

INTERNATIONAL JOURNAL OF LAW MANAGEMENT & HUMANITIES

[ISSN 2581-5369]

Volume 6 | Issue 2

2023

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The Paradigm of Fair Trial in Adversarial System: A Legal Discourse

SAYED QUDRAT HASHIMY¹

ABSTRACT

The idea of the rule of law is fundamentally based on the idea of a fair trial, and the ideas of "due process" and "the rule of law" are essential to the defence of human rights. Therefore, the core of every legal system must be a mechanism for the assertion of legal rights and the correction of violations via the course of a fair trial in court, as the law is useless without effective remedies. In criminal proceedings, the fairness of the judicial system is especially important since it guards against violations of human rights. Since the death sentence is an irrevocable punishment, constitutional due process and basic justice demand that the judicial functions of trial and sentencing be carried out with fundamental fairness. This article provides a critical analysis of the right to a fair trial in the adversarial System and highlights the difficulties the Indian criminal justice system faces.

Keywords: *fair trial, fair judgement, biased judgement, accused, conviction, presumption of innocence.*

I. INTRODUCTION

Fair trial is a legal term that refers to a trial in which both the prosecution and the defense are given an equal opportunity to present their case, and in which the judge or jury is impartial and unbiased. The right to a fair trial is a fundamental human right enshrined in international law and is essential for maintaining the rule of law and ensuring justice. It includes the right to be presumed innocent until proven guilty, the right to a competent and independent legal representation, the right to a public trial, the right to present evidence and cross-examine witnesses, and the right to appeal. A fair trial is necessary to protect the rights of both the accused and the victims and to ensure that justice is served in a transparent and impartial manner. A trial is a process by which a court determines whether an accused person is guilty or innocent.

Fair trial in the adversarial system is a fundamental aspect of the legal system in many countries. In an adversarial system, the prosecution and defence are responsible for presenting their cases before an impartial judge or jury. The judge or jury is responsible for determining the facts of

¹ Author is a LL.M. Student at Department of Studies in Law, University of Mysore, India.

the case and applying the law to those facts.

The right to a fair trial in an adversarial system includes several key components, such as the right to a competent attorney, the right to present evidence, the right to cross-examine witnesses, and the right to an impartial judge or jury. Additionally, the adversarial system requires that both sides have access to all relevant evidence and that the burden of proof rests with the prosecution. However, there are criticisms of the adversarial system, particularly regarding its emphasis on winning rather than discovering the truth. Some argue that the system places too much emphasis on legal manoeuvring and advocacy skills rather than on uncovering the truth. Others argue that the adversarial system is inherently unfair to defendants who may not have the resources to mount a strong defence. Despite these criticisms, the adversarial system remains a cornerstone of many legal systems around the world, and efforts are continuously being made to improve and refine it to ensure a fair and just legal process.

Many common law countries follow the adversarial system, including the United States, Canada, Australia, New Zealand, England, Wales, and many countries in Africa and Asia that were formerly under British colonial rule. Some civil law countries, such as France and Germany, also use elements of the adversarial system in their criminal justice systems.

A fair trial is a set of legally enforceable rights that the state guarantees to its citizens, for whom the state itself exists, rather than a favour extended to the legal supplicant. Basic rights, including the right to remain silent,² the rule against double jeopardy, the right to legal representation, the right to be informed of the charges, and others are used to define the notion of a fair trial. The idea, however, goes beyond the total of these specific commitments. This means that the right to a fair trial includes the notion that each individual must be able to make use of his procedural rights regardless of his individual capabilities. Seeking to refine the quality of justice at every turn, fair trial norms are nuanced to afford particular protection to the more vulnerable and greatly disadvantaged who may come before the law,³ whether as witnesses, victims or accused. These rights, constitutionally guaranteed, compel and cast a legal duty on the judge to ensure that they are respected realised and never violated. A trial primarily aimed at ascertaining truth has to be fair to all concerned which includes the accused, the victims and society at large.⁴ Each person has a right to be dealt with fairly in a criminal trial. Denial of a

² Constitutional and Statutory Safeguards for Fair Trial and Justice under Cameroonian Legal System: A Legal Appraisal | Journal of Constitutional Law and Jurisprudence, and significance., 16 (2022), <https://lawjournals.celnet.in/index.php/Jolj/article/view/1035> (last visited Feb 8, 2022).

³ FULVIO M. PALOMBINO & PIERFRANCESCO ROSSI, FAIR TRIAL, RIGHT TO (CIVIL PROCEEDINGS) 45 (2022), <https://www.elgaronline.com/display/book/9781789903621/b-9781789903621.fair.trial.right.to.civil.xml> (last visited Feb 8, 2022).

⁴ Richard Ashcroft, *Giving medicine a fair trial*, 320 BMJ 1686, 11 (2000).

fair trial is as much injustice to the accused as it is to the victim and society.

