Effective Criminal Defence:

Right to Legal Assistance in the Pretrial Stage

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Abstract

The criminal justice system of Mongolia is undergoing dynamic reform started in 2012. Accordingly, the Criminal law was amended on the conceptual level and several new laws were adopted, including laws that advancing human rights protection in criminal justice system such as the Law on Protection of Victims and Witness and the Law on Legal Aid for Indigent Defendants.

The crucial part of the reform-procedural law has undergone the revision in 2016. However it is doubtful that if the progress was made considering the right to legal assistance and the participation of the defence lawyer in criminal proceedings as determining element of the defence rights. Newly adopted substantive laws will not enforce human rights protection of entire criminal justice system solely, without progressive procedural law which ensure the defence rights. Effectiveness of the defence, which is in greater part depend on the right to legal assistance, derive from precise procedural regulations.

Right to legal assistance in criminal cases was one of the least popular issues of the system as it had accustomed for a relatively long period (since socialist era) and did not undergo substantial reform. Thus legal professionals and scholars are starting to raise the issue of a defence rights in relation with the legal assistance as a crucial part of human rights-based criminal justice system. The issue of the effective application of international human rights law concerning the access to justice in conjunction with the right to legal assistance in the domestic jurisdiction is the important aspect of the human rights-based approach in the system which should be addressed in policy level.

Under this topic it is aimed to determine function and effectiveness of the advocacy on the grounds of comparative research on jurisdictions with relatively progressive procedural regulation focusing on specific perspective in the context of

the timing of the realization of the right to legal assistance, in particular in the initial stage of the criminal proceedings or the initiation of investigation.

Methodology

The research will rely on the primary sources and jurisprudence of the universal and regional institutions, namely the UN, the European court of Human Rights and the European Union and the law and practice of the home jurisdiction. Secondary sources such as books, scholarly articles will be used to build a theoretical framework of the work.

Scope of the research

The early stage of criminal proceedings is referred in several ways such preliminary, pretrial, inquiry, police custody and investigative stages. In this research, the early stage will be considered as pretrial or investigative stage.

The early access to a lawyer in many ways overlaps with legal aid issue, but limited to the general right to legal assistance and won't go further into detail of legal aid. Also right to legal assistance in this paper is referred to right professional legal assistance. Therefore it is an access to a lawyer. Also in case of the home jurisdiction studied in this work, only professional legal assistance is allowed during the proceedings. As before 2008 persons accused of criminal offence had right to have assistance of a non-professional if they did not have access to professional assistance. The regarding provision was repealed by the decision of Constitutional court of Mongolia.

Though it will be argued of early the intervention or the participation of the lawyer in the investigative stage or in the first interrogation, the defence practice of a lawyer in the interrogation room will not be the topical issue to be discussed in this

work. In a broader sense practice of a defence lawyer is attributed by the notion that the right to legal assistance provides the 'key' which opens the door to all other rights and possibilities regarding the defence party in the course of criminal proceedings, suggesting that defence lawyer not only acts as a mouthpiece for the defendant but to provide an active defence against the accusation made by the prosecuting party. This concept of "active defence" is manifested by the principle of equality of arms which is aimed to eliminate any substantial disadvantage of the parties, in particular of the defence party, by giving a reasonable opportunity to present their own case and evidence, at the same time to have sufficient knowledge of the evidence that are adduced by prosecuting party on order to lay a criminal charge. The issue of active defence or participation of the defence lawyer, in particular in the interrogation room, is a topical issue which needs separate consideration.

Also it often the effectiveness of the defence or the legal assistance is often associated with the issue of competence of the defence lawyer. However this issue will not be discussed in detail further in this research work.

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CHAPTER 1: INTRODUCTION

1.1 Right to legal assistance: safeguard of the fair trial

Criminal procedure is excessively complex in a way it involves number of actors; covers range of actions and decision-making processes; functions in accordance with numerous regulating and mediating rules. However, it can be assessed precisely with the rights-based approach from the perspective of the accused person. Suspected, accused person or a defendant is the most disadvantageous actor of the criminal procedure as he is challenged with the investigating and prosecuting authority with high expertise and professionalism. Therefore he should be granted with number of rights, comprehensively with fair trial rights including right to legal assistance as a component of the defence rights. Right to defence has elements that such as right to defend himself or herself, right to have a legal assistance of a lawyer on his or her choosing and right to have legal aid if he or she does not have means to pay for it. As much as the importance and legitimacy of the defence rights, in particular right to legal assistance, justified thoroughly over the course of development of the universal principles of justice and human rights and therefore recognized, some aspects and the scope of it are still … scholarly discussion.

In order to recognize fair trial rights of the defendant, he at first, ”must be regarded as a subject rather than as an object of criminal proceedings” and his basic human dignity should be acknowledged.[1] The right to defence including right to legal assistance ensures that the accused or the defendant plays an active role of a subject in the criminal proceedings. Thus active role of a defendant enforced by the right to defend himself or herself or with the assistance of the lawyer can be determined as an ability to influence the course of the proceedings in his or her interest. This purpose of

[1] S. Trechsel , Why Must Trials be Fair?, Israel Law Review, Israel Law Review, 31(1-3), pp. 94–119, 1997, p. 100

a right to legal assistance to enable the subjective role of the defendant in the proceedings, Stefan Trechsel defines as structural. Consequently defence rights and right to legal assistance guarantee the respect for the dignity of the defendant and humane treatment. This safeguard does not only serve a personal interest but also determines a broader implication of the justice which is based on a principles of humane treatment and respect to human dignity. This overarching principle of the criminal justice is enshrined in the International Covenant on Civil and Political Rights (ICCPR):

> Article 10(1): "All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person", thus recognized by the majority of the world countries regardless of their legal and criminal justice systems.

In that sense, a defendant granted with the defence rights is integral to the proceeding where the interest of justice served to the highest extent possible.
(As the Court put it in Granger, granting legal aid 'would in the first place have served the interests of justice and fairness by enabling the applicant to make an effective contribution to the proceedings')

Right to defence is coherent with other fair trial rights and serves as a precondition of the effective enjoyment of those rights. If the defendant denied of defence rights, there is no guarantee he will be not presumed guilty, compelled to self-incrimination, exposed to torture and inhumane treatment, and overall be aware of his procedural rights and be able to challenge the authority in a case violation of the rights. Defence lawyers not only provide advice and enforce rights of the defendant but monitor and prevent the abuse of power of the authorities, which in a broader sense ensures the rule of law.

Stefan Treschel differentiates the substantive and the formal aspects of the defence rights, by giving more consideration in the analysis of the substance and purpose of the right in a sense of the latter aspect.[2] He finds the substantive aspect of the defence rights as more self-explanatory and prosaic including elements such as "right to defend oneself on his or her own, to propose evidence, to challenge the bias of trial judges, to question the credibility of witnesses, to plead etc."[3] He emphasizes the formal aspect of the right to a defence and presents the intrinsic purpose and the value of the right basing on that aspect. He claims that 'the right to defence in the formal sense means the right to have the professional assistance and services of counsel' and distinguishes four aspects - technical, psychological, humanitarian and structural. The latter one mentioned earlier as to the importance to right to legal assistance (and overall defence rights) to regard a defendant as a subject of a proceeding therefore to respect his intrinsic value as a human person.[4] As to the order presented, the foremost evident aspect is the technical aspect. Professional legal assistance is referred as a key to the door to all rights including fundamental rights and possibilities of defence afforded by procedural as well as substantive law and enables the defendant to make full use of them.

Defence lawyer assists defendant in the life-changing decision-making through out the complex process of criminal justice, basing on the knowledge and practical experience of the law, which is indeed incomprehensible for the layperson. Defence lawyer's expertise not only benefits his or her clients in their personal

[2] S. Trechsel, Human Rights in Criminal Proceedings Collected Courses of the Academy of European Law, Oxford Scholarly Authorities on International Law, Oxford Public International Law, Oxford University Press, 2015, p .244

[3] ibid.

[4] ibid.

interest but also in a broader sense secures human rights in the proceedings supervising the authority whether the procedural rules are enforced adequately, thus serves the administration of the criminal justice system. This complex duty of a lawyer was put in the American Bar Association's Criminal Justice Standards of the Defense Function:

> " Defense counsel have the difficult task of serving both as officers of the court and as loyal and zealous advocates for their clients. The primary duties that defense counsel owe to their clients, to the administration of justice, and as officers of the court, are to serve as their clients' counselor and advocate with courage and devotion; to ensure that constitutional and other legal rights of their clients are protected; and to render effective, high-quality legal representation with integrity" [5]

Following from it is impossible to put in a hierarchical order the functions of representation of the own client and the service to the administration of justice. Therefore assistance of a lawyer is by no means a rudimentary service neither a luxury regarding the defendant. Here the reference can be made to the landmark case of US Supreme Court, Gideon v. Wainwright (Gideon) where the legal assistance recognized as the fundamental right essential to fair trial, also the point that "(defence) lawyers in criminal courts are necessities, not luxuries" [6] was made. However the question may arise that different legal traditions regard the role of a defence lawyer and right to legal assistance differently. Defence rights, in particular right to legal assistance always has been the foremost topic of a debate on the dichotomy of the criminal justice systems. Historical development of the concept and

[5] Fourth Edition of the Criminal Justice Standards for The Defense Function, American Bar Association, Standard 4-1.2(b)
[6] Gideon v. Wainwright 372 USSC, 1963, para. 344

practice of the right to legal assistance considered as a part of the common law tradition and more significance given to the right in the realm of the adversarial system. Thus it plays crucial role in adversarial system, which is "… based upon the idea that truth will emerge out of struggle between two contesting parties presenting their case to an impartial tribunal."[7] Consequently principle of "equality of arms" derives from that "such a contest enables the court to discern the truth presupposes that the two sides have an access to roughly equivalent resources and expertise."[8] Equality of arms entails the need of proper legal assistance in order to take turn for the better in the situation of the defendant. Accordingly defendant's defence lawyer or the counsel plays active role in the proceedings. While in inquisitorial system judges are the main investigatory actors and has the central role in the proceedings, thus role of the defense lawyer is limited.

