RIGHT TO FAIR TRIAL IN INDIA: A MYTH OR REALITY

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"…The threat to the continued existence of a free democracy is not imaginary but very real, because democracy's very life depends upon making the machinery of justice so effective that every citizen shall believe in and benefit by its impartiality and fairness."

William J. Brennan[1]

INTRODUCTION

Right to fair trial has been a part of Indian legal jurisprudence for quite long now and is deeply ingrained into our justice administration system, be it civil, administrative or criminal. Time and again, the courts have also intervened to ensure that the right is not unduly violated.

However, some recent developments have raised some doubts in public mind, quite naturally so, as to whether this right is a myth or a reality. As said, these doubts do have some ground. For example, the police, the investigating agencies and the judiciary showed a deserving promptness and alacrity in cases involving terrorists like Kasab, Guru and Memon and took them to their natural conclusion. But in many cases involving even petty offenders, the same sort of seriousness is often found missing on the part of the concerned agencies. Our snail-paced and over-burdened judiciary also hardly has time to go into the merits of such cases and do justice within a reasonable time. Instead *'tarikh pe tarikh'* (dates after dates) is given forcing the accused to languish in jails, in some cases, even for a period much longer than the statute actually provides for. Similarly, a Sanjay Dutt gets out on parole whenever he feels like or a Salman Khan gets an anticipatory bail from the concerned High Court within no time while legal technicalities and indifference of the authorities come in the way to deny a well-deserved bail to many an accused even in imminently bail-able cases, again making a mockery of the two very deeply sacred constitutional guarantees, namely, the 'Right to fair trial' U/A.21; and

[1] 287 U.S. 45 (1932).

"Equality before law" as well as "Equal protection of the laws" U/A. 14.[2] Such a partisan approach deeply shakes people's confidence in the justice administration system because it goes against the now a very popular and often-cited adage "Justice should not only be done but it should also be seen to be done", which is no longer merely a legal adage but forms the core of justice administration system of any civilised and democratic country.

In this backdrop, the article not only talks about different features of the "Right to Fair Trial", the related provisions and the case laws but also attempts to explore the reasons behind the shaking public confidence in the criminal justice system and suggests measures for restoring this waning confidence.

The Concept of Fair Trial

The right to fair trial is a norm of the international human rights law and has also been adopted by many countries including India in their procedural law. The concept, based on the principles of natural justice, has been designed to protect the individuals from arbitrary deprivation and curtailment of their very basic rights, especially the right to life and liberty.[3]

Fair Trial and International Law

The Universal Declaration on Human Rights (hereinafter, UDHR), 1948, International Covenant on Civil and Political Rights (hereinafter, ICCPR), 1966 and the European Convention on Human Rights (hereinafter, ECHR), 1950 accept the right to fair trial as an integral part of the human rights jurisprudence.[4] The Art.10 of the UDHR says,

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[2] *See Maneka Gandhi* v. *Union of India*, (1978) 1 SCC 248. *See also,* Art. 21, Constitution of India, 1950.

[3] Neeraj Tiwari, "Fair Trial vis-à-vis criminal justice administration: A critical study of Indian criminal justice system", Journal of Law and Conflict Resolution Vol. 2(4), pp. 66-73, April 2010 as available at http://www.academicjournals.org/article/article1379856371_Tiwari.pdf (accessed on 19th March, 2017).

[4] The Universal Declaration on Human Rights (hereinafter UDHR), Art 10 and 11; International Covenant on Civil and Political Rights (hereinafter ICCPR), Art.14 says, "1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (*ordre public*) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children. 2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law. 3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: (a) To be informed promptly and in detail in Art. 14, ICCPR says, "1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his

"Everyone is entitled in full equality to fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations of any criminal charge against him." The Art.11 further extends the rights conferred by the Art.10 and states that "everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence."

The same sentiment is echoed by the ICCPR as well as the ECHR in the Art. 14 and the Art. 6 respectively.[5] The Sixth Amendment to the American Constitution and the Sec. 11 of the Canadian Constitution's Charter of Rights also talk about protecting a person's basic legal rights in the criminal prosecution.[6]

Features of Fair Trial

There are various facets to the right to a fair trial. Talking of them the Hon'ble Supreme Court in the *Zahira Habibullah Sheikh & Anr* v *State Of Gujarat*[7] has held that, *"the principle of fair trial now informs and energizes many areas of the law. It is reflected in numerous rules and practices.... fair trial obviously would mean a trial before an impartial Judge, a fair prosecutor and atmosphere of judicial calm. Fair trial means a trial in which bias or prejudice for or against the accused, the witnesses, or the cause which is being tried is eliminated."*

It is generally believed that the right to a fair trial, as the name suggests, starts after the accused is formally charged before the court of law. However, this is not always true as in many cases, it starts from the moment a person is arrested. According to Manfred Nowak, "The right to a fair trial on a criminal charge is considered to start running not only upon the formal lodging of a charge but *rather on the date on which State activities substantially affect the situation of*

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rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (*ordre public*) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children. 2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law. 3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;

[5] *Ibid.*

[6] *Supra* note 3.

