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Fair Trial: A Global Right

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ABSTRACT

The focus of this paper is to unravel the concept of fair trial. The initial chapters of the paper shall introduce the concept of trial and fair trial. The edifice of fair trial cemented by natural justice principles is the succeeding part. Explanation of fair trial as a human right is also given in nutshell. This is followed by the multifaceted dimensions of fair trial and the barriers in its way. A glimpse at the international instruments germane to the aforementioned right to fair trial and an analysis of a few cases across the globe occupies the next segment. The Indian position accompanied by the scrutiny of the quintessence of seven recent judgments (2016 verdicts) relevant to the topic at hand is unveiled in the chapter that trails by. Finally, the authors view on the topic gives the concluding remarks.

I. INTRODUCTION

A Mother who enters the house and sees that the walls are scribbled with crayons, immediately doubts her naughty children. The next step is that she calls her children and enquires about the scribbling. When they admit to scribbling on the walls with crayons, an ideal mother asks the reason for the same before she gives them any small punishment to refrain them from further activities of similar nature. A bigger and a legal version of the same which stems out on account of an offence are called as a fair trial.

A trial is the entire process of determining the guilt or innocence of an accused. Legally a trial is encompassed of investigation, evidence, examination of the evidence, factual matrix and the subsisting law. A trial is said to be a fair trial when the trial is free from any bias, prejudice, partiality or any sort of contamination. Moreover, a trial is a fair trial when it has its edifice on the principles of natural justice. Right from the story of Adam and Eve this is evincible.

Right to fair trial is an important right that has been recognized in most of the countries across the world. The ultimate aim of a fair trial is nothing but establishment of truth. The underlying objective of any criminal justice system is anchored in the protection of truth. Fair trial undertakes the accomplishment of the task of disclosing the concealed truth by fair investigation, valid and legitimate evidence, impartial judiciary and an impeccable verdict. Fair

¹ Author, Legal Officer, The South Indian Bank Ltd.

trial protects the rights of the accused, rights of the victim and most importantly the interest of the society at large. However, any flaw to the pillars of fair trial strikes at the root of fairness and places justice at a trauma.

II. NATURAL JUSTICE

Though known to everyone, a mention of the three principles of natural justice is indeed inevitable at this juncture. Without a mention of the principles of natural justice an elaboration of fair trial shall always remain incomplete. The three principles of natural justice are as follows:

- i. *Nemo judex in causa sua* - No man shall be the judge of his own cause.
- ii. *Audi alteram partem* - Hear the other side
- iii. Speaking orders – *an Order shall be accompanied by a reason*

Lord Eshers's principle '*justice should not only be done but also seen to be done*' plays a crucial role in the first principle of natural justice. This is exactly why Lord Cottenham was restrained from hearing the case of *Dimes v. Grand Junction Cannal*. It was evidently written in the case with regard to the same that nobody doubts on the impartiality of Lord Cottenham nor is the case that Lord Cottenham was influenced on account of the shares he held in the Canal. The whole point was that the first principle of natural justice as *justice should also be seen to be done*. This is also a rule against bias. An interested person, being the judge shall whittle down the sanctity of fairness in a trial. No man shall be the judge in his own cause so that there is an assurance of fairness in any trial.

The second principle of is the right of the accused to defend himself. Only after he is given a chance to defend an accused it held to be innocent or guilty. Every accused shall have a right to represent himself through a counsel of his choice as per the second principle of natural justice to ensure fair trial. As on date most of the criminal justice systems also provides for free legal aid. This is because no person should be deprived of his to defend himself. Lawyers in criminal Court are necessities and not luxuries.

The third principle of natural justice is speaking orders. This simple means that every order should be accompanied by reasons or it should be a reasoned order. Speaking order is an order that speaks for itself. Such an Order shall be inclusive of every details of the issue, clear findings and also it shall be well reasoned. This principle of natural justice also requires that the Order shall satisfy the test of legality, fairness and reason before every forum.

III. AS A HUMAN RIGHT

A human right is a right available to a person by the very reason of being a human being. These are rights recognized across the globe and unlike fundamental rights, human rights are not confined merely to the citizens of a nation. Human rights on the other hand are those undeniable rights guaranteed to a person irrespective of his nationality, language, religion, etc. Human rights are showered on an individual upon birth. Human rights attain sanctity from conscience. However, it would not be a mistake to say that at times fundamental rights and human rights do overlap each other.