The court has a legal obligation to ensure that these rights are respected, realised, and never violated because they are protected by the constitution. The accused, the victims, and society at large must all be treated fairly in a trial that has as its primary goal discovering the truth. In a criminal trial, everyone has the right to a fair trial.⁵ Principles of a fair trial: the following are the principles of fair trial:-

- Adversary trial system :
- Presumption of innocence
- Independent, Impartial and Competent judge:
- Knowledge of accusation:
- Right to open trial
- Right to free legal aid
- Right to free legal aid
- The trial in presence of accused
- Evidence to be taken in presence of accused
- Protection against illegal arrest
- Right to bail
- Prohibition on double jeopardy
- Right against self-incrimination

Denial of a fair trial is unfair to the accused in the same way that it is to the victim and society. *“It is better that ten guilty escape than one innocent suffers.”*⁶ This quote reflects the principle, known in criminal law as Blackstone’s Formulation named after English jurist William Blackstone, that there is hardly anything more undesirable in a legal system than the wrongful conviction of an innocent person. This is because the consequences of convicting an innocent person are so significantly serious that its reverberations are felt throughout a civilised society.⁷ For example, the sentence served by an innocent person cannot be erased by any subsequent act

⁵ Fair Trial, Right to, International Protection, OXFORD PUBLIC INTERNATIONAL LAW, <https://opil.oup.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e798> (last visited Feb 8, 2022).

⁶ Letter from Benjamin Franklin to Benjamin Vaughan, 14 March 1785.

⁷ Kali Ram v State of Himachal Pradesh 1973 AIR SC 2773.

of annulment.⁸ Thus, to ensure as far as possible that no court will wrongfully convict an innocent person, an accused person is presumed innocent until proven guilty, with the prosecution bearing the burden of establishing the facts necessary to prove guilt.⁹

II. FAIR TRIAL IN INDIA

Fair trial is a fundamental right enshrined in the Constitution of India. The Indian legal system ensures that every person, regardless of their social, economic, or political status, receives a fair and impartial trial. This right is protected under Article 21 of the Constitution of India, which states that "No person shall be deprived of his life or personal liberty except according to a procedure established by law."

The Indian legal system is based on the adversarial system of justice, which ensures that both the prosecution and defense have equal opportunities to present their arguments and evidence before the court. The accused person is presumed innocent until proven guilty, and it is the responsibility of the prosecution to prove beyond a reasonable doubt that the accused person is guilty. In India, the right to a fair trial includes the following:

1. The right to be heard by an impartial judge: The Constitution of India ensures that every person has the right to a fair and impartial trial. The judge must be unbiased and should not have any preconceived notions about the case.
2. The right to a public trial: The trial must be open to the public, and the accused person has the right to be present during the trial.
3. The right to legal representation: Every person has the right to be represented by a lawyer of their choice. If the accused person cannot afford a lawyer, the court will provide one.
4. The right to cross-examine witnesses: The accused person has the right to cross-examine the witnesses presented by the prosecution.
5. The right to produce evidence: The accused person has the right to produce evidence in their defense.
6. The right against self-incrimination: The accused person has the right to remain silent and not incriminate themselves.
7. The right to a speedy trial: The Constitution of India ensures that every person has the right to a speedy trial. The trial should not be unduly delayed, and the accused person

⁸ Ibid., para. 28.

⁹ Ian Langford, *Fair Trial: The History of an Idea*, 8 JOURNAL OF HUMAN RIGHTS 37 (2009).

should not be detained for an extended period without a fair trial.

All criminal trials are based on the principle that the accused is innocent till proved guilty. The accused is presumed innocent until and unless proven guilty in all criminal proceedings. The right of the accused to be presumed innocent is a fundamental tenant of Indian law. From the moment of suspicion through the course of the investigation, the course of the trial, and up until the judgement is given, the assumption must stand and serve as the guiding principle. The goal of criminal procedure is to uphold the right to remain innocent unless proven guilty.¹⁰ The prosecution has the burden of proving a defendant's guilt when it is asserted that they are innocent until proven guilty in a criminal case.¹¹ Arguments that there is nothing wrong per se in shifting the burden of proof onto the accused, especially where grave offences are involved, have not found favour in our legal system, where the notion of being “*innocent until proven guilty*” is considered as important as the liberty of the individual. Over time, the pronouncements of the Supreme Court have consistently reaffirmed that the presumption of innocence is a human right.¹²

The Apex Court in *P.N. Krishna Lal v Government of Kerala*¹³ The court made it clear that the presumption of innocent is ingrained in the Indian Constitution, the Universal Declaration of Human Rights, and the Civil and Political Rights Convention, both of which India is a signatory to and which guarantee an accused person's fundamental rights and liberty. The trial method must also pass the constitutional rights test set forth in these fundamental human rights. In criminal jurisprudence, the settled law is that the prosecution must prove all the ingredients of the offences for which the accused has been charged. The proof of guilt of the accused is on the prosecution and must be beyond a reasonable doubt. The accused is never required to prove his innocence during the course of the trial. In contrast to a civil case trial, the burden of proof in a criminal case always falls on the prosecution and is never transferred. ... Therefore, it is arbitrary, unjust, and unfair, and it violates the guarantee under Article 21 to put the onus of proof entirely on the shoulders of the accused. This privilege is further strengthened by Section 101 of the Indian Evidence Act, which states that the presence of any facts the claimant says is necessary for the court to render a decision about any legal right or liability. Thus, if the state wishes to convict an individual of an alleged crime, the state carries the burden of firmly

¹⁰ Hock Lai Ho, *The Fair Trial Rationale for Excluding Wrongfully Obtained Evidence*, in DO EXCLUSIONARY RULES ENSURE A FAIR TRIAL? A COMPARATIVE PERSPECTIVE ON EVIDENTIARY RULES 283, 34 (Sabine Gless & Thomas Richter eds., 2019), https://doi.org/10.1007/978-3-030-12520-2_9 (last visited March 18, 2022).