[7] MANU/SC/1344/2006.

the person concerned (emphasis supplied).”[8] Therefore, even the pre-trial rights like rights of an arrested/ detained person may also get covered in the right to a fair trial. Thus the Right to fair trial can be divided in two stages:

I. At pre-trial stage

II. During trial

I. Fair Trial at pre-trial stage

Now the first and foremost pre-trial right is *‘right to not to be arrested or detained arbitrarily or for flimsy and frivolous reasons’*. Art. 9(1) of the ICCPR provides “No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.”[9] In India, this right has been constitutionally recognised by giving it the status of a ‘Fundamental Right’ under Art.21.[10] In *Maneka Gandhi*[11], the apex court observed, *“The procedure contemplated by the Art. 21 must be ‘right and just and fair’ and not arbitrary, fanciful or oppressive; otherwise it would be no procedure at all and the requirement of the Article would not be satisfied.”(emphasis supplied)*That’s why, an illegal arrest is a punishable offence U/Ss. 220 (when a public servant makes the arrest) and 342 (for wrongful confinement, when arrest is made by any person) of the Indian Penal Code (hereinafter, IPC) and may also lead to a suit for damages. Further, the offended person also gets the right of private defence to protect himself.[12]

However, once a person is arrested/detained, the law confers on him certain rights to protect his as well as society’s interests. Such rights, which find a prominent place in our Constitution[13], are:[14]

[8] Manfred Nowak, *U.N. Covenant on Civil and Political Rights, CCPR Commentary* (N.P. Engel, Arlington: 1993) [hereinafter Nowak Commentary], p. 244, as quoted in “WHAT IS A FAIR TRIAL?” A Basic Guide to Legal Standards and Practice, March 2000, Lawyers Committee for Human Rights(hereinafter Lawyers Committee), p.10.

[9] *See also* Art. 5(1), ECHR, *Supra*, note 4; Art. 6, African Charter on Human and People’s Rights (hereinafter African Charter); Art. 7(1)-(3), American Convention on Human Rights (hereinafter American Convention).

[10] Art. 21(Protection of life and personal liberty), Constitution of India, 1950 provides, “No person shall be deprived of his life or personal liberty except according to procedure established by law”.

[11] *Supra* note 2.

[12] See, Ss. 96-106, Indian Penal Code (hereinafter IPC), 1860.

[13] Art. 22 (Protection against arrest and detention in certain cases), Constitution of India.

[14] Dr. K. N. Chandrasekharan Pillai (Rev.), *R. V. Kelkar’s Criminal Procedure*, [4th ed. (Rep.), 2002], Chapter 6, pp. 73-80, Eastern Book Company, Lucknow.

a. *Right to know the grounds of arrest*- Art. 9(2), ICCPR[15] provides that "Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him." It means that anyone who is arrested must be informed of the general reasons for the arrest "at the time of his/her arrest," while subsequent information, to be furnished "promptly," must contain accusations in the legal sense.[16]Similarly, S. 50(1) (arrest without warrant) and S. 75 (arrest with warrant) of the Code of Criminal Procedure, 1973 (hereinafter, the CrPC) mandates a police officer or other person arresting any person to forthwith communicate him i.e. the arrested person the full particulars of the offence or other grounds for which the arrest has been made. It enables him to move the proper court for bail, or in appropriate circumstances for a writ of *habeas corpus*, or to make expeditious arrangements for his defence.[17] In *Harikishan* v *State of Maharashtra*, AIR 1962 SC 911, 914, The Supreme Court found it reasonable that the communication should be in a language understood by the arrested or detained person.[18]

b. *Information regarding the right to be released on bail*- If a person has been arrested for a bailable offence, he must be informed by the police officer, making the arrest, of his right to be released on bail.[19] According to Pillai[20], in a country like ours, this will not only make the illiterate and ignorant aware of a very important right but also, to some extent, fill the trust-deficit between the police and the public.

c. *Right to be taken before a magistrate without undue delay*- The Ss. 56 and 76 r/w S. 57of the CrPC make it mandatory for the arrested/detained person to be produced before the magistrate without undue delay, not exceeding 24 hours in any case, excluding, of course, the time taken for the journey from the place of arrest to the court of the magistrate.[21] The provisions aim at (i) preventing arrest and detention for the purpose of extracting confessions, or as a means of compelling people to give information; (ii) preventing police stations being used as though they were prisons; and (iii) affording

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[15] *See also* Article 5(2), ECHR, *supra*, note 4; Article 7(4), American Convention, *supra*, note 9.
[16] Lawyers Committee, *Supra* note 8 at p. 11.
[17] *Supra*, note 14. *See also*, In Re Madhu Limaye, (1969) 1 SCC 292.
[18] *See also* Art. 5(2), ECHR, *supra*, note 4; Principle 14, the Basic Principles for the Treatment of Prisoners, UN General Assembly resolution 45/111, December 14, 1990 [hereinafter Basic Principles on Prisoners]; Art. 67(1)(f) , Statute of the International Criminal Court [hereinafter ICC Statute].
[19] S. 50(2), Code of Criminal Procedure, 1973 (hereinafter, the CrPC).
[20] *Supra*, note 14.
[21] Art. 22(2), *supra*, note 13.

an early recourse to a judicial officer, independent of the police, on the all matters of bail or discharge.[22]

d. *Right to consult a legal practitioner*- The right to be provided and communicate with counsel is the most scrutinized specific fair trial guarantee in trial observation practice, because it has been demonstrated to be the one that is most often violated. Principle 1 of the Basic Principles on Lawyers states that "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." This right is particularly relevant in pre-trial detention.[23] In cases like *Khatri*[24] and *Hussainara Khatoon*[25], the apex court has made it clear in no uncertain terms that the right to free legal aid, as implicit in Art. 21 of the Constitution, arises not only when the trial commences but also when the accused is brought before the magistrate for the first time, as also when he is remanded from time to time and the state is obliged to provide him the same. S. 41D of the CrPC, as amended in 2009, makes it a statutory right of the arrested person.

e. *Right to be examined by a medical practitioner*- According to S. 54 of the CrPC[26], the accused has a right to get himself medically examined to enable him to defend and protect himself properly. In *Sheela Barse* v *State of Maharashtra*, [(1983) 2 SCC 96], the Supreme Court said that the arrested accused person must be informed by the Magistrate about his right to be medically examined in terms of S. 54.

f. *To have his kith and kin informed of his arrest*- Principle 16 of the Body of Principles[27] requires that the family of any arrested or detained person must be notified promptly of the arrest and the location of their family member. If the detainee is moved to another facility the family must be notified of that change. The Supreme Court of India, realising the importance of this invaluable right of an arrested person, in *Joginder*

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[22] *Mohd. Suleman* v *King- Emperor*, 30 CWN 985, 987 (FB) (Per Rankin, J.) as quoted in Dr. K. N. Chandrasekharan Pillai, *supra*, note 14, p. 76. *See also Khatri (II)* v *State of Bihar*, (1981) 1 SCC 627; Art. 5(3), ECHR; Article 7 and 10, ICCPR, *supra*, note 4; Art. 7(5), American Convention, *supra*, note 9.

