

ISSN: 2582 - 2942



LEX FORTI

LEGAL JOURNAL

VOL- I ISSUE- V

JUNE 2020

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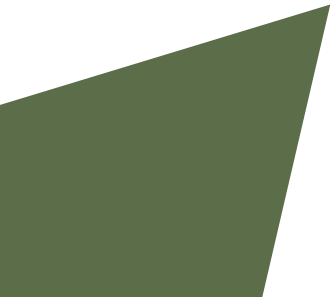
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Right to consult legal practitioner- A comparative overview

Romi Kumari

RIGHT TO CONSULT LEGAL PRACTITIONER IN DIFFERENT COUNTRIES – AN OVERVIEW

In India right to consult a legal practitioner is given under section 303 of CrPC and Article 22 of the constitution of India. In country like Australia, there is no provision for legal representation since it does not have a common law right. In *Dietrich v. The Queen*¹ it was held that if the person alleged with a serious offence, then the proceedings will be delayed to the time a legal representation is available to the accused.² In such case any application for the same should be accepted. Most commonly in the *Dietrich*, even if there is no existence of right to counsel, the judge out of his discretion stays the proceedings or in some other cases also grant adjournment when the accused doesn't have a counsel to represent him in the court of law.

Similarly in Cambodia which is a country following International Covenant on Civil and Political Rights has provided to any accused with the right to counsel under Article 38 of its constitution, which states that the citizen shall have the right to be defended by a counsel in case of a judicial proceedings initiated against them.³

In United Kingdom, countries such as England, Wales, and Northern Ireland are provided under Article 58(1) of the Police and Criminal Evidence Act of 1984(PACE) that in any circumstances if a person who is accused of any crime and is held in police custody in station or any other premises can on his request, be represented by a solicitor of his own choice to provide him with legal consultation privatively at any point of time. PACE is such a regulation which provides the right to consult a legal practitioner and of being informed about their legal rights too which is not provided under any common law. In United Kingdom around 2000, the honourable supreme court held in one of the leading case of *Cadder v. Her Majesty's Advocate*⁴ that no person who is accused of any alleged crime or even a suspect of a crime can't be questioned by the Scottish police Inspector about the crime in the absence of a legal representative or a legal counsel. Earlier the Scottish police had the luxury of interrogating the accused or the suspect to a maximum of 6 hours of his arrest in the absence of a legal practitioner. However the Supreme Court latter in several of its judgement found this right of a police to interrogate a person without his counsel was violative of Article 6 of its constitution and hence Article 6(c) was added to their constitution.

In United States, the right of being represented by an attorney of his choice was amended in the United States Constitution by Fifth and Sixth amendment respectively. The Sixth amendment of

¹ (1992) 177 CLR 292

² Mason CJ, Deane, Toohey, Gaudron &

³ CJR(Center for justice and Reconciliation) Law Review, March 2010

⁴ (2010)UKSC 43

U.S constitution provided that the accused shall be empowered to enjoy the right of being assisted by the counsel of his own choice in any respective case and soon after this addition in the U.S constitution, there was one of the leading landmark case of Supreme court of Gideon v. Wainwright⁵ in which the right to be represented by a counsel was incorporated against the state. In Zimbabwe in order to protect the interest of the accused, the constitutional section (18)(3)(d) provides that a defendant is allowed to have a counsel of his own choice at his own expenses, however if the magistrate is of the view that the counsel would not be able to bear the expense himself then, in order of providing him justice, the magistrate will certify a legal practitioner to defend him in the case.⁶

In country like Uganda also the constitution under article 28(3)(e) safeguards a person charged with any criminal offence which punishes him for either death or with imprisonment for life can be entitled to right of being consulted by a legal representative at the expense of the state.

Therefore the researcher would like to acknowledge the fact that most of the country safeguards the interest of the person either charged with any criminal offence or who is being the suspect of any criminal offence to be rightfully defended by a legal representative of his own choice in the light of justice by certain provisions either in their constitution or by certain criminal laws and enactment in the criminal procedure codes.