While legal assistance or the role of a defence lawyer is the inherent to the adversarial principle it would be misconception if the inquisitorial or continental system did not regard the importance of the role of the defence lawyer and the right to legal assistance of the defendant. In the inquisitorial tradition predominant in the continental Europe, rules are codified precisely and even when such legal rules require the state authorities to be impartial and adhere to principles of objectivity and to respect or even promote the rights and interests of the defence, practice shows that the knowledgeable assistance of a lawyer is definitely not superfluous to the proceedings.[9] The inquisitorial system has its own advantages over the adversarial, regarding the participation of the defence lawyers as they considered as independent

[7] Steinberg, Paulsen, A Conversation with Defense Counsel on Problems of Criminal Defense, Prac. Law 25, 26, 1961, cited in M. G. Paulsen and S. H. Kadish, Criminal Law and Its Process, 1962

[8] R.Young, D. Wall, Access to Justice: Legal Aid, Lawyers and the Defence of the Liberty, Blackstone Press Limited, 1996, p.5

[9] supra note 2, p. 245

party of the procedure rather than just a representative or an assistant voicing the personal interests of the defendant. As mentioned before the fact that the defendant is in the fundamentally unequal position regardless the differentiating attributes of the systems, in terms of power and knowledge, detriment to him or her is self-evident. Therefore the legal guarantee of the right to legal assistance and the practical opportunity of the defence lawyer to intervene at any stage of the proceedings and to act independently in favor of the defendant should be granted firstly in order to ensure the human rights as the minimum protection, secondly to give the best possible chance to the defendant to have favorable outcome in his or her interest.

In other hand defendant could have a decent knowledge of criminal law and procedural law or even could be the specialist in the field. But there is a nuance regarding the objectivity of the decision-making in the defence in cases where the defendant chooses to defend himself or herself. Stefan Treschel defines it as a psychological aspect of the right to legal assistance. Psychological aspect is characterized with the need of a professional legal assistance even if the defendant is technically competent in the field but the loss of the objective reasoning is apparent due to the excessive personal subjective interest in the case.[10] This apparent risk could lead the defendant to make decisions rendered by the emotion toward his or her case. In this sense while the right to defend himself or herself is an essential element of the right to defence, the conditions of a meaningful waiver of the right to legal assistance by a lawyer should be precisely defined and the defendant should be fully informed of risks taking by choosing to waive the right a professional assistance.

The right to legal assistance could be not only a guarantee of the principle of the humane treatment of a defendant but also the enforcement of the right could be

[10] ibid.

itself a realization of the humane treatment of a kind. It is overt that feelings of anxiety, frustration and fear are implicit to the person who is suspected, arrested or accused. Assistance of a defence lawyer therefore provides reassurance and consolation to him or her. It might be also true even in the case where the defence lawyer did not act deliberately to provide such a support but solely aimed to assist technically as his or her companion could suffice. Stefan Treschel puts that "the assistance of counsel … serves the humanitarian aim of providing the defendant with a human companion, to lessen the feeling that he or she has been abandoned by the world only to be 'processed' by the judicial machinery which can be perceived as distant and cold, if not downright hostile."[11] This importance of a professional expertise and human companion needs further consideration on the timing of the access , as the person who is involved in the criminal procedure is most likely to be frightened and disoriented the most at the police station or in the police custody, and the his or her basic rights are most at stake.[12] The atmosphere is pressuring and for detainees especially inexperienced or vulnerable ones who have complex needs, Kafkaesque condition is real which is characterized by desperation of uncertain future and inability to determine it by own will.[13] This aspect therefore determines the purpose of the right in the intrinsic value and the meaning of it rather than in an instrumental significance of the right.

Instrumental aspect of the significance of the right can be further analyzed based on the secondary outcomes or the enforcement of other rights conditioned by the realization of the right to legal assistance. Legal assistance could prevent of

[11] ibid.
[12] Cadder v Her Majesty's Advocate, UKSC Judgment, 2010, para. 70
[13] F. Leverick, The Right to Legal Assistance during Detention, 15 Edinburgh Law Review pp. 352-380, 2011, p. 363

unnecessary pretrial detention, ill treatment and wrongful conviction. For instance assistance of a defence lawyer is necessary in effective enjoyment of a right to silence. Enjoyment right to silence is conditioned by the information to it and the meaningful understanding. However it is a duty of an authority or a police (as a first instance authority of the criminal proceedings) to inform a suspected person of his or her right to silence and further procedural rights including non other than right to a legal assistance itself. Therefore it might be found paradoxical to seek the effectiveness of a legal assistance in conjunction with its instrumental aspect regarding the awareness of procedural rights. Nevertheless the noticeable fact is that providing a right to legal assistance in the earliest stage of the criminal proceedings, notably at the initiation of the police investigation is the obligation of the state authority. Therefore an adequate mechanism to inform the suspected person of his right to legal assistance and provide the access to legal assistance is the indicating factor of the effectiveness of the right to legal assistance. In the universal and regional legal frameworks it is determined as a principle of "early access to legal assistance" or "access to a lawyer before suspects are first interrogated by the police."

In other hand the effectiveness of the right to legal assistance could be assessed in its internal substance or quality in respect with the competence of the defence lawyer. The competence of the defence lawyer and quality of his or her performance is complex as it needs to be assessed on empirical level and needs practical approach rather on abstract level of the legal regulation. However effectiveness of a defence has wider meaning than a competent legal assistance as it

solely does not guarantee fair trial if not facilitated by proper procedural rules and organizational structure. [14]

Whereas certainty of the legal assistance, as an inseparable part of the defence, is justified by the underpinning legal and human rights principles, the scope in relation with the timing of the realization of the right and the qualitative indication in relation with competence of the defence lawyer (especially the competence of the legal aid lawyer) are yet to come to common understanding and practical realization. The further discussion of this work on effectiveness of the right to legal assistance will be focused on the timing of the realization of the right or the access to a legal assistance by the first interrogation of the police.

1.2 Right to legal assistance in the context of procedural traditions

In the comparative study of the defence rights in particular right to legal assistance, especially if it is aimed to observe common ground for minimum standards in favor of defence party, it is not possible to avoid to do at least a basic insight to the historic origin of the criminal defence in the context of the two legal systems or traditions, namely adversarial and inquisitorial systems (also referred as models, traditions and cultures).

Before exploring the main features of the system in relation with the defence rights it should noted that conceptualization and the categorization of the systems are developed on the ideal-type approach rather on actual historical development of the systems. Ideal-type approach which is conceptually developed by Max Weber and

[14] T. Spronken, D. de Vocht, EU Policy to Guarantee Procedural Rights in Criminal Proceedings: "Step by Step", North Carolina Journal of International Law & Commercial Regulation, 2011, p. 439

constitutes that "pure" type (here can be referred to legal systems) have never existed in history, therefore the scientific insight and theorization of the types should done on the basis of mental construct of the "ideal type" in order to see the distinctions and attributes relevant to certain system vividly (Mirjan Damaška sophisticatedly adopted this approach in the determination of procedural models of the criminal justice systems.)[15] Therefore as Langer states that adversarial and inquisitorial "ideal types" or structures are the "lenses" through which understand how legal actors operate in reality, also constitute two normative orders that indicate how cases should be handled, what technologies should be used, how each of the actors of the system should behave. [16] Stuart Field points out that disagreements in labeling the procedural traditions and identifying certain elements that are intrinsic to certain system should not prevent us to see and recognize the differences which indeed lead to find common values providing set of minimum standards applicable to both systems.[17] Thus the purpose to look into specific characteristics structurally innate to a certain system is because crime and criminal justice policies are traveling across jurisdictions and principles (which are perhaps the core of those policies) are in need to be analyzed in their contexts thus be interpreted and reclaimed in the realm of other legal cultures. [18]

Here also it should be noted that not only particular principles or rules but also legal traditions as a whole are subjected to reinterpretation, reshaping, and mixed and

[15] M. Langer, From Legal Transplants to Legal Translations: The Globalisation of Plea Bargaining and the Americanization Thesis in Criminal Procedure, Harvard International Law Journal 1, 2004, p. 8
[16] ibid. p. 14
[17] S. Field, Fair Trials and Procedural Tradition in Europe, Oxford Journal of Legal Studies, Vol. 29, No. 2, pp. 365–387, 2009, p. 379
[18] E. Cape, J. Hodgson, T. Prakken, T. Spronken Suspects in Europe, Procedural Rights at the Investigative Stage of the Criminal Process in Europe, Maastricht Faculty of Law Working Paper Series, Intersentia Antwerp-Oxford, 2007, p. 1

hybrid systems are developing progressively not only on the national but the international and regional levels. The transfer of crime and criminal justice policies is the most evident in and between the member states of the European Union (EU) and countries that are state parties to European Convention of Human Rights (ECHR). These two different legal systems, which have their distinct purposes and legal and political basis at the time of establishment, nowadays has more of common principles rather than disparities regarding in securing human rights, especially in the field of crime and criminal process policy. ECHR case law and EU policy in conjunction with the reception and responses of the national jurisdictions will be the primary subjects to be elaborated in this work.

Following two points are determined to be made by this part: firstly, the importance of reclaiming the right to legal assistance as a valuable asset to develop human rights based criminal justice system regardless of the dichotomy or competition of the legal systems; secondly, necessity of the right to legal assistance recognized and enforced in the inception of the criminal proceedings or at the investigative stage, in particular upon the initial interrogation by the police, regarding the domestic jurisdiction of the study, which has influenced by the soviet legacy and adopted the continental (inquisitorial) criminal justice system, both reliant on the investigative stage in the main purpose of the truth finding.

The main goal of the criminal justice system is the finding the truth and to determine the guilt or the innocence of the defendant basing on the facts found in the course of the investigation conducted according to strict rules of criminal procedure. The baseline difference of the systems therefore lies in the difference of the approach in finding the truth. The adversarial tradition relies on the emergence of the truth in the result of the contest of defence and prosecuting parties in presenting their side of

the case supported by the related evidence. Therefore the system is greatly determined by the trial where the decisive part of the presentation and performance of the parties takes place. In the other hand inquisitorial tradition is based on the centralized approach, which is determined by the powerful supervision by the court, in particularly a judge. The collection of the evidence is performed the by investigative authority under the supervision of the court (partaken by prosecuting authority to some or considerable extent), therefore the greater emphasis is placed on the pretrial stage.