[23] *Supra*, note 8. *See also* Art. 22(1), *supra*, note 13.

[24] *Supra*, note 22.

[25] *Hussainara Khatoon (IV)* v *Home Secretary, State of Bihar*, (1980) 1 SCC 98.

[26] *See* Principle 24, Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, UN General Assembly resolution 43/173, December 9, 1988 [hereinafter Body of Principles]; Rule 24.Standard Minimum Rules for the Treatment of Prisoners, UN Economic and Social Council resolution 663 C (XXIV), July 31, 1957 and resolution 2076 (LXII), May 13, 1977 [hereinafter Standard Minimum Rules].

[27] *See also* Rule 92, Standard Minimum Rules, *ibid.*

Kumar v *State of U.P*[28], formulated a rule in this regard and cast a duty on the concerned police officer to inform the arrested person, when he is brought to the police station, of this right and also to make a entry in his diary as to who was informed of the arrest. Subsequently, in *D. K. Basu*[29], the court, with an objective to deal with the issues of police atrocities against the arrested persons as well as those of custodial deaths, issued certain guidelines, to be followed in all cases of arrest or detention till legal provisions were made. Most of these guidelines are now a part of the CrPC[30], following its amendment in 2009. The amended CrPC, vide S. 41C, also makes it obligatory for the state to set up a control room at the district as well as the state level and display and maintain all the information regarding arrests made viz., name of the arrested person, nature of the offence he is arrested for, name of the police officer making the arrest etc.

However, it is also pertinent to note here that although, the Code grants the aforesaid rights to an arrested person and also imposes a corresponding duty on the concerned authorities, any illegality or irregularity in making any arrest does not vitiate the trial of the arrested person.[31]

Having had a look at the rights conferred on a person after his arrest or detention, i.e., at the pre-trial stage, which is merely a point of origin for such rights, we now move on to the next stage i.e. the rights during the trial, something from which the term 'Fair Trial' draws its name.

II. Fair Trial during trial

The main features of the right to fair trial, also visible in the CrPC, are:

1. **Adversarial trial system**- The system is based on accusatorial method wherein burden of proof lies on the prosecution while the judge plays an independent umpire's role unlike the inquisitorial system where the judge does play a role in collecting evidences against the accused. The system is more or less based on the notion of reconciliation between public and private interests i.e. public interest in punishing the wrong-doer and protecting the society against the evil and the private interest in protecting the accused against wrongful conviction and undue deprivation of his personal liberty.[32] It gives an

[28] (1994) 4 SCC 260.
[29] *D. K. Basu* v *State of West Bengal*, (1997) 6 SCC 642.
[30] S. 41B, CrPC.
[31] *Emperor* v *V. D. Savarkar*, ILR 35 Bom 225 as quoted in Dr, K. N. Chandrasekharan Pillai, *supra* note 14.
[32] *Supra*, note 3.

equal opportunity to both the parties to prove their case and get justice and is also known as the right to equality of arms.[33].

In *Bulut* v *Austria*[34], the European Court of Human Rights has explained the principle of equality of arms as "one of the features of the wider concept of a fair trial" as understood by article 6(1) of the European Convention, which implies that "each party must be afforded a reasonable opportunity to present his case under conditions that do not place him at a disadvantage *vis-à-vis* his opponent"; in this context, "importance is attached to appearances as well as to the increased sensitivity to the fair administration of justice".

However, in India, though, the CrPC is based on the adversarial system, it doesn't strictly follow this system as there are situations where the statute itself permits some departure. For example,

- Ss. 228 and 240 suggest that charge against the accused is to be framed by the court and not by the prosecution;
- Ss. 229, 241 and 252 give discretion to the magistrate to convict the accused if the latter pleads guilty;
- Ss. 303 and 304 confer on the accused not only a right to be defended by a lawyer of his choice but also provide in case of an indigent accused person a right to get legal aid for his defence at state's cost.[35];
- S. 311 empowers the court to examine any person as a witness though such person has not been called by any party as a witness (similar power is also given to the court under section 165 of the Indian Evidence Act, 1872)[36];
- S. 313 empowers the court to examine the accused at any time to get explanation from him regarding any circumstances appearing in the evidences against him;
- S. 320 mandates prior permission of the court before certain offences are compounded;

[33] "With regard to the concept of "fair trial" in article 14(1) of the International Covenant, the Human Rights Committee has explained that it must be interpreted as requiring a number of conditions, such as equality of arms and respect for the principle of adversary proceedings and that these requirements are not respected where ... the accused is denied the opportunity personally to attend the proceedings, or where he is unable properly to instruct his legal representative." as quoted in "*The Right to a Fair Trial: Part II – From Trial to Final Judgement*", *Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers*, Chapter 7, p. 258

[34] *Ibid.*

[35] *See also* Art. 22(1), *Supra*, note 13.

[36] *Himanshu Sabharwal* v *State of M.P. and Ors.*, MANU/SC/1193/2008.

- S. 321 requires the prosecutor to seek prior consent of the court for withdrawing a case.

Moreover, even the apex court in cases like *Ram Chander* v *State of Haryana*[37], and Malimath Committee in its Report[38] have advocated an active role for the judges in the trial, just like the one under the inquisitorial justice system, for an effective dispensation of justice.