RIGHT TO CONSULT A LEGAL PRACTITIONER IN INDIA

INTRODUCTION

In India the right to be consulted by a legal practitioner is not only provided under the code of criminal procedure, 1973 under section 303 but also in the constitution of India under Article 22(1). It is considered to be a fundamental principle of rule of law. It is also recognised as one the most important fundamental right. The objective behind inscription of this right as a criminal law and a fundamental right is achieving a free and fair trial. The accused or any person shall not be held guilty because of lack of sufficient defence in the absence of a counsel to defend him. As it can be a possibility that the person is innocent but due to lack of the knowledge of the law and the way of defending professionally is unable to defend himself and is held liable on unreasonable ground.

⁵ 372 U.S. 335 (1963)

⁶ Legal aid act, part III section(10)(1)(a-b),1996

SECTION 303 OF THE CODE OF CRIMINAL PROCEDURE

Section 303 of criminal code of procedure enables an accused of any criminal offence and is being tried before the criminal court or against whom the criminal proceedings are being initiated shall have the right to be consulted by a legal practitioner of his own choice.

ARTICLE 22(1) OF THE CONSTITUTION OF INDIA

Article 22(1) of the constitution of India states that no person shall be arrested without informing the ground for his arrest neither should the person accused of any crime be denied of his right to consult a legal practitioner or defended by the legal practitioner of his own choice.

The right of consulting a legal practitioner begins soon with the arrest of the person accused of committing any criminal offence. The person so accused can be consulted by his legal adviser in the presence of the police. Moreover the accused should get enough and all required necessary opportunity to be consulted by the legal practitioner of his choice and communicate with him in order to prepare his defence for the case.

The above mentioned section⁷ or the article⁸ confers no right on the accused of being provided with a legal practitioner or an advisor with the help of the state or the magistrate. It only provides the magistrate with a duty of providing the person so accused of any alleged crime with sufficient opportunities to engage with a lawyer of his choice to defend himself in the interest of justice. Even in the situation where the counsel for the defendant does not show up in the court, the court is bound to stay the proceeding and appoint another legal practitioner to defend him in the court of law.

Therefore the accused is entitled to the right to consult his lawyer, at the time he is being brought by the police before the magistrate for recording his confession before the court of magistrate under section 164⁹ and the magistrate should inform the accused about his fundamental right under article 21(1) and 20(3) of the constitution of India before the procedure for recording his confessions begins.

The right enshrined in the constitution of India under article 22(1) is a fundamental principle and should be protected at all the cost. It is that principle that guarantees a fair trial and therefore shall not be denied. This right of consulting a legal practitioner is provided to a person with the objective that a common man is unaware of the knowledge of law or the skill of defending himself as a professionally experienced counsel in a court of law wherein his opponent is being represented by a competent or an experienced counsel.

⁷ Section 303, Code of Criminal Procedure, 1973

⁸ Article 22(1), constitution of India, 1950

⁹ Code of Criminal procedure, 1973

LANDMARK JUDGEMENTS IDENTIFYING RIGHT TO CONSULT LEGAL PRACTITIONER

The researcher would like to throw light on a case of¹⁰ Supreme Court of America, where the honourable judges expressed that if the person is not being heard by its counsel then the golden principle of rule of law as to the right to be heard before a court cannot be efficiently followed and will be of little avail. This was observed as it might be possible that the person to be tried is unaware of the rule of evidence and if he is tried in the absence of a competent counsel, then he might be tried under irrelevant or inadmissible evidence.

In addition to this in the case of¹¹ it was held that taking into consideration the free and fair trial proceeding given under Article 21 of the constitution of India and the case of Maneka Gandhi v. UOI¹² that the right to consult a legal practitioner is an essential principle to be followed while adhering to the privilege under Article 21 of the constitution of India.

RIGHT TO COUNSEL IN UNITED STATES

CONSTITUTIONALIZING RIGHT TO CONSULT A LEGAL PRACTITIONER AFTER AMENDMENT TO THE US CONSTITUTION

SIXTH AMENDMENT

The constitution of United State did not recognise the right to counsel unless the Sixth amendment came into being. With the help of sixth amendment of the constitution of United States of America, it gave recognition to the right to counsel to a person accused of any particular criminal offence. It enabled a person to have the right to an attorney of one's own choice and if the person is not able to bear the expense of the attorney, he will be provided with one.