¹¹ William Glanville, *The Proof of Guilt*; edn. 3, Stevens, 1963, pp. 184 -85.

¹² Narendra Singh and Anr. v State of Madhya Pradesh, (2004) CrLJ (2842), para. 31

¹³ 1995 Supp(2) SCC 187

establishing and proving the defendant's guilt.

To protect this right to be presumed innocent, Section 161(2) of the Code of Criminal Procedure permits persons questioned by the police to refrain from answering questions which might expose them to criminal penalty. Imprisonment without regard to procedures intended to protect the right to remain silent is unconstitutional under Article 21.

Ram Gopal v. State of Maharashtra¹⁴

Facts: Ram Gopal, the appellant, was accused of killing Zingrooji Sita Ram. It was proven that Sita Ram was poisoned and passed away while travelling to the hospital. Ram Gopal allegedly gave the victim some pesticide dissolved in kerosene oil, either with tea or water, and Sita Ram died as a result of the deadly insecticide, according to the prosecution. A chemical analyst's analysis and the post-mortem report both indicated that the deceased may have died from poisoning, and the corpse's viscera contained an organo-chloro compound. The defence contended that the defendant's motivation for killing Sita Ram was demonstrated by the fact that Sita Ram sold a plot of land to Ram Gopal just before he passed away. Ram Gopal had pledged to pay the sum within six weeks of the execution of the selling document, but he had not yet done so. Ram Gopal continued to put Sita Ram off on various grounds despite persistent nagging.

Brief Summary of the case

The post-mortem chemical examination of the viscera revealed the presence of an organo-chloro compound, which was the foundation of the prosecution's case. It said that following a visit to the accused, the dead fell ill and passed away. The means of opportunity and death had been established. Ram Gopal was found guilty of murder by the Sessions Judge in Nagpur, and the High Court of Bombay upheld this decision (Nagpur Bench). The prosecution's case, according to the Supreme Court in response to an appeal against the death penalty, had too many loopholes. There was no evidence that the accused ever had any organo-chloro compounds in his or her possession. It was unlikely that the victim would have ingested such a massive quantity of a lethal kerosene-based poison without realising it, and other scenarios including suicide had not been ruled out.¹⁵

The Apex Court reversed the lower courts' decisions because this was enough to give the accused the benefit of the doubt. The case serves as a reminder that not only must the relevant

¹⁴ (1972) 4 SCC 625

¹⁵ Joëlle Vuille, Luca Lupària & Franco Taroni, *Scientific evidence and the right to a fair trial under Article 6 ECHR*, 16 LAW, PROBABILITY AND RISK 55, 12 (2017).

facts be proven, along with the necessary mens rea, but that the prosecution must also be able to demonstrate the chronology of events and rule out any alternative plausible explanations for the incident. The Supreme Court ruled that the victim's death may have been caused by other factors in this case and that the standard of proof of beyond a reasonable doubt had not been fulfilled.

Kali Ram v. State of Himachal Pradesh¹⁶

Kali Ram was convicted of two murders. He appealed his conviction in the Supreme Court. The prosecution's case rested on three pieces of evidence.

- i. First, a witness testified that Kali Ram had spent the night near the victims' residence, and on the evening of the crime was seen heading toward the victims' house.
- ii. Second, the prosecution asserted that they had a written confession from Kali Ram which he had mailed to the police station.
- iii. Third, the prosecution asserted that Kali Ram made an oral confession to a witness.

The Supreme Court examined at the prosecution's evidence, noting that the accused was entitled to the presumption of innocence, which required the prosecution to prove guilt beyond a reasonable doubt. First, the Court found that the testimony of the witness who claimed to have seen Kali Ram go towards the victims' home on the night of the crime was untrustworthy since she waited more than two months to come forward despite being aware of the incident.

The Court stated that the prosecution failed to provide a convincing justification for the witness's protracted silence. Second, the Court determined that the prosecution had not eliminated the possibility that the letter of confession might have been faked or established its veracity. The prosecution had to take such steps before the letter of confession could be used as evidence. Third, the Court deemed the witness' testimony on the oral confession to be very dubious because the police had paid for her testimony. The prosecution did not refute the accused's presumption of innocence, the court explained in its decision to reverse the conviction after finding all of the prosecution's key evidence to be invalid.¹⁷

The Supreme Court in ***Sharad Birdhichand Sarda v. State of Maharashtra*** stressed the following five golden principles that must be fulfilled before the case against an accused can be said to be fully established and called it the Panchsheel of the proof of a case based on circumstantial evidence: The circumstances from which the conclusion of guilt is to be drawn

¹⁶ AIR 1973 SC 2773

¹⁷ Jixi Zhang & Xiaohua Liang, *The Scope of Application of Fair Trial Rights in Criminal Matters-Comparing ICCPR with Chinese Law*, 1 ARTS AND SOCIAL SCIENCES JOURNAL 0 (2010).

should be fully established. The Court stressed that the circumstances concerned must or should and not may be established. Certainly, it is a primary principle that the accused must be and not merely may be guilty before a court can convict and the mental distance between 'may be' and 'must be' is long and divides vague conjectures from sure conclusions.