Right to fair trial is accepted as a human right all over the world. The Universal Declaration of Human Rights also recognizes this right which shall be discussed in the succeeding segments of this paper. In many countries, right to fair trial is embedded in the Constitution as a fundamental right too. Fair trial falls within the purview of a human right as it is capable of establishing the guilt or innocence of an accused and also it opens the gateway to truth. It gives an accused a legitimate chance to be heard and establish his innocence. It is a mechanism to unveil truth. Fair trial is rooted in natural justice. Right from a kid in a family to the most wretched criminal, a chance to be heard is bestowed which undoubtedly makes the right to fair trial a human right.

IV. THE MULTIFACETED DIMENSIONS

The right to fair trial, as a human right, involves multifaceted dimensions. In every stage of a trial, fair trial makes its signature. Commencing from investigation and ending in the enforcement of a verdict the different faces of fair trial is apparent. It is a triangular right which preserves the right of an accused, of the victim and of the society at large.

Let us commence with investigation. Once an offence is committed, there shall be an investigation. The investigation shall be fair. A fair trial also entails a fair investigation. Fairness here means, the investigating officer shall be impartial, he shall make a note of all the valid evidence, have a nose for genuine witnesses, put them on record, and finally garner a *prima facie* case against a person whom he supposes to be the culprit. That person against whom the evidences on record point to be the culprit is called the accused of a case. Here, it is also necessary that every single charge against accused should be backed by corroborative evidence to assure fairness. It should not be any false or frivolous charge. When all these elements are satisfied, an investigation is said to be fair. Thus ends the first stage of the right of fair trial.

Once a person becomes an accused he shall be immediately endowed with a couple of other

rights by the parent right of fair trial. The basic rights in this regard shall include the right to be informed of the grounds for indictment, right to be bailed out, right to know the evidences, etc. At this juncture, the most important right an accused shall have is the right to access to legal aid. It means that the accused shall have a legitimate right to be defended by a Counsel of his own choice. A noting by the U.S. Supreme Court in *Gideon v. Wainwright*² becomes prominent here which runs as, '*lawyers in criminal courts are necessities and not luxuries*'. This is of utmost importance. A fair prosecution and a right to be defended are the most important rights of an accused as far as a fair trial is concerned. In the absence of a counsel to defend, no trial shall happen. An order passed without hearing the accused or an order passed in the absence of a counsel to defend the accused is not a fair order. Such an order is *void ab initio*. Such an order shall be vitiated by the principles of natural justice. Adequate time shall also be given to prepare defense.

Also, it should be noted that legal aid should be accessible. Free and fair access to legal aid is an important facet of the right to fair trial. Everyone should be given a right to access legal aid. This is a right which is mainly focused on indigenous people. Merely because a person is not able to afford to engage a counsel his right to be defended is not taken away. In such a circumstance it is the obligation or the bounded duty of the State to render a Counsel to the needy. Thus access to legal aid also entails that it shall be affordable too.

Next is the evidence part. The evidence that incriminates an accused is open to examination by the accused in order to establish his innocence or to confirm his guilt. Evidence can be material evidence or the testimonies of the witnesses. A fair crack of whip is given to every one under the right to fair trial.

At the outset, in a trial, both the parties to the transaction shall submit their evidences and witness to substantiate their case. Thereafter, both the parties shall examine the evidence set out by their opposite party. Irrelevant evidence, fabricated evidence, false evidence and any contaminated evidence shall be struck down on strict proof of the same. The witness testimonies are also not accepted in one go. Every witness is subjected to chief examination, cross examination and also re-examination. This is also to make sure that the trial is fair. In a chief examination the witness is examined by the party who produced that witness in order to adduce evidence which shall establish their version. This is followed by cross examination of the witness. Cross examination of a witness is done by the Counsel of the opposite party in order to test the credibility of the witness. If anything else still remains to be clarified, that shall

² 372 U.S. 335 (1962)

be done in re-examination. In this regard the witness is also conferred with certain rights and duties encompassed of *inter alia* right to furnish only truthful information, right not to be subjected to harassment and right to brush up memory by referring to documents on record.