This right is a constitutional right which is provided to any person who is alleged of committing a federal crime by the sixth amendment of the constitution. It should also be mentioned that in the state of North Carolina, the constitution confers this right to the accused who are charged with the state crimes. Therefore only North Carolina is a place where every citizen is provided with this constitutional right to be represented by an attorney. The attorney would represent the accused at the trial. This right comes into effect when the judicial process had commenced and the person has been subjected to preliminary hearings of the case, or formal charging has taken place. This right is not available for intake at jail neither for meeting the probation officer.

¹⁰ Powell v. Alabama, 287 US 45 (1932)

¹¹ Huassainara Khatoun v. State of Bihar, 1980 1 SCC 98

¹² 1978 1 SCC 248

FIFTH AMENDMENT

There was also a fifth amendment to the constitution of United States which further deals with the right to the consultation of legal counsel. It provides this right when the person is either in the police custody or is being taken to the police station for interrogation. It conferred a right on the accused to refuse to answer or talk to the police and provided a right to speak to or consult with his counsel. In the United State, the fifth and sixth amendment gave a right to remain silent which any person can or should assert and it even provided with the right to consult to speak to a legal practitioner at the time of custodial interrogation of the accused.

However, if a person who is alleged of committing a federal crime is not able to bear the expense of having a defence counsel for himself, then it is the duty of the court to provide the accused with a court appointed counsel. The person claiming not to afford the counsel will be required to file an affidavit of indigency to show that he is truly not in a position to afford any counsel for defending him in the court of law. However, if the accused is not being subjected to face the jail trial, the said person cannot be conferred with the right to be provided with court appointed counsel even if he is indigent.

It should also be brought to the notice that having an attorney is an individual choice and it cannot be made mandatory. If the accused do not desire to have any attorney for defending him in the trial, he cannot be forced to have one. They have the freedom of representing themselves before the court of law. This feature of the right to consult a legal practitioner is known as being "Pro se". Therefore it can be rightfully said that a defendant who is not being fortunate enough to have a counsel for him for defending him in the case, can be provided with a counsel appointed by the state to represent him including fro, all the stages from of the court until the defendant voluntarily waives of his right appeal.

CERTAIN ASPECT RIGHT TO DEFENCE COUNSEL

TIME LIMIT FOR APPLICATION

There is an issue in determining as to until when can any person who is accused of any alleged crime can exercise his constitutional right to consult a legal practitioner. This is the most crucial question in both the Vietnamese and German criminal procedure which needs to be . According to the United States criminal procedure, it is mandatory duty of the government to provide the accused with the right to counsel in certain stages which are presumed to be critical in the proceedings. These stages are mostly referred as (1) providing of the right to consult a legal practitioner at a pre-trial process, (2) providing with the constitutional right of consulting a counsel during the trial and the sentencing (3) providing of the right to consult with the counsel at the time of appeal to a higher authority

The researcher would like to conclude the same by acknowledging the sixth amendment of the United State constitution that whatever might be the case, the accused of any alleged criminal case shall be liable to enjoy to the right to legal practitioner.

WAIVER OF THE RIGHT TO CONSULT A DEFENDANT

United States of America has recognised the right to waiver of consulting a legal practitioner like various other nations such as Germany and Vietnam. It is not mandatory for the person so accused of committing a crime to be defendant by a counsel; instead he can defend himself in a court of law. This right to the counsel which is accompanied by the right to waiver is subjected to certain limitations. These limitations are as follows; firstly the court and everyone is required to respect the right of self-defence of an accused; second, it should be noted that there should be an acknowledgement of the fact that the waiver of the above mentioned right is in the interest of ensuring an effective defence of the person so accused of committing the criminal act. To substantiate the researcher would like to mention a landmark judgement of *Faretta v. California*¹³ in which the Supreme Court of the United State has applied sixth amendment to the U.S. Constitution and held that the right to defend oneself on its own in the court of law is one of the basic rights to the US system of criminal justice and hence it forms an essential part of the “due process of law”. It should also be noted that the researcher had pointed out that originally that when the framers of the constitution was framing it the constitution of the United State, then they had acknowledgement the right of self-defence given to the accused as a matter of course and tried to relate it to all the person who was accused or was alleged to have been committed a said crime.¹⁴ The right of self-defence have been identified as the person to be punished after the conviction is the defendant and neither the defence counsel nor the defendant has to do anything with the punishment. Therefore it should be fully the liberty of choosing whether the accused wants to be defended by a defence counsel or wants to defend himself and he has the complete liberty of deciding as to what is beneficial to him. Therefore this privilege given to the person so accused of a criminal act should be honoured and hence is rightfully said, “That respect for the individual which is life of law”¹⁵

