

# **RIGHT TO FAIR TRIAL**

## **Introduction:-**

A fair trial is an open trial by an impartial judge in which all parties are treated equally. The right to fair trial is one of the fundamental guarantee of human rights and rule of law, aimed at ensuring administration of justice.

Fair trial includes fair and proper opportunities allowed by law to prove innocence.

# Sources of law

## International Human Rights Law:

### Article 14 of the international covenant on civil and political rights

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (order public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgment rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;

(b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;

(c) To be tried without undue delay;

(d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;

(e) To examine, or have 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;

(f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;

(g) Not to be compelled to testify against himself or to confess guilt.

4. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.

5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.

6. When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.

7. 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.

## Article 10 of the Universal Declaration of Human Rights

Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.

Domestic fair trial right:

Indian constitution on fair trial:

Article 21 of the Indian Constitution: No person shall be deprived of his life and personal liberty except according to procedure established by law.

The right to defend oneself and for that purpose to adduce evidence is recognized by the parliament in terms of sub-section (2) of section 243 of code of criminal procedure, 1973.

**Principles of fair trial:** the following are the principles of fair trial:-

- i) Adversary trial system :
- ii) Presumption of innocence
- iii) Independent, Impartial and Competent judge:
- iv) Knowledge of accusation:
- v) Right to open trial
- vi) Right to free legal aid
- vii) Right to free legal aid
- viii) The trial in presence of accused
- ix) Evidence to be taken in presence of accused
- x) Protection against illegal arrest
- xi) Right to bail
- xii) Prohibition on double jeopardy
- xiii) Right against self incrimination

# Concept of reverse burden

The golden rule that runs through the web of civilized criminal jurisprudence is that an accused is presumed innocent until proved guilty of the charged offence. Presumption of innocence is a human right recognized as such under Article 14(2) on the International Covenant on Civil and Political Rights 1966. Article 11(!) of the Universal Declaration of Human Rights 1948, also provides that any person charged with penal offences has a right to be presumed innocent until proved guilty according to law in public trial in which he has all the guarantees necessary for his defence. Even before these declarations, this principle was part of common law of England as observed by viscount Sankey in

## **Woolington v. Director of Public Prosecutions,(1935 AC 462)**

### **Facts**

- Woolmington showed his wife a gun and said he would commit suicide if she left him to live elsewhere
- The gun discharged, killing the wife

### **Issue**

- Could the conviction be quashed on the grounds that the judge said it was for the jury to decide whether Woolmington had proved that the evidence was in his favour?

### **Decision**

- Yes, conviction quashed

### **Reasoning**

- Subject to some exceptions, it is always for the prosecution to prove beyond reasonable doubt that the defendant committed the crime in question
- Common exceptions are the defence of insanity, which the defendant has the legal burden of proving, and where Parliament expressly wills to the contrary

**K.Veeraswamy v. Union of India and  
others [(1991)3 SCC 655].**

“No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is a part of the common law of England and no attempt to whittle it down can be entertained.”

**V.D. Jhingam v. State of Utter Pradesh, AIR  
1966 SC 1762.**

“The cardinal rule of our criminal jurisprudence that the burden to prove the guilt of the accused would always lie upon the prosecution to prove all the facts constituting the offence beyond reasonable doubt. If there is a reasonable doubt, the accused is entitled to the benefit of reasonable doubt.”

**State of West Bengal v. Mir Mohammed  
Omar and Others, [2000(8) SCC 382]**

“The concept of reverse burden has been adopted in many statutes like Negotiable Instrument Act , Prevention and Corruption Act ,Narcotic drugs and Pyscotropic Substance Act and Unlawful Activities (Prevention ) Act ,1967 etc .In Indian Evidence Act,section 113A (for section 306 IPC) and section 113B (304B IPC) places reverse **burden** on accused.”

