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Right to a Fair Trial vis-a-vis Criminal Justice Administration: A Study of the Provisions in India, South Africa and UK

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ABSTRACT

Right to fair trial is a facet of Due Process or Natural Justice, which can be significantly traced back to Roman Jurisprudence and in the contemporary times to the Magna Carta. The Right is accessible or has to be made accessible to every individual in both civil and criminal cases. But it has a significant role to play in Criminal Justice Delivery mechanism, as the accused has to fight the whole state machinery trying to prove his guilt. The importance of the same has been so imminent that it has been raised to the pedestal of Fundamental rights. The deprivation of free trial is injustice to the aggrieved as well as to the society, as violation of the same is a looming danger of magnanimous level. A mere glance at the international monitoring organs' jurisprudence depicts that the right to fair trial is often violated in various parts of the world. Right to Fair trial has been adapted in various forms in various countries with more or less the same fundamental structure.

The Research paper will critically examine the dynamic legal structure of the international organizations with a specific focus on India, UK and South Africa. The research paper will be dealing with the principle of equality before law which is applicable in both criminal, it will further deal with the principle of presumption of innocence which is of utmost importance in regards to the criminal proceedings. The paper will further discuss the various obstacles which the countries have been facing in order to administer justice. The paper will also specify about the Pre-trial procedure which has a bearing on Fair Trial Principles and trial rights.

I. INTRODUCTION

The right of fair trial is one of the most important norms of International Human Rights Law and has been adopted as a part of procedural law in many countries. This principle has been enshrined in the Constitutions of countries like India, Canada, USA, South Africa and UK. Various International documents have given the definition of Right to Fair Trial. The Universal Declaration of Human Rights, 1948 has upheld the major features of criminal trial.

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Article 10– "*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"*[3]

Article 11– "*(1) Everyone charged with a penal offense 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 defense. (2) No one shall be held guilty of any penal offense on account of any act or omission which did not constitute a penal offense, 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 the penal offense was committed."*[4]

Article 14 of the **International Covenant on Civil and Political Rights**[5] 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."* **Article 14(2)** provides for "*the presumption of innocence*," and **article 14(3)** sets out *a list of minimum fair trial rights in criminal proceedings.*" **Article 14(5)** establishes the rights of a convicted person to have a higher court review the conviction or sentence, and **article 14(7)** prohibits double jeopardy

Section 11 of the **Canadian Charter of Rights and Freedoms**[6], protects a person's basic legal rights in criminal prosecution.

Article 6 of the **European Convention on Human Rights**[7] provides the minimum rights, adequate time and facilities to prepare their defense, access to legal representation, right to examine witnesses against them or have them examined, right to the free assistance of an interpreter to everyone charged with a criminal offense.

The Sixth Amendment to the United States Constitution provides in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favour, and to have the assistance of counsel for his defense.

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

[3] Universal Declaration of Human Rights, Article 10 (1948)
[4] Universal Declaration of Human Rights, Article 11 (1948)
[5] International Covenant on Civil and Political Rights, Article 14 (1966)
[6] Canadian Charter of Rights and Freedoms, Section 11(1982)
[7] European Convention on Human Rights, Article 6 (1950)

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highlighted the pivotal role of fair trial in a number of cases. 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.

II. CONSTITUTION AND ITS ROLE IN CRIMINAL ADMINISTRATION

Only a constitutional structure can provide for a robust criminal administration. A few of the essential constitutional principles are very much intrinsic to the structure and functioning of a modern state and moreover it provides for a constitutional right to get a fair trial even in criminal law. Principles of constitution such as democracy, rule of law and human rights, guarantee a fair trial. States have the duty to maintain law and order and to uphold the democratic society, hence, there is legislation on criminal law administration system.

The decency of a state can be deduced from the state's conduct of its punishment policies followed by the procedure followed. A state with decency treats human beings with dignity.

The structure of the constitution comes into play when there is a bridge required between criminal law and international law on human rights.

III. HUMAN RIGHTS AND CRIMINAL PROCEEDINGS

- The right to respect for one's private life, home and correspondence: The right to respect for one's privacy, family, home and correspondence is guaranteed, albeit in different terms, by article 17 of the International Covenant on Civil and Political Rights, article 11 of the American Convention on Human Rights and article 8 of the European Convention on Human Rights. Limitations on its exercise may however be imposed in certain circumstances.
- The right to be treated with humanity and the right to freedom from torture: The treatment of detainees and prisoners will be dealt with in further detail in Chapter 8, but in view of the frequency of recourse to torture and other ill-treatment of persons deprived of their liberty in the context of criminal investigations, it is indispensable to emphasize here that the right to freedom from torture, cruel or inhuman treatment or punishment is guaranteed by all the major treaties and by the Universal Declaration of Human Rights, article 7 of the International Covenant on Civil and Political Rights[8]; article 4 of the African Charter on Human and Peoples' Rights[9]; article 5(2) of the American Convention on Human Rights[10];

[8] International Covenant on Civil and Political Rights, Article 7 (1966)
[9] African Charter on Human and Peoples' Rights, Article 4(1981)
[10] American Convention on Human Rights, Article 5(2) (1969)

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article 3 of the European Convention on Human Rights[11], which does not contain the term "cruel"; and article 4 of the Universal Declaration). In some legal instruments this right is reinforced, for persons deprived of their liberty, by the right to be treated with humanity and with respect for the inherent dignity of the human person. In the course of criminal investigations and judicial proceedings, the universal and non-derogable prohibition on torture and other inhuman or degrading treatment or punishment is consequently to be respected at all times, without exception even in the direst of circumstances

- The right to be notified of the charges in a language one understands: Article 14(3)(a) of the International Covenant on Civil and Political Rights provides that in the determination of any criminal charge against him, everyone shall be entitled *"to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him".*

- The right to legal assistance: The right to prompt legal assistance upon arrest and detention is essential in many respects, both in order to guarantee the right to an efficient defence and for the purpose of protecting the physical and mental integrity of the person deprived of his or her liberty. While all relevant human rights treaties guarantee the right of an accused to legal counsel of one's own choosing (art. 14(3(d) of the International Covenant, art. 7(1)(c) of the African Charter and art. 6(3)(c) of the European Convention), article 8(2)(d) of the American Convention on Human Rights provides moreover that during criminal proceedings every accused person has the right *"to communicate freely and privately with his counsel."*

- The right not to be forced to testify against oneself: The right to remain silent Article 14(3)(g) of the International Covenant guarantees the right of everyone "not to be compelled to testify against himself or to confess guilt", and article 8(2)(g) of the American Convention provides for the right of everyone "not to be compelled to be a witness against himself or to plead guilty", a provision that is strengthened by article 8(3) according to which "a confession of guilt by the accused shall be valid only if it is made without coercion of any kind". The African Charter and the European Convention contain no similar provision.