Apart from these two major traditions of the criminal justice there is a debate of the existing third model which is pertinent to former Soviet Union. The soviet system fell down however the legacy exceptional to the soviet legal system including criminal procedure can be found in most post-soviet or former satellite countries including the domestic jurisdiction studied in this work-Mongolia. There is a disagreement among comparative legal scholars whether to consider the soviet legal system as independent category of the legal system. While some find that its is possible to regard the soviet legal system as a "separate category of a socialist legal tradition", considering the fact that law was a instrument of state policy with economic and educational functions apart from regulating. [19] The other view is that the soviet or socialist criminal procedure could be regarded as a form of a inquisitorial system "adapted for the purposes of the totalitarian state." [20] Aside from the categorization the main attributes of the "soviet procedure" is that hefty load of the entire process was put on the pretrial investigative stage which was heavily reliant on the confessions and the principal function of all participants of a process, including

[19] P. Reichel, Comparative Criminal Justice Systems, New Jersey, Pearson, 4th edition, 2005, p. 123

[20] R. Vogler, A World View of Criminal Justice, Aldershot, Ashgate, 2005, p. 64.

defence lawyers, was to serve the interests of the state. After the collapse of USSR the tendency was that many of the former soviet jurisdictions choose to move toward adverseriality. [21]

In case of Mongolia as a former satellite country to Soviet Union, after the fall of it, the inquisitorial tradition was preferred over the adversariality. Due process or fair trial rights are formally declared however the adversarial principles such as equality of arms followed by active role of a defence lawyer were (and are relatively) far from the practice. The judge played central role in determining the truth relying on the evidence collected in the dossier by police officer, but the judicial power regarding the supervision of the investigative stage or the pretrial stage was nowhere near to procurators' or a state prosecutor's office. In this sense, the pretrial-investigative stage where the incriminating evidence collected precisely and persistently including the confession of the defendant, constituted the most gravity of the criminal proceedings.

Lawyers, former state advocates appointed to assist the defendant and considerable amount of former judges converted, could not entirely disengage or to say "betray" the interest of the state authority and act as independent agency behalf the defendant. Also the conflict of interest was overt (which is still exists due to limited number or pool of legal professionals) as the most of the defence lawyers where "appointed" to the suspect or a defendant by the police officer or the prosecutor of the same case indirectly. That was also partly influenced by the sudden offhand liberalization of the profession under the capitalism.

As to some contesting opinions on systems regarding the defence role and the lawyer's role, the understanding that inquisitorial system is more hostile to defence is

[21] supra note 15, p. 6

prevail. However as to historical insights of the tradition, inquisitorialism in continental Europe also perceived the defence rights are fundamental to the procedure. Mirjan Damaška observed (the continental tradition in Italian and German lands) that "the requirement to disclose incriminating evidence to the defendant was one of those rules attributed to "defensio" with respect to which there was widespread agreement that they flowed from immutable natural law and were indispensable for meaningful defense… Failure to inform the defendant of incriminating material was sanctioned by the nullity of the resulting conviction." [22] However various restrictions were imposed on lawyers such as not being allowed to be present during interrogations and only "honest, upright and learned men" were admissible to act as counsel. [23]

As to nowadays, for instance, in Germany defence lawyers are accepted as independent "organ of justice" in equal position with the public prosecution. Event though the some professionals of the field question the "organ theory" as it might be the implication of state power to discipline the lawyers again, Christian Fahl argues that "organ theory" is helpful to determine the purpose of the defence counsel or a lawyer than affecting them. He presumes that as to the standpoint of the "organ theory", defence lawyer carries a duty of serving the effective defence to own client as well as to the public, who also share the interest in the effectiveness of the defence.[24]

[22] M. Damaška, The Quest for Due Process in the Age of Inquisition, The American Journal of Comparative Law, Vol. 60, No. 4, pp. 919-954, Oxford University Press 2012, p.929
[23] ibid. p. 930
[24] C. Fahl, The Guarantee of Defence Counsel and the Exclusionary Rules on Evidence in Criminal Proceedings in Germany, German Legal Journal, 2007, p. 1057

The defence role is conceived differently in each tradition on the basis how the defence and the prosecuting parties are present and challenge the evidence, nonetheless, a consensus has been made within both traditions that defence lawyer should represent accused persons during criminal proceedings and a right to legal assistance became embedded into various human rights law internationally.

Mirjan Damaška also observed that "in the dialectics of the criminal process there is always a point where fact-finding precision must give way to other societal values" even if one system found to be better fitted or superior in discovering the truth over the other. [25] Thus right to legal assistance has a societal value to it in a way not only of guaranteeing individual rights of the defendant but also monitors legality of the conducts of the criminal justice administration, therefore ensures overall legitimacy of the system .

From the perspective of the defendant, safeguards of the fair trial will be trivial if the they are, in particular the defence rights, restricted just to the trial stage.[26] As much trial stage is the decisive stage of the proceeding, it is not the only, most importantly not the first stage of the criminal proceeding, where the defendant most probably develops his or her impression regarding the justice system. In this sense guaranteeing defence rights, including the right to legal assistance from the earliest moment of the course of events which leads to the final outcomes, builds the trust to the criminal justice system which determines the legitimacy of the system. Legitimacy of the criminal justice system is the key factor of sustaining the effective crime and criminal justice policy.

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[25] M. Damaška, Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study, University of Pennsylvania Law Review, Vol. 121, No. 3, pp. 506-589, The University of Pennsylvania Law Review, 1973, p. 588

[26] E. Cape, Z. Namoradze, Effective Criminal Defence in Eastern Europe, Soros Foundation–Moldova, 2012, p. 10

Right to legal assistance in its full enjoyment enhances the legitimacy of the whole criminal justice system. Legitimacy of the criminal justice system elaborated in the infamous quote of Lord Hewat "It is not merely of some importance but it is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done."[27] According to the comprehensive socio-legal research on legitimacy and criminal justice, "people are given an opportunity to explain their side of an issue and feel fairly treated, then they are more likely to defer to authority and accept their actions as legitimate."[28]

Right to defence is the foundation of to be heard on one's side and the safeguard to be tried fairly. However the issue of the enforcement of the right in the earliest possible moment of the process, in the pretrial investigative stage, has many practical challenges along with textual embedment into the laws and its interpretation, even international and supranational human rights institutions assert it.

1.3 Right to legal assistance: importance of the right enforced early in the investigative stage

Recognizing, extending and providing defence rights, in particular right to legal assistance, in pretrial stage is fundamental need and prerequisite to full and effective functioning of entire criminal process and ensuring rule of law as whole. The critical amount of risks arise in the pretrial stage, especially in the police custody and pretrial detention. In principle, police are bound to principle of legality and and their actions should be approved by a prosecutor or a judge but in practice police have extensive direct power over the arrested persons or suspects.

[27] The Legal Mind, Essays for Tony Honore, Oxford, 1986, p. 105
[28] A. Crawford, A.Hucklesby, Legitimacy and Compliance in Criminal Justice, New York: Routledge, 2013

The assistance of defence lawyer during the pretrial proceedings is especially important in proceedings where the trial judge mainly rely on and verify the evidence collected and record made in the investigative stage rather focus on issues raised and the case presented by the parties at the trial. However, the importance of the right to legal assistance in the pretrial is equally true for both the fully adversarial and the inquisitorial (contintental) proceedings.[29] Therefore it is impossible to say, despite the particularity of any jurisdiction, that the trial satisfies human rights norms, in particular the right to legal assistance, unless the investigative stage is also conducted in accordance with those norms. [30]

The recognition of the right to legal assistance in the stage of police interrogation is primarily conditioned by the recognition of the right to silence as a means of realization of it. The access to the lawyer or the attorney by the first police interference came to the center of the debate when the US Supreme Court ruled on Miranda v. Arizona which required a prior warning to suspects on their right to silence along with the right to the presence of the attorney. US Supreme Court held:
"Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently. If, however, he indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking, there can be no questioning."[31] Number of elements can be indicated in respect the the right to have a lawyer present at the interrogation: notification of the right to

[29] supra note 2, p. 249
[30] supra note 15. p. 7
[31] Miranda v. Arizona, 384 U.S. 436 (1966), paras. 444-445

consult a lawyer and to have him or her present during interrogation; the right of a indigent person to have a lawyer appointed or a legal aid and the waiver of the right which is made knowingly and intelligently.[32] These three elements are not only inevitable to full enjoyment of the right to legal assistance but also determine the effectiveness of a defence as a whole, therefore it will be discussed in the course of the entire research.

In the international human rights legal framework it is well-defined that the participation of the defence lawyer is guaranteed in all court. However it was ambiguous whether the suspected and arrested person is entitled of legal assistance in the investigative stage, while being under the control of police authority. The police interrogation and investigation is recognized as the integral stage of the proceeding, where there is a high risk of the rights of the arrested person. Consequently access to legal assistance in criminal proceedings is interpreted in benefit of the suspected person both in universal and regional regulations concerning fair trial rights. State has an obligation to "ensure that all persons arrested or detained, with or without criminal charge, shall have prompt access to a lawyer, and in any case not later than forty-eight hours from the time of arrest or detention" according to the UN Basic Principles on the Role of Lawyers.[33] The European Committee for the Prevention of Torture acknowledges access to legal assistance in the police investigation stage as one of the "fundamental safeguards against the ill-treatment of detained persons which should

[32] J. D. Jackson, Responses to Salduz: Procedural Tradition, Change and the Need for Effective Defence, The Modern Law Review Limited, 2016, p. 1010
[33] Basic Principles on the Role of Lawyers, Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, 1990, Principle 7

apply as from the very outset of deprivation of liberty, regardless of how it may be described under the legal system concerned."[34]

European Court of Human Rights (ECtHR) in a landmark case of John Murray held that right to legal assistance arises right upon arrest and later in case of Averill it held that one has a right to lawyer prior to police interrogation.[35] But until the case of Salduz v. Turkey the ECtHR did not acknowledge presence of a lawyer during interrogations as a fundamental element of the right to defence. In seminal case of Salduz ECtHR recognized that assistance of a lawyer at first interrogation is crucial safeguard of the privilege not to self-incriminate.[36] Later in in Dayanan v. Turkey the Court ruled that "a suspect should be granted access to legal assistance from the moment he is taken into police custody or pretrial detention"[37]. ECtHR took account on that that here can be compelling reasons to restrict the access to legal assistance but notes that "even in such exceptional circumstances, the use of evidence obtained from the suspect in the absence of legal advice is likely to breach fair trial rights."[38]

The European Union in the Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings defines that "the right to legal advice (through a legal counsel) for the suspected or accused person in criminal proceedings at the *earliest appropriate stage* of such proceedings is fundamental in order to safeguard the fairness of the proceedings."[39]