Recent two judge bench of Supreme Court in the case of **Sher Singh @ Partapa v. State of Haryana**. “The prosecution can discharge the initial burden to prove the ingredients of S.304B IPC even by preponderance of probabilities. Once the presence of the concomitants are established or shown or proved by the prosecution, even by preponderance of possibility, the initial presumption of innocence is replaced by an assumption of guilt of the accused, thereupon transferring the heavy burden of proof upon the accused and requiring him to produce the evidence dislodging his guilt, ‘beyond reasonable doubt. Keeping in perspective that Parliament has employed the amorphous pronoun/noun it followed



by the word “shown” in Section 304B, the proper manner of interpreting the Section is that “shown” has to be read up to mean “prove” and the word “deemed” has to be read down to mean “presumed”.

**Sanjeev kumar v. State of Punjab (2009)16 SCC 487** *para no.20 of the judgment ;*“

we cannot loose the sight principle that while the prosecution has to prove its case beyond reasonable doubt ,the dense of the accused has to be tested on the touchstone of probability.The burden of proof lies on the prosepction in all criminal trials , though the onus may shift to the accused in given circumstances, and if so provided by law. Therefore ,the evidence has to be appreciated to find out whether the defnse set up by appellatnt is probable and true”

**Rangammal v. Kuppuswami,(AIR 2011 SC 2344).**

“It is well established dictum of the Evidence Act that misplacing burden of proof would vitiate the judgment.”

Section 43E of the Unlawful Activities(Prevention) Act.1967 also raises similar presumption of the offence under Section 15 of the Act.Section 15 of the Act pertains to the pertaining of terrorists Act.

## **Speedy Trial through Lens of Terrorism**

The speedy trial is an essential feature of fair trial as adage; justice hurried is justice worried. Thus there is need to strike balance between right of the accused to have a speedy trial and right of the prosecution to fair opportunity to establish guilt of accused. The concept of right to speedy trial flows from Article 21 of the constitution of India.

In **Husainera Khatoon and others v. Home Secretary, State of Bihar, AIR 1979 SC 1369** “speedy trial is an essential ingredient of right to life and liberty under Article 21 of the constitution and it is the constitutional duty of the state to set up procedure to ensure speedy trial.”

In **Moti Lal Saraf v. Union of India, 2007 (1) SCC Cri,180.**” The Court observed that the concept of fair trial flows directly from the Article 21 of the Constitution of India.”

## **GOOD PRACTICE No. 2: HAGUE MEMORANDUM**

Good Practice 2: Support the Use of Continuous Trials in Terrorism and other National Security Cases A fair and expeditious criminal trial is a fundamental component of a functioning, effective justice system and an inherent right of the person charged.<sup>5</sup> However, in many legal systems, protracted legal proceedings and inherent delays remain a critical barrier to an effective, efficient, and just resolution of criminal cases. Delays also contribute to increasing community disillusionment with the justice system and decreasing satisfaction with the law. The negative impact of delays is shared by all of the participants in the judicial process: the accused, who is often detained pending trial; the victims and their family, who have been harmed by the offenses committed against them; and the community that demands justice, safety, and protection. For most judicial systems, the harm invariably includes taxing scarce judicial resources. The use of continuous trials provides for case management efficiency, lowering costs, and saving scarce resources.<sup>6</sup> One of the significant factors contributing to delays in the justice system is the discretionary practice of non-continuous criminal trials, where evidence is heard by the court in piecemeal fashion, with cases effectively spread out over the course of many months or even years. While limited judicial or court resources and a shortage of available court time due to the volume of cases are often cited for the use of this discretionary practice, the costs of non-continuous trials to both parties and to the justice system as a whole can far outweigh the perceived benefits. The negative effects of non-continuous trials include