- The duty to keep records of interrogation: It is essential, both in order to prevent and if need be to prove the occurrence of treatment prohibited by international human rights law, and consequently also for the future judicial proceedings, that records of interrogations be kept and that they remain accessible both to prosecuting authorities and to the defence.

- The right to adequate time and facilities to prepare one's defence Article 14(3)(b) of the International Covenant on Civil and Political Rights provides that in the determination of

[11] European Convention on Human Rights, Article 3 (1950)

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any criminal charge against him, everyone shall be entitled *"to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing".*

IV. WHAT IS FAIR TRIAL?

Fair trial basically deals with the duty that the State and its instruments have to bring the offenders to justice. In the war against crimes and law, the state and its instruments on no counts forsake the reputation of behaviour of state and take recourse to extra judicial ways even for the detection of crime or criminals. Otherwise how can we the state insist its citizens to be in their best behaviours if the state itself is behaving in an unjust manner. Hence, the methods taken up by the state should be reasonable and fair. An accused should not be punished unless they have been given a chance to appear in a fair trial and proven guilty.

The right to fair trial was further defined in English common law by Dicey's principle of 'the rule of law'. Dicey suggested that courts ought to be established by law, without any influence on, or interference with, their powers.

V. PRINCIPLES OF FAIR TRIAL UNDER INDIAN LEGAL SYSTEM

Article 21 of the Indian Constitution[12] provides protection to the convicts. It says no person shall be deprived of his life and personal liberty except to the procedure established by law and it adds the quality of life, right to live with human dignity, right to livelihood is the primary aspect of human being life. It provides right to a reasonable, fair, and just trial.

In Maneka Gandhi v. Union of India[13] the supreme court held that right to live is not a physical right but includes right to live with human dignity. the procedural rights also include right to information and document which being used against him will deprive him, of a due opportunity to defend himself which is the human right to free and fair trial.

In the case P. Ramachandra Rao v., the State of Karnataka[14] (2002), the Court established that under Sections 309, 311, and 258 of the Code of Criminal Procedure[15] provides the right provides for speedy trial. The High Court under Section 482 of the Criminal Procedure Code and Articles 226 and 227 of the Constitution can be used to seek appropriate remedy and directives. fundamental right under Article 21focuses on right to quick and fair trial.

Sec 243 Cr. P.C: evidence for defence - It is obligatory on the part of the trial court to issue

[12] INDIA CONST. art. 21
[13] Maneka Gandhi v. Union of India (1978) 1 SCC 248
[14] P. Ramachandra Rao v., the State of Karnataka (2002) 4 SCC 607
[15] The Code of Criminal Procedure, 1973

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process when the accused seeks summoning of any witnesses or production of any document in his defence

VI. PRINCIPLES OF IMPARTIAL TRIAL

(A) Adversary system

Our country adopts human system of criminal trial. in step with this any dispute on the criminal responsibility of someone is to be resolved by the judicature when giving truthful and adequate chance to the person before the court of their several cases. It permits associate Impartial and competent court to own correct perspective of the case and it's a more robust device to get the reality in an exceedingly truthful manner. In such, state represent the victim and therefore the state starts an attempt against the suspect.

This system recognized equal right and chance to each the parties. Further, the code needs the judicature to play a lot of active and positive role than that of mere referee within the combat between the prosecutor-state and therefore the suspect person. The charge against the suspect is to be framed not by the prosecution however by the court when considering the circumstance of the case and lawyer cannot withdraw from the case while not the consent of the court.

Himanshu v. State of MP[16] two case apex court fanciful that below free trial the Code is not granted to the gatherings and court has motivations to simply accept that organization or examiner is not acting within the imperative means and therefore the court will observe its power below section 311 and 165 of the Code of the Indian Evidence Act, 1872 to bring for the material witness and acquire the necessary reports so as to serve the reason for equity.

(B) Presumption of innocence

An accused has the right to be presumed innocent until he is proven guilty and this is a central role of our criminal justice system. It is the responsibility of the state to prove the guilty. If the accused is silent, it should not be used as evidence of guilt or as a reason to place them in pre-trial detention.

State of U.P. V. Naresh and Ors[17], the Supreme Court observed every accused is assumed to be innocent unless his guilt is proved. The presumption of innocence is a human right subject to the statutory exceptions. The said principle forms the basis of criminal jurisprudence in India."

[16] Himanshu vs State of MP and Ors, MANU/SC/1193/2008.
[17] State of U.P. V. Naresh and Ors (2001) 4 SCC 324

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(C) Independent, impartial and competent judge

The most essential feature of a fair criminal trial is to have an independent, impartial and competent Judge to conduct the trial. The Code has provided for the separation of the judicial from the executive and it would ensure the independent functioning of judicial free of all suspicion of executive influence or control. The right to an independent and impartial tribunal established by law is a right of every convict

(D) Expeditious trial

Article 21[18] of the Constitution confers an inviolable fundamental right of expeditious trial to the applicant main purpose of expeditious trial

(1) to set off the right of the accused to a speedy trial;

(2) timely resolution of criminal cases in a fair and accurate manner according to public interest and

(3) ensuring the effective utilization of resources.

(E) Doctrine of double jeopardy under article 20 (2)[19]

According to this doctrine if someone is tired and not guilty of any offence he can't be tired more than once for same offence or on same facts for the other offence. This doctrine has been considerably incorporated in Article 20(2) of the constitution and is additionally embodied in section 300 of the code. The second or future trial in violation of the higher than doctrine would mean unjust harassment of the suspect person and may be thought of as something however truthful and has prohibited each by the code and the constitution.

