BREAKING BARRIERS

A SOCIO-LEGAL ANALYSIS OF THE RIGHT TO ACCESS TO JUSTICE

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1. PROLOGUE: THE HUMAN QUEST FOR JUSTICE

Aspiration for 'justice' is as old as humanity itself. And endless has been the voyage of humanity to discover its meaning. Throughout the pages of academic history, philosophers have debated its meaning without the prospect of any consensus. Aristotle provided a complicated account of justice, dividing the same into two categories, a general concept of justice as 'the lawful' and a particular concept as 'the fair and equal.'[1] Emphasizing on the nature of 'General Justice,' he suggested, '.. justice is complete virtue to the highest degree because it is the complete exercise of complete justice.'[2] While Thomas Aquinas regarded justice as a habit which makes a man 'capable of doing what is just and of being just in action and in intention,'[3] Mencius observed that '[a] 11 men have things they will not do, and of what makes this so can be fully developed in the things they will do then 'Justice' results.'[4] Aristotle's sentiments found echo in Adam Smith when he argued that justice is a virtue, the observance of which 'is not left to the freedom of our own wills, which may be

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' Aristotle, The Various Types of Justice, in Robert C. Solomon & Mark C. Murphy (eds.) *What is Justice* 36 (2000).

[2] *Id.*

[3] Thomas Aquinas, The Nature of Justice, in Robert C. Solomon & Mark C. Murphy (eds.) *What is Justice, supra* n., 1 at 50.

[4] Mencius, Justice and Humanity, in Robert C. Solomon & Mark C. Murphy (eds.) *What is Justice, supra* n. 1 at 57.

extorted by force, and of which the violation exposes to resentment, and consequently to punishment.'[5] John Stuart Mill after analyzing the diverse applications of the term 'justice' concluded, 'it is a matter of some difficulty to seize the mental link which holds them together, and on which the moral sentiment adhering to the term essentially depends.'[6] However, on a discussion based on the etymology of the word, Mill argued that "justice is a name for certain moral requirements which, regarded collectively, stand higher in the scale of social utility, and are, therefore, of more paramount obligations...'[7] More recently, John Rawls in his approach to justice suggested that 'the fundamental idea in the concept of justice is fairness'[8] and offered an analysis of the concept of justice from this point of view.

The difference in the opinion of philosophers notwithstanding, every Constitution has *its* own philosophy of justice. The genesis of the high rhetoric on justice inscribed in the Preamble to the Indian Constitution may be found in the Objective Resolution of Pandit Nehru that was adopted by the Constituent Assembly on January 22, 1947.[9] The Constitution, following from the Objective Resolution resolves to '... to secure to all its citizens: JUSTICE, *social, economic and political..."* The provisions of the Constitution reflect the steel resolve of our makers to ensure that the high ideal of justice found adequate promise in our supreme *lex.* The principle of universal adult suffrage[1] and the right of every citizen, irrespective of his propriety or his educational

[5] Adam Smith, Justice as a Moral Sentiment, in Robert C. Solomon & Mark C. Murphy (eds.) *What is Justice, supra* n. 1 at 144.

* John Stuart Mill, Social Justice and Utility, in Robert C. Solomon & Mark C. Murphy (eds.) *What is Justice, supra* n. 1, at 170.

[7] W.atl71.

[1] John Rawls, Justice as Fairness, in Robert C. Solomon & Mark C. Murphy (eds.) *What is Justice, supra* n. 1 at 282 -283.

* See *Constituent Assembly Debates* (CAD), 304 (16th Dec. 1947). Clause 5 of **the** Resolution reads: 'Wherein shall be guaranteed and secured to all People of India *justice-social,* economic and political; equality of status, of opportunity, **and** before the law; freedom of thought, expression, belief, worship, vocation, association and action, subject to law and public morality;'

[10] Art. 328.

qualifications, to participate in the political process,[1'] reaffirm; vision of political justice. Similarly, equal opportunity to men women, irrespective of their caste, creed, language and religic matters of public employment[12] is no less an evidence of pol justice. The makers of our Constitution were not oblivious t< gross inadequacy of 'political democracy' without econ justice.[13] In their enthusiasm to guarantee the same, the m recognised the right to an adequate means of livelihood,[14] the to ensure that the operation of the economic system did not 1 in the concentration of wealth and means of production t< common detriment.[15] The philosophy of economic justice further manifestation in the duty cast on the state 'to secure... workers agricultural, industrial or otherwise, work, a living A conditions of work ensuring a decent standard of life anc enjoyment of leisure...'[16] The goal was the banishment of po[1] not by expropriation of those who have, but by the multiplic of the national wealth and resources and an equitable distrib thereof amongst all who contribute towards its production. [7] constitutional eloquence would, however, provide little sua institutions entrusted with the solemn endeavour to provide ji were not accessible. Political democracy would be of little and the high aspiration of economic justice, an unrealistic h< necessary institutions failed the test of accessibility.[18]

[1] Art. 84.
[12] Art. 16.
[13] See D.D. Basu, *Introduction to the Constitution of India*, 24 (1995) The quotes Pandit Nehru in his inaugural address at the Seminar on Parlian Democracy in these words: "Democracy has been spoken of chiefly in tl as political democracy, roughly represented by every person having a vote vote by itself does not reflect very much to a person who is down and o person let us say, is starving or hungry. Political democracy, by itself, enough except that it may be used to obtain a gradually increasing mea economic democracy, equality and the spread of good things of life to oth the removal of gross inequalities."
[14] Art. 39 (a).
[15] Art. 39 (c).
[16] Art. 41.
[17] *Supra* n., 13 at 24.
[18] See generally *supra* n., 13.