In the EU Directive on The Right to Access to a Lawyer there is given precise

[34] Committee for the Prevention of Torture, 2nd General Report, CPT/Inf (92) 3, 36, available at http://www.cpt.coe.int/en/annual/rep-02.htm.
[35] John Murray v. UK, ECtHR, 18731/91, 1996 and Averill v. UK, ECtHR no. 36408/97, 2000
[36] Salduz v. Turkey, ECtHR, no. 36391/02, 2008
[37] Dayanan v. Turkey, ECtHR, no. 7377/03, 2009
[38] ibid.
[39] EU Roadmap in Criminal Proceedings, 2009

exclusion of questionings that are not in the scope of the Directive, in other words situations where the legal assistance is not mandatory. The member states are obliged to "ensure that suspects or accused persons have the right of access to a lawyer without undue delay in accordance with this Directive". [40]Further it states that "in any event, suspects or accused persons should be granted access to a lawyer during criminal proceedings before a court." [41] According to the Directive "questioning does not include preliminary questioning by the police or by another law enforcement authority the purpose of which is to identify the person concerned, to verify the possession of weapons or other similar safety issues or to determine whether an investigation should be started, for example in the course of a road-side check, or during regular random checks when a suspect or accused person has not yet been identified." [42] However, the formal commencement of the right is still vague. Terms and definitions framed in international and regional norms such as "arrest," "charge," "promptly," "without undue delay," and "adequate time" concerning pretrial stage entail "legitimate disagreement" in interpreting terms in the context of timing of the application of the certain right.[43] In this regard uniform understanding of the timing application of the right to legal assistance is important at most at domestic level. According to new Criminal Procedure Code of Mongolia defence lawyer's initial intervention starts in the investigative stage. Arrested person should be informed of his right to legal assistance upon arrest and defence lawyer has the right to be present from in all interrogations or questionings of the police, assumingly including the first. However, realization of this right in practice requires certain mechanisms. Arrests are

[40] Directive 2013/48/EU, Article 3
[41] ibid.
[42] ibid.
[43] Improving Pretrial Justice: Roles of Lawyers and Paralegals, Open Society Initiative, Open Society Foundation, 2012, 29

often unplanned, therefore, ensuring the presence of a lawyer in a short notice is difficult. Permanent schemes to provide timely legal assistance at police stations are required.

1.4 Right to legal assistance in texts of major human rights instruments

The foremost document that enshrines right to legal assistance is United Nations' International Covenant of Civil and Political Rights (ICCPR). It is stated in the Article 14(3)(d) as follows :

> … 3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:
>
> … (d) … and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it."[44]

Here, right to legal assistance interrelated with right to be informed of right to legal assistance and the right to legal aid can be distinguished. However, there is no expression on the commencement of the right. But it might be a misconception that the Covenant did not regard the timing of the access to the lawyer completely. It could be assumed that the suspected or the accused person should be guaranteed of the access to a legal assistance in the earliest possible moment on the basis of separate subsection, in particular Article 14(3)(c) which guarantees the right "…to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing."[45] As it refers to the "preparation of the defence"

[44] International Covenant on Civil and Political Rights (ICCPR), UN General Assembly, 1966, Article 14
[45] ibid.

(presumably informed on his all defence rights), it could be assumed that it is an implication to the preliminary stage to the trial or the investigative stage. General Comment no. 32 refers to the section as follows: "The right to communicate with counsel requires that the accused is granted prompt access to counsel. Counsel should be able to meet their clients in private and to communicate with the accused in conditions that fully respect the confidentiality of their communications." The prompt access therefore could indicate the access that is as early as possible. We could find more detailed interpretation in UN Basic Principles on the Role of Lawyers:

> "All persons are entitled to call upon the assistance of a lawyer of their choice to protect and establish their rights and to defend them in all stages of criminal proceedings."[46]

And consequently it refers to special safeguard in the criminal justice matter that "governments shall ensure that all persons are immediately informed by the competent authority of their right to be assisted by a lawyer of their own choice upon arrest or detention or when charged with a criminal offence."[47]

Also the issue of access to a lawyer is coherent with the rights of any (in this case most importantly detained in pretrial stage) detained and imprisoned person so that it is ensured in the Body of principles for the Protection of All Persons under Any Form of Detention or Imprisonment that "… communication of the detained or imprisoned person with the outside world, and in particular his family or counsel, shall not be denied for more than a matter of days."[48]

[46] Basic Principles on the Role of Lawyers, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, 1990, Article 1
[47] ibid. Article 5
[48] Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, A/RES/43/173, General Assembly, UN, 1988

Fair trial rights are encompassed in the European Convention on Human Rights (ECHR) under Article 6, subsequently right to legal assistance is granted as a minimum guarantee for the criminally charged persons under Article 6(3)(c):

> "3. Everyone charged with a criminal offence has the following minimum rights:
>
> …(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require…"[49]

ECHR is "saved on" more words than ICCPR and did not mention the right to be informed on the right to a legal assistance. Indeed ICCPR is currently the only text (of international human rights law), which extends the protection to cover the right to be informed of the legal assistance.[50]

Similarly the convention does not indicate the stage when at first the assistance of a lawyer required. In the ECHR jurisdiction the right to legal assistance well-established by several case laws, notably by the Salduz v. Turkey and its descendant cases.

Another regional human rights convention guarantees the right to legal assistance is American Convention on Human Rights (ACHR). In the Article 8 of ACHR it is stated as following:

> "2. …During the proceedings, every person is entitled, with full equality, to the following minimum guarantees:

[49] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR), Article 6

[50] supra note 2, p. 242

> …(d) the right of the accused to defend himself personally or to be assisted by legal counsel of his own choosing, and to communicate freely and privately with his counsel;
>
> (e) the inalienable right to be assisted by counsel provided by the state, paid or not as the domestic law provides, if the accused does not defend himself personally or engage his own counsel within the time period established by law"[51]

ACHR distinguished the right "to communicate freely and privately" with the lawyer in the same section with the right to be assisted by lawyer, emphasizing the confidentiality of the communication, which is indeed integral to the full enjoyment of the right to legal assistance. (The implication of the free communication and its confidentiality can be sought in the ICCPR where it stated in the separate section that ""…to have … to communicate with counsel of his own choosing.")

Overall there are no significant differences between the texts in a sense that all instruments guarantee the vital elements - to retain a counsel or a lawyer in legal assistance of their own choosing or to be provided with and state has a positive obligation to provide legal assistance without payment in any case where the interests of justice so require.

[51] American Convention on Human Rights, 1969, Article 8

CHAPTER 2: CURRENT ESTABLISHMENT OF THE RIGHT TO LEGAL ASSISTANCE IN THE EUROPEAN CONTEXT

2.1 European Convention on Human Rights and the case law of the European Court of Human Rights

While the fair trial protections of right to silence and privilege against self-incrimination in pretrial stage have had solid grounds of justification and hade been enforced by international standards, the access to a defence lawyer prior and during the police interrogation still had to overcome challenges mostly related to the fundamental differences of the procedural traditions.[52] Nonetheless as by the right to be informed of all rights vested in the course of criminal proceedings had affirmed, the need of guaranteeing the access to a defence lawyer in the pretrial stage induced inevitably.

In 1984 The foundational pronouncement of the ECtHR on the activity of defence regarding the inception of the right made in the Can v. Austria, The applicant was imposed by restrictions for considerable period of time regarding his communication with his defence counsel at the initial phase of the police investigations. The Commission found that the Article 6 (3) (b) and (c) applicable to the situation of the case, therefore claimed that "…the investigation proceedings are o great importance for the preparation of the trial because they determine the framework in which the offence charged will be considered at the trial . Furthermore it cannot be excluded that evidence obtained in the investigating proceedings will be relied on in the judgment . It is therefore essential for the .defence, whether it is assured .by the accused himself or with the assistance of a chosen or official defence counsel, that the basis for its defence activity can .be laid already at this stage."

After almost a decade the case Imbrioscia v. Switzerland (1993) launched where it sought whether the absence of a defence lawyer during interrogations

[52] supra note 29, p. 994

constituted a violation of the Convention. In the decision it observed (regardless it was held that there was no violation of the Article 6) that preliminary or the investigative stage was integral to the criminal proceedings where all the fair trial rights should be enforced. Therefore it concluded that as to the main purpose of the Article 6 of the Convention "it does not follow that the Article has no implication to the pretrial proceedings." Comprehensively it was recognized by the Court that "the coterminous nature of the several stages of the criminal process and the cumulative effect of state actions and decisions at those stages on the end result and overall fairness of the criminal proceeding."

ECtHR in a landmark case of John Murray held that right to legal assistance arises right upon arrest. Firstly the Court notes that "national laws may attach consequences to the attitude of an accused at the initial stages of police interrogation which are decisive for the prospects of the defence in any subsequent criminal proceedings." Further the Court states that "at the beginning of police interrogation, an accused is confronted with a fundamental dilemma relating to his defence. If he chooses to remain silent, adverse inferences may be drawn against him . . . . On the other hand, if the accused opts to break his silence during the course of the interrogation, he runs the risk of prejudicing his defence without necessarily removing the possibility of inferences being drawn against him." Consequently the Court concluded that "the scheme … is such that it is of paramount importance for t he rights of the defence that an accused has access to a lawyer at the initial stages of police interrogation." Also later in case of Averill the Court held that one has a right to lawyer prior to police interrogation.[53] But until the case of Salduz v. Turkey the ECtHR did not acknowledge physical presence of a lawyer during interrogations as a

[53] John Murray v. UK, ECtHR, 18731/91, 1996 and Averill v. UK, ECtHR no. 36408/97, 2000

fundamental element of the right to defence. In seminal case of Salduz ECtHR recognized that physical assistance of a lawyer during interrogations is crucial safeguard of the privilege not to self-incriminate.[54]

2.2 Salduz case: the principle of access to a lawyer

In Salduz the Court found that access to a lawyer should be provided from the first interrogation of a suspect by the police unless it is demonstrated that there are compelling reasons to restrict the right. The Court refers to the underpinning principle that the Convention "guarantee not rights that are theoretical or illusory but rights that are practical and effective" and following from it claims that simply "assigning counsel does not in itself ensure the effectiveness of the assistance he may afford an accused"[55] Further the Court states that Article 6 of the Convention "require the accused be allowed to benefit from the assistance of lawyer already at the initial stage of police interrogation", because at the initial stages of police interrogation the prospects of the defence are most likely to be determined. As to the Court, the reason of restriction of the right should be justified "in the light of the entirety of the proceedings: and should not "deprive the accused of a fair hearing." Also the restriction to deny the access of a lawyer "must not unduly prejudice the rights of the accused under Article 6".The Court concludes that "the defence will be irretrievably prejudiced when incriminating statements made during police interrogation without access to a lawyer are used for a conviction." The Court makes a standpoint that the access to the lawyer at the initial police interrogation is inevitable to maintain the principle not to self-incriminate. It is stated in the judgment that "the early access to a lawyer is part of the procedural safeguards to which the Court will have particular

[54] Salduz v. Turkey, ECtHR, no. 36391/02, 2008
[55] ibid. para. 51

regard when examining whether a procedure has extinguished the very essence of the privilege against self-incrimination."[56] The Court asserts that particular vulnerability of the accused at the stage of police interrogation constituted by the potential coercion or oppression of the authority that could cause the accused person to make self-incriminating statements, "can only be properly compensated by the assistance of the lawyer whose task is to help to ensure respect of the right of an accused not to incriminate himself."[57] In Dayanan v. Turkey ECtHR reassured access to a lawyer of accused person in all stages of criminal proceedings and by stating that "an accused person is entitled, as soon as he or she is taken into custody, to be assisted by a lawyer, and not only while being questioned… The fairness of proceedings requires that an accused be able to obtain the whole range of services specifically associated with legal assistance"[58].