In S.A. Venkatraman V. Union of India[20] case the Supreme Court states that the procedure taken before the Enquiry Commissioner did not add up to a commission for an offense. it had been within the plan of truth finding to prompt the government for disciplinary activity against the appellant. It cannot be aforesaid that the individual has been indicted.

(F) Hearing ought to be in open court

Fair trial needs public hearing in associate open court. Section 327 of the Code makes provision for open court usually accessible to the members of the general public.

According to section 327 the place wherever the court is in command shall be open court that the general public might have access. Public trial in open court is an incredible instrument for

[18] INDIA CONST. art. 21
[19] INDIA CONST. art. 20
[20] S.A. Venkatraman V. Union of India 1954 AIR 375

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creating certainty of public in reasonableness, sound judgement and fair mindedness of the organization

In the case of Naresh Sridhar Mirajkar V. State of Maharashtra[21], the apex court observed that the right to open trial must not be denied except in exceptional circumstances. High Court has inherent jurisdiction to hold trials or part of a trial in camera or to prohibit publication of a part of its proceedings.

According to section 479,

1. No judge or magistrate shall expect with permission of the upper court strive or commit for trial any case to or during which he's a party or personally interested

2. No judge or a magistrate shall hear any appeal from any judgement or order passed or created by himself.

3. Transfer of case to secure impartial trial- in step with section a hundred ninety (1) c, a magistrate has power to require cognizance of any offence might do upon his own knowledge concerning the commission of any such offence. However, in such case the suspect should be told before any proof is taken that he's entitled to own the case tried by another magistrate sec. 191

Secondly, whenever it's created to look to the high court that a good and impartial inquiry or trial can't be command in any criminal court subordinate thereto might subject to condition set down in section 407, order that

(i) any offence be inquired into or tired by the other competent court or

(ii) that any explicit case or category of case be transferred from a court subordinate to its authority to the other judicature. Similarly, the ability of transfer of cause given to the Supreme court and therefore the session court by section 406 and 408.

In K Anbazhagan v. Superintendent of Police[22], Supreme court command that party interested about sec 406(2) would comprehend political opponents of the suspect spoken communication they're the watch dogs of the govt. in power. The petitioner wished the criminal case filed against the Chief Minister of the state to be transferred out of the state. The Supreme court ordered spoken communication that the petitioner has raised several excusable and affordable apprehensions of miscarriage of justice would need our interference in exercise of power below

[21] Naresh Sridhar Mirajkar V. State of Maharashtra AIR 1967 SC 1
[22] K Anbazhagan v. Superintendent of Police AIR 1996 SC 1418.

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sec.406 Cr. P.C.[23]

(G) Knowledge to the accused of his accusation and adequate opportunity

Accused ought to be truthful opportunity to defend himself and therefore the particulars of the offence of that he's suspect shall be declared to him. The proper to own precise and specific accusation is contained in Section 211 of the Code.

Article 22[24] of the Indian Constitution provides that no person can be detained in custody without giving proper information. The Sixth Amendment of the Constitution of the United States also provides this right of the accused to know the accusation. The accused should be aware of the reason why he is being detained. Section 50[25] of the Code of Criminal Procedure also provides that it is the right of every accused to be informed about the various grounds of arrest. The police officer has to inform the person of the various reasons for arrest if the arrest is done without a warrant.

The right to have precise and specific accusation is contained in section 211[26] Criminal procedure code. The right to adequate time and facilities for the preparation of a defence applies not only to the defendant but to his or her defence counsel as well.

(H) Trial in presence of accused

The presence of the suspect throughout his trial will be understood from the provisions which permit the Court to dispense with the non-public attending of the suspect person under certain circumstances, a magistrate issuing summons might dispense with the non-public attending of the suspect and allow him to look by his advocate (Section 205). Section 317 empowers the court to dispense with personal attendance of the accused person at his trial.

This power will be exercised on condition that the suspect person is represented by a lawyer. The Court is additionally needed to record its reasons for such order.

(I) Evidence to be taken in presence of accused

Section 273[27] of the Code contemplated that evidence to be taken in presence of accused.

According to section 273 all evidences taken in presence of the accused or when his personal attendance is dispensed with in the presence of his pleader. according to sec. 279, any evidence can be given in any language and if not understood it shall be converted in language understood

[23] The Code of Criminal Procedure, Section 406 (1973)
[24] INDIA CONST. art. 20
[25] The Code of Criminal Procedure, Section 50 (1973)
[26] The Code of Criminal Procedure, Section 211 (1973)
[27] The Code of Criminal Procedure, Section 273 (1973)

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by him. if any accused is of unsound mind and is unable to understand the proceeding in such case special provision in section 328 -339 shall be applied.

(J) Cross-examination of prosecution witnesses

Evidence given by witnesses may become more reliable if given on oath and tested by cross-examination. Though the burden of proving the guilt is entirely on the prosecution and though the law does not require the accused to 52 lead evidence to prove his innocence, yet a criminal trial in which the accused is not permitted to give evidence to disprove the prosecution case, or to prove any special defence available to him, cannot by any standard be considered as just and equitable.

(K) Autrefois Acquit and Autrefois Convict

According to this doctrine, 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. This doctrine has been substantially incorporated in the article 20(2) of the Constitution and is also embodied in section 300 of the Cr. P.C.[28]

In Kolla Veera Raghav Rao vs Gorantla Venkateswara Rao[29] the Supreme Court observed that Section 300(1) of Cr.P.C. is wider than Article 20(2) of the Constitution. While, Article 20(2) of the Constitution only states that *'no one can be prosecuted and punished for the same offence more than once'*, Section 300(1) of Cr.P.C. states that no one can be tried and convicted for the same offence or even for a different offence but on the same facts. In the present case, although the offences are different but the facts are the same. Hence, Section 300(1) of Cr.P.C. applies. Consequently, the prosecution under Section 420, IPC was barred by Section 300(1) of Cr.P.C. The impugned judgment of the High Court was set aside.