III. RIGHT TO EQUALITY BEFORE THE LAW AND EQUAL TREATMENT BY THE LAW

The right to equality before the law and equal treatment by the law means that discrimination is prohibited throughout the judicial proceedings. Judges and officials may not act in a discriminatory manner when enforcing laws and they must ensure that the rights of all are equally protected.¹⁸

(A) Fair trial under Indian Constitution

Article 14 of the Constitution states: *The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.*¹⁹ Article 15 lays down the principle of non-discrimination according to which: The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.

In terms of justice delivery, the principle of equality basically has two aspects: equal access to the courts and equal treatment at law. In its application, this means that irrespective of religious identity, gender, caste, class, or regional identity, every citizen appearing before a court has a right not to be discriminated against in the course of the proceedings or the manner in which the law is applied.²⁰

a. Protection in Respect of Conviction of Offences/Privilege Against Self-Incrimination

Article 20(3) of the Constitution protects the right of the accused to remain silent by providing that: No person accused of any offence shall be compelled to be a witness against himself.

(B) Examination of Witnesses by Police

Section 161(2) of the Code of Criminal Procedure leaves no room for doubt when it states that an accused is bound to answer all questions of a state official truthfully except questions the answers to which would have a tendency to expose him to a criminal charge or to a penalty or

¹⁸ David P. Stewart, *The Right to a Fair Trial in International Law*. By Amal Clooney and Philippa Webb. Oxford, UK: Oxford University Press, 2020. Pp. cxx, 900. Index., 116 AMERICAN JOURNAL OF INTERNATIONAL LAW 664 (2022).

¹⁹ William Glanville, *The Proof of Guilt*; edn. 3, Stevens, 1963, pp. 184 -85.

²⁰ Allan Ardill, *The Right to a Fair Trial*, 25 ALTERNATIVE LAW JOURNAL 3 (2000).

forfeiture.²¹

(C) Further Statements of the Accused to the Court

The Code of Criminal Procedure, Section 313 further protects the right to silence. It protects the accused from liability for refusing to answer or falsely answering questions by a judge during a court proceeding. It says: the accused shall not render himself liable to punishment by refusing to answer such questions, or by giving false answers to them.²²

(D) The Accused is a Competent Witness for the Defence

During a trial, the accused can be arraigned as a witness for the defence but cannot be called on to give evidence except at their own request. If the accused chooses not to give evidence, the court cannot draw any adverse presumption against him. Additionally, the accused can choose not to answer questions put to them by the court. Except as a condition requisite to a tender of pardon, no influence by means of any promise or threat or otherwise can be used on the accused to induce them to disclose or withhold any matter within their knowledge. Thus Sections 161, 313, 315 and 316 of the Code raise a presumption against guilt and in favour of innocence, grant a right to silence both at the stage of investigation and trial and also preclude any party or the court from commenting on the silence.

Nandini Satpathy v P.L. Dani²³

Ms Nandini Satpathy while serving as Orissa's Chief Minister, Ms. Nandini Satpathy was accused of embezzling money. She was ordered to appear before the Deputy Superintendent of Police for Vigilance and respond to written inquiries. Because she believed that doing so would violate her fundamental right against self-incrimination, she declined to respond to the questionnaire. Ms. Satpathy was accused under Section 179 of the Indian Penal Code, 1860, which imposes a penalty for refusing to respond to any inquiries made by a public official with the authority to conduct those inquiries, after she refused to answer. The issue before the Supreme Court was whether Ms Satpathy had a '*right to silence*' and whether people can refuse to answer questions during investigation that would point towards guilt. The Supreme Court held that Ms Satpathy had to answer all questions that did not materially incriminate her. For questions she refused to answer, she was required to provide, without disclosing details, her reasons for fearing that answering such questions would result in self-incrimination. Her reasons for invoking her right to remain silent would then be examined and she would be liable for

²¹ Ashcroft, *supra* note 4 at 45.

²² Mohd Sahil, *The Principles of Fair Trial*, 41 (2021), <https://papers.ssrn.com/abstract=3903240> (last visited Feb 28, 2022).

²³ AIR 1978 SC 1025

prosecution under Section 179 if it was determined that she refused to answer a question under the false pretence of self-incrimination.²⁴

(E) Narco Analysis

Tests for narcotics, polygraphs, and brain mapping have all been the subject of contentious legal disputes in India.²⁵ On these topics, various High Courts have issued differing decisions. No longer the case. As of today, the Supreme Court has ruled that these tests cannot be performed on any accused person without that person's permission. Additionally, the courts shouldn't treat the procedure for getting the accused's consent lightly.²⁶ The courts must guarantee that the accused's agreement to these tests was given voluntarily. The National Human Rights Commission established guidelines in this regard, and the Supreme Court not only accepted them but also help them to be binding. The Supreme Court in *Selvi and others v State of Karnataka*²⁷ held that: The compulsory administration of the impugned techniques violates the 'right against self-incrimination'. This is because the underlying rationale of the said right is to ensure the reliability as well as voluntariness of statements that are admitted as evidence. The Court also stated that: Forcing an individual to undergo any of the impugned techniques violates the standard of 'substantive due process' which is required for restraining personal liberty.²⁸ Such a violation will occur irrespective of whether these techniques are forcibly administered during the course of an investigation or for any other purpose since the test results could also expose a person to adverse consequences of a non-penal nature.