the following: 4 Judges selected for such training should be experienced judges who have already handled serious cases and demonstrate the appropriate judicial temperament. The specialized training should be continuous throughout the time they are sitting on the bench. 5 ICCPR, *infra*, Art. 14.3.c 6 The GCTF Rabat Memorandum Good Practice 5 encourages States to adopt incentives for terrorist suspects and others to cooperate in counterterrorism investigations and prosecutions. - 4 - Promoting a culture of delays and general tardiness in the justice system. This in turn,• generally, results in a lack of focus on the case by both defense and prosecuting counsel. The lack of focus often results in modifications to charges or the defense theory over time causing further delays, or late or piecemeal production of evidence, potentially putting the accused in a disadvantageous posture<sup>7</sup> and increased potential for evidence to be misplaced or lost; A decreased incentive for both government and the accused to seek pre-trial resolution in• systems where a pre-trial disposition mechanism exists; A failure of the courts to streamline the trial process through effective case management,• such as not setting a pre-trial schedule with set dates and required performance and not identifying issues of contention that may be resolved prior to the commencement of a trial; Increasing the hardship on witnesses and victims by requiring multiple appearances. This• generally increases the likelihood of work and personal conflicts which can act as disincentives for non-professional witnesses to cooperate; Magnifying the anxieties associated with participation and increasing the opportunities• for intimidation or obstruction of justice caused by prolonged trial proceedings. All of which can cause witnesses and victims to become disillusioned with the justice system and not want to

cooperate with authorities; and, An adverse impact on the ability of the accused to receive a fair trial, especially where the accused is detained during pre-trial and trial. While all the underlying factors that have led many States to adopt the use of protracted proceedings cannot be addressed by the judiciary, a trial judge is responsible for safeguarding both the rights of the accused and the interests of the public in the administration of the criminal justice system. In all cases, the trial judge should: Seek to avoid delays, continuances, and extended recesses, except for demonstrated good cause; Be proactive in ensuring punctuality, the strict observance of scheduled court hours, and the effective use of working time to identify and resolve issues that may result in delays; 7 Production of evidence refers here to an obligation of the prosecution authority to disclose the evidence that it intends to use to prove the charges lodged and also includes exculpatory evidence that it may possess. - 5 - Permit full and proper examination and cross-examination of witnesses, but also require such examination to be conducted fairly, objectively, and within reasonable time constraints; and Not permit unreasonable repetition or permit counsel to pursue clearly irrelevant or improper lines of inquiry. It is recommended that where such authority does not now exist, States should ensure that judges have the authority to compel witnesses to appear at hearings or trial and otherwise have authority to manage the progress of a case. For example, some States have established guidelines for the length of time various stages of the trial process may take.

The govt., of India enacted the National Investigation Agency Act,2008 to constitute national agency at the national level to investigate and prosecute offence affecting the sovereignty ,

security and integrity of the state, friendly relations with foreign states and offences under acts enacted to implement international treaties, agreements, conventions and resolutions of United Nations.

Section 11 of the Act provides for constitution of special courts for such case or class or group of cases as may be specified by Central Government in the notification.

Section 19 of NIA Act addresses the issue of speedy trial of terrorism related offences and clearly lays down that the trial under NIA Act of any offence by special court shall be held on day to day basis.

The judgment in case of **Abdul Rehman Antulay and others v. R.S.Naik and another {1992(1) SCC225}** throws considerable light on the right to speedy trial as is recognized in India. It is now well accepted that right to speedy trial is a inherent and flows from article 21 of the constitution of India, which declares that no person should be deprived of his life and liberty except in accordance with procedure prescribed by law. The following conclusion drawn by the supreme court in the aforesaid case are noteworthy :-

**(1) Fair, just and reasonable procedure implicit in article 21 of the constitution creates a right in the accused to be tried speedily. Right to speedy trial is the right of the accused .The fact that a speedy trial is also in public interest or that it serves the societal interest also, does not make it any-the-less the right of the accused . It is the interest of all concerned that the guilt or innocence of the accused is determined as quickly as possible in the circumstances.**

**(2) Right to speedy trial flowing from article 21 encompasses all the stages,namely the stage of investigation, inquiry ,trial, appeal ,revision and retrial.**

**(3) The concern underlying the right to speedy trial from the point of accused are:**

**(A)**the period of remand and pre –conviction trial should be as short as possible.

**(B)**The worry, anxiety, expenses and disturbances to his vocation and peace resulting from and unduly prolonged investigation, inquiry ,trial should be minimal