VII. ISSUES IN CRIMINAL JUSTICE ADMINISTRATION IN INDIA

The Criminal Justice System in India is considered as the best example of the phrase "Justice delayed, Justice denied". The potency of any justice system can be judged by the speed at which the cases are disposed of. Right to Speedy Trial is given under Section 309 of CrPC and it is considered as a Constitutional right of every accused. Generally, delay in Speedy trial is because either of delay in investigation of crimes or the negligent way in which a case is investigated. This this inordinate delay in litigation is leading to huge pendency in courts. According to a data approximately 30 million cases are pending in various courts.

[28] The Code of Criminal Procedure, Section 300 (1973)
[29] Kolla Veera Raghav Rao vs Gorantla Venkateswara Rao (2011) 2 SCC 703

Many of these cases consist a story of an innocent man who are in jail as an under trial prisoners for decades. In Akshardham Terror Attack case, the accused Mufti Abdul spent 12 years in jail. On 16 May 2014, a Supreme Court bench composed of Justices A. K Patnaik and Venkate Gopala Gowda acquitted all six persons, including those awarded the death penalty. The Supreme Court slammed the Gujarat Police for the incompetence with which it investigated the case. The bench gave the decision holding that the prosecution failed to establish the guilt of the accused. In 2012 Delhi gang rape case the Supreme Court took 7 years to pass the verdict. In India there are 10 judges per million people as compared to 107 in England. This figure needs to be increased to ensure that the case is disposed of on time.

We as a society needs to work towards a system in which the principles of criminal jurisprudence are adhered to. A system in which right to fair trial for both the parties is respected. Trials by media need to be stop immediately because the nation saw the disaster it created in the **Aarushi Murder Case**[30]. The media played a major role in pointing towards her parents. Other examples include **Priyadarshini Mattoo case**[31], **Jessica Lal case**[32]. **Nitish Katara murder** case[33]. There have been numerous examples where the media has been accused of conducting the trial of the accused and passing the verdict even before the court passes its judgment. The job of the media is to act as watchdog and tell what is happening in the society. Hence, proper rules and regulations should be made to ensure a proper code of conduct.

VIII. SOUTH AFRICA AND THE LAWS REGARDING FAIR TRIAL

Incorporation of the rights in the South African Constitution in 1945, South Africa became a party to the UN Charter and was, therefore, obliged to respect and observe human rights.114 This situation did not last very long: in 1948 the National Party came to power and introduced apartheid as an official aspect of government policy. South Africa thereby became the only 'Western' country to abstain from adopting the provisions of the UDHR.

Article 5 of the African Charter[34] provides for the protection of the right to human dignity of every individual and recognition of his legal status;

Article 6[35] protects the right to liberty and security of person and prohibits the deprivation of freedom except for reasons and conditions previously laid down by law and no one may be

[30] (1984) 2 SCC 627
[31] 2007 CriLJ 964
[32] (2010) 6 SCC 1
[33] 724 SC 2016
[34] African Charter on Human and Peoples' Rights, Article 5(1981)
[35] African Charter on Human and Peoples' Rights, Article 6(1981)

arbitrarily arrested or detained;

Article 7[36] provides that everyone shall have the right to have his cause heard which comprises of the right to appeal; the right to be presumed innocent; the right to defence; and the right to be tried within a reasonable time by an impartial court or tribunal. It also refers, in subsection 2, to the principle of legality; and

Article 26[37] places a duty on state parties to guarantee the independence of the courts. Every accused has the right to a fair trial in terms of sections 12 and 35 of the Constitution of the Republic of South Africa Act 108 of 1996.

Section 34[38] of the South African Constitution provides for the rights of access to courts and for a fair hearing in civil disputes as follows: '*Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum'.*

Section 35(3)[39] of the Constitution provides a host of fair trial rights in criminal cases, including the right to legal representation. The provision on criminal proceedings 'entrenches basic norms of criminal procedure and provides for the right of an accused person to a fair trial'. Since the right to a fair trial is central to the rule of law, it requires criminal trials to be conducted in accordance with the 'notions of fairness and justice' These principles require a separation of powers between legislative, executive and judicial officers of the state, which ensures the equal protection of other human rights, including the right of access to courts.

Section 34 provides for a fair civil trial, which requires independence and impartiality of the courts, and guarantees fair and public hearings. Implicit in both the criminal and civil aspects of fair trial is the principle of equality, which requires a 'fair balance' between disputing parties. This right is expressly protected by section 9 of the Constitution. It is clear from the above definitions of the rights of access to justice and fair trial that they overlap, although the Constitution seems to ignore this connection. This, however, is a critical issue.

First, section 34, which provides for access to courts and a fair civil trial, does not mention the right to legal representation, as in section 35(3). This omission makes it particularly difficult for rural women to pay for legal counsel, since as litigants, they are mostly involved in civil claims such as divorces and maintenance matters, with no assurances of legal aid. Secondly, the same section, which provides for a fair criminal trial, requires strict procedural rules that

[36] African Charter on Human and Peoples' Rights, Article 7(1981)
[37] African Charter on Human and Peoples' Rights, Article 26(1981)
[38] Section 34 of the Constitution
[39] Section 35(3) of the Constitution

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appear inapplicable in traditional tribunals, especially the right to equality, which affects the treatment of women. To expound upon the conceptual framework of the rights of access to justice and fair trial, it is useful to examine their international origins.

In Shinga v The State, the Constitutional Court(CC)[40] in 2007, made it clear that all subsequent proceedings, for example applications for leave to appeal, petitions, appeals and reviews, should meet the requirements of a fair trial as set out in s 35(3) of the Constitution. Although the procedures of applying for leave to appeal by way of an application or a petition have undergone serious judicial and legislative scrutiny over the past few years, the CC stated that these procedures are necessary in order to identify and prevent unmeritorious appeals. In order to give full effect to the constitutionally guaranteed right to a fair trial, the CC ordered that the full record of the proceedings of the court a quo be sent to the High Court when a convicted person files a petition, that two judges consider the petition, and, that, if leave to appeal is granted, the appeal be heard in an open court with oral argument being provided for. It is noteworthy that the CC finally took matters in its own hands. The CC decided to amend the CPA by using the tools of severance and reading in. In addition, the order was granted with immediate effect.

In the case of S v Tandwa and Others[41], the Supreme Court of Appeal held that for the trial to be fair an accused person is not only entitled to legal representation but has a right to legal representation that is competent and of quality and of such a nature to ensure that the trial is indeed fair.