Right against self-incrimination is a right which is guaranteed to the accused as a part of securing the right to fair trial. This right protects the accused against any compulsion to testify against him or her and also a right against confessing guilt. However, I am completely against this view.

We shall now discuss another most important and an integral part of right to fair trial. This is nothing but the right to be heard by an impartial Court. The Coram hearing a case shall not be prejudiced, shall be free from bias and shall not be an interested party. The very first principle of natural justice rings a bell here. This also mandates that justice should also be *seen to be done*. The Court shall not be influenced by any external factor. The only factor influencing the Court shall be the thirst for truth by scrutinizing the evidence on record. The Court shall be able to demarcate between the evidences relevant to the case and those which are not. Everything that is necessary to establish truth shall be taken on record and those irrelevant factors shall be brushed aside.

Finally to preserve the right to fair trial, the Judiciary is conferred with certain responsibilities. Primarily, Courts shall make a correct appreciation of law and facts. The factual matrix of every case is different. Court needs to analyze the same before drawing a conclusion. Also, after the same the Court shall also give a reasoned verdict. The judgment should be fair. This fairness mandates that the Court shall do justice to the accused, to the victim and to the society at large. The judgment shall strictly adhere to the law in force as well as principles of natural justice. In a nutshell, a fair judgment shall also pay heed to the doctrine of balance all through the verdict as and when required.

V. BARRIERS TO FAIR TRIAL

The road to fair trial is not a straight road free from traffic. It has a lot of junctions, hump and also barriers. Hence this is the next focus of this paper. Let us have a glimpse at the various barriers that standing the way of fair trial blocking the destiny of truth and justice.

At the outset, it is necessary that the investigation should be fair. Investigation shall not be influenced by anyone. Bribery shall not deviate the route of the investigation. Investigation should be sharp enough to identify the evidences. Where there is insufficient evidence one shall not be forced to step into the shoes of accused. A common instance seen these days is the ‘*purchase*’ of an accused. An accused shall not be allowed to evade punishment at the cost of

an innocent man's indictment which is the very foundation of the criminal justice system.

Evidence should not be tampered or fabricated. The acceptance of false or tampered evidence shall corroborate a wrong charge. Eventually this shall lead to miscarriage of justice. Witness should not be a partisan witness. Also, hostile witnesses can also have adverse effects on the fairness of a trial.

Media, the fourth pillar of democracy is another barrier to fair trial. Many a times, media flames an issue with the rapidity of forest fire. This brings a negative impact on the cases to a large extent. How much ever one argues that the Court will never be influenced by all these, as Cardozo said in *the Nature of Judicial Process* judges are also human morals. They can be a bias in their sub conscious mind.

Lastly, though it is argued that delayed trial is in no way detrimental to fair trial, I vehemently object to the same adhering to the saying, '*delayed justice is denied justice*'.

VI. INTERNATIONAL INSTRUMENTS

Article 11 of the United Nations Universal Declaration of Human Rights 1948 elucidates that an accused shall be presumed to be innocent till proved guilty which the very foundation of criminal justice system is. Also it requires that if an act is not a penal offence under national or international law a person shall not be punished for the same. In addition to this a person shall not be punished with a punishment heavier than what is prescribed by the then law in force. Articles 14 and 15 of the International Covenant on Civil and Political Rights are also of similar nature.

Execution without regular trial is one among the rules common to the four Geneva Conventions and Additional Protocols. Geneva Convention relative to the Treatment of Prisoners of War of 12th August 1949 and the Additional Protocol I elucidates that no person shall be put to trial on account participation in war. Geneva Convention relative to the Protection of Civilian Persons in Time of War and Additional Protocol envisages the right to fair trial on account of prosecution (*Protocol I*, 75). It adds that no person shall be sentenced without a regular trial (IV, 71).

The criminal limb, right to fair trial is embedded in Article 6 of the European Convention on human rights. This also comes with a waiver of the guarantees of a fair trial. Article 6 lays stress on the importance of fair trial to an accused and also requires that trial shall be conducted by an independent and impartial tribunal. Also, it excludes the presence of media during pronouncement of orders to oust the element of bias. Presumption of innocence until proved

guilty is also embedded in Article 6. Apart from this certain elements are also enshrined in Clause 3 of Article 6 which reflects the undeniable rights to a person charged with any criminal offence. This includes informing the person about the nature and causation of the charge against him, adequate time and facilities for preparing defense, to engage a Counsel to defend him and the same shall be free of cost as the case may be and also examination of witnesses. The provision also provides for assistance through an interpreter in cases where if the person is unable to speak or understand the language of the Court.