However if the access to a lawyer meant the physical presence of a lawyer was ambiguous in the Salduz decision. But in subsequent judgments of Mader v. Croatia and Sebaji v. Croatia the Court pronounced expressly that indeed the right to access to a lawyer during the initial stage of interrogations constituted a physical presence of the lawyer. In Mader the Court found a violation of Article 6 (1) and 6 (3)(c) where the "applicant was questioned by the police and made his confession without consulting with a lawyer or having one present."[59] In Sebaji judgment also the violation of Article 6 (1) and 6 (3)(c) was found "on account of the applicant's questioning by the police … without the presence of a defence lawyer"[60]

[56] ibid. para. 54 referred to Jalloh v. Germany
[57] ibid.
[58] Dayanan v. Turkey, ECtHR, no. 7377/03, 2009, para. 32
[59] Mader v. Croatia, ECtHR, No. 56185/07, 2011, para. 153
[60] Sebalj v. Croatia, ECtHR, No. 4429/09, 2011, para. 256.

Salduz judgment influenced greatly the national courts to advert the right to legal assistance in early stages of the criminal proceedings. For instance, in France, the decision of the Court the Cassation (Supreme court of France) to strike down the constitutionality of the relevant article of the Code of Criminal Procedure (which did not allow the lawyer to be present during the interrogation of the person in pretrial detention) based on the same rationale as Salduz decision and found that the detained person should benefit of the assistance of lawyer during the interrogation and emphasized the role of a lawyer that could prevent the self-incrimination and ensure the right to silence. [61]

The case of Cadder v. HM Advocate of United Kingdom Supreme Court is the clear presentation of how the Salduz approach was endorsed in the judiciary of member states.[62] The Salduz rationale, which was based on the conjunction of right to silence, the privilege against self-incrimination and the access to a lawyer, served as a ground to find that permitting the police to question suspects for six hours without allowing them access to a lawyer was unlawful. In the judgment Lord Hope pointed out that that: "there was a consensus across Europe that the presence of a lawyer was a safeguard against ill-treatment . . . But it is just as plain that the risk of irretrievable prejudice to the accused because of a lack of respect of his right to remain silent was at the forefront of its mind too: … in the contracting states and elsewhere to

be primarily concerned with respecting the will of the defendant to remain silent in the face of questioning and not to be compelled to provide a statement. "[63]

[61] D. Giannoulopoulos, Strasbourg Jurisprudence, Law Reform and Comparative Law: A Tale of the Right to Custodial Legal Assistance in Five Countries, Oxford Human Rights Law Review 16, 103–129, 2016, p. 113
[62] supra note 29, p.1002
[63] Cadder v Her Majesty's Advocate, UKSC Judgment, 2010, para. 44

Moreover, several countries including those who did not recognize the principle of access to a lawyer during police interrogation such as Belgium, France, the Netherlands, introduced the right in their own way (by legislation, by prosecutorial decree etc.) following the Salduz. However, the extent to which lawyers can act after being granted the access during the interrogation or the practical implication of the Salduz principle needs further consideration (further than this work) as in this case the procedural traditions (including the culture of legal professionals and existing institutional mechanisms) of each individual member state jurisdiction should considered thoroughly.

The fact that ECtHR jurisdiction is "directed at member states across the full spectrum of adversarial and inquisitorial traditions"[64], makes this research, which is mainly discussing the case law of European supranational institution, relevant to my home jurisdiction. The rationale and the further practical implication (in general) of the Salduz principle, which is indeed an universal principle, can be an expedient lesson for the country like Mongolia, which surely looks up to European legal tradition, in particular to continental tradition of Germany, especially in the criminal law and procedure. It is inevitable future to domestic jurisdiction of Mongolia to recognize and enforce the right to legal assistance at the initial police interrogation rather a choice to make. Further insight will be made in to the European Union standard of the right access to lawyer at the pretrial stage.

2.3 Strengthening the Right to Legal Assistance in EU

In 2009 EU established a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings. As to the Roadmap EU

[64] supra note 29, p. 1004

proposed to adopt number of regulations to provide procedural rights including right interpretation, right to information, right to protection for vulnerable suspects and right to legal advice and legal aid. EU acceded ECHR thus agreed to comply the case-law of the ECtHR, thus the regulations' relied upon ECHR principles and the principles developed by ECtHR landmark cases on right to access to a lawyer.

Directive "On the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty " (the Directive) adopted in 2013. The Directive refers to the Article 6 of the ECHR which enshrines fair trial rights and states that "the conditions in which suspects or accused persons are deprived of liberty should fully respect the standards set out in the ECHR … and in the case-law of the Court of Justice of the European Union (the Court of Justice) and of the European Court of Human Rights."[65]

Salduz case had a far-reaching influence in the regional level. The principle established in Salduz has been reassured and expanded upon, in more than one hundred judgments, collectively referred to as the Salduz jurisprudence, therefore it enabled the European Union to include strong provisions concerning the right of access to a lawyer in during police interrogation in the Directive.[66]

The core principle of a Directive is to ensure "the right of access to a lawyer in such time and in such a manner so as to allow the persons concerned to exercise their rights of defence practically and effectively."[67] The Member states are obligated to

[65] Directive 2013/48/EU, European Parliament and of the Council, 2013, Recital paras (1) and (29)
[66] A. Ogorodova, T. Spronken, Legal Advice in Police Custody: From Europe to a Local Police Station, Erasmus Law Review, pp. 191-205, 2014, p. 191
[67] supra note 64, Article 3(1)

ensure the access to a lawyer without "undue delay" or to provide as earliest as possible in order to provide the full enforcement of the right to access to a lawyer. [68] The timing of the providing of the access to lawyer is specified in following terms: "before the first interrogation of the police", ""without undue delay after deprivation of the liberty, "in due time before they appear before that court". [69] The Directive provides the right of access to lawyer in the following provision:

> "Member States shall ensure that suspects and accused persons have the right of access to a lawyer in such time and in such a manner so as to allow the persons concerned to exercise their rights of defence practically and effectively."

From the above provision the important questions arise for further consideration: the timeliness of the access to assistance of a lawyer, confidentiality of the communication with the lawyer, the waiver of the legal assistance and the information on the right to access of a lawyer in relation with the effectiveness of the right.

The Directive provides a clear direction of the point of the time when right to legal assistance of access to a lawyer arises. Article 3(2) of the Directive states in the following text:

> "… In any even, suspects or accused persons shall have access to a lawyer whichever of the following points in time earliest:
>
> (a) before they are questioned by the police or by another law enforcement or judicial authority;

[68] ibid. Article 3(2)
[69] ibid. Article 3(2) (a), (c), (d)

(b) upon the carrying out by investigating or other competent authorities of an investigative or other evidence-gathering act in accordance with point (c) of paragraph 3;

(c) without undue delay after deprivation of liberty;

(d) where they have been summoned to appear before a court having jurisdiction in criminal matters, in due time before they appear before that court."

It is apparent in the provision of the Directive that the right applies from the outset of police investigation, and not only if and when a suspect or accused is interrogated by the police.[70]

The Directive requires that Member States make necessary arrangements to ensure "that suspects or accused persons have the right to meet in private and communicate with the lawyer representing them, including prior to questioning by the police or by another law enforcement or judicial authority." Also Member States shall ensure that "the lawyer to be present" at the interrogation and "participate effectively" while doing so.[71] In the Directive it is emphasized that such participation should be conducted in accordance with procedures under the national law, but such procedures should not prejudice "the effective exercise and essence of the right concerned."

According to the recital of the Directive the effective participation means that "the lawyer may, inter alia, in accordance with such procedures, ask questions, request clarification and make statements." Also according to the Directive state authority is responsible of making "general information available to facilitate the obtaining of a lawyer by suspects or accused persons."[72]

[70] supra note 65, p. 194
[71] supra note 64, Article 3 (4)
[72] ibid.

Ensuring the access to a lawyer also entails that the state authority should grant a possibility for suspects and accused persons "to meet in private and communicate with the lawyer representing them, including prior to questioning by the police or by another law enforcement or judicial authority." Thus, the confidentiality of the communication with a lawyer is essential to the full enjoyment of the right. In the text of the Directive it follows: "Member States shall respect the confidentiality of communication between suspects or accused persons and their lawyer in the exercise of the right of access to a lawyer provided for under this Directive. Such communication shall include meetings, correspondence, telephone conversations and other forms of communication permitted under national law."