The court in the case of S v Hena[42] stated that courts have discretion to allow unconstitutionally obtained evidence and the criterion that must be applied is whether the admission of such evidence is detrimental to the administration of justice. Moreover, in S v Tandwa the Supreme Court of Appeal confirmed that evidence obtained after the accused was assaulted by the police or where such evidence was procured by torture, assault, beatings and other forms of coercion violates an accused fair trial rights at its core and it brings the entire justice system into disrepute.

The rights for fair trial protected by the Bill of Rights are not absolute-it may be limited in certain prescribed circumstances. Any limitation must comply with the requirements set out in section 36 of the Constitution also referred to as the limitation clause.

[40] Shinga v The State (Society of Advocates, Pietermaritzburg Bar, as Amicus Curiae); O'Connell v The State (1) 2007 (4) SA 611 (CC)
[41] S v Tandwa [2007] SCA 34 (RSA)
[42] S v Hena 2006 (2) SACR 33

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Pre Trial Rights

1. The Right to Liberty and Prohibition of Arbitrary Detention

This right is guaranteed in article 6 of the African Charter, article 9(1) of the ICCPR, as well as in article 3 of the UDHR, among other human rights standards. Article 6 of the African Charter:

"Every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained."[43]

The right to liberty is not absolute. International human rights standards prescribe the circumstances and manner in which people may lawfully be deprived of their liberty, including in the context of law enforcement. The standards include measures and safeguards that aim to protect against abuse by the state of the power of detention. They aim to safeguard the rights, lives and physical and mental integrity of people who are deprived of their liberty.

2. Rights to information upon arrest

Everyone who is arrested or detained has the right to be informed of the reasons for his or her arrest. This right is set out in article 9(2) of the ICCPR. While not expressly set out in the African Charter, the duty to inform of reasons for arrest or detention are necessary to ensure the effectiveness of the prohibition of arbitrary arrest and detention in article 6 of the African Charter.

3. The right to legal assistance before trial

Everyone arrested or detained has the right to legal counsel. This right applies to everyone in detention, whether or not in connection with a criminal offence. It also applies to everyone suspected or charged with a criminal offence, whether or not they are deprived of their liberty. The Principles on the Right to Fair Trial in Africa affirm that *"legal representation is regarded as the best means of legal defence against infringements of human rights and fundamental freedoms."*

4. Right to contact with others

Everyone who is arrested or detained has the right to inform, or have the authorities notify, a family member or another person that they have been arrested or detained and where they are being held. In addition, each time the individual is transferred, they have the right to notify

[43] African Charter on Human and Peoples' Rights, Article 6(1981)

their family or third person where they are being held.

5. Presumption of release from custody and police bail

While the presumption of release is not expressly set out in the African Charter it is implicit in the right to liberty in article 6, and it is set out in the following standards that have been established by the African Commission.

6. The right to be brought promptly before a judge

To safeguard the right to liberty and other human rights, all forms of detention or imprisonment must be ordered by or subject to the effective control of judicial authorities. It should be noted that this right is distinct from, and not alternative to, the right of a person to access a court in order to challenge the lawfulness of his or her or another person's detention.

7. The right to challenge the lawfulness of detention

Everyone deprived of their liberty has the right to bring proceedings before a court to challenge the lawfulness of their detention. The court must consider and rule on such challenges without delay, and order the release of the individual if the detention is unlawful. This right is enshrined in article 9(4) of the ICCPR among other international standards. The jurisprudence of the African Commission has clarified that the right to challenge the lawfulness of detention is inherent in article 7(1) of the African Charter.[44]

8. Right of detainees to trial within a reasonable time or release

All people charged with a criminal offence, whether or not they are detained, have the right to a trial without undue delay. This right is guaranteed under article 7(1)(d) of the African Charter and article 14(3) of the ICCPR. It is based on the presumption of innocence and the interests of justice.

9. Right to adequate time and facilities to prepare a defence

As part of the right of defence, everyone suspected or charged with a criminal offence has the right to adequate time and facilities to prepare and present a defence. This right is guaranteed in Article 7(1)(c) of the African Charter while not explicit, it is widely understood as part of the rights of defense.

United Kingdom on Fair Trial

Right to a fair trial in the United Kingdom is guaranteed by the Article 6 of the Human Rights Act 1998.

[44] African Charter on Human and Peoples' Rights, Article 7(1981)

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Between 1971 and 1975, the right to a fair trial was suspended in Northern Ireland. Suspects were simply imprisoned without trial, and interrogated by the British army for information. This power was mostly used against the Catholic minority. The British government supplied deliberately misleading evidence to the European Court of Human Rights when it investigated this issue in 1978. The Irish government and human rights group Amnesty International requested that the ECHR reconsider the case in December 2014. Three court cases related to the Northern Ireland conflict that took place in mainland Britain in 1975 and 1976 have been accused of being unfair, resulting in the imprisonment of the Birmingham Six, Guildford Four and Maguire Seven. These convictions were later overturned, though an investigation into allegations that police officers perverted the course of justice failed to convict anyone of wrongdoing.

The United Kingdom created an act – the Special Immigration Appeals Act in 1997, which then led to the creation of the Special Immigration Appeals Commission (SIAC). It allowed for secret evidence to be stated in court; however, it provides provisions for the anonymity of the sources and information itself. The judge has the power to clear the courtroom of the public and press, and the appellant if need be, if sensitive information must be relayed. The appellant is provided with a Special Advocate, who is appointed in order to represent their interests, however no contact can be made with the appellant after seeing the secret evidence. SIAC is mostly used for deportation cases, and other cases of public interest.

Secret evidence has seen increased use in UK courts. Some argue that this undermines the British criminal justice system, as this evidence may not come under proper democratic scrutiny. Secret evidence can now be used in wide range of cases including deportations hearings, control orders proceedings, parole board cases, asset-freezing applications, pre-charge detention hearings in terrorism cases, employment tribunals and planning tribunals.

In England and Wales, the origin of Right to Fair Trial & Right to Be Heard can be traced back in the Magna Carta Act, 1215. Art. 39 of the Act speaks about fair trial and punishment by a competent court after the trial.