VII. A GLIMPSE AT THE CASES ACROSS THE GLOBE

In the case of *Findlay v. United Kingdom*,³ it was held that there is close link between the two elements of independence and impartiality of Courts as far as the right to fair trial is concerned. Only if these two elements are blended together in the correct ratio, the right to fair trial can be sustained. These two facets apply equally to professional judges, lay judges and jurors as per the decision in *Holm v. Sweden*.⁴ While interpreting impartiality and independence in *Ninn Hansen v. Denmark*,⁵ it was held that the aforementioned provision requires independence of the Court from the other two branches of power i.e. the Legislature and the Executive. The importance of guarantees against outside pressure in a fair trial is also elaborated in the cases of *Daktaras v. Lithuania*⁶ and *Moiseyev v. Russia*.⁷ Impartiality has been defined in the cases of *Kyprianou v. Cyprus*⁸ and *Micallef v. Mica*⁹ as the absence of prejudice or bias and its existence or otherwise can be tested in various ways.

Equality of arms is an inherent feature of fair trial. It requires striking of a fair balance between the parties and this principle applies equally to civil and criminal cases. This principle simply indicates that both the parties shall be given a reasonable opportunity to present his case under conditions that do not place him or her at a substantial disadvantage. The said points were affirmed in the cases of *Foucher v. France*,¹⁰ *Bulut v. Austria*, *Bobek*¹¹ v. *Poland* and *Klimentyev v. Russia*.¹²

In the case of *Borgers v. Belgium*,¹³ a restriction on the rights of the defense can be seen. In

³ 29 February 1997, Reports of Judgments and Decisions 1997-I

⁴ 25 November 1993, Series A no.279-A

⁵ 28972/75, ECHR1999-V

⁶ 42095/98, ECHR 2000-X

⁷ 62936/00, 9 October 2008

⁸ 73797/01, ECHR 2005-XIII

⁹ 17056/06, ECHR 2006

¹⁰ 18 March 1997, Reports of Judgments and Decisions 1997-II

¹¹ 22 February 1996, Reports of Judgments and Decisions 1996-II

¹² 46503/99, 16 November 2006

¹³ 30 October 1991, Series A no.214-B

this case, the Applicant was restrained from replying to the Advocate General's submissions before the Court of Cassation and a copy of submissions was not furnished beforehand. We can see in this case that inequality was exacerbated by the Advocate General's participation in the Court's deliberation in advisory capacity.

A violation of Article 6(1) read with Article 6(3) of ECHR was also found in the case of *Makhfi v. France*.¹⁴ During criminal proceedings, the defence lawyer was made to wait for about fifteen hours before he was finally given a chance to plead his case in the early hours of morning.

In *Bonisch v. Austria*,¹⁵ it was held that witness for the prosecution and defence must be treated equally. An infringement of the same happens where the witness enjoys a privileged role. In the case of *Kuopila v. Finland*,¹⁶ the defence was not given an opportunity to comment on a supplementary police report. On account of the same, the Court held that it was envisaged by the Court that non-disclosure of evidence to the defence may breach equality of arms. On the point of equality of arms, it was observed in the case of *Matyjek v. Poland*¹⁷ that when the accused is rendered only a limited access to his case file or other documents on public interest grounds, the same puts equality of arms at stake.

Further, in the case of *Rowe and Davis v. United Kingdom*,¹⁸ it is stated that the fundamental aspect of the right to fair trial in equality of arms between the prosecution and the defence. In view of the same, the prosecution authorities shall disclose to the defense all the materials evidence in their possession for or against the accused.

The importance of a reasoned order can be seen in the case of *Papon v. France*.¹⁹ As per the decision in the case of *Ruiz Torija v. Spain*,²⁰ the duty to give reasons varies according to the nature of decision and must be determined according to the circumstances of the case. This does not mean that the Courts are required to give a detailed answer to every argument raised as per the case of *Van de Hurk v. the Netherlands*.²¹ In tune with the verdict in *Boldea v. Romania*²² it simply denotes that the decision should have a precision that the essential issues are clearly addressed.