The Court further said: The protective scope of Article 20(3) extends to the investigative stage in criminal cases and when read with Section 161(2) of the Code of Criminal Procedure, 1973 it protects accused persons, suspects as well as witnesses who are examined during an investigation.²⁹ The test results cannot be admitted as evidence if they have been obtained through the use of compulsion. Upholding the right to remain silent, guaranteed by Article 20(3) of the Constitution, the Supreme Court held that the forcible conveyance of personal knowledge that is relevant to the facts in issue violates Article 20(3) of the Constitution. In the concluding paragraph of the Selvi case, the Supreme Court held the Guidelines for the Administration of

²⁴ Constitutional and Statutory Safeguards for Fair Trial and Justice under Cameroonian Legal System, *supra* note 2.

²⁵ Radina Stoykova, *Digital evidence: Unaddressed threats to fairness and the presumption of innocence*, 42 COMPUTER LAW & SECURITY REVIEW 105575, 3 (2021).

²⁶ Stoykova, *supra* note 25.

²⁷ Criminal Appeal No. 1267 of 2004.

²⁸ CRISTINA TELEKI, DUE PROCESS AND FAIR TRIAL IN EU COMPETITION LAW: THE IMPACT OF ARTICLE 6 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 6 (2021), <https://www.jstor.org/stable/10.1163/j.ctv1v7zbtr> (last visited Feb 19, 2022).

²⁹ Zhang and Liang, *supra* note 17.

Polygraph Test (Lie Detector Test) on an Accused issued by the National Human Rights Commission in 2000, as binding.³⁰

(F) Protection Against Ex-Post Facto Law

Article 20(1) of the Constitution states: No person shall be convicted of any offence except for violation of a law in force at the time of the commission of the Act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence.³¹

However, courts can still apply repealed criminal statutes if the accused committed the crimes prior to such statute's repeal. Illustratively, persons charged under the Terrorism and Disruptive Activities Act (TADA) and Prevention of Terrorism Act (POTA) continue to languish in jail even though the laws have been repealed, and they will be tried and sentenced under those laws. Courts can as well, apply a repealed statute to crimes committed after to the repeal if by trial time a new statute is in force that revives the earlier statute's rule.³²

G.P. Nayyar v State (Delhi Administration)³³

According to the 1947 Prevention of Corruption Act, two public officials were convicted in 1973 for criminal conspiracy and illegal gratification. They were accused of collecting bribes between 1955 and 1961. The accused appealed to the Supreme Court on the grounds that the 1964 legislative repeal of the pertinent Act that applied this criterion, which mandated that the court presume the accused guilty unless proven innocent, was a violation of Article 20(1). The Supreme Court rejected the appeal, stating that statutes that have been repealed nevertheless apply to acts committed before their repeal. Additionally, the repealed provision in this case was reinstated by a later statute in 1967, allowing the rule to be applied even for conduct performed before the repeal took effect.

IV. RIGHT TO BE TRIED BY A COMPETENT, INDEPENDENT & IMPARTIAL TRIBUNAL

The fundamental human right of an accused person to be tried by a competent, independent, and impartial tribunal is insisted upon by all significant human rights documents, as well as by our own Constitution and legal framework. This is a crucial component of any impartial trial. One of the foundational elements of the rule of law is the judiciary's independence. For the safeguarding of the standards of a fair trial, independence is necessary. A judge must be able to

³⁰AIR 2010 SC 1974.

³¹ Constitution of India, Article 20

³² Ho, *supra* note 10 at 11.

³³ AIR 1979 SC 602

make every decision without the involvement of the executive branch of government in accordance with the independent judiciary principle.³⁴

Only higher courts have the authority to review court judgements. By guaranteeing that a judge considering a case has no relationships with either party that could influence the decision-making process, the impartiality and independence of the courts can be guaranteed. Judges must consider both sides equally and fairly in order to reach a ruling that is purely based on the case's facts and evidence. Because it promises citizens that a body other than the legislature and the executive, that is, other than the law maker and the law enforcement, would decide on legality and disputes, the assurance of a competent, impartial, and independent judiciary forms the foundation of the rule of law. Additionally, it guarantees that the rights of the person in legal conflict will be respected.

V. INTERNATIONAL PERSPECTIVE ON FAIR TRIAL

A person has the right to a fair trial when they are accused of a crime or engaged in another legal dispute.³⁵ This entails a timely, impartial court proceeding that is fair and open to the public. Thousands of instances of unjust trials, many of which resulted in the imprisonment of an innocent person, have been brought to light by the European Court of Human Rights. People have utilised the European Convention on Human Rights to obtain a new trial and ensure that governments create appropriate regulations to prevent similar injustices.

Italy approved a regulation in 1992 to provide compensation for those who acquired infections like HIV and hepatitis as a result of subpar blood transfusions. The compensation consisted of a set amount and a consistent perk. The monthly compensation helped many victims cover the cost of addressing major health issues brought on by their conditions.³⁶

A difficult legal dispute over whether the compensation should be adjusted for inflation, however, called these sums into question. After thousands of victims attempted to file for inflation-adjusted compensation, the government stopped it in 2010. The new rule, according to Italy's constitutional court, is discriminatory since it treats victims of tainted blood differently from those who suffered injury from the medicine Thalidomide and who are entitled to compensation that is adjusted for inflation.

The main instrument dealing with the pre-eminent international legal standards on the subject

³⁴ Stewart, *supra* note 18.

³⁵ Fair Trial, Right to, International Protection, *supra* note 5.