In the United Kingdom Supreme Court case of Cadder v Her Majesty's Advocate[45], in which the right to custodial legal advice was held to be required in Scotland under Salduz,

Lord Hope DP noted:

"The conclusion that I would draw as to the effect of Salduz v Turkey is that the contracting

[45] Cadder v HM Advocate [2010] UKSC 43

states are under a duty to organise their systems in such a way as to ensure that, unless in the particular circumstances of the case there are compelling reasons for restricting the right, a person who is detained has access to advice from a lawyer before he is subjected to police questioning."

The Salduz line of jurisprudence is significant in defining the scope of art 6 of the ECHR, but the nature of the ECHR is that it leaves a margin of appreciation for states to ensure compliance according to their own procedural traditions.

After Al-Khawaja v United Kingdom[46] the "essence of the right" constraint seems no longer to exist in substance. It can no longer be said that there is a "minimum irreducible core of fairness" to art.6. According to the Grand Chamber, even the explicit "minimum rights" must be balanced against other competing interests to ascertain whether the fair trial guarantee had been violated. The "sole or decisive rule" has been diluted to homeopathic levels. Thus Strasbourg has moved toward the British circumscribed and contingent notion of the nature of art.6 rights. The seesaw metaphor is now deeply embedded in political and public discourse due to avowals of successive Home Secretaries of the need to "rebalance" the criminal justice system "in favour" of the "victim". This implies that affording greater protection to an alleged victim or a witness necessarily means removing rights from the defence: rights, it is also implied, which the defendant unjustifiably—even unfairly—enjoys. Even the UK Supreme Court has deployed it, claiming that recognising an accused's art.6 right will "tilt the balance" against the police and prosecution.

The baseline rule under art.6(3)(d) is that ordinarily, the accused is entitled to be present and to challenge all evidence in an adversarial hearing in public. The ECtHR has developed several extrapolations of and exceptions to the rule, such as permitting anonymous statements to be used in the investigation but not the trial, and special provision for the needs of vulnerable witnesses, provided that defence rights are ultimately respected. Article 6(3)(d) is not violated if an adequate and proper opportunity to challenge the evidence is afforded at some point in the criminal process, even if that is before the formal public hearing at which guilt is adjudicated. It is intrinsic to a fair trial that the defendant be tried on the most reliable, tested evidence available to the trier of fact. A defendant is entitled only to challenge a witness's testimony under the conditions most conducive to eliciting the truth.

In the case of DG v Secretary of State for Work and Pensions[47], DG appealed against a decision

[46] Al-Khawaja v United Kingdom [2011] ECHR 2127
[47] DG v Secretary of State for Work and Pensions [2010] UKUT 409

to refuse him Employment and Support Allowance (ESA), which was taken after a medical examination. Even though DG requested Jobcentre Plus to contact his GP (also his nominated representative), neither the GP nor DG's social worker were approached for evidence. At the first stage of the independent tribunal process (the First Tier Tribunal), DG waived his right to put his case in person at an oral hearing. This decision was based on advice from Jobcentre Plus. The appeal was dealt with on paper and dismissed.

When DG appealed this decision, the Upper Tribunal found that DG did not have a fair hearing of his appeal as required by Article 6. This decision took into account the bad advice from Jobcentre Plus, the claimant's mental health problems and the failure of both the Department for Work and Pensions and the tribunal to communicate with his GP.

The right to a fair trial is not allocated to any one person, but rather is enjoyed on a collective as well as an individual level. It is the right of society as a whole, and of every participant in the trial process including the defendant, to a verdict with integrity, to embody the administration of justice itself as a public good, reinforcing the rule of law. Thus, the integrity of the verdict depends not just on the fairness of procedures which generated it, but also on the accountability of the criminal justice system to the public, from which springs the principle of open justice.

In many cases the ECtHR has rather glibly concluded there was no violation to a fair trial by the use of evidence obtained in breach of the accused's fundamental rights, such as the fruits of illegal surveillance or coercion, because the defendant had the opportunity to contest its authenticity and its admission at trial, preserving the adversarial process. The fair trial right offers more protection than merely the opportunity to make submissions which are unsuccessful.

Pre Trial Rights

Some of the most intricate problems raised by the protection of the fair trial principle concern its implementation in the early stages of criminal proceedings. The importance of the pre-trial procedure for the implementation of the fair trial guarantee has been pointed out in most of the national reports contained in this volume. It has been shown that there are national systems of criminal justice in which the conviction of the accused is heavily based on the evidence produced and the results obtained by the police and the prosecution agencies during pre-trial investigation. But even in countries where this is not the case and where the evidence in principle has to be adduced and discussed in full before the court at the trial, statements made by the accused and by witnesses or other evidence obtained during the pre-trial procedure often

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carry a considerable weight.

- Protection from Arbitrary Detention During the Pre-trial Procedure

1. The Right of Detained Persons to be Brought Promptly before a Judge

From the perspective of the suspect, the pre-trial procedure in more serious cases usually starts in earnest with his arrest by the police. In most countries, the police are entitled to arrest persons suspected of a criminal offence, either in fulfilment of a judicial warrant or by use of their general powers of arrest, most notably in cases where the suspect has been caught in the act of committing an offence. An important safeguard against arbitrary detention at this stage is the obligation of the police to bring the persons arrested promptly before a judge or other official authorized by law to exercise judicial power.

The fundamental importance of this safeguard against arbitrary detention is underlined by the fact that it has been incorporated with almost identical wording in the International Covenant (article 9 (3) ICCPR)[48], the American Convention on Human Rights (article 7 (5) AMR) and the European Convention (article 5 (3) ECHR). Only the African Charter does not mention explicitly the obligation to bring the detainee promptly before a judge, but the African Commission on Human and Peoples' Rights has recognized in its recent Resolution on the Right to Recourse Procedure and a Fair Trial that this obligation is an integral part of the right to a fair trial guaranteed by article 7 of the Charter.