2. **Presumption of innocence**- In fair trial, an accused is presumed innocent unless proved guilty. This principle is also of cardinal importance in the administration of justice and has been duly incorporated as a right of an accused under various Conventions like UDHR (Art. 11),[39]ICCPR [Art. 14(2)][40] and American Convention [Art.8(2)][41]. The principle is based on a very popular legal adage which says, "It is better that ten criminals escape than that one innocent person is wrongfully convicted." It, *inter alia*, means that the burden of proof in a criminal trial lies on the prosecution and the accused has the benefit of doubt. The Latin maxim, *ei incumbit probatio qui dicit, non qui negat* i.e. the burden of proof rests on who asserts, not on who denies, also says the same thing.[42]

In *Kali Ram* v *State of H.P.*[43], the Supreme Court observed, "It is no doubt true that wrongful acquittals are undesirable and shake the confidence of the people in the judicial system, *much worse, however, is the wrongful conviction of an innocent person (emphasis supplied).* The consequences of the conviction of an innocent person are far more serious and its reverberations cannot be even felt in a civilized society."

In *V.D. Jhingan* v *State of U.P.*(AIR 1966 SC 1762) it was observed by the apex court that all that an accused is required to do is to show the preponderance of probability in his/her favour. It is for the prosecution to prove his/her guilt beyond reasonable doubts and till the time it manages to do so, the accused is presumed to be innocent.

[37] (1981) 3 SCC 191.
[38] Malimath Committee on Criminal Reforms.
[39] *Supra*, note 4.
[40] *Ibid*.
[41] *Supra*, *note 9.*
[42] *Supra*, note 3.
[43] 1973 SCC (Cri) 1048 at 1061.

In *Manu Sharma* v *State (NCT of Delhi)* [(2010) 6 SCC 1], the apex court observed that the criminal justice administration system in India places human rights and dignity for human life at a much higher pedestal. In our jurisprudence an accused is presumed to be innocent till proved guilty, the alleged accused is entitled to fairness and true investigation and fair trial and the prosecution is expected to play balanced role in the trial of a crime. Laying further emphasis on fairness of investigation, the Hon'ble Court stated that the investigation should be "*judicious, fair, transparent and expeditious*" (*emphasis added*) to ensure compliance with the basic rule of law as these are the fundamental canons of our criminal jurisprudence and they are quite in conformity with the constitutional mandate contained in Articles 20 and 21 of the Constitution of India.

However, the court has also spoken against the frequent use of this principle. In *Shivaji Sahabrao Bobade* v *State of Maharashtra*, 1973 SCC (Cri) 1033, the court said that the doubt raised against the principle of 'presumption of innocence' appears to be more against the manner in which this principle has been applied and misused by weak and incompetent judges. Another thing that has been weakening this right is the latest trend of 'Media Trial'(especially in famous cases involving celebrities or terrorists), also termed as a 'Parallel Trial', which starts and concludes even before the court takes cognizance into the matter. In India itself, there have been cases[44], where the trial by media has influenced the decisions of the court. This practice not only violates the right to presumption of innocence of the accused but also endangers the witnesses at times as many a times, the identity of victims is also revealed by the media.[45] Similarly, in many rape cases (e.g. 'Damini/Nirbhaya' rape and murder case in Delhi), even the victims' identity is disclosed flouting all the norms of moral decency and statutory provisions[46]. Such unconscionable practices have led to vigorous demands of curbing the media freedom.

However, considering the positive role the same media has played in many cases (e.g. Jessica Lal Murder case, just to cite one example) by forcing the prosecuting agencies to re-open the closed files and enabling victims and their families to get the justice they deserved, instead of

[44] *See M. P. Lohia* v. *State of West Bengal*, (2005) 2 SCC 686.
[45] Law Commission of India, 200th Report on Trial by Media, 2006 as quoted in Nina R. Nariman, "TRIAL BY MEDIA, CONTEMPT LAW AND THE RIGHT TO A FAIR TRIAL" in Delhi Law Review, Vol. XXX, 2011, pp. 207-214, Faculty of Law, University of Delhi.
[46] *See* S. 228A, IPC.

gagging its voice which will be a violation of its freedom of speech and expression as implicit in Art.19[47], its role should be regulated by the court, through contempt proceedings or otherwise, as well as by the media itself in the interest of justice.[48]

3. **Independent, impartial and competent judges**- This happens to be one of the most desirable requirements for a truly fair trial. The maxim, *nemo judex in causa sua* i.e. nobody can be a judge in his own case, which is an integral part of the principles of natural justice, applies equally to the criminal justice system. The rationale of this provision is to avoid the arbitrariness and bias that would potentially arise if criminal charges were to be decided on by a political body or an administrative agency. In a criminal trial, as the state is the prosecuting party and the investigating machinery is also a limb of the state, it is of utmost significance and importance that the judiciary is unchained of all suspicion of executive influence and control, direct or indirect. [49] Art. 50 of our Constitution, which talks of separation of the judiciary and the executive, is also based on this very principle as it aims to ensure the independence of judges.[50] Also, even though the appointments of the sessions judges and judicial magistrates, under the Code, are made by the state government in consultation with the high court, once the first appointment is made by the government, the judge or the magistrate, as the case may be, thereafter, works only under the direct control and supervision of the high court and not of the government.[51] So, in this way the independence in the subordinate level of judiciary is protected. Further, S.6 of the CrPC also provides for the separation of the judicial and the executive magistrates. S. 479 prohibits a judge from becoming part of trial of a case to or in which he is a party or personally interested. It also forbids a judge or magistrate from hearing an appeal from any judgment or order passed or made by himself.