³⁶ PALOMBINO AND ROSSI, *supra* note 3.

of fair trial rights is the International Covenant on Civil and Political Rights (ICCPR)³⁷. The ICCPR is a United Nations treaty created in 1966 and entered into force on 23 March 1976. Nations that ratified this treaty are bound by it. The ICCPR is monitored by the Human Rights Committee, a group of 18 experts who meet thrice a year to consider periodic reports submitted by member states on their compliance with the treaty. India ratified the ICCPR in 1979, meaning that India is committed to upholding all the rights it guarantees. Many of the rights contained in the ICCPR relate to the criminal justice system – whether in relation to the pre-trial, trial or post-trial stage. Many of the safeguards provided in Indian law are also mandated by international law.

(A) The Universal Declaration of Human Rights (UDHR)³⁸ lays down the common standard to be met by all nations. Article 11(1) states:

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.

Indian law is precisely in line with Article 14(2) of ICCPR which states: Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

(B) International Covenant on Civil and Political Rights (ICCPR)

Article 15(1) of the ICCPR states: No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby. In addition to the ICCPR espousing this principle, several international criminal statutes have adopted non-retroactivity, including the Rome Statute of the International Criminal Court.³⁹

Article 9(1) of the ICCPR sets forth several provisions that essentially mirror the principles in Indian domestic law.

³⁷ TELEKI, *supra* note 28 at 34.

³⁸ The Human Rights Committee is a body of independent experts that monitors the implementation of the International Covenant on Civil and Political Rights by its state parties.

³⁹ Rome Statute of the International Criminal Court, Art. 22, UN Doc. A/CONF. 183/9 (17 July 1998).

Article 9(1) of the ICCPR reads as follows:

Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

Further to this, Article 9(2) of the ICCPR 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.* This asserts more or less the same basic principle stated under Indian law.⁴⁰ The major legal provisions on fair trial are to be found in article 14 of the International Covenant on Civil and Political Rights, article 7 of the African Charter on Human and Peoples' Rights, article 8 of the American Convention on Human Rights and article 6 of the European Convention on Human Rights. The relevant provisions of these articles will be dealt with below under the appropriate headings.⁴¹

The right to be tried by an independent and impartial tribunal must be applied at all times and is a right contained in article 14(1) of the International Covenant on Civil and Political Rights, which provides that 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.

Although article 7(1) of the African Charter on Human and Peoples' Rights speaks only of a '**competent**' (art. 7(1)(b)) or '**impartial**' (art. 7(1)(d)) court or tribunal, article 26 of the Charter imposes a legal duty on the States parties also to '**guarantee the independence of the Courts.**' Article 8(1) of the American Convention refers to a **competent, independent,** and impartial tribunal, previously established by law, and article 6(1) of the European Convention on Human Rights to '**an independent and impartial tribunal established by law.**' Lastly, article 40 of the Statute of the International Criminal Court provides that the judges shall be independent in the performance of their functions and that they shall not engage in any activity which is likely to interfere with their judicial functions or to affect confidence in their independence.

(C) The Right to a Fair Hearing

The notion of a fair hearing is contained both in article 14(1) of the International Covenant on Civil and Political Rights and in article 6(1) of the European Convention on Human Rights, while article 8(1) of the American Convention on Human Rights speaks of '**due guarantees**'.

The African Charter on Human and Peoples' Rights provides no specification in this respect,

⁴⁰ ICCPR, *supra* note 47, Article 9(2).

⁴¹ Ardill, *supra* note 20 at 17.

but it should be pointed out that, according to article 60 of the Charter, the African Commission on Human and Peoples' Rights '**shall draw inspiration**' from other international instruments for the protection of human and peoples' rights, a provision that enables the Commission to be inspired, inter alia, by the provisions of article 14 of the International Covenant on Civil and Political Rights when interpreting the trial guarantees laid down in article 7 of the Charter.⁴²

Articles 20(2) and 21(2) of the respective Statutes of the International Criminal Tribunals for Rwanda and the former Yugoslavia both provide that the accused shall be entitled to a fair and public hearing in the determination of charges against him or her, although with the proviso that the protection of victims and witnesses may require measures which '**shall include, but shall not be limited to, the conduct of in camera proceedings and the protection of the victim's identity**' (arts. 21 and 22 of the respective Statutes). The rights of the accused as contained in these Statutes are heavily inspired by article 14 of the International Covenant.

VI. FAIRNESS FROM THE POINT OF VIEW OF THE VICTIMS

The so-called '**Street Children**' case against Guatemala concerned the abduction, torture and murder of four street children, the killing of a fifth, and the failure of State mechanisms to deal appropriately with these violations and provide the victims' families with access to justice. Criminal proceedings were instituted but nobody was punished for the crimes committed.⁴³

The Inter-American Court of Human Rights concluded that the relevant facts constituted a violation of article 1(1) of the American Convention on Human Rights in relation to its article, since the *State had failed to comply with the obligation to carry out an effective and adequate investigation of the corresponding facts*, i.e. the abduction, torture and murder of the victims.

According to the Court, the domestic proceedings had two types of serious defect:

- a) first, *investigation of the crimes of abduction and torture was completely omitted*, and
- b) second, *evidence that could have been very important for the due clarification of the homicides was not ordered, practised or evaluated*.

It was thus evident that the domestic judges had *fragmented the probative material and then endeavoured to weaken the significance of each and every one of the elements that proved the responsibility of the defendants, item by item*, and that this contravened the *principles of evaluating evidence, according to which, the evidence must be evaluated as a whole*, ... taking

⁴² Dalia Višinskytė, Remigijus Jokubauskas & Mykolas Kirkutis, *Arbitration Agreements and Protection of the Right to a Fair Trial*, 13 BALTIC JOURNAL OF LAW & POLITICS 159, 9 (2020).