2. Limits on the Use of Pre-Trial Custody

When the suspect is brought before the court, the court -- or in some legal systems the investigating judge -- decides whether on the evidence presented so far pre-trial detention should be imposed or whether the suspect can be released on bail or on his promise to appear for trial. The International Covenant states that it shall not be the general rule that persons awaiting trial shall be detained in custody. The Human Rights Committee, in its General Comment on article 9, has stressed that pre-trial detention should be an exception and as short as possible.

There are two ways in which the principle that pre-trial detention should be an exception can be implemented: either by imposing strict conditions under which persons suspected of a criminal offence can be arrested or by ensuring that they will be released as quickly as possible when the original cause of their detention have disappeared. In no case, however, may pre-trial detention be used as a form of anticipated punishment of the suspect. The imposition of pre-

[48] International Covenant on Civil and Political Rights, Article 9 (1966)

trial detention for this purpose violates the presumption of innocence recognized by the International Covenant and the regional human rights instruments.

3. Right to Judicial Review

Article 9 (2) ICCPR[49] provides that anyone who is arrested shall be informed, at the time of his arrest, of the reasons for his arrest and shall be promptly notified of any charges against him. This right to notice is important, because without sufficient information on the reasons for his or her arrest a detained suspect will hardly be able to challenge the legality of his detention successfully. Such a right to challenge is granted to the accused under article 9 (4) ICPPR according to which everybody who is deprived of his liberty shall be entitled to take proceedings before a court, in order that the court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful. The European Convention and the American Convention on Human Rights contain similar provisions.

4. Length of Pre-Trial Detention

Another important aspect of the protection of the individual in the pre-trial procedure concerns the duration of pre-trial detention. The international human rights instruments -- the International Covenant, the American Convention and the European Convention on Human Rights -- provide that anyone arrested or detained is entitled to a trial within a reasonable time. The Human Rights Committee has interpreted this as meaning that pre-trial detention should be as short as possible.

In most countries, suspects are arrested by the police and, after a certain delay during which the police try to collect evidence by questioning the suspect or by other means, are presented to a court, if they are not released beforehand.

Right to Silence in the Pre-trial Procedure

1. International and National Guarantees of the Right to Silence

According to article 14 (3) (g) of the International Covenant[50], everyone is entitled, in the determination of any criminal charge against him, not to be compelled to testify against himself or to confess guilt. Although the right to silence is guaranteed as part of the accused's right to a fair trial, the Human Rights Committee did not hesitate to apply it to the pre-trial procedure as well.

[49] International Covenant on Civil and Political Rights, Article 9 (1966)
[50] International Covenant on Civil and Political Rights, Article 14 (1966)

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On the other hand, the European Convention on Human Rights does not expressly provide for the right to silence. It is generally recognized, however, that the ban on torture and cruel, inhuman or degrading treatment in article 3 does prohibit the use of torture and oppression to obtain confessions or incriminating statements from the accused.

2. Limits to the Right to Silence

In theory no legal sanctions attach to the refusal of the accused to speak to the police or other investigating authorities. In reality, however, the courts may often draw negative inferences from the accused's silence when pondering their final judgement. It has even been said that in some countries the courts will take the accused's silence for an implicit confession of guilt.

The English legislature has recently tried to define the situations in which the court may draw an inference from the accused's silence during the police interrogation and at trial. Historically, English criminal law has always recognized a right to silence.

3. Scope of the Right to Silence with Regard to Violent and Non-Violent Methods of Interrogation

Under the provisions of most legal systems, statements or confessions made by the accused during pre-trial interrogation can only be used against him if they were made voluntarily. The law usually prohibits all coercive methods of interrogation, thus excluding all forms of torture, inhuman or degrading treatment and the use or threat of violence. In principle, any statement obtained in direct violation of the prohibition of coercion is inadmissible at trial. Thus confessions extracted by violent means are generally excluded.

4. Burden of Proof

An aspect of the problem of admissibility of unlawfully obtained statements which is of practical importance concerns the question who should bear the burden of proof in cases where it is disputed whether illegal methods of interrogation have been used or not. In principle, it should be the responsibility of the prosecution to show that the evidence it relies upon to convict the accused has been obtained lawfully. This is the position adopted by English law, which provides that in any proceedings where the prosecution proposes to give in evidence a confession made by an accused person, the court may of its own motion require the prosecution to prove that the confession was not obtained by the use of oppressive means, but also of other legal systems.

Right to Counsel During the Pre-trial Procedure

The right to counsel is crucial to any effective protection of the rights of the individual in the

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pre-trial procedure. Most suspects are ignorant of their rights and of the implications of the allegations or evidence placed against them. A suspect is in need of reliable information including on such matters as how long the police may detain him or her, what inference a court may draw from a refusal to answer questions and whether the questions asked by the police are fair or biased. Therefore, the right to consult a lawyer at an early stage of the proceedings is important and may act as a check on improper investigative methods used by the prosecution.

1. Guarantees of the Right to Counsel under International and National Law, Especially During Police Interrogation

The International Covenant on Civil and Political Rights guarantees in article 14 (3) (b)[51] the right of the accused to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing. Additionally, article 14 (3) (d) recognises his right to defend himself through legal assistance of his own choosing, to be informed of this right, if he does not have legal assistance, and to have legal assistance assigned to him at no cost if he does not have the necessary means to pay for it whenever the interests of justice so require.

2. Right to Receive Counsel Paid for by the State

To the extent to which a right to counsel is recognized during the pre-trial procedure, accused persons who cannot afford counsel generally have a right to receive counsel paid for by the state. In some legal systems, this right seems to apply regardless of the nature of the crime of which the accused is suspected once he has been arrested.

IX. THREATS TO FAIR TRIALS

(A) Discrimination

Discrimination and bias, which can be both explicit and implicit, are embedded in criminal legal systems and institutions around the world. They affect outcomes at every stage of the criminal justice process, from policing and arrest through to sentencing and release. This means that minoritised and marginalised groups are more likely to be suspected of criminal behaviour, whether profiled by automated systems using biased date or by the police – in the UK, stop and search policies disproportionately affect Black communities. If arrested, minoritised and marginalised groups are more likely to be detained in prison while waiting for a trial and punished more severely if they are found guilty. In the US, Black and Latino people get worse plea bargain offers than white people, and often do not have access to adequately resourced

[51] International Covenant on Civil and Political Rights, Article 14 (1966)

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counsel before l making a decision to waive their right to a trial. Many, including innocent accused people, still feel that it is better to accept a deal than to face a jury that may be inherently hostile to certain groups and the prospect of a vastly increased penalty after a trial.