¹⁴ 59335/00, 19 October 2004

¹⁵ 6 May 1985, Series A no.92

¹⁶ 27752/95, 27 April 2000

¹⁷ 38184/03, 24 April 2007

¹⁸ 28901/95, ECHR 2000-II

¹⁹ 54210/00, ECHR 2001-XII

²⁰ 9 December 1994, Series A n.303-A

²¹ 19 April 1994, Series A no.288

²² 19997/02, 15 February 2007

Finally, a reference to the cases of *Taxquet v. Belgium*²³ and *Legillon v. France*²⁴ imbibes that for the requirement of fair trial to be satisfied, the accused as well as the public should be able to understand the given verdict which thus presses into service as a safeguard against arbitrariness.

VIII. INDIAN POSITION AND RECENT CASES OF INDIAN SUPREME COURT

Right to fair trial is an integral facet of Article 21 of the Constitution of India. Article 20 of the constitution also absorbs the connected rights such as the right against self-incrimination and the right against double jeopardy. Another important aspect germane to the analysis of the Indian position on fair trial is the formulation of the Human Rights Act 1993 in the light of the Universal Declaration of Human Rights in 1948. The said enactment has Chapter VI encompassed of two Sections i.e. Section 30 and Section 31. The chapter is titled Human Rights Courts and Section 31 deals with Special Public Prosecutor. The main purpose of this chapter is to ensure speedy justice through speedy trials. Let us now have a bird's eye view the latest cases on fair trial given by the Supreme Court of India.

In the recent decision of *Anita Kushwaha and Ors. v. Pushap Sudan and Ors.*,²⁵ (July 2016) while dealing with a reference from a Three Judge Bench, the Supreme Court in this case emphasized on the importance of fair trial and the elements of access to justice. The Court explicated the importance of access to free legal aid facilitating fair trial in the Country. The Court adds that access to justice is an invaluable human right and it is recognized in most constitutional democracies as a fundamental right which owes its origin to the Common Law and as much as in the Magna Carta. In all civilized societies across the globe it serves an inevitable right. Magna Carta, Universal Declaration of Human Rights, International Covenant on Civil and Political rights, 1966, ancient Roman Jurisprudential maxim of '*ubi jus ibi remedium*', developments of fundamental principles of common law by Judicial pronouncements of Courts over centuries past have all contributed over centuries past have all contributed to the acceptance of justice as a basic and inalienable human right which all civilized societies and systems recognize and enforce.

In this regard the Court lists out four facets that constitute the essence of access to justice. They are encompassed of effective adjudicatory mechanism, mechanism so provided to be reasonably accessible in terms of justice, speedy process of adjudication and affordability. On a meticulous analysis of these elements embedded in this decision, it is evincible that the same

²³ 926/05, ECHR 2010

²⁴ 53406/10, 10 January 2013

²⁵ MANU/SC/07972016

is mandatory to make the notion of fair trial a reality.

In another recent case of the Supreme Court, *Pooja Pal v. Union of India and Ors.*,²⁶ (January 2016) the Court elucidated that fair trial includes a fair investigation too. Fair trial is the companion of speedy trial. However, there is a qualitative difference between the two as the Court feels that denial of speedy trial is never a barrier in the way of fair trial. Examination of a partisan witness results in denial fair trial. The principles of fair trial permeate the common law in both civil and criminal contexts. Hence the necessity of a delicate judicial balancing of competing interests in a criminal trial shall never be underscored by the Courts. The competing interests includes the interests of the accused, interests of the public and the interests of the victim too. Thus the Court observed that the concept of fair trial entails the triangulation of the interest of the accused, the victim, society and the community acts through the state. Human rights protection under the rule of law guarantees a fair trial primarily aimed at ascertaining truth. Fair trial is an integral constituent of Article 21 of the Constitution of India. However, while protecting an accused's right to fair trial, the interests of the public at large should never be overlooked. Finally, the Court remarks that the duty of the Court while conducting trial is to be guarded by the mandate of law, conceptual fairness and most important of all its sacrosanct role to arrive at truth on the basis of the evidence on record.