- (C) Undue delay may well result impairment of ability of accused to defend himself.
- (4) The delay is more defence tactic and more often than not ,it is caused due to the tactis of defence .since the burden of proving guilt is of the accused lies upon the prosecution, delay ordinarily prejudices the prosecution .
  - (5) While determining undue delay has right to speedy trial one must have regard to all the attendant circumstances, including nature of offence, number of accused and witnesses, the workload of the court concerned prevailing local conditions and so on what is called ,the systematic delays.
  - (6) Each and every delay doesnot necessarily prejudiced the accused.
  - (7) The “DEMAND RULE” the accused cannot be in matter of violation of speedy trial
  - (8) Ultimately court has to balance and weigh the several relevant factors balancing test and balancing processes and determine in each case whether the right to speedy trial has been denied or not .
  - (9) It is not necessary in every case to quash the proceedings, where the court comes to the conclusion that right to speedy trial of accused has been violated thus nature of offence and other circumstances in a given case may not be justified to quash the criminal proceedings on the ground of mere delay.
  - (10) It is neither practicable nor advisable to fix any time limit for trial of offence, it depends on the fact and circumstance of each case .



(11) An objection based on denial of right to speedy trial and for relief on that account, should be first addressed to high court. Such proceedings in high court should be disposed of on a priority basis.

*The law laid down in **Abdul Rehman** case (supra) and the proposition laid down therein would govern even trials in terrorism related cases.*

# Open justice v. In camera trial

## **Introduction :**

**The law belongs to the people. Access to the legal system is a basic right and public good. Chief Justice of Canada The Rt Hon Beverly McLachlin “the open justice is constitution principle of highest order. It can be disapplied only when the administration of justice is disserved by adherence to it.**

### ***From unruly crowds to Bentham’s publicity***

“Publicity is very role of justice .It keeps judge under trial while trying .It pplays vital role in The rule of law.” The exception to the rule of open justice represents those instances in which completely open court have undermined the purpose of hearing.

***The lord bigham in his book “Rule Of Law” defined rule of law of which open court principle is key component as “***

All the person or authority with state whether private or public should be bound by and entitled to the benefit from the laws publically made taking effect ( generally in future and publically administered in the courts). It is evident that justice should not only be done but seem to be done .Open justice enable public to see how justice administered and by subjecting it to public and press scrutiny, safeguards and fairness of the trial. Indian Constitution guarantees freedom of speech and expression with certain restrictions. Freedom of speech includes freedom of press. Also that the trial should be heard by public, the

accused has the right to know for what he is tried for. It should be in the language known and understood by public and accused. IT ensures that the trial was conducted by judge is fair and the judge is not biased. Every rule as an exception and to the principle of open court is also not absolute, there are certain circumstances and situation where trial can be held in camera .These exceptions have been statutorily and judiciously well recognized in India.

**OPEN JUSTICE:** Open justice work with its ideas such as adequately facility for public and press to sit, report the proceedings to the public, for the public to inspect the pleadings, for the accused to know the trial and to be tried before him and the lat accused to confront his accuser. Openness, while being of general importance to the conduct of trial, takes on heightened importance in the case of criminal proceedings. This is based on natural justice principle and doctrines such as *audi alterm partem* and *nemo judex in causa sua* . There is one more reason why the trial should be conducted in open court is that the public shall either criticize that the law has been misapplied or that the law itself needs amendment.

Indian constitution “that the judgment of the supreme court of India shall be delivered only in open court “. The stress to open justice can be seen in order XVIII rule 4 of civil procedure code, 1908. The similar is the position in the criminal trials. Under the UAP Act while terrorism case the emphasis is to have an open court trial.