⁴³ A Court HR, Villagrán Morales et al. Case (The Street Children Case) v. Guatemala, judgment of November 19, 1999, Series C, No. 63, p. 198, para. 233.

into account mutual relationships and the way in which some evidence supports or does not support other evidence. In this case the Court also importantly emphasized that *it is evident from article 8 of the Convention that the victims of human rights violations or their next of kin should have substantial possibilities of being heard and acting in the respective proceedings, both in order to clarify the facts and punish those responsible, and to seek due reparation.*⁴⁴

The case of Brandstetter

The Vienna Court of Appeal relied in the Brandstetter case, which involved defamation proceedings, on arguments made by the Senior Public Prosecutor that were not communicated to the applicant and were not even known to him or his attorney. The fact that the Supreme Court later overturned the pertinent appeal court judgement in this case did not help the Court's position because, in the Court's opinion, an indirect and purely hypothetical opportunity for an accused person to comment on prosecution arguments contained in a judgement cannot be regarded as a suitable replacement for the right to scrutinise and directly respond to prosecution arguments. Furthermore, *the Supreme Court did not remedy this situation by quashing the first judgment since its decision was based on a ground entirely unrelated to the matter in issue.*⁴⁵ The right to equality of arms or the right to truly adversarial proceedings in civil and criminal matters forms an intrinsic part of the right to a fair hearing and means that there must at all times be a fair balance between the prosecution/plaintiff and the defence. At no stage of the proceedings must any party be placed at a disadvantage vis-à-vis his or her opponent.⁴⁶ The right to be tried *without undue delay* or *within a reasonable time*.

According to article 14(3)(c) of the International Covenant and articles 20(4)(c) and 21(4)(c) of the respective Statutes of the International Criminal Tribunals for Rwanda and the former Yugoslavia, every person facing a criminal charge shall have the right *to be tried without undue delay* (emphasis added). In the words of article 7(1)(d) of the African Charter, article 8(1) of the American Convention and article 6(1) of the European Convention, everyone has the right to be heard within a reasonable time.

What it means to be tried *without undue delay*: In General Comment No. 13, the Human Rights Committee stated that the right to be tried without undue delay is a guarantee that relates not only to the time by which a trial should commence, but also the time by which it should end

⁴⁴ 7Ibid., p. 198, para. 233.

⁴⁵ Eur. Court HR, Case of Brandstetter v. Austria, judgment of 28 August 1991, Series A, No. 211, p. 28, para. 68.

⁴⁶ Eur. Court HR, Case of Lobo Machado v. Portugal, judgment of 20 February 1996, Report 1996-I, pp. 206-207, paras. 31-32.

and judgement be rendered; all stages must take place *‘without undue delay’*.

To make this right effective, a procedure must be available in order to ensure that the trial will proceed ‘without undue delay’, both in first instance and on appeal. This view has been further emphasized in the Committee’s jurisprudence, according to which article 14(3)(c) and (5) *are to be read together, so that the right to review of conviction and sentence must be made available without delay.*⁴⁷

(A) Key Women’s Rights Issues

Violence against women has been defined to include any act of gender-based violence that results in or is likely to result in, physical, sexual or mental harm or suffering from violence and fear of violence is essential to the full enjoyment of all human rights.⁴⁸ Under international human rights law, States have an obligation to refrain from committing acts of violence against women (for example, the State is responsible for ensuring that soldiers do not commit rape) and to put in place laws and policies to prevent others from doing the same (such as by criminalizing domestic violence).⁴⁹

The Inter-American Court of Human Rights examined Mexico’s responsibility for violations of both the American Convention on Human Rights and the Convention of Belém Do Pará in connection with a wave of murders and disappearances of girls and women in Ciudad Juarez.⁵⁰

The Court found the State responsible for violating the victims’ rights to life, humane treatment, personal liberty, due process, and judicial protection in relation to its obligation under the Convention of Belém do Pará to prevent, punish and eradicate violence against women.

(B) Sexual Violence

Sexual violence includes rape, enforced prostitution, and other forms of sexual assault. As with other forms of violence, as described above, States have an obligation to prevent State actors from committing sexual violence against women, as well as a duty to adopt laws and policies to prevent such abuses by private persons and to ensure the elective investigation and prosecution of those responsible.⁵¹

⁴⁷ Communications Nos. 210/1986 and 225/1987, E. Pratt and I. Morgan v. Jamaica (Views adopted on 6 April 1989), in UN doc.GAOR, A/44/40, p. 229, para. 13.3.

⁴⁸ Constitutional and Statutory Safeguards for Fair Trial and Justice under Cameroonian Legal System, *supra* note 2 at 16.

⁴⁹ UN G.A. Res. 48/104, Declaration on the Elimination of Violence against Women, A/RES/48/104, 20 December 1993, art. 1.

⁵⁰ I/A Court H.R., González et al. (Cotton Field) v. Mexico. Preliminary Objection, Merits, Reparations, and Costs. Judgment of November 16, 2009. Series C No. 205, para. 232 et seq.

⁵¹ Shirin Bakhshay & Craig Haney, *The media’s impact on the right to a fair trial: A content analysis of pretrial publicity in capital cases*, 24 PSYCHOLOGY, PUBLIC POLICY, AND LAW 326, 7 (2018).