Confidentiality of the communication was subjected in cases of ECtHR in relation of the full enjoyment of fair trial rights. ECtHR, when ruled on a case S v. Switzerland that stated that "an accused's right to communicate with his advocate out of hearing of a third person is part of the basic requirements of a fair trial in a democratic society"[73], relied on the Standard Minimum Rules of the Treatment of Prisoners of the Council of Europe. In the Article 93 of the Rules it stated:

> "Interviews between the prisoner and his legal adviser may be within sight but not within hearing, either direct or indirect, of a police or institution official."[74]

Later ECtHR held that "the presence of the police officer within hearing during the applicant's first consultation with his solicitor infringed his right to an effective exercise of his defence rights" in the case of Brennan v. UK.[75]

[73] S v Switzerland, ECtHR, No. 12629/87, 13965/88, 1991, para. 48

[74] Standard Minimum Rules for the Treatment of Prisoners, Council of Europe (Committee of Ministers), 1973, Article 93

[75] Brennan v the United Kingdom, ECtHR, No. 39846/98, 2001, para. 58

The Member states could derogate from the application of the right to access of a lawyer in timely manner only in exceptional circumstances of the case on the basis of compelling reason. The application of the right in case of point of time of section (c) of Article 3(2), where the suspected or accused person shall have access to a lawyer "without undue delay after deprivation of liberty", can be derogated only "where the geographical remoteness… makes it impossible to ensue the right without undue delay."[76] Member States can derogate temporarily from the obligation stated in Article 3(3), namely from ensuring the right to meet in private and communicate the lawyer, to have a lawyer present during questioning, in exceptional circumstances "where there is an urgent need to avert serious adverse consequences for the life, liberty or physical integrity of a person" or "where immediate action by the investigating authorities is imperative to prevent substantial jeopardy to criminal proceedings."[77]

The important issue of the enforcement of the right to legal assistance and right of the access of a lawyer is the right of the suspects and accused persons to waive the legal assistance or right to self-defence. Right to self-defence is ensured by caselaw under ECHR as a key element of the right to defence. In the case of Pischalnikov v. Russia, the European Court of Human Rights (ECtHR) ruled that the defendant can waive his rights to lawyer but such a waiver "must not only be voluntary, but must also constitute a knowing and intelligent relinquishment of a right" and "must be shown that he could reasonably foreseen what the consequences of his conduct should be."[78]

[76] supra note 64, Article 3(5)
[77] ibid. Article 3 (6)(a) and (b)
[78] Pischalnikov v. Russia No. 7025/04, ECtHR, 2009, para. 77

In the Article 9 of the Directive the conditions of such waiver are designated. The Directive requires that the suspected or accused persons able to waive the legal assistance only under following conditions where: "the suspect or accused person has been provided, orally or in writing, with clear and sufficient information in simple and understandable language about the content of the right concerned and the possible consequences of waiving it" and "the waiver is given voluntarily and unequivocally."[79] Also suspects and accused persons should be able to revoke a waiver at any moment of the criminal proceedings and should be informed of such a possibility.[80] Also the Directive foresee the conditions in the preamble that the "suspects or accused persons should be able to waive a right granted under this Directive provided that they have been given information about the content of the right concerned and the possible consequences of waiving that right" and further stating that "when providing such information, the specific conditions of the suspects or accused persons concerned should be taken into account, including their age and their mental and physical condition."[81]

From all above conditions mentioned and interrelated to the enforcement of the right to legal assistance, the key issue, determining the enjoyment of the right, concerns the information to the right, including the information on obtaining a lawyer, information to an entitlement of the free legal assistance or legal aid, information of the waiver of the (in particular the consequences of it).

Right to information is and consequently the Directive on Right to information in criminal proceedings closely relates to the right to legal assistance. "Clear and sufficient information" required by the Directive is not only precondition of the

[79] supra note 64, Article 9 (1)(a) and (b)
[80] ibid. Article 9 (3)
[81] ibid.

waiver but serves as a guarantee of the overall legitimate and rights-based criminal proceedings.[82] Therefore the Directive obliges the state authority to ensure that suspects and accused persons are promptly provided with the information in order to allow the following procedural right to be exercised effectively:

> "(a) the right of access to a lawyer; (b) any entitlement to free legal advice and the conditions for obtaining such advice;
>
> (c) the right to be informed of the accusation;
>
> (d) the right to interpretation and translation;
>
> (e) the right to remain silent."[83]

On this matter the Directive on right to information introduced an innovative tool- the Letter of Rights, which is required to be "simple and accessible" comparing to previous practices of the state authorities, which were "bureaucratic" in a style and usage that not have been of meaningful consideration of the right to access for a lawyer for suspected and accused persons.[84] In accordance with the Directive on the right to information state authority should provide the suspects and accused who are arrested or detained with written Letter of Rights promptly.[85] Further the Directive requires that suspected and accused persons "shall be given an opportunity to read the Letter of Rights and shall be allowed to keep it in their possession throughout the time that they are deprived of liberty."[86] The Directive also provides the indicative model of Letter of Rights which comprises of nine points of procedural rights in matters related to them including the urgent medical assistance, period of deprivation of liberty etc.

[82] Directive 2012/13/EU, European Parliament and of the Council, 2012

[83] ibid. Article 3 (1)
[84] ibid. Recital 38
[85] ibid. Article 4 (1)
[86] ibid.

EU Directive on the right of access to a lawyer provides clear and precise indications of the timely access to a lawyer and application of the right to legal assistance. Therefore it is an advanced legal instrument to look up to into the wording. Moreover the Letter of Rights in any form, as long as it would keep the initial purpose and adapted to the context of the national jurisdiction, can be a reliable tool of ensuring the enjoyment of the right to legal assistance.

CHAPTER 3: CURRENT CHALLENGES OF MONGOLIA: LAW AND PRACTICE OF THE RIGHT TO LEGAL ASSISTANCE

3.1 Legal framework of the defence rights

Fair trial rights are protected under bill of rights of Constitution of Mongolia in Article 16 (14). The citizens of Mongolia are guaranteed of the following fair trial rights: "not to testify against himself, his parents and children, to self-defense, to receive legal assistance, to have evidence examined, to be tried by impartial tribunal; to be tried in his/her presence, to appeal against a court decision, to seek pardon."[87]

Also compelling accused person to testify against himself is prohibited and should be presumed innocent "until proved guilty by a court by due process of law."[88] The closing clause states that "the penalties imposed on the convicted shall not be applicable to his family members and relatives."[89]

Right to interpretation and right to defence also guaranteed under Section 4 (Judiciary) in Articles 53 and 55. As I assume, this two rights are considered as a crucial element of the judicial process, therefore mentioned in the Section of Judiciary.

Newly revised Code of Criminal Procedure (which came in effect in July 1st of 2017) (the Code) inherited almost all provisions on regulating the right to legal assistance and access and participation of a defence lawyer from the former Code.

As to general principles, the Code ensures the adversarial principle of the criminal trial (but not the entire criminal proceedings[90]). Firstly, right to defence mentioned under person's inviolability protection provision. According to Article 1.8 (3) upon

[87] Constitution of Mongolia (unofficial translation), 1991, Article 16 (14)
[88] ibid.
[89] ibid.
[90] Code of Criminal Procedure of Mongolia (Revised) 2017,
Article 35.8 (1)

an arrest everyone shall be reminded of the right to have a defence lawyer, to defend himself or herself and not to give testimony against himself or herself. [91]

Basic provision guaranteeing right to legal assistance is Article 1.14 (1) of the Code, which reads: "Everyone who considers that his or her right or the lawful interest is infringed shall have the right to defend himself or herself, to be defended by defence lawyer or to receive legal aid." [92] In the former Code instead of "everyone", it was listed "suspect, accused, defendant and victim". It is somewhat unsuitable for the wording of the new Code that it did not refer to the defence party of the criminal proceedings directly. Assumingly, the initial purpose of the revision was to include and protect the victim's interests in the proceedings. However the wording that emphasized that "who considers that his or her right or the lawful interest has been infringed" is inarticulate toward the defence party. Assumingly, the initial purpose to refer to "everyone who considers that his or her right or the lawful interest has been infringed" was to accommodate lawful interests of all persons evoked by the criminal case, especially the victims, as the new revision of the Code aimed to elevate the victim's status and protection in the criminal proceedings. However legal assistance is the inherent element of the defence rights which should be addressed exclusively to the defendant as a priniciple and issue of legal assistance of the victim can be addressed separately in the relevant provision regarding the rights of the victim in the criminal proceedings.

As to the guarantee of the professional conduct of the defence lawyer in the course of criminal proceedings, he or she has a right to communicate with the defendant freely, be present at the interrogations and ask questions. [93] But it is

[91] ibid. Article 1.8(3)
[92] ibid. Article 1.14 (1)
[93] ibid. Article 5.1 (2.1)

questionable that the defence lawyer could exercise the rights if he or she not provided of adequate time and facilitation. It is stated under the regulation of the rights of the defendant that he or she shall be provided with adequate time and facilitation to communicate with the defence lawyer and the state authority is obliged to provide the right to legal assistance. [94] However the elements of timing, proper information and waiver are disregarded.

Further, according to the guaranteed right to legal assistance state authority has an obligation to provide opportunity, facilitation and time for everyone to defend himself or herself, defended by defence lawyer and receive legal aid. It provides regulation on selecting one's defence lawyer under the general regulation regarding the participation of the defence lawyer in the article 5.2. Criminally charged persons and also the victim and civil applicant have right to choose lawyer on their own or request their legal representative or family member to do so on their behalf. In Article 5.3 necessary circumstances for obligatory legal assistance are defined. State authorities should carry out proceeding only if the defence lawyer is involved in the following instances: "mute, deaf, blind, and other persons who by reason of their physical or mental defects are not able to exercise their right to defense themselves; minors; persons who do not have command of Mongolian language; to whom death penalty may be applied; if one of defendants who have contradicting interests on a case has a defence lawyer, then other defendant; if the defendant request a legal aid" and if the defendant can not have defence lawyer by any means "state authorities are obliged to secure participation of a defence lawyer." [95] If the state authority did not ensure the participation of a defence lawyer in the interrogation in above instances,

[94] ibid. Article 7.6
[95] ibid. Article 5.3

the obtained statement should be deemed null and void. [96] Following from above, it is perceived that the presence of a lawyer during interrogations is not obligatory for any other cases, therefore the early involvement of the defence lawyer in particular by the first interrogation, is not a subject issue of regulation under the procedural law.

Crucial elements such as privacy and the confidentiality of the communication, presence of a defence lawyer during interrogations and examinations, right of the defence lawyer to put question to other parties, to access the case file are guaranteed in both provisions ensuring rights of the suspects, accused persons, defendants and defence lawyer. However, waiver of the right to legal assistance and self-defence is not regulated precisely in regard with the voluntary, intelligent and informed choice. As to self-defence, it is referred in the Article 5.3 (3) that "criminal proceedings could be carried out without the participation of the defence lawyer if the suspect, accused person or a defendant requested defend himself or herself in writing," Therefore, the rule to of a written request of a self-defence is the only guarantee of ensuring the presumably voluntary and knowing decision of the defendant. Though the right to information of the right to legal assistance and the consequences waiving the right, which are not apparent in the Code, are of fundamental importance to the enjoyment of all defence rights.