Emphasising that the judges can not remain a mute spectator during trial, it was remarked by the apex court in *Pooja Pal* v *Union of India and Ors.* [Criminal Appeal No. 77 of 2016 arising

[47] *See Express News Papers* v *Union of India*, 1959 SCR 12; *Bennett Coleman & Co.* v *Union of India*, AIR 1973 SC 106.
[48] See Art. 14(1), ICCPR, Supra, note 4.
[49] *Supra*, note 3.
[50] *Ibid. See also Art. 6(1), ECHR, Supra,* note 4; Art. 8(1), American Convention, *Supra*, note 9.
[51] *Supra*, note 14, p. 324.

out of Special Leave Petition (CRL.) No. 1458/2015] that due administration of justice is always viewed as a continuous process, not confined to the determination of a particular case so much *so that a court must cease to be a mute spectator and a mere recording machine but become a participant in the trial evincing intelligence and active interest and elicit all relevant materials necessary for reaching the correct conclusion, to find out the truth and administer justice with fairness and impartiality both to the parties and to the community*. (*emphasis supplied*)

4. **Public hearing**- Fair trial also requires public hearing in an open court. The right to a public hearing means that the hearing should, as a rule, conducted orally and publicly, without a specific request by the parties to that effect. The court is, *inter alia*, obliged to make information about the time and venue of the public hearing available and to provide adequate facilities for attendance by interested members of the public, within reasonable limits because it is a right not only of the parties but also the general public in a democratic society.

Art. 14(1) of the ICCPR[52] also considers the right to a public hearing as one of the essential ingredients of the right to a fair trial except when doing so will be against public order, interest of parties or national security, but even in such exceptional situations, the court must go by the set procedure. Similarly, S. 327 of the CrPC not only provides for open courts for public hearing but it also gives discretion to the presiding judge or the magistrate that if he thinks fit, he can deny the access of the public generally or any particular person to the court. The section also provides for *in camera* proceedings in rape cases[53]. The provisions regarding the venue or place of inquiry or trial are contained in Ss.177 to189 of the CrPC.

Highlighting the importance of public hearing in a criminal case, the apex court in the case of *Naresh Sridhar Mirajkar* v. *State of Maharashtra*[54] the apex court observed that the public confidence in the administration of justice is of such great significance that there can be no two opinions on the broad proposition that in discharging their functions as judicial tribunals, courts must generally hear causes in open court and must permit public admission to the court.

[52] *Supra*, note 4. *See also*, Art. 8(5), American Convention, s*upra, note 9*.
[53] S. 327(2), CrPC.
[54] AIR 1967SC 1.

5. **Knowledge of charges**- It is also imperative that the accused must be made aware of the charges levelled against him and which he is being tried for. Keeping this objective in mind, the CrPC in Ss. 228(2), 240(2), 246(2) and 251 clearly states that the accused, whenever brought for trial before a judge, must be conveyed the charges framed against him so that he gets an adequate opportunity to defend himself. Moreover, such a communication must be in a language the accused is familiar with.
6. **Trial in the presence of the accused**- The general rule in criminal cases is that all inquiries and trials should be conducted in the presence of the accused person. The underlying principle behind this is that in a criminal trial the court should not proceed *ex parte* against the accused person.[55] It is also necessary for the reason that it facilitates the accused to understand properly the prosecution case and to know the witnesses against him so that he can check their truthfulness in a later stage. Though the CrPC does not explicitly provide for mandatory presence of the accused in the trial but it can be indirectly inferred from the provisions which allow the court to dispense with the personal presence of the accused person under certain circumstances[56].

In *H.R. Industries* v *State of Kerala*[57], the Kerala High Court very beautifully stated the circumstances in which the personal presence of the accused person could be done away with. It was opined that:

"*In cases which are grievious in nature involving moral turpitude, personal attendance is the rule (emphasis supplied)*. But in cases which are technical in nature, which do not involve moral turpitude and where the sentence is only fine, exemption should be the rule. The courts should insist upon the appearance of the accused only when it is in his interest to appear or when the court feels that his presence is necessary for effective disposal of the case. *When the*

[55] Art. 67(1)(d), ICC Statute, *supra* note 18. *See also*, Art. 14(3)(d), ICCPR, *supra*, note 4.

[56] Ss. 235(2) and 248(2), CrPC, which are related to pre-sentence hearing require that the judge shall hear the accused on the question of sentence before passing the sentence, provide for the presence of the accused. See also, Ss. 205(1), 273 and 317. S. 205(1) provides that *"whenever a magistrate issues summons, he may, if he sees reasons to do, dispense with the personal attendance of the accused and permit him to appear by his pleader."* This power is limited to the first issue of process and that it cannot be exercised at any later stage, it is immaterial for this purpose that whether the case is a summons case or a warrant case. Under S. 317 the court can dispense with the personal presence of the accused if such attendance is not necessary in the interests of the justice, or that the accused persistently disturbs the proceedings in court. But this power can only be exercised after satisfying the following prerequisites; that the accused person is represented by a lawyer and the judge or magistrate has recorded his reason for doing so.

[57] 1973 Cri LJ 262 (ker) at 263.

accused are women labourers, wage earners and other busy men, court should as a rule grant exemption from personal attendance. Court should see that undue harassment is not caused to the accused appearing before the court."(emphasis supplied)

7. **Evidence to be taken in the presence of the accused**- As a logical corollary to Ss. 228, 240, 246 and 251 (where the particulars of the offence have to be explained to the accused person) it is also imperative that in a trial the evidence should be taken in the presence of the accused person. S. 273 of the CrPC is significant in this regard as it provides that all evidences taken in the course of the trial shall be taken in the presence of the accused. The section also provides for an exception to this rule. It says that if the personal attendance of the accused is dispensed with, the evidence shall be taken in the presence of his pleader.[58]

The right created by S. 273 is further supplemented by S. 278, which, *inter alia*, provides that whenever the law requires the evidence of a witness to be read over to him after its completion, the reading shall be done in the presence of the accused, or of his pleader.

These provisions enable the accused person to prepare his arguments for rebuttal of such evidences. If any evidence is given in a language not understood by the accused person, the object of S. 273 will not be fulfilled. Therefore, to avoid this difficulty S. 279 casts a mandatory duty on the court that whenever any evidence is given in any language not understood by the accused, it shall be interpreted to him in open court in a language understood by him. But non-compliance with this provision will be considered as a mere irregularity not vitiating the trial if there was no prejudice or injustice caused to the accused person.

