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Full Length Research Paper

Fair trial vis-à-vis criminal justice administration: A critical study of Indian criminal justice system

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Every civilised nation must have one thing common in their criminal justice administration system that is minimum fair trial rights to every accused person irrespective of his or her status. It is settled in common law and also adopted by other countries too that criminal prosecution starts with 'presumption of innocence' and the guilt must be proved beyond reasonable doubt. This paper proposes to trace different dimensions of fair trial standards under Indian criminal justice system and will also focus on the role of defence counsel in the process of achieving ends of justice, as he is the only person on whom the lonesome accused can repose his trust.

Key words: Fair trial, Indian criminal justice system and defence counsel.

INTRODUCTION

The right to a fair trial is a norm of international human rights law and also adopted by many countries in their procedural law.[1] It is designed to protect individuals from the unlawful and arbitrary curtailment or deprivation of their basic rights and freedoms, the most prominent of which are the right to life and liberty of the person. The concept of fair trial is based on the basic principles of natural justice. Though the form and practice of the principles of natural justice may vary from system to system on the basis of prevailing conditions of the society concerned. The formal account of the concept of fair trial has been accepted as human rights jurisprudence in the Universal Declaration of Human Rights, 1948 (hereinafter as UDHR). The major features of fair criminal trial are preserved in Article 10 and 11 of the UDHR.[2] Article 14 of the International Covenant on Civil and Political Rights (hereinafter as ICCPR)[3] reaffirmed the objects of UDHR and provides that

> "Everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law."

The standards against which a trial is to be assessed in terms of fairness are numerous, complex, and constantly evolving. They may constitute binding obligations that are included in human rights treaties to which the state is a party. But they may also be found in documents which, though not formally binding, can be taken to express the direction in which the law is evolving.[4]

As far as Indian legal system is concerned, the international promise of fair trial is very much reflected in its constitutional scheme as well as its procedural law. Indian judiciary has also highlighted the pivotal role of fair

[1] Countries like U.S.A., Canada, U.K., India have adopted this norm and it is enshrined in their Constitution. The Sixth Amendment to the United States Constitution is the part of the United States Bill of Rights which sets forth rights of accused person in relation to fair criminal trial. Section 11 of the Canadian Charter of Rights and Freedoms, which is part of the Canadian Constitution's Charter of Rights, protects a person©s basic legal rights in criminal prosecution. Article 6 of the European Convention on Human Rights also provides detailed right to a fair trial, which is discussed hereinafter.

[2] Universal Declaration of Human Rights was adopted by the General Assembly on December 10, 1948. Article 10 of UDHR provides that "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." Article 11 extends the rights conferred by Article 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."

[3] International Covenant on Civil and Political Rights, UN General Assembly resolution 2200A (XXI), December16, 1966, entered into force March 23, 1976. http://www2.ohchr.org/english/law/pdf/ccpr.pdf (accessed on 10-11-09).

[4] For example, India is not a signatory of the 'Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment', (UN General Assembly resolution 39/46, December 10, 1984, entered into force June 26, 1987) but there are many provisions in Criminal Procedure Code, 1973 which tacitly affirmed the objects of the said Convention.

trial in catena of cases. In Zahira Habibullah Sheikh and ors v. State of Gujrat and ors[5] the Supreme Court of India observed the evolving horizons of fair trial and stated that the principle of fair trial now informs and energizes many areas of the law. It is reflected in numerous rules and practices. It is a constant, ongoing development process continually adopted to new and changing circumstances and exigencies of the situations, peculiar at times and related to the nature of crime, person involved, directly or operating behind, social impart and societal needs and even so many powerful balancing factors which may come in the way of administration of criminal justice.

This article proposes to critically examine various components of fair criminal trial in the light of Indian criminal justice system. To achieve this end, the author will discuss relevant provisions of criminal procedure as well as various case laws. Lastly, this article will also throw light on the role of the defence counsel in relation to the enforcement of these basic guarantees.

GLIMPSES OF FAIR TRIAL UNDER THE CRIMINAL PROCEDURE CODE, 1973

Adversary trial system

The system adopted by the Criminal Procedure Code, 1973 (hereinafter referred as the Code) is the adversary system based on the accusatorial method. In adversarial system responsibility for the production of evidence is placed on the opposing party that is prosecutions with the judge acting as a neutral referee between the parties. By contrast, in inquisitorial trial system responsibility for the production of evidence at trial is the job of the trial judge and it is the trial judge who decides which witnesses will be called at trial and who does most of the questioning of witnesses.

The adversary system is more or less based on the notion of reconciliation of public and private interests, that is public interest in punishing the wrongdoer and prevents him to commit more crimes and private interest in preventing the wrongful convictions and protect his life and personal liberty. This system of criminal trial assume-es that the state, on one hand, by using its investigative agencies and government counsels will prosecute the wrongdoer who, on the other hand, will also take recourse of best counsels to challenge and counter the evidences of the prosecution.[6] But if we take a close look of the Code then we will find that there are some pro-visions which negate the strict adherence of the adversarial trial system.[7] In Himanshu Singh Sabharwal v. State of M.P. and Ors.[8], the apex court observed that if fair trial envisaged under the Code is not imparted to the parties and court has reasons to believe that prosecuting agency or prosecutor is not acting in the requisite manner the court can exercise its power under section 311 of the Code or under section 165 of the Indian Evidence Act, 1872 to call in for the material witness and procure the relevant documents so as to sub serve the cause of justice. Though the concept of adversary trial system is diluted in the Code but still this system is praised not only because of the protection it accords the accused but also because its competitive style of presenting evidence and argument is thought to produce a more accurate result than an inquisitorial system where the judge monopolizes evidence taking. [9] The judiciary has also advocated the role of presiding judge as a participant in the trial rather than a mere spectator in order to be an effective instrument in dispense of justice.[10]

Presumption of innocence

The principle that the accused person is presumed to be innocent unless his guilt is proved beyond reasonable doubt is of cardinal importance in the administration of justice.[11] This notion is incorporated as a right of accused person under many Conventions.[12] Actually this principle is based on legal adage that it is better that ten criminals

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[5] MANU/SC/1344/2006.

[6] K.N.C. Pillai (ed.), R.V. Kelkar's Criminal Procedure, at 336 (5th edn.).

[7] Provisions which show departure from the adversary trial system are sections 228 and 240 which suggest that charge against the accused is to be framed by the court and not by the prosecution, sections 303 and 304 which confers 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(Article 22(1) of our Constitution confers similar right on the accused person), section 311 which 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), section 313 where the court can examine the accused at any time to get explanation from him, section 320 where certain offences to be compounded need prior permission of the court, section 321 where the prosecutor cannot withdraw the case without the consent of the court.

[8] MANU/SC/1193/2008.

[9] Encyclopaedia of Crime and Justice (2nd edn.) Vol. 1 at 25.

[10] Ram chander v. State of Haryana (1981) 3 SCC 191. This viewpoint of judiciary acquires support of the recommendations made by Malimath Committee Report on Criminal Reforms. The Committee recommended that some of the good features of the inquisitorial system, like the duty of the court to search for truth, pro-active role of judges etc., could be adopted to strengthen the adversarial system and to make it more effective. See 'Recommendations of the Committee on Reforms of Criminal Justice System', Criminal Law Journal 110, 2004 (Jun) J 102.

[11] Babu Singh v. State of Punjab (1964) 1 Cri. LJ 566 at 572.

[12] For example article 14(2) of the ICCPR states that every person charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law. Article 11 of the UDHR also 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 they have had all the guarantees necessary for their defence. Article 6(2) of the European Convention on Human Rights (hereinafter as ECHR) provides that everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law. American Convention on Human Rights (hereinafter as ACHR) also states the same principle in article 8(2) that every person accused of a criminal offence has the right to be presumed innocent so long as his guilt has not been proven according to law.
http://www.echr.coe.int/nr/rdonlyres/d5cc24a7-dc13-4318-b457-5c9014916d7a/0/englishanglais.pdf
http://www.wunrn.com/reference/pdf/American_convention_Human_Rights.PDF (Accessed on 15-11-09).

escape than that one innocent person is wrongfully convicted. This principle was recognised by the United States (hereinafter as US) way back in 1895 in the case of Coffin v. United States[13] that 'the principle that there is a presumption of innocence in favour of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law...' It is worth noting that the US Supreme Court has raised the presumption of innocence to the level of a fundamental right by reading it into the 'due process' clause.

As a basic component of the right to a fair trial, the presumption of innocence, *inter alia,* means that the burden of proof in a criminal trial lies on the prosecution and that the accused has the benefit of doubt.[14] This presumption is seen to flow from the Latin legal principle that *ei incumbit probatio qui dicit, non qui negat* that is the burden of proof rests on who asserts, not on who denies. The presumption of innocence is in fact a legal instrument created by the law to favour the accused based on the legal inference that most people are not criminals. The presumption means: With respect to the critical facts of the case - whether the crime charged was committed and whether the defendant was the person who committed the crime - the state has the entire burden of proof. With respect to the critical facts of the case, the defendant does not have any burden of proof whatsoever. The defendant does not have to testify, call witnesses or present any other evidence, and if the defendant elects not to testify or present evidence, this decision cannot be used against him. The judge is not to draw any inferences against the defendant from the fact that he has been charged with a crime and is present in court and represented by a counsel. He must decide the case solely on the evidence presented during the trial.[15]

In Kali Ram v. State of H.P. [16] 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. The consequences of the conviction of an innocent person are far more serious and its reverberations cannot be felt in a civilized society." It is the duty of the prosecutor and defence counsel as well as all public authorities involved in a case to maintain the presumption of innocence by refraining from pre-judging the outcome of the trial.

Independent, impartial and competent judges

The basic institutional framework enabling the enjoyment of the right to a fair trial is that proceedings in any criminal case are to be conducted by a competent, inde-pendent and impartial court. Independence presupposes a separation of powers in which the judiciary is institutionally protected from undue influence by or interference from the executive branch.[17] 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 trail, as the state is the prosecuting party and the investigating machinery is also 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. In this regard section 6 of the Code is relevant which separates courts of Executive Magistrates from the courts of Judicial Magistrates. Article 50 of the Indian Constitution also imposes similar duty on the state to take steps to separate the judiciary from the executive. Impartiality refers to the conduct of the judge. Bias is the decisive factor for ascertaining a court's impartiality. It can, thus, be *prima facie* called in question when a judge has taken part in the proceeding in some prior capacity or when he has a personal stake in the proceedings. But this presumption is taken away by section 479 of the Code[18], which prohibits trial of a case by a judge or magistrate in which he is a party or otherwise personally interested.

Venue of trial and public hearing

Fair trial also requires public hearing in an open court. Article 14(1) of the ICCPR also guarantees the right to a public hearing, as one of the essential elements of the concept of a fair trial.[19] It is a right not belonging to the

[13] 156 U.S. 432 (1895).

[14] But strict liability offences are exception to this principle where the burden of proof is shifted on the accused person and the prosecution is required only to prove that the accused has committed the *actus reus* of a particular offence. In India, there are many welfare legislations have been enacted (e.g. The Prevention of Food Adulteration Act 1954, Essential Commodities Act 1955, Income Tax Act 1961) which aim to curb economic offences by excluding the adherence of *mens rea* and in these specific cases the burden of proving innocence is on the accused person.

[15] http://en.wikipedia.org/wiki/presumption_of_innocence (accessed on 11-12-09).

[16] 1973 SCC (Cri) 1048 at 1061. Though in the same year in a previous case of *Shivaji SahabraoBobade* v. *State of Maharashtra,* 1973 SCC (Cri) 1033, this court questioned the frequent use of this principle. The doubt raised against the principle of 'presumption of innocence' appears to be more against the manner in which this principle and the principle of giving the accused the benefit of doubt, was been applied and misused by weak and incompetent judges.

[17] Though the appointments of the sessions judges and judicial magistrates are made by the state government in consultation with the high court but once the first appointment is made by the government, the judge or magistrate thereafter works only under the direct control and supervision of the high court and not of the government. So, in this way the independence in the subordinate level of judiciary is protected. Article 50 of the Indian Constitution has also incorporated the principle of separation of powers and states that the executive branch should be separated from judiciary.

[18] Section 479 provides that "no judge or magistrate shall, except with the permission of the court to which an appeal lies from his court, try or commit for trial any case to or in which he is a party, or personally interested, and no judge or magistrate shall hear an appeal from any judgment or order passed or made by himself."

[19] But there are some exceptions to this rule provided under article 14(1). It says that the press and public may be excluded from all or any part of a trial for reasons or morals, public order or national security in a democratic society or when the interest of the private lives of the parties so requires or to the extent

parties only, but also to the general public in a democratic society. The right to a public hearing means that the hearing should as a rule is 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. A judgment is considered to have been made public either when it was orally pronounced in court or when it was published, or when it was made public by a combination of those methods.[20]

Section 327 of the Code makes provision for open courts for public hearing but it also gives discretion to the presiding judge or magistrate that if he thinks fit, he can deny the access of the public generally or any particular person to the court. The provisions regarding the venue or place of inquiry or trial are contained in sections 177 to 189 of the Code. It is general rule that every offence is to be inquired into or tried by a court within whose local jurisdiction it was committed. Trial at any other distant place would generally mean hardship to the parties in the production of evidence and it would also adversely affect the defence preparation. In the case of *Naresh Sridhar Mirajkar* v. *State of Maharashtra*[21] 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 hears causes in open court and must permit public admission to the court.

Knowledge of the accusation

It is also one of the attributes of the fair trial that the accused person is given adequate opportunity[22] to defend himself. But this opportunity will have no meaning if the accused person is not informed of the accusation against him. But the Code considered the value of this object and provides under many provisions[23] in plain words that when an accused person is brought before the court for trial, the particulars of the offence of which he is accused shall be stated to him. In case of serious offences, the court is required to frame in writing a formal charge and then read and explain the charge to the accused person.[24]

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. 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 Code does not explicitly provide for mandatory presence of the accused in the trial[25] 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.[26]

In the case of H.R. Industries v. State of Kerala[27], the Kerala High Court very beautifully stated that the circumstances in which the personal presence of the accused person could be done away. It was opined that:

> "In cases which are grievous in nature involving moral turpitude, personal attendance is the rule. 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 his interest to appear or when the court feels that his presence is necessary for effective disposal of the case. When the 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."

Evidence to be taken in the presence of the accused

As a logical corollary of sections 228, 240, 246 and 251

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strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interest of justice.

[20] http://www.humanrightsfirst.org/pubs/descriptions/fair_trial.pdf (accessed on 15-12-09).

[21] AIR 1967SC 1 at 8.

[22] Article 14(3) (b) of the ICCPR provides that in the determination of any criminal charge against him or her everyone is entitled "to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing." Article 6(3)(b) of the ECHR and article 8(2)(c) of the ACHR also provide that every person accused of a criminal offence has a right "to have adequate time and facilities for the preparation of his defence". What constitutes "adequate" time will depend on the nature of the proceedings and the factual circumstances of a case. Factors to be taken into account include the complexity of a case, the defendant©s access to evidence, the time limits provided for in domestic law for certain actions in the proceedings, etc.

[23] Ss. 228(2), 240(2), 246(2), 251 of the Code.

[24] *Supra* note 6 at 340.

[25] Ss. 235(2) and 248(2) 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.

[26] Ss. 205(1), 273 and 317 of the Code. Section 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 section 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.

[27] 1973 Cri LJ 262 (ker) at 263.

(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. Section 273 of the Code is significant in this regard which provides that all evidence taken in the course of the trial shall be taken in the presence of the accused. This section provides for exception to this rule that if the personal attendance of the accused is dispensed with the evidence shall be taken in the presence of his pleader.[28] The right created by this section is further supplemented by section 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 section 273 will not be fulfilled; therefore to avoid this difficulty section 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.

Cross-examine prosecution witnesses

Article 14(3)(e) of the ICCPR[29] states that in the determination of any criminal charge against the accused, he is entitled to examine, or has examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him. This mandates that the parties be equally treated with respect to the introduction of evidences by means of interrogation of witnesses. 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 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.

In Badri v. State of Rajasthan[30], 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.

Expeditious trial

Speedy trial is necessary to gain the confidence of the public in judiciary. Delayed trial defeats the objective of the re-socialization of the offenders too. Delayed justice leads to unnecessary harassment. Section 309(1) gives directions to the courts with a view to have speedy trials and quick disposals.[31] Though this feature is recognised as an element of fair trial but the real problem is how to make it a reality in actual practice where millions of cases are pending before the subordinate courts for disposal.

In Hussainara Khatoon (IV) v. State of Bihar[32] this court declared 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. In Motilal Saraf v. State of J and K.[33] 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.

Prohibition on double jeopardy (*ne bis in idem*)

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. Article 14(7) of the ICCPR also provides that;

[28] As provided under ss. 205, 293, 299 & 317 of the Code.
[29] See *supra* note 3.
[30] AIR 1976 SC 560.
[31] Section 309 directs that every inquiry or trial proceeding shall be held as expeditiously as possible. Clause (1) provides that when the examination of witnesses has once begun, the same shall be continued from day to day until all the witnesses in attendance have been examined. The court, after recording its reason, may adjourn the same beyond the prescribed day. For detailed discussion see B.L. Arora, *'Law of Speedy Trial in India'*, (Universal Law Publishing, Delhi, 2006).
[32] (1980) 1 SCC 98 at 107.
[33] (2007) 1 SCC (Cri) 180.

> "No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country".[34]

This concept is embodied in section 300 of the Code 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.[35] 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.[36] If we compare the constitutional position of India and America on double jeopardy then we will make out that the protection under article 20(2) of our Constitution is narrower than that given in American constitution.[37] 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.[38]

Aid of counsel

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. 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 where in the prosecution is conducted by a competent and experienced prosecutor.[39] 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 Gideon v. Wainwright[40], the Supreme Court of United States held that the 6th Amendment's guarantee of counsel to indigent defendants was so fundamental and essential to a fair trial that the due process clause required states to provide counsel to all indigent defendants in felony cases…

In Powell v. Alabamma[41] 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 to cite here. He said "even the intelligent and educated layman has small or sometimes no skill in the science of law. If charged with 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…"[42]

In India, right to counsel is recognised as fundamental right of an arrested person under article 22(1) which provides, *inter alia,* no person shall be denied the right to consult, and to be defended by, a legal practitioner *of his choice.* Sections 303 and 304 of the Code are manifestation of this constitutional mandate.[43] In Maneka Gandhi v. Union of India[44], 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 article 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. In this context a difference is to be noted as between article 21 of the Constitution and section 304 of the Code. Article 21 as interpreted by the Supreme Court in Khatri v. State of Bihar[45] the mandatory obligation to provide free legal aid arise in every criminal case against an indigent accused, whether the trial is before a Magistrate or Sessions Judge. Under section 304 of the Code, 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 section 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 took the other way and set aside a conviction by a

[34] See also article 20 of the ICC Statute. Note that article 8(4) of the American Convention which says "an accused person acquitted by a nonappealable judgment shall not be subjected to a new trial for the same cause", is different in that the prohibition applies only if the accused has been previously *acquitted*, but then the prohibition is not limited to retrial on the same charge— no charge arising out of the same facts ("the same cause") may be pursued.

[35] Similar right is also provided by the Constitution under article 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 considered both situations.

[36] *Jitendra Panchal* v. *Intelligence Officer NCB & Ors.* 2009 (2) SCALE 202.

[37] Fifth Amendment to the American Constitution provides that *"no person shall be twice put in jeopardy of life or limb."*

[38] Basu, D.D., *Commentary on the Constitution of India,* (8th edn.) at 2973.

[39] *Supra* note 6 at 371.

[40] 372 U.S. 335 (1963).

[41] 287 U.S. 45 (1932).

[42] *Id.* at 69.

[43] Section 303 provides a right to accused person to be defended by a pleader of his choice, whereas section 304 casts a duty on the State to provide legal aid to indigent persons in a trial before the *Court of Sessions.*

[44] AIR 1978 SC 597.

[45] AIR 1981 SC 928.

Magistrate made upon evidence taken without offering legal representation to the accused.[46] In this way the court tried to remove the anomaly which is created by the Legislature.

Further, article 39-A 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 forgotten that if law is not only to speak justice but also deliver justice, legal aid is absolute imperative. Legal aid is really nothing else but equal justice in action. It is in fact the delivery system of social justice. In Suk Das and Ors. v. Union Territory of Arunachal Pradesh[47], the court strengthen the need for legal aid and held that "free legal assistance at state cost is a fundamental right of a person accused of an offence which may involve jeopardy to his life or personal liberty. The exercise of this fundamental right is not conditional upon the accused applying for free legal assistance so that if he does not make an application for free legal assistance the trial may lawfully proceed without adequate legal representation being afforded to him. On the other hand the Magistrate or the Sessions Judge before whom the accused appears is under an obligation to inform the accused that if he is unable to engage the services of a lawyer on account of poverty or is entitled to obtain free legal services at the cost of the State. The conviction reached without informing the accused that they were entitled to free legal assistance and inquiring from them whether they wanted a lawyer to be provided to them at State cost which resulted in the accused remaining unrepresented by a lawyer in the trial is clearly a violation of the fundamental right of the accused under article 21 and the trial must be held to be vitiated on account of a fatal constitutional infirmity".[48]

ROLE OF DEFENCE COUNSEL AND FAIR TRIAL

In the eyes of many people, the criminal defence lawyer represents all that is best about the legal profession; in the eyes of others, all that is worst. Defence counsel is the innocent accuser's last shelter against the horror of wrongful conviction or we can say that the defender is the only friend that an accused person has left in the world. He is also the accuser's chief instrument for defeating justice and getting away with crime. It sounds absurd or seems to contradict itself, but is in fact true that the defender is at once the indispensable condition for justice and the enemy of justice. An advocate, in the discharge of his duty, knows but one person in the entire world, and that person is his client. To save that client by all means and expedients and at all hazards and costs to other persons, and, amongst them, to himself, is his first and only duty. [49] The system of criminal justice, adopted by our Code, pits prosecution against defense and requires undivided partisanship. Because the prosecution will present the state's case, the defendant must concentrate entirely on the accused's, and present it as forcefully as possible.

The scope of counsel's participation in the pre trial process, particularly before the commencement of judicial screenings is however the focal point of a strong controversy. The conflict between the individual rights and demand of society for security, which administration of criminal justice aims to resolve, is perhaps more apparent at this period than at any other stage in criminal process.[50] It is noteworthy that unlike the other stages of the criminal process, this initial period which intervenes between the invocation of the process against a person and his production before a judicial officer, is marked by the absence of a disinterested third party to ensure fairness in procedure and justice and impartiality in decision making. The vesting of the function of the decision making in the impartial judge, who presides over and supervises the proceeding, is one of the principal safeguard to the accused against the arbitrary and oppressive action. But during this initial stage, this triangular situation is notably non-existent. The investigating officers on whom there is a direct pressure to 'solve' crimes and 'to bring criminal to justice' and hence whose impartiality is subjected to the greatest stress. In this situation the presence of counsel might encourage the accused person.[51] Secondly, in bail matters an accused who is at liberty has always the advantage to prepare and organize his defense by locating and conferring with witnesses as well as by collecting evidence for his favour. A lawyer is *sine qua non* to get the bail and assistance of a client who is at liberty also helps the counsel to prepare his case. At trial stage, the effective participation by counsel might significantly reduce the drop in the number between the prosecution initiated and the convictions resulted. He can prevent hasty and oppressive application of the criminal process against the innocent person and can save him from inconvenience, humiliation and expense which might result from a lenghty and protracted trial. During trial stage the counsel has a duty to ensure that full disclosure is provided by the prosecutor; that all evidence bearing on the accused's case is disclosed or produced; that all legal issues bearing on

[46] *Nekram* v. *State of M.P.,* (1988) Cr LJ 1010 (MP).
[47] AIR 1986 SC 991.
[48] *Id* at 993.
[49] Encyclopaedia of Crime and Justice (2nd edn.) Vol. 3 at 278.
[50] Prasannan, R., 'Counsel in the Criminal Process', 10 *Journal of the Indian Law Institute,* 1968 at 645.
[51] *Id.* at 646.

the accused's case are fully explored and properly adjudicated; that, in particular, all evidence tendered by the prosecution was collected in accordance with constitutional standards; that all evidence supporting the accused's case is tendered at trial; that prosecutor's witnesses are cross-examined; that an accused is convicted only when the prosecution has satisfied its constitutional burden of proving guilt beyond a reasonable doubt.[52] Defense counsel is professionally bound to advance all arguments ethically permitted on behalf of the accused, to ensure that the accused is convicted only if the prosecutor can properly establish guilt. If on the basis of all of the evidence the accused is convicted it is the duty of the counsel to see that the penalty is proportionate to the gravity of the offence and to the degree of culpability of the accused, and he may also in pre-sentence hearing show those conditions which may help the accused to reduce the gravity of punishment. The appellate process is intended and designed to give a last opportunity to challenge the methods and policies of the administrators of criminal justice at the earlier stages, and the legality and fairness of the decision taken by them. There may be a mistaken identification arising out of the victim's and the witnesses' desire for vengeance. The witnesses may have committed perjury or the police may have made suggestions to them. While these and other similar mistakes of facts may go directly to the innocence of the defendant, errors in the interpretation and application of the related provision of the law may also result in grievous injustice. The counsel's presence at this level is necessary to put before the appellate court all that is indigence, he rele-vant to show the errors of law or arbitrariness of the trial court.[53]

Conclusion

After analyzing different provisions of the Code it can be submitted that though the system adopted by the Indian justice administration is adversary in nature but the reflections of inquisitorial system can also be not negated. The Code provides a balancing approach while dealing with these two kinds of systems. As far as other basic components of fair trial are concerned, the adherence of these components can be seen in different provisions of the Code. But the real issue comes with the implementation part of these provisions. One of the example is provision for speedy trial which seeks quick disposal of cases but the truth is that around 1.7 lakh under trials languishing in jail who are booked for petty offences (though the total number of under trials are approximately 2.45 lakh) and despite having served a major part of the prescribed maximum sentence.[54] In these circumstances the role of counsel in an adversary criminal system, which is triangular in nature, is very crucial because in such cases the prosecution, which represents state, is in a stronger position because it has also the support of investigating agencies. On the other hand, the accused person can solely rely on his counsel who, being the last resort for him can save him from the arbitrary and oppressive action.

[52] http://www.ebcindia.com/practicallawyer/index.php?option=com_content&task=category&id=50&Itemid=0 (accessed on 20-12-09).

[53] *Supra* note 49 at 652.

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[54] One of the most neglected aspects of criminal justice system is the delay in the disposal of the cases and detention of the poor accused pending trial. It is undesirable that the criminal trial should wait till everybody concerned has forgotten all about the crime. The facts mentioned above run against the dictum of this court in *Maneka Gandhi Case* (see *supra* note 44) where Justice Krishna Iyer and Justice Bhagwati stressed that the procedure established by law should be 'just, fair and reasonable' and not oppressive and fanciful. Now obviously procedure prescribed by law for depriving a person of his liberty cannot be reasonable, fair or just unless that procedure ensures a speedy trial for determination of guilt of such person. Procedural law is expected to quicken the pace of justice, but often it acts contrary to this purpose.