There was a considerable modification made concerning to the theme of this research work, which might made inarticulate if not diminished to some extent the regulation of the right to legal assistance and the role of the defence lawyer in the criminal proceedings. In the former Code in the Article 38(3) it was ensured that defence lawyer has a right "to take part in criminal proceedings starting from the moment when some one is deemed as suspect in a crime", but the circumstances of

[96] ibid. Article 16.11 (1.3)

immediate measures (stated in Article 172(3)) to be taken on solid ground of suspicion that crime was committed or being committed are excluded.[97] Therefore, we could have assume that suspected person is entitled of the right to legal assistance upon first interrogation of the police. As to the current Code, there is no indication on the timing of the application of the right, which indeed the main rationale of this work to specify the enforcement of the right to legal assistance in the earliest possible point of time, in the outset of investigative stage of the proceedings. Implementation of the rights and the practice of criminal defence will be presented further based on the empirical data and research conducted by the National Human Rights Commission of Mongolia and Customer Review Research of the Legal Aid Centre of Mongolia.

3.2 Legal assistance in practice

The research conducted by National Human Rights Commission is based on the empirical data of the survey carried out among the defendants who were detained in the pretrial stage mainly at the pretrial detention centre of the General Executive Agency of the Court Decision. Therefore it might not represent fully the general condition of the right to legal assistance and the access to the defence lawyer including the suspects and accused persons who are investigated and interrogated outside of a police custody or detention. Nonetheless, as the pretrial detention is most probably the highest risk of vulnerability to the ill-treatment and violation of fair trial rights for the defendant, the practice could be assessed to significant extent in relevance with the right to legal assistance and its early commencement.

In order to address the importance of the assistance of the defence lawyer pretrial detention, it is important to define the nature of the pretrial detention. Pretrial

[97] ibid.

detention should be used as means of last resort according to Tokyo Rules.[98] Pretrial detention is the part of formal commencement of criminal proceedings, but it is in significance not to restrict it to formality of the proceeding and to understand in a broader sense as the concept referring to any deprivation of the liberty prior to trial in order to implement fundamental principle of criminal justice that "a person who has been arrested or detained on a criminal charge must be "promptly" brought before a judge." While there is an international criminal justice determination to use minimal pretrial detention, the statistics show the contrary. Around one third of the global prison population are pretrial detainees and 10 million people are subject to the pretrial detention decision every year. Mongolia is not an exception in using pretrial detention excessively in contrast to its small population approximately of three million. Apart from the numbers of detained there are considerable issues such as length of the detention, detrimental conditions and consequences of the individual detainee and overall affect in society. Defence lawyers can impact all above mentioned issues by early involvement assistance.

The empirical data is collected based on the survey conducted among 691 suspects, accused persons and defendants. Out of 529 survey participants who where assisted by defence lawyer, 55 percent of them were reminded of their defence rights including right to legal assistance, right defend themselves and not to incriminate themselves.[99] 38 percent were not reminded any of the rights and 30 percent answered they do not remember or did not answered. [100] 108 detainees of the pretrial detention centre were not assisted by defence lawyer. 44 percent of them were reminded of their

[98] Standard Minimum Rules for Non-Custodial Measures (the Tokyo rules), General Assembly, UN, 1990, rule 6.1
[99] Report on the rights of detainees in the pretrial detention,15th Report on the Human Rights, National Human Rights Commission of Mongolia, 2016, p. 79
[100] ibid. p. 85

rights, 48 percent were not.[101] Therefore the procedural principle of being informed of the defence rights upon the arrest is followed irregularly which in consequence infringes the right to legal assistance.

Right to be assisted by defence lawyer is not enforced fully. A defence lawyer who was suggested without other alternative names or imposed directly by a police officer or the judge assisted 18 percent or 95 persons.[102] However here it should be differentiated that imposing the lawyer on someone and informing about the possibilities and open the access to lawyers (access to lawyers' contact list etc.) In the case of the survey the participants were imposed with the certain names of the lawyers against their will or being not fully informed and having no other available choices. As to the procedural law, also Law on Legal Status of Lawyer, police officers, prosecutors and judges shall ensure the right to legal assistance by providing suspects, accused persons and defendants with the contact list of the available lawyers and law firms, in case of indigence the state authority should request legal aid centre or the bar association and mediate on appointment of the defence lawyer, but not to impose particular names. Out of 104 participants of the survey who were imposed by a name of certain lawyer, 60 percent were imposed by a police officer in the course of the investigation.[103] Thus the proper enforcement of the right to legal assistance in the investigative stage is an issue of concern. Investigative stage is determinant of an overall fairness of the proceedings where it is decided whether the defendant has an access to legal assistance, consequently whether all other his or her rights, which constitute the fairness of the criminal proceedings provided meaningfully.

[101] ibid.
[102] ibid. p. 88
[103] ibid.

As to the involvement of the defence lawyer regarding the stages of the criminal proceedings, 80 percent (423 persons out of 530) of detainees who were assisted by defence lawyer of their choice or a legal aid lawyer, accessed the legal assistance after the official initiation of the case, the earliest after they had considered as a suspect.[104] Moreover, 235 persons or a majority of the above 80 percent attained a defence lawyer as late as when they accused of a crime officially, when the case had submitted to the prosecutor's office and even upon the trial stage in almost a hundred cases. [105] 20 percent or 107 persons accessed defence lawyer upon their first involvement in the case.[106] Here it should be noted that the survey conducted before the revised Code of Criminal Procedure came to effect. Therefore, it was concluded in the relevant research that the practice of this very low access to the legal assistance in the early stage of the criminal proceeding was in breach with the law that required the defence lawyer "to take part in criminal proceedings starting from the moment when some one is deemed as suspect in a crime". As to current situation, it is impossible to refer to a certain provision of the newly revised Code concerning the timing of the involvement of a defence lawyer in the proceedings or the enforcement of the right to legal assistance. It could be referred considering the timing, in particular the early access to legal assistance, to the general principle of inviolability where it stated that the persons should be informed of their right to defence including right to legal assistance upon the arrest. However it is only limited to the situation and the point of time where the person is arrested, apart from that the person could come to the questioning or the interrogation upon a warrant or came to the police station voluntarily etc. Also mere information to the rights does not constitute the actual

[104] ibid. p. 96
[105] ibid.
[106] ibid.

enforcement of the rights. Therefore the newly revised Code diminished the guarantee of the right to legal assistance to some significant extent.

In fact, active participation and the actual presence of the defence lawyer is still mostly limited to the trial. Pretrial detainees who are assisted with the defence lawyer asked of the question whether the defence lawyer assisted in their all interrogations in the course of the their cases' proceedings. 31 percent of them answered that defence lawyer did not come to any of their interrogations with the police and 24 percent answered that "in some of the interrogations". [107]The majority of reasons that the defence lawyer could not be able to attend the interrogation,concerned the workload of the defence lawyer such as he or she was not available due to a trial of the other case. Considerable number of people answered that their lawyer could not come to the interrogation because the lawyer was not informed of the date and time of the interrogation in advance. Apart from the research of the National Human Rights Commission, there was an opportunity to collect few data from the ongoing customer review research of the Legal Aid Centre exclusively on the matter concerning the timely access of a lawyer. The survey conducted among 102 suspects, accused persons and defendants who are served by appointed lawyers of the Legal Aid Centre of Mongolia. Only 19,6 percent of all survey participants had an opportunity to be assisted by lawyer when they first suspected of crime.[108] The majority of the defendants obtained a defence lawyer after the first interrogation of a police or during the course of the investigative stage and at the trial stage, which constitute over 60 percent.[109] It asked in the questionnaire that if the defendants

[107] ibid. p. 104
[108] The Research Report on Customer Review of the Legal Aid Centre of Mongolia (incomplete), National Legal Institute, 2017, table 1

[109] ibid.

where able to consult with their lawyer upon any of the interrogations (not necessarily in the first). 40 percent of them answered they did not provided such an opportunity.[110] As to refer some reasons, it has been said that "the police officer said there is no accessible lawyer at a time to assist"; "the police officer arrested and detained without advance notification or reminder that I could have a lawyer"; "the police officer convinced to interrogate me before the lawyer arrived at the police station."[111] Therefore it could be assumed that there is a tendency among police officers who conducting the investigation to avoid the presence of a lawyer or consultation of the defendant with the lawyer before the interrogation. Thus participation of a lawyer in the overall proceedings, not to mention the early intervention, is not satisfactory.

Additionally the facts on legal aid should be considered in conjunction with the adequate legal assistance in the criminal cases. Law on Legal Aid for Indigent Defendants was adopted in 2013. Consequently the Legal Aid Centre has been established to provide the service. In the first year of the operation of the Centre one legal aid defence lawyer worked on 6-8 cases simultaneously per month. This number has been increased to 8-10 cases in 2015. There are over 5000 licensed lawyers are practicing in the national level. Although the Centre's defence lawyers constitute only 1 percent of the total number approximately, legal aid lawyers work on up to 30-35 cases of all cases decided in the courts.[112] This is a clear example of a gap in distribution of resource, which affects all in all the proper function of the administration of justice.

[110] ibid.
[111] ibid. table 2
[112] supra note 41, p. 91.

3.3 Conclusion to Chapter

Mongolia's criminal justice system has been challenged by vigorous waves of reform through out the years of democratization since its de facto declared the independence and sovereign state after seventy years of soviet dependence as a satellite state. Soviet legacy is strongly rooted in the criminal justice system of Mongolia. Defence lawyers were part of the system and their representation of the defendant was appear to be symbolic. Lawyers duties at most parts constituted of served the procurators in investigative stage and assisting the judge in the trial rather than the defendants.[113] Defence lawyers were state servants employed by the Collegue of Advocators which can be defined as "an only law firm" of the country which performed as a state agency. [114] In that sense defence rights of the defendant was systematically diminished. This legacy of passive and subsidiary role of the defence lawyer stayed untouched until the 2000s when the first criminal justice reform made.