¹³ 422 U.S 806 (1975),

¹⁴ Joseph G. Cook, Parul Marcus, Melanie, page 412,

¹⁵ Ibid,

RIGHT TO CONSULT LAWYER IN UNITED KINGDOM

INTRODUCTION

United Kingdom being a European nation follows the same laws as other European nation. The Europe and therefore in United Kingdom the right to consult a lawyer is recognised as a fundamental right.

The right a consulting a legal practitioner is provided under article 6(3c) of the ECHR which states that, “everyone charged with a criminal offence have the privilege of defending oneself before the court of law either himself in person or with the help of a legal assistance of his own choice.” Similar thing was found in the under article 47 of the charter which provides for the fundamental right of the European Union. It says that every citizen should have the right of being defended, advised or represented by his own will.”

In Europe, all the member states such as United Kingdom has to firmly adhere by this right and it is the part of their national legal system. These rights incorporated in the constitution of the United Kingdom. However, a common question is prevalent to be answered in all the member states of the European member states which include the United Kingdom. These questions which are required to be answered in detail are as to “when” and “how” this right could be exercised in all the member states in Europe.

ENACTMENT OF THE POLICE AND CRIMINAL EVIDENCE ACT OF 1984 (PACE)

It should be mentioned that in United Kingdom, certain countries such as the England, the wales, and even the Northern Ireland are all provided with a constitution which have the right to legal counsel which is influenced from the provision under Article 58(1) of the Police and Criminal Evidence Act of 1984 (PACE) which promptly states that in any given circumstances if any person who is alleged of any criminal act and is held in the police custody in the police station or is detained in any other premises, can on his request to the police officer, be represented by a solicitor of his own choice to provide him with legal consultation and can be advised privately at any point of time to defend himself before the court of law in any offence under which he detained.

PACE is that regulation which provides and enables the right to consult a legal practitioner or solicitor by the accused and suspect of any crime and the accused is entitled of being informed about his or her legal rights too in case of arrest or a criminal proceeding initiated against him; however this right is not given or followed by any nation under common law system.

LANDMARK CASES RECOGNIZING RIGHT TO COUNSEL

It should be noted that in the United Kingdom around 2010, the honourable Supreme Court with a three-judge bench held in one of the landmark cases of *Cadder v. Her Majesty's Advocate*¹⁶ that there should be no such person who is accused of any alleged criminal act or even if he or she is the suspect of any criminal act are not bound to be questioned by the Scottish police officer regarding the alleged crime in the absence of any legal representative or any legal counsel or a solicitor of his own choice. Before the incorporation of such provision by the Scottish police had the luxury of interrogating the accused or the suspect to a maximum of 6 hours of his arrest in the absence of a legal solicitor. In addition to that the Supreme Court latter in most of its judgement and in many of its landmark cases found this right of a police to interrogate a person without his counsel was violative of Article 6 of its constitution and hence Article 6(c) was added to their constitution.

In another leading case of *Murray V. UK*¹⁷ the honourable Supreme Court held that it is in the national interest that in all the places which adhere to or follows national laws, are required to and shall be following the right given under article 6 of ECHR and will be required to provide the accused with the right of benefiting with the assistance of a legal practitioner at the initial stage of interrogation by the police officer of the person so accused committing a said criminal act and held in the police custody.