(B) Overcriminalisation

Many politicians like to talk about being 'tough on crime' but societies would be safer if we did not use criminal legal systems to solve social problems, such as drug abuse. Punitive approaches that use the criminal process to address disfavoured social, economic or personal behaviour lead to overcriminalisation, which in turn leads to states having more criminal cases than they can cope with. States may try to find ways to impose punishments without a trial taking place, such as through plea bargaining or trial waivers. But states could instead try to reduce criminalisation – for example by focusing on social welfare policies that address poverty and discrimination.

(C) Access to lawyers

In many countries, people who have been accused of a crime cannot afford or do not have access to a lawyer. Even in countries that offer free access to lawyers, not everyone gets effective legal representation because inadequate support for public defence leads to overwhelming caseloads. It's crucial that anyone who has been accused of a crime has access to a lawyer at all stages of the legal process, not just the trial itself. In particular, people should be able to get help from their lawyers as soon as possible after their arrest.

(D) Criminal Profiling

States are increasingly using artificial intelligence and automated decision-making systems to profile people as at risk of committing a crime even if they have not done anything. These frameworks are many times used to profile individuals, 'predict' their moves, and examine the risk of certain conduct, for example, carrying out a crime, subsequently. This can have wrecking ramifications for individuals included, who are profiled as criminals or regarded as a risk despite the fact that they haven't really carried out a crime.

Predictions, profiles, and risk evaluations that depend on algorithms, AI, and moreover data analysis, can prompt genuine criminal justice administration results. These can incorporate regular surveillance, repeated stop searches, inquiry, fines, and arrests. These frameworks can likewise vigorously impact sentencing, and prosecution decisions.

(E) Coercion

Law enforcement agencies use coercive tactics to induce people to confess to crimes or

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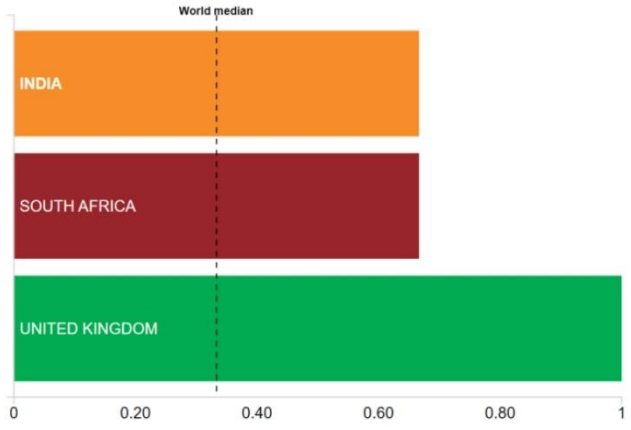
implicate others. In some states, this includes torture and inhumane or degrading behaviour.

Pre-trial detention

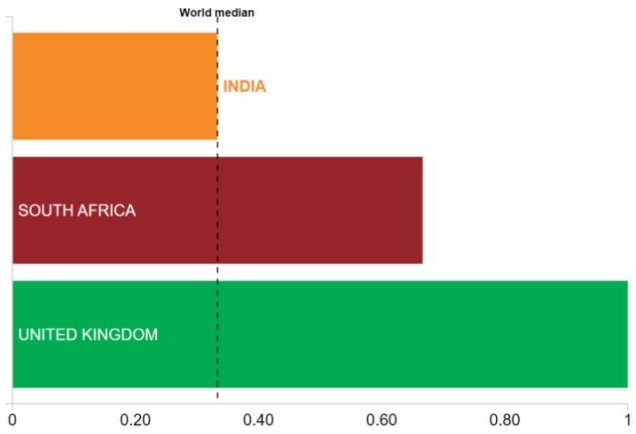
Right now, more than three million people worldwide are being detained even though they have not been found guilty of a crime. Pre-trial detention is one of the harshest actions that a state can take against someone and can have devastating consequences. It can lead to the loss of employment, housing and family rights, and inhibits the ability of the accused person to prepare a defence. Being held in pre-trial detention can affect how a judge or jury perceives someone and this can have an impact on the outcome of a case. High rates of pre-trial detention also lead to overcrowding and contribute to poor conditions in prisons.

Statistics



[52]

The above graph is for the year 2015. In 2015, India has the value 0.67 Scale, making it part of the Top 30% for the indicator "Fair trial ". Among the selected countries, United Kingdom has the highest indicator value at 1.00 Scale whereas South Africa has the lowest indicator value at 0.67 Scale.



[53]

[52] https://www.worldbank.org/en/home
[53] https://www.worldbank.org/en/home

The above graph is for the year 2020. In 2020, India has the value 0.33 Scale, making it part of the Bottom 40% for the indicator "Fair trial ". South Africa stands at the value of 0.67. Among the selected countries, United Kingdom has the highest indicator value at 1.00 Scale whereas India has the lowest indicator value at 0.33 Scale. While South Africa and UK have held on to their positions, India has come down from 0.67 to 0.33 on the scale within a span of 5 years.

X. CONCLUSION

This paper has thrown light on the basic rights which ensure fair trial in India, UK and South Africa. We have also discussed the landmark cases which reiterate the principles of fair trial and its importance. The UN General Assembly has taken on the 'Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power' in 1985, which focuses on the 'necessity of adopting national and international measures in order to secure the universal and effective recognition of, and respect for, the rights of victims of crime and of abuse of power', without bias to the privileges of the accused. Even though there are pre-trial rights and other provisions which are supposed to ensure a right to fair trial to the people, there are certain cases in which the fair trial procedures are not upheld. The Judicial system has to be more transparent so that there will be no case of an unfair trial Courts have long held that the idea of criminal administration of equity depends with the understanding that a criminal act is harmful to a person as well as to the general public overall. Perhaps the time has come to hold that the option to fair trial can completely be acknowledged by adjusting the freedoms of the person in question and the accused with the rights for the general public, without bias to each other. This paper has further explained the link between criminal administration, Constitutional rights and International Human Rights and how they depend on each other.

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