However the Association of Advocators which has the status of the non-governmental association had very limited power of self-governance of the profession. As the reform can be theoretically coherent, it was also important to consider the existing professional culture, which is indeed in many ways could be a challenge to a legal reform. The independent lawyers carried out their functions in the criminal proceedings mostly relying on their communication and network (conceived from the soviet era) with the police officers and the judges, which is entailed excessive conflict of interests overall in the sector.

By the second initiative of the criminal justice reform the important issue of the self-governance of the legal profession was taken to account. Consequently the

[113] Impartiality of the Lawyers in Mongolia, Uyanga Delger, an article published on jargaldefacto.com, http://jargaldefacto.com/article/mongol-uls-dakhi-khuulich-umguulugchiin-kharaat-bus-baidal
[114] ibid.

Mongolian Bar Association was established in 2013. Also the law enforcement procedure or the conduct of police authority was a major subject to reform. These two separate agendas of the criminal justice reform could have met on the particular point of the role of the defence lawyer in conjunction with right to legal assistance and access to a lawyer, in the criminal proceedings, especially in the pretrial or investigative stage. The very visible advancement regarding the right to legal assistance and the access to lawyer is the Law on Legal Aid adopted in 2013. In general the essential elements of the right to legal assistance such as the timing, the right to information of procedural rights or the reminder of rights upon arrest that should be addressed on the level of legal regulation are disregarded to nowadays.

Following from reformation of the procedural law and the recent practice on right to legal assistance, it could be concluded that participation of the defence lawyer has many grey areas where the right to legal assistance is still systematically violated. From the empirical researches it is evident that the early investigative stage is the most hostile to the defendant. Police tend to take advantage particularly early in that stage to obtain incriminating evidence (or statement by the defendant) by inhibiting the participation of a defence lawyer.

The procedural law needs more precise and detailed regulation addressing the early access to defence lawyer ensuring his or her presence in the first interrogation by the police authority. In order to achieve that, the right to information to defence rights in particular to right to legal assistance should be enforced by an effective and practical approach such as letter to rights. As to my own limited observation, the procedural rights are reminded in formality. The legal provisions are usually copied on the from of testimony without any simplification for a lay person and further not given of detailed explanation by the investigator or a police officer.

On some occasions police officers just hand in the defendant the actual copy of the Code and let them read the provisions regarding the rights of the defendant, which an act of on the surface. On the other hand there were several times where the defence lawyer was present at the interrogation, the defence lawyer has been prepared a simplified version of procedural rights in advance to introduce it to the client, which was indeed an identical document to letter of rights. However it is paradoxical if the defendant is just informed meaningfully in the case of a present defence lawyer, as the adequate first instance reminder or information to procedural rights by the police ensures the presence of a defence lawyer. Therefore it is a duty of state authority or the police to ensure that the defendant has meaningfully informed of his or her procedural rights and enjoy his or her right to legal assistance timely as involved in criminal case.

Also the fact that the Code is insufficient of the regulation on the waiver of the right to legal assistance has a negative consequence of the proper enforcement of the defence rights overall. There is no empirical or primary source data available concerning the issue of self-defence and consequently on the waiver of the right to legal assistance by a defence lawyer. But it could be concluded in any case that there is a risk of uninformed and involuntary waiver of the right to legal assistance due to lack of the accurate and definite regulation on the conditions of the waiver.

CONCLUSION

It has been many times referred to right to legal assistance of defence lawyer as a gateway right to enjoyment of fair trial or procedural rights to full extent in this research. Defence lawyer is defined as "the central component of the system, the glue that holds it together, and the protector of guarantees."[115]

In order to fulfill the effectiveness of the defence rights, it is emergent to ensure the legal assistance in the earliest point of time of the criminal proceedings. As much as the importance of the legal assistance or the access to a lawyer was a recurrent subject of the debate throughout years the participation of the defence lawyer from the first interrogation is a relatively recent idea of scrutiny of any jurisprudence. It has been given more emphasis to procedural rights in the trial stage historically. The shift of center of attention from the trial stage to pretrial or investigative stage is inevitable for the human rights-based approach in the criminal justice system. The pretrial stage is where the defendant is most prone to infringement his or her inviolability, where he or she is most probably keen to make uninformed or involuntary decisions which are determinative in the further establishment of the case and has far-reaching consequence on the final decision. It adds more value to the research in the case of the home jurisdiction of Mongolia where the in the incriminating evidence is heavily relied on the confession of the defendant in the course of police investigation. The main rationale of this research therefore is that that the early access to a lawyer in investigative stage (in particular upon the first interrogation) can constitute a proper compensation of such vulnerable conditions.

In the case home jurisdiction, the issue of effectiveness of defence right in conjunction with the right to legal assistance in the early stage of criminal

[115] J. Tomkovicz, An Adversary System Defense of the Right to Counsel Against Informants: Truth, Fair Play, and the Massiah Doctrine, U.C. DAVIS Law Review 1, 1988, p. 40

proceedings is regarded on seldom occasions and not comprehensively. As to the main subject to this research, ECtHR jurisprudence has demonstrated ample analyses on the right to legal assistance regarding the timing and the presence of a lawyer in the first interrogation by police authority. However the responses of the Member states vary and the acceptance and adaptation of the Salduz principle are still an ongoing matter. Therefore it might be quite simple-minded conclusion to directly compare the home jurisdiction to regional supranational institution's jurisprudence. In the other hand the consideration and further adaptation of principle of early access to a lawyer in criminal cases is an unavoidable issue to undergo sooner or later for a developing home jurisdiction where the struggle of implementing adversary principles is still present.

Further EU regulation on access to a lawyer in detail can constitute a reliable source in formulating the texts of the procedural law of home jurisdiction. Also as to the practical approach the letter of rights is the accessible, simple, but a sophisticated mechanism to ensure the defence rights including right to legal assistance.

In the scope of this research following main issues are recommended to take into consideration in order to improve the effectiveness of the defence rights in conjunction with the right to legal assistance. Firstly, in regard of the timely enforcement of the right the legal regulation should directly indicate the commencement of the right in earliest point of the criminal proceedings where the person is involved in the criminal case or arrested and consequently ensure that the state authority shall provide an access to a defence lawyer upon the first interrogation by police. Secondly, in order to do so, in practice the state authority should introduce an accessible and simple solution to inform the procedural rights in particular the right to legal assistance. In this regard the letter of rights could be the most convenient way

to provide the right to information. Letter of rights should be written and interpreted in a simple and comprehensible way to a layperson in reference to legal rights. thirdly the conditions and consequences of the waiver should be regulated in detail to ensure the well-informed and voluntary decision to defend himself or herself. This information could be included in the letter of rights comprehensively.

This duty of a state authority to help or provide the access to legal assistance has certain nuances regarding the effectiveness. The question could be raised that is it enough to inform. For instance the German Supreme Court (Bundesgerichtshof) has decided on the case where the non-German (Italian) person got involved in the criminal case and got provided with the list of telephone numbers of lawyers by the police upon his own request. As he did not speak the language, he failed to find a lawyer and consequently made a full confession without any legal assistance. The Court found that "it was not enough to inform an accused of his rights and provide the telephone directory and a telephone to make use of them, but that the police are obliged to help the suspect effectively if help is needed and thus give actual first aid."[116] Therefore it could be an obstacle to indicate precisely the conducts which are constitute the effectiveness of the defence rights or not, but actual key words such as "meaningful", "informed", "voluntary" should be included in the texts of the legal regulation to enforce the effectiveness of the right to legal assistance and therefore make sure of legal consequence.

Right to legal assistance not only has an irreplaceable importance in its substance but has many consequential value to it which should be addressed independently in detail apart the scope of this research. For instance the prevention of

[116] C. Fahl, The Guarantee of Defence Counsel and the Exclusionary Rules on Evidence in Criminal Proceedings in Germany, 8 German L.J. 1053 2007 Content, p. 1060

ill-treatment or the wrongful conviction should considered further. Also there are issues of separate consideration which are inherent to effective and meaningful realization of the right to legal assistance. Namely the issue of active defence or participation of a defence lawyer in the interrogation room and overall in the course of the investigation; impartiality of the defence lawyer and the competence of the defence lawyer should be researched properly based on the sufficient empirical research.

Also the issue of a legal aid or state appointed lawyer for indigent defendant should be taken to account coherently in addressing the effectiveness of the legal assistance and the access to a lawyer. In case of Mongolia the relevant law and the state agency to provide the legal aid are present and are functioning relatively sufficiently**.** However the competence of the legal aid lawyer is an apparent issue like elsewhere. There is a logical corollary between the right to a lawyer and right to effective legal assistance of a lawyer, which constitute that the former right does not serve its purpose and would appear symbolic without the latter.[117]

Beforehand of discussing such an issue it might be better to recognize that the absolute fairness can not be upheld in the interest of the defendant regarding the competence of the defence lawyer (not only a legal aid lawyer). In this regard Stefan Trechsel argues that "the problem (of appointed counsel) should not be over-dramatized. For instance, chosen counsel may also turn out to be inadequate while the ex officio counsel may sometimes be exceptionally good."[118] In fact, the clients of the Legal Aid Centre of Mongolia gave a relatively positive feedback on the satisfactory performance of the appointed defence lawyers, which constituted over 60 percent of

[117] J. F. Marceau, Embracing a New Era of Ineffective Assistance of Counsel, Journal of Constitutional Law, 2012, p. 1165
[118] supra note. 2, p. 269

all cases defended by the legal aid lawyer.[119] Effectiveness of the defence should be regarded further in theoretical, normative and practical contexts in relation with the quality of a legal assistance and the competence of a defence lawyer.

Also the important issue of a human rights-based approach in the criminal justice system is the criminal legal defence regarding the vulnerable defendants such as children, women and mentally-challenged persons. Thus this issue needs a special consideration in order to overcome the gaps in criminal justice system as a whole regarding the defence party.

In the course of this research the main obstacle was the insufficient theoretical as well as empirical analyses of the home jurisdiction in regard of the right to legal assistance and in general of the defence rights in particularly in the pretrial stage. The legitimacy regarding the impartiality of the judiciary and professional, competent, human rights-based conduct of the police is an apparent issue, which involves broad public discourse. Therefore there is a demand regarding legal scholars, professionals as well as the decision makers to address the relevant issues timely. If the right to legal assistance in the early stage of the criminal proceeding is brought forward and guaranteed in coherence with all its elements, it could serve as an asset to validate the legitimacy of the criminal justice administration, to advance the defence rights profoundly and increase the professional reputation of the legal profession.

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