In another leading case of the Supreme Court of United Kingdom, the honourable bench held and laid out strict rules regarding waiver of the right to consult a legal practitioner or a solicitor of his own choice for defending the accused in the case and noted that, "the right to counsel, is a fundamental right and by the virtue of being a fundamental right, it enable the nation to have a fair trial and it even ensures the effectiveness of the Article 6 of the ECHR. Thus, setting a biggest and most important example as to such rights which are in need of special attention of knowing the waiver standard."¹⁸

ISSUES IN DISPUTE

TIME LINE OF ACCESSING THE RIGHT TO COUNSEL

There should be clear indication of as to when can any person exercise his right to legal practitioner or a solicitor, so that this right which is fundamental in its nature is not merely a theoretical right but also a can be exercised in practical nature. The right to consult a legal practitioner should be

¹⁶ (2010)UKSC 43,

¹⁷ (1996) UKSC 63,

¹⁸ Ibid,

made accessible as soon as possible as in order to guarantee the right to consult a legal practitioner the said right of defence can become “ practicable and effective” rather than only a “ theoretical and illusory right”.

This right of consulting a legal practitioner is important to protect the misuse of law. It might be possible that in accordance of revelation of truth by the accused the police officer uses his wildness and tortures the accused to produce inadmissible or unreliable evidence against him. This is the abuse of the process of law. And a person who is being alleged to have been committed a criminal act shall be informed about his right to have a counsel and to right remain silent in case of any such interrogation. He shall be well informed of the fact that no one can force him to be a witness against himself before the court of law or even the police custody. A good and actively involved legal practitioner or a defence counsel would always protect the suspect from any unlawful act of coercion and other abused which might be faced by him in the event of his interrogation in the police custody or while his prosecution is going on. The counsel would also enable to contribute in taking out the truth in the event of any such criminal case in accordance with the procedure laid down by the law.

DEROGATIONS FROM THE RIGHT TO CONSULT A LAWYER

Any exemption or derogation in the process of attempting to have an access to the lawyer should be treated with a high level of caution. If a person is found to be exempted from the right to approach a counsel for defending his case or any compelling reason is justifying a temporary derogation from this fundamental right enshrined in the constitution, then the restriction imposed must have to either be authorized by such a judge who is not looking after this matter or it must be done in order to protect the violation of any right or liberty of the person so accused or if providing the accused with such right would bar the person so accused from questioning in relation to the acts he is being suspected of having committed.

CONFIDENTIALITY OF COMMUNICATIONS BETWEEN THE COUNSEL AND THE CLIENT

The researcher would like to draw attention towards the fact that the accused should be allowed to have a private and confidential communication with his legal defence lawyer. It is not mandatory for any of them i.e. neither the lawyer nor the person so accused to disclose as to what has been discussed between them. It was held in one of the leading case of the United Kingdom that there shall be no exception to the rule of confidentiality of communication between the accused and the counsel; and that it shall always continue to be a fundamental principle to maintain a fair trial.

In another case of *Castravet v. Moldova*¹⁹ it was observed by the honourable Supreme Court of the United Kingdom that one of the key to the representation of an accused or client by a lawyer is the protection of the secrecy and the confidentiality of the information which is exchanged between the lawyer and his client. This confidentiality enables a free, fair and honest communication between them thereby helping the defence counsel to be well acquainted with the truth of the matter.

CONCLUSION AND SUGGESTIONS

The researcher would like to state that after doing a detailed research with regard to the right to consult a legal practitioner in different countries such as India, United State and The United Kingdom and various other European Nation too, it is observed that this right is accompanied with another right i.e. waiving of the right to consult a counsel.

It should also be mentioned that the country like India had recognised this particular right of consulting a legal practitioner as one of the Fundamental right and therefore it shall be followed by its entire citizen. The country like United Nation has preserved this right as constitution right by amending the constitution through Sixth and Fifth Amendment. The country like United Kingdom has the provision of this right in its country as both a fundamental as well as a constitutional right.

However, till today there is an on-going debate in certain nation as to the time line when this right can be exercised efficiently. In some nations it beings the very moment the person is held in the police custody or is being arrested while in other it is exercised at the time of trial and some have the exercise of this right at the time of interrogation by the police official.

Therefore, the researcher would like to conclude by saying that the right to consult a legal practitioner is a well-recognised right in almost all the nation. But, still the question as to when can a person access the counsel is still required to be answered strictly to protect the interest of the person and render judgement in the light of the justice, equity and good conscience.

¹⁹ (2007) UKSC 49