8. **Cross-examination of prosecution witnesses**- The right to cross-examine the prosecution witness is aimed at treating parties equally with respect to the introduction of evidences through interrogation of witnesses.[59] The prosecution must inform the defence of the witnesses it intends to call at trial within a reasonable time prior to the trial so that the defendant may have sufficient time to prepare

[58] *Supra*, note 3.
[59] See Art. 14 (3)(e), ICCPR, Art. 6(3)(d), ECHR, *supra*, note 4. See *also*, Art. 8(2)(f), American Convention, *supra*, note 9.

his/her defence. Though, in adversarial trial system, the burden of proving the guilt is entirely on the prosecution and the law does not call for the accused to lead evidence to prove his innocence, yet the accused is given a right to disprove the prosecution case or to prove special defence available to him. The refusal without any legal justification by a magistrate to issue process to the witnesses named by the accused person was good enough to vitiate the trial.[60]

In *Badri* v *State of Rajasthan*[61], the court held that where a prosecution witness was not allowed to be cross-examined by the defence on a material point with reference to his earlier statement made before the police, his evidence stands untested by cross-examination and cannot be accepted as corroborating his previous statement.

9. **Speedy trial**- Speedy trial keeps the public trust in the judicial system intact whereas a snail-paced trial betrays that trust as it is rightly said, "Justice delayed is justice denied". That's why, S. 309(1) of the CrPC gives directions to the court with a view to have expeditious trials and quick disposals.[62]

However, as said in the very beginning of this article, the directions have not been practically applied owing to various reasons giving rise to serious doubts over the efficiency of our judicial system. The Supreme Court, in *Hussainara Khatoon (I)* v. *State of Bihar*[63], had held that *"Speedy trial is an essential ingredient of 'reasonable, just and fair' procedure guaranteed by article 21 and it is the constitutional obligation of the state to set up such a procedure as would ensure speedy trial to the accused. The state cannot avoid its constitutional obligation by pleading financial or administrative inadequacy. As the guardian of the fundamental rights of the people, it is constitutional obligation of this court to issue necessary directions to the State for taking positive action to achieve this constitutional mandate."*(*emphasis supplied)*This judgment enabled many accused persons tormented by unduly lengthy trial or criminal proceedings, in any forum whatsoever, to successfully maintain petitions for quashing of charges, criminal proceedings and/or conviction on making out a case of violation of Art. 21of the Constitution. Right to speedy trial and fair procedure has passed through several milestones

[60] *Supra*, note 3.
[61] AIR 1976 SC 560.
[62] *See also*, Art. 14(3)(c), ICCPR, *supra*, note 4.
[63] *Supra*, note 25 at 81.

on the path of constitutional jurisprudence. However, despite underlining the importance of this right, the Constitution Bench of the apex court, in *A.R. Antulay* v *R.S. Nayak*[64], refused to accept the demand for putting an outer time-limit for completion of all criminal proceedings as it did not find it feasible or advisable to do so.

In *Motilal Saraf* v *State of J and K*[65] the Supreme Court explained the meaning and relevance of speedy trial and said that the concept of speedy trial is an integral part of article 21 of the Constitution. The right to speedy trial begins with actual restraint imposed by arrest and consequent incarceration and continues at all stages so that any possible prejudice that may result from impressible and avoidable delay from the time of commission of the offence till its final disposal, can be prevented.

The lack of manpower in the courts is also coming in the way of the quick dispensation of justice. According to the Law Ministry, India has only 18 judges per one million people as against 50 judges recommended by the Law Commission in its Report[66], way back in 1987 and also against 35-40 in other developing countries and 50 in a developed country and .[67] Moreover, the sanctioned strength of the High Courts till 2014 was 906 judges and it was increased to 1,079 in June 2016. There are 24 High Courts in the country. But despite the increase in the sanctioned strength, the High Court, as in July last year, faced a shortage of 477 judges. The subordinate courts in the country, the backbone of justice delivery system, have a sanctioned strength of 20,502. But there are only 16,070 judicial officers serving in the courts and the shortage stood at 4,432 as on December 31, 2015.[68] Various posts at other levels, e.g. Public and Assistant Public Prosecutors, are also lying vacant in different states.

As to add salt to injury, the dilly dallying attitude of the advocates, administrative and technical difficulties, infrastructure issues further make it next to impossible for parties to get justice in time and without undue delay.

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[64] (1992) 1 SCC 225.
[65] (2007) 1 SCC (Cri) 180.
[66] Law Commission of India, 120th Report on "Manpower Planning in Judiciary", July 1987.
[67] http://indianexpress.com/article/india/india-news-india/india-has-18-judges-per-ten-lakh-people-law-ministry-2953735/ (accessed on 21st April, 2017).

[68] *Ibid*

Having said so, it is not impossible, however, to overcome these problems with political and administrative will power and sincerity on the part of all those who can make a difference.

10. **Prohibition on 'Double jeopardy'(*ne bis in dem)***- The concept of double jeopardy is based on the doctrine of *'autrefois acquit'* and *'autrefois convict'* which mean that if a person is tried and acquitted or convicted of an offence he cannot be tried again for the same offence or on the same facts for any other offence. The concept is embodied in S. 300 of the CrPC which provides that persons once convicted or acquitted not to be tried for the same offence or on the same facts for any other offence[69]. This clause embodies the common law rule of *nemo debet vis vexari* which means that no man should be put twice in peril for the same offence. Plea of double jeopardy is not applicable in case the proceedings for which the accused is being tried are distinct and separate from the offence for which the accused has already been tried and convicted[70].

If we compare the constitutional position of India and America on double jeopardy, we will make out that the protection under Art. 20(2) of our Constitution is narrower than that given in American constitution[71]. Under the American Constitution the protection against double jeopardy is given for the second prosecution for the same offence irrespective of whether an accused was acquitted or convicted in the first trial. But under article 20(2) the protection against double punishment is given only when the accused has not only been 'prosecuted' but also 'punished', and is sought to be prosecuted second time for the same offence.