## **GOOD PRACTICE No. 8: HAGUE MEMORANDUM**

Good Practice 8: Develop and Articulate Media Guidelines for the Court and Parties Trials involving the prosecution of terrorism offenses are

generally high profile by their nature, inviting scrutiny from the general public and the media.<sup>20</sup> As a general rule, timely access to accurate information of court proceedings increases transparency and public confidence in the fairness of the justice system. The judiciary should develop rules and procedures for media coverage of public judicial proceedings, with good practices including the following: Providing the trial judge with latitude to control the conduct of the proceedings to:• (i) maintain decorum and prevent distractions; (ii) guarantee the safety of any court official, party, witness, or juror (where applicable); and (iii) ensure the fair and impartial 20 In states where terrorism and other national security offenses are not tried in a public court or are otherwise closed to the public, close media coverage is limited because of a lack of access and in some situations, may be prohibited by law. - 13 - administration of justice in the pending case. policy that requests by representatives of the media for such coverage are made in writing to the trial judge, prior to the scheduled trial date or specific trial event. Written should be provided by the court to the attorneys of record in the case, with the parties provided an opportunity to object.<sup>21</sup> Before denying, limiting, suspending, or terminating media coverage, the trial judge may• hold a hearing, if such a hearing will not delay or disrupt the judicial proceeding or receive affidavits to consider the positions of the parties. Any finding that media coverage should be denied, limited, suspended, or terminated• should be supported by a finding of the court that outlines the underlying justifications for its actions. The court may prohibit the use of any audio pickup, recording, broadcast, or video close• up of conferences, which occur in a court facility, between attorneys and their clients, between co-counsel of a client, and between counsel and the presiding judge held at the trial. When more than one request for media coverage is made and the trial judge has granted•

permission, the court may request that the media select a representative to serve as a liaison and be responsible for arranging "pooling" among the media if such is required by limitations on equipment and personnel as a result of courtroom space limitations or as directed by the court.

22 Where non-print media is covering a trial, the judge may impose additional guidelines• which limit the use of photographic and audio equipment to that which does not produce distracting sound or light and may limit or prohibit the use of moving lights or flash.

**Section 327 of code of criminal procedure** emphasize necessity of open court and clearly provides that 'the place in which any criminal court is held for the purpose of inquiring into and trying any offence shall be deemed to be an open court, to which the public generally may have access so far as the same can conveniently contain them.

## **Exception to the rule of open justice:**

- (1) An exception to the rule of open court can be justified only if it is necessary in the interest of proper administration of justice.
- (2) It has been seen that at the presence of the public and press at the trial will often result in increased stress for the accused, the invasion of his privacy, and damage to his reputation.
- (3) **Smt. Ujjam Bai v. State of U.P .** The power to prohibit publication of proceedings is essentially the same as the power to hold a trial in camera and the law empowering a trial in camera is a valid law and does not violate the fundamental right in regard to liberty of speech.
- (4) **Section 327 of the code of criminal procedure,** advocates open trial with well recognized exception trial in rape cases are needed to be held in cameras.

The need for in camera trials can also be seen in Unlawful activities ( Prevention) Act,1967. Section 44 clearly states that this section, ostensibly for the purpose of protecting witnesses permits the court to hold proceedings in camera and take another measure for keeping the identity and address of the witness secret, including passing an order that “ all or any of the proceedings pending before such a court shall not be published in any manner “.

## **SUBCONSCIOUS BIAS AND PRECONCEIVED NOTIONS IN TERRORISM CASES:**

Subconscious bias in judicial decision also known as implicit bias in judicial decision making is when our attitudes or stereotypes affect our decision making and behavior, without our even realizing it. Implicit bias can function automatically, even in ways that the person holding such a view point would not endorse if that person were aware of it.

The implicit or subconscious bias could be of various types:-

- (i) Racial bias;
- (ii) Regional bias;
- (iii) Religion bias;
- (iv) Caste bias; and
- (v) General bias

### **Conclusion:**

1. The judicial code of conduct expressly requires judges to engage in impartial decision making. Judges take their oath

seriously, yet the judges hold similar implicit biases as the rest of the public.

2. In addition, the judges are generally overly confident in their self-assessment in their ability to control their biases.
3. The judges need to be made aware of their implicit and explicit biases.