The paper endeavours to discuss the justification for a right to access to justice in a constitutional democracy, its meaning and its future. What gives a person the right to access to justice in a constitutional democracy? First, we shall endeavour to trace the genesis of the right in two principles now firmly entrenched in our constitutional jurisprudence; supremacy of law and the independence of judiciary. Thereafter, we shall endeavour to provide the right to access to justice with a definite content. Attempts have been made on many earlier occasions to provide the right to access to justice with content.[1] There is, however, no consensus on what the right may include. We would suggest that the right to access to justice might be said to constitute two broad components, one relating to the *judicial* process and the other relating to the *political* process. The distinction is important because without recognition of the political processes as part of right to access to justice, one may be attempting an analysis with implied assumptions, which may or may not be true. The duty to translate these un-stated assumptions into actuality, often, falls within the jurisdiction of the political authorities, requiring little or no intervention from the judicial processes. The right to access the court, the right to fair trail, the right to legal aid and so on may be regarded as the rights relating to the *judicial* process while the right to contribute to law reforms, the right to living wages, the right to secure work may be regarded as one relating to the *political* process of the right to access to justice. The discussion in this paper is limited to the judicial process of the right to access to justice. We propose that the right to access to justice relating to the judicial process includes the right to access the court, the right to

** See generally Anon, The Path to Equal Justice: A Five-Year Status Report on access to Justice in California, Oct. 2002 available at ■np://www.calbar.ca.gov/calbar/pdfs/accessjustice/2002-Access-Justice-Report.pdf; David Goldstein, *et al, Improving Access to Justice: Legal Services \ Funding and Private Bar Involvement in Public Interest Lawyering Around the | World, Advanced Seminar in Ethics and Public Interest Lawyering,* Spring I 3000, available at http://www.pili.org/library/access/improving_access_to_JBStice.htm; Norman Daniels, *et al, Justice is Good for Our Health: How greater economic equality would promote public health.* available at inp://www.bostonreview.net/BR25.1/daniels.html; John E. Bonine, *Sfttnding to Sme: The First Step in Access to Justice,* available at tap://www.law.mercer.edu.elaw/standingtalk.html

fair trial, the right to speedy trial and the right to legal aid. We shall argue that these categorizations form what may be called the *core* of the right; development of constitutional jurisprudence may require that they be expanded. Finally, in the epilogue, we look at the future. Do the contingencies of the future and the increasing pressure on democratic institutions require that more be done? Is the access more sham than true, more in letter than in reality? Is it still a call in the wilderness, a candle in the wind that beacons but little hope?

2. ACCESSING JUSTICE: TRACING THE JURISPRUDENTIAL GENESIS

In this section, we propose to trace the jurisprudential basis for the right to access to justice. Do we have a right to access to justice? Does the right presuppose the existence of any system of political governance? The existence of an independent judiciary presupposes the supremacy of law that the judicial process, itself, has a mandate to uphold. We shall argue that an independent judicial mechanism is the consideration that the state makes in return for the commitment that an individual makes to the state to submit himself to the due process of law.

In his celebrated treatise authored in 1885, Prof. Dicey regarded supremacy of law as an essential of the rule of law.[20] He argued that a constitutional democracy requires that law rather than the arbitrary will of men hold the pride of place in the political governance.[21] Thousands of years before Prof. Dicey had even formulated his theory of the rule of law; supremacy of law had found pronounced prominence in the philosophy of *Rajdharma*, the constitutional law of ancient India.[22] Unlike the unlimited monarchy of the West, ancient Indian jurisprudence advocated the supremacy of *Dharma*, i.e. the rule of law. The law was the king

[2] A. V. Dicey, *An Introduction to Constitutional Law*, (Chapter 4 1998) (1885).
[21] See *id.*

See Rama Jois, *Seeds of Modern Public Law in Ancient Jurisprudence* (hereinafter *Seeds)*, 22 (2000). See also Rama Jois, *Legal and Constitutional History of India* (hereinafter *Constitutional History)*, 581 (2001). [23] *Id.*, at 24.

of kings and nothing was superior to law.[24] All *dharmas* merged into the philosophy of *Rajdharma* and it was, therefore, the paramount *Dharma.*[25] It was the supreme power in the State; the embodiment of ultimate purpose of human life, and the king was only the instrument to realize this goal of *Dharma*. The sovereignty of the regal was limited and so were his executive and judicial powers.[27] While the monarch was required to consult the Council of Ministers and to