Another prominent decision is the case of *State of Haryana v. Ram Mehar and Ors.*²⁷ (August 2016) wherein the Court underlined in this case that a denial of further cross examination of witnesses on account of change of counsel is a denial of fair trial. Cross examination is extremely important and germane to the defense of an accused. However, it would be pertinent to note that the Court also jotted down that an old adage of fair trial to the accused doesn't mean that this concept will be applied in favour of the accused alone, rather this concept will take in its fold the fairness of trial to the victim as well as to the society. Also, an inadvertent error discovered at any stage of a trial should mandatorily be rectified to ensure a meaning full defense and a fair trial. Fair trial entails the rights of the accused, the victim and the society. Denial of a fair trial is as much as injustice to the victim and the society.

A fair trial necessarily includes trial before an impartial judge, a fair prosecutor and an atmosphere of judicial calm. Over technicalities should not swallow fair trial as the whole purpose of the notion of fair trial is to mete out justice. Right to get a fair trial is not only a basic fundamental right but also a human right. The concept of fair trial is neither in the realm of abstraction nor a vague idea. Fair trial is a concrete phenomenon. Fair trial is not rigid and

²⁶ MANU/SC/0071/2016

²⁷ MANU/SC/0938/2016

it doesn't have a strait-jacket formula for its application. On occasions it has the necessary flexibility. However the concept of fair trial cannot be allowed to such an extent that so that the systematic order of conducting a trial is not mortgaged to the whims and fancies of the prosecution or defense. Finally the Court stated that if the concept of fair trial is stretched limitlessly, one may fall into the sanctity of errors. The doctrine of balance steps into the scene at this avenue.

Further, the Supreme Court in this clarified that it has the power to strike out any pleading that may prejudice, delay or embarrass the fair trial of a suit in the case of *Ajay Arjun Singh v. Sharadendu Tiwari and Ors.*²⁸ (August 2016). Fair trial is difficult unless there is a fair investigation according the decision rendered by the Supreme Court in *Dharam Pal v. State of Haryana and Ors.*²⁹(January 2016).

Referring to the case of *Captain Arminster Singh*³⁰ the Supreme Court in *Usmangani Adambhai Vahora v. State of Gujarat and Ors.*³¹ (January 2016) once again reiterated in this case that the assurance of fair trial is the first imperative of justice. The absence of fair trial leaves the entire criminal justice system at stake.

Next is the noting of the Supreme Court in *Anant Prakash Sinha v. State of Haryana and Ors.*,³² (March 2016) whereby the Supreme Court emphasized that it is the duty of a trial court to assure that no prejudice is caused to the accused as it shall have the potentiality to oust fair trial. Section 216 of the Code of Criminal Procedure has certain in-built safeguards in this regard. The Court has also reaffirmed that every accused has a right to fair trial by mentioning *Bhimanna's case*.³³ While analyzing the relevance of *Bahal's case*,³⁴ the Supreme Court opined in *Anil and Ors. v. State of Haryana*³⁵ (February 2016) that it depends on the facts on each case whether an accused has received a fair trial.

IX. CONCLUSION

The discovery, vindication and establishment of truth are the avowed purposes underlying the existence of the Courts of Justice. The chain of justice has strong knots of principles and law which preserve justice. Right to fair trial is an important right which is so bestowed which has

²⁸ MANU/SC/0939/2016

²⁹ MANU/SC/0118/2016

³⁰ (2009)6 SCC 260

³¹ MANU/SC/0014/2016

³² MANU/SC/0279/2016

³³ (2012)9 SCC 650

³⁴ AIR 1976 SC 2032

³⁵ MANU/SC/0265/2016

the ultimate goal of protecting truth and preserving justice.

Fair trial, these days are often misread as a right which is given to an accused to evade punishments and it is a right which always inclines in favour of the accused. This is misconception. Fair trial is a right guaranteed to the accused, to the victim and also to the public. Fair trial is not a right which means the accused is set free or it is a right which establishes that the accused is innocent and rules out any presumption against the accused. A fair trial is a trial which establishes truth. To be more precise, fair trial can either establish the innocence of the accused or it can establish the guilt of the accused. Whichever be the result, it is said to be the product or the outcome of a fair trial if such a conclusion is arrived at after adhering to the mandates of a fair trial.