11. **Legal aid**- Lawyers in criminal courts are necessities, not luxuries. The requirement of fair trial involves two things-
    a) An opportunity to the accused to secure a counsel of his own choice; and
    b) The duty of the state to provide a counsel to the accused in certain cases.

[69] Similar right is also provided by the Constitution under Art. 20(2) but it only protects the person who is *prosecuted and punished* for the same offence and does not include previous acquittal as in case of section 300 of the Code which considers both situations.
[70] *Jitendra Panchal* v *Intelligence Officer NCB & Ors.* 2009 (2) SCALE 202.
[71] Fifth Amendment to the American Constitution provides that *"no person shall be twice put in jeopardy of life or limb."*

The right is recognised because of the obvious fact that ordinarily an accused person does not have legal knowledge and the professional skill to defend him before a court of law wherein the prosecution is conducted by a competent and experienced prosecutor.

Art.14 (3) (d) of the ICCPR[72] entitles the person facing the criminal charge either to defend himself in person or through the assistance of a counsel of his choice and if he does not have legal assistance, to be informed of his right and provide him the legal assistance without payment in case he does not have sufficient means to pay for it.

In U.S.A., the 6th Amendment to the Constitution provides, *inter alia*, in all criminal prosecutions, the accused shall enjoy the right to have the assistance of counsel for his defence. In *Powell* v *Alabamma*[73], Justice Sutherland of the Supreme Court of United States gave classic expression to the plight of the unguided individual entangled in a criminal process. The passage is worth citing here. He said, *"Even an intelligent and educated layman has small or sometimes no skill in the science of law. If charged with a crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of the counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defence. He requires the guiding hand of counsel at every stage of proceedings against him. Without it, though he is not guilty, he faces the danger of conviction because he does not know how to establish his innocence…(emphasis supplied)"*

In India, right to counsel is recognised as a fundamental right of an arrested person under Art. 22(1), which provides, "No person shall be denied the right to consult and to be defended by a legal practitioner of his choice." Ss. 303 and 304 of the Code are manifestation of this constitutional mandate[74]. In *Maneka Gandhi* v *Union of India*[75], it was held that *the right of an indigent person to be provided with a lawyer at state's expenses is an essential ingredient of*

[72] *Supra*, note 4.
[73] 287 U.S. 45 (1932) as quoted in Neeraj Tiwari, *supra*, note 3.
[74] S. 303 provides a right to accused person to be defended by a pleader of his choice, whereas S. 304 casts a duty on the State to provide legal aid to indigent persons in a trial before the *Court of Sessions.*
[75] *Supra*, note 2.

Art. 21 for no procedure can be just and fair which does not make available legal services to an accused person who is too poor to pay for a lawyer.(emphasis supplied)

In this context, a difference is to be noted as between Art. 21 of the Constitution and S. 304 of the CrPC. Art. 21, as interpreted by the Supreme Court in *Khatri* v *State of Bihar*[76], makes it a mandatory obligation for the State to provide free legal aid in every criminal case against an indigent accused, whether the trial is before a Magistrate or a Sessions Judge whereas U/S. 304 of the CrPC, the imperative duty arises only if the trial is before the Sessions Court, while in the cases before the Magistrate, the duty would arise only if the State Government issues a notification to that effect. If we take literal meaning of S. 304, no conviction by a Magistrate can be quashed for failure to provide free legal assistance to the indigent person. But the M.P. High Court, in *Nekram* v *State of M.P.*, (1988) Cr LJ 1010 (MP), took the other way and set aside a conviction by a Magistrate made upon evidence taken without offering legal representation to the accused. In this way the court tried to remove the anomaly which is created by the Legislature.

In Suk Das and Ors. v *Union Territory of Arunachal Pradesh*[77], The Supreme Court has held that a conviction of the accused in a trial in which he was not provided legal aid would be set aside as being violative of Art. 21of the Constitution. But where the accused pleads guilty without the assistance of a counsel under the legal aid scheme and was convicted by the Magistrate, it was held that the trial and conviction was not vitiated because the Magistrate was fully satisfied that the plea was voluntary, true and genuine.

Further, Art. 39A was also inserted in the Constitution as per Constitution (42nd Amendment) Act, 1976, which requires that the state should pass suitable legislations for promoting and providing free legal aid. This article also emphasizes that free legal service is an unalienable element of 'reasonable, fair and just' procedure for without it a person suffering from economic or other disabilities would be deprived of the opportunity for securing justice. To fulfil this constitutional mandate the Parliament enacted Legal Services Authorities Act, 1987. Section 12 of the said Act provides legal services to the persons specified in it. Let it not be forgotten that if law is not only to speak justice but also to deliver justice, legal aid is an absolute

[76] AIR 1981 SC 928.
[77] AIR 1986 SC 991.

imperative. Legal aid is really nothing else but equal justice in action. It is, in fact, the delivery system of social justice.[78]

It is also to be kept in mind that the advocate assigned to the accused must be equal to the task as providing legal assistance to the accused at the state cost is not a mere formality.
In *Ramchandra Nivrutti Mulak* v *The State of Maharashtra*[79], the appeal was based on the fact that the appellant was not represented before the Sessions Court in his original trial under S.302 of the IPC (Punishment for murder) and other offences. A lawyer had been appointed to represent the appellant but had made an application to withdraw from the case. Despite rejection of this application by the Sessions Judge, the lawyer failed to appear for the trial. The trial proceeded without the appellant being assisted by an advocate or the court informing the appellant that he could avail of the services of a lawyer under the free legal aid scheme. The court treated the above situation as if there had been no representation and set aside the conviction.

Keeping the pious objectives of S.304 in mind, the High Court of Bombay even made certain rules, under the section with previous consent of the State Government, regarding legal aid for an accused without representation before Sessions Courts. These rules, which came into effect from October 1982, cast a duty on the Presiding Officer to explain to every accused person without representation the provisions of the rules of Legal Aid as soon as the accused is produced before him for the first time. If the accused confirms his income does not exceed Rs. 5, 000/p.a., he shall be asked if he desires to submit an application for Legal Aid.[80]

12. **Right to pre-sentence hearing**- The Code also provides for pre-sentence hearing of the accused. Ss. 235(2) and 248(2), CrPC, which are related to pre-sentence hearing require that the judge shall hear the accused on the question of sentence before passing the sentence, provide for the presence of the accused before sentencing is pronounced. Further, Ss. 205(1), 273 and 317 also make provisions

[78] *Supra*, note 3.
[79] Available at http://hrln.org/hrln/criminal-justice/pils-a-cases/98-ramchandra-nivrutti-mulak-vs-the-state-of-maharashtra.html (acccessed on 21st April, 2017).

[80] Available at http://www.legalservicesindia.com/article/article/fair-trial-under-section-304-of-crpc-1759-1.html (accessed on 21st April, 2017).

in this regard. Under S. 317 the court can dispense with the personal presence of the accused if such attendance is not necessary in the interests of the justice, or that the accused persistently disturbs the proceedings in court. But this power can only be exercised after satisfying the following prerequisites; that the accused person is represented by a lawyer and the judge or magistrate has recorded his reason for doing so.[81]

CONCLUSION

Notwithstanding the sacred constitutional and statutory provisions, the international conventions to which India is a party and judicial pronouncements, a general public perception in the country is that the law of the land and the justice is meant for the rich only as the poor have neither the knowledge of legal technicalities nor the resources to hire a legal mind, who will exploit the legal loopholes to turn the case in their favour nor the time and patience to pursue their cases to the end. So the poor seldom get even delayed justice let alone a speedy justice.

Judiciary, as discussed above, also doesn't help their cause as it cites lack of manpower, poor infrastructure and other technical, procedural and administrative difficulties as the reasons for its helplessness and passes the buck on the executive i.e. government and the legislature.

The executive and the legislature, on the other hand, claim that they are trying their level best to make and implement policies to meet the constitutional and statutory obligations and make the justice administration a smooth process and seek time and perseverance to make 'justice for all' a practical reality in a one billion plus country.

Considering these practical difficulties, the right to fair trial does seem an illusion, a myth and nothing but empty words to be found in law books and judicial interpretations. It is indeed a very sorry state of affairs and even the Law Commission had shown its displeasure over it in its 120th Report[82].

[81] *Supra*, note 56.
[82] *Supra*, note 66.

The author, however, believes that these difficulties are not as big as they are made out to be and can be removed with sincere co-operation and will-power of all the three wings of the democratic set up namely, the legislature, the executive and the judiciary. The following steps need to be taken:

a. *Filling up vacant judicial posts*- It is not an excuse by the judiciary when it complains of lack of manpower. For a quick and efficient justice delivery system, it is recommended that the Government must not only fill up the vacant judicial posts immediately but also aim to improve the judge-population ratio. Merely doubling the strength at the subordinate level, which is proposed to be done in the next five years, won't be enough.

b. *Transparency in judicial appointments*- Now that the judiciary has not remained immune to the disease called 'Corruption', it is imperative for the concept of fair trial that all the judicial appointments are aboveboard.

c. *Setting up fast track courts*- The Malimath Committee[83], in its Report, had recommended setting up of fast track courts for quick disposal of specific issues just like those under the inquisitorial system.

d. *Providing qualitative Legal Aid*- It is also in the interest of a fair criminal justice system that the poor and needy are provided qualitative legal aid in all the proceedings to fight their case and get justice.[84]

e. *Simple and smooth criminal procedure*- The criminal procedure is needed to be streamlined, made simple and smooth and undue technicalities are required to be done away with.

f. *Discouraging dilly-dallying tactics*- The court should use its power under the CrPC (Ss. 258, 309 and 482)[85] to discourage dilly-dallying tactics of the parties.

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[83] *Supra*, note 38.

[84] *Sunil Batra* v. *Delhi Administration*, (1978) 4 SCC 494. See *M.H. Hoscot* v. *State of Maharashtra*, (1978) 3 SCC 544; *Fransic Corollie* v. *Union Territory of Delh*i, (1981) 1 SCC 608.

[85] S. 258, CrPC says, "In any summons-case instituted otherwise than upon complaint, a Magistrate of the first class or, with the previous sanction of the Chief Judicial Magistrate, any other Judicial Magistrate, may, for reasons to be recorded by him, stop the proceedings at any stage without pronouncing any judgment and where such stoppage of proceedings is made after the evidence of principal witness has been recorded, pronounce a judgment of acquittal, and in any other case, release the accused, and such release shall have the effect of discharge."*See also,* Ss. 309 (Power to postpone or adjourn proceedings) and 482 (Saving of inherent power of High Court).

g. *Spreading legal literacy*- In a country, where a larger part of its population, is illiterate, it won't be a bad idea to use mass media to spread legal literacy to make people aware not only of some legal nitty-gritty but also of their legal rights like right to legal aid.

h. *Regulating media*- Media works both ways- it spreads awareness and also creates confusion, at times. As discussed in earlier paragraphs, nowadays, 'Media Trial' is in fashion, especially in high profile cases, wherein an accused is pronounced 'guilty' or 'innocent' long before the court sits for trial of his case. It seriously affects, *inter alia,* the basic tenets of a fair trial. Therefore, it is high time for our responsible media to deeply introspect and exercise self-regulation in the interests of fair and impartial justice system.

Fair trial is a must for a vibrant democracy as it entails a familiar triangulation of the victim, the accused and the society. Therefore, it becomes an absolute duty for all the concerned to ensure at any cost as the absent of it will lead to the crashing of democratic set up in the country and eventually to the death of democracy as observed by William J. Brennan[86]

[86] *Supra*, note 1.