In *Aydin v. Turkey*,⁵² The European Court of Human Rights has interpreted the European Convention on Human Rights to require States to establish and apply electively a criminal-law system punishing all forms of rape and sexual abuse.

(C) Sexual Violence in Conflict Zones

Sexual violence against women is especially prevalent in conflict zones. Militaries and rebel groups have used rape and other forms of sexual violence as a military tactic against civilian populations. In 2013, the UN Security Council adopted Resolution 2106, which recognized the need for collective action by States, civil society and international actors to implement preventative measures, protect civilians during conflict, and punish perpetrators.⁵³

The African Commission on Human and Peoples' Rights has condemned armed forces' use of sexual violence as a military tactic against civilian populations.⁵⁴

In the case of D.R. Congo, armed forces of Burundi, Rwanda, and Uganda raped and killed women in the Democratic Republic of Congo, among other violations. The Democratic Republic of Congo also alleged that the Rwandan and Ugandan forces specifically attempted to decimate local populations by spreading AIDS through the rape of Congolese women and girls. *Id.* at para. 5. The African Commission found violations of the First Protocol Additional to the Geneva Conventions and the Convention on the Elimination of All Forms of Discrimination against Women and the African Charter on Human and Peoples' Rights. Sexual violence may also constitute a crime against humanity, and the international criminal tribunals for both Rwanda and the former Yugoslavia have prosecuted individuals in connection with sexual violence committed against women during conflict.⁵⁵

(D) Female Genital Mutilation

As described by the World Health Organization (WHO), the practice of female genital mutilation (FGM) includes procedures that intentionally alter or cause injury to the female genital organs for non-medical reasons.⁵⁶

Economic, Social and Cultural Rights (CECSR) has interpreted Article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) to require States parties to the ICESCR to protect women from being coerced to participate in this harmful cultural practice.⁵⁷

⁵² *Algür v. Turkey*, no. 32574/96, Judgment of 22 January 2002

⁵³ UN S.C. Res. 2106, S/RES/2106, 24 June 2013.

⁵⁴ *D.R. Congo v. Burundi, Rwanda, and Uganda*, Communication No. 313/05, 33 Ordinary Session, May 2003.

⁵⁵ *Women and Armed Conflict* (2000); *Prosecutor v. Akayesu*

⁵⁶ Stewart, *supra* note 18 at 10.

⁵⁷ General Comment No. 14, *The Right to the Highest Attainable Standard of Health*, UN Doc. E/C.12/2000/4, 11

(E) Domestic Violence

Domestic violence may be emotional, psychological, physical, or sexual. Although this kind of abuse involves relationships between individuals and generally takes place in the private sphere, States still have a positive obligation to provide legal mechanisms to protect women from domestic violence, including the investigation and prosecution of those responsible.⁵⁸

Fair trials are essential for everyone involved in a case and assist in establishing the truth. They serve as a pillar of democracy, promoting fair and just societies and preventing misuse by governments and governmental institutions. Every individual should be presumed innocent until and unless proven guilty, which is a key tenant of the right to a fair trial. However, there are numerous instances in which this right is compromised in reality. Before they have had their day in court, accused people are frequently treated like criminals. One example of this is when law enforcement parades arrested people through public areas so that they can be photographed by the media. This practise is known as a "perp walk," and another is when accused people are required to wear restraints that make someone appear dangerous. Article 14 of UDHR stipulates that everyone must be treated equally before the courts and tribunals. Everyone has the right to a fair and public hearing before a competent, independent, and impartial court that has been legally formed to determine their rights and obligations or the outcome of any criminal accusation brought against them. Accordingly, Article 21 of the Indian Constitution states that: No person shall be deprived of his life and personal liberty except according to the procedure established by law. One of the core tenets of both the rule of law and human rights is the right to a fair trial, which is intended to ensure the administration of justice. The fundamentals of a fair trial are unwavering and constructed in such a way that the rights of those who have been convicted are also protected. The unalienable right to a fair trial is available both before and after the trial.

VII. CONCLUSION

In conclusion, the concept of fair trial in the adversarial system is a crucial aspect of the justice delivery system. It ensures that both the prosecution and the defense have an equal opportunity to present their cases before an impartial adjudicator. The principles of a fair trial, such as the presumption of innocence, the right to legal representation, the right to a speedy trial, and the right to cross-examination, play a crucial role in ensuring that justice is served in a transparent and impartial manner. However, the adversarial system is not without its limitations, and efforts

May 2000, paras. 22 and 35.

⁵⁸ Jessica Lenahan (Gonzales) et al. (United States), 21 July, 2011

must be made to address these limitations to ensure that the system operates in an efficient and just manner. The role of legal professionals, including judges, lawyers, and legal scholars, is critical in shaping the paradigm of fair trial in the adversarial system and ensuring that the system operates in a manner that upholds the principles of justice and fairness.

In nutshell, It is the state's duty to establish a defendant's guilt, not the burden of the accused to establish their innocence. Additionally, it is the state's duty to provide evidence supporting the need for detention. People shouldn't be forced to confess to a crime or to implicate themselves using abusive interrogation techniques or the prospect of worse punishment for claiming their fundamental rights. In principle, exercising one's right to remain silent should not be punished, used as proof of guilt, or be a justification for holding one in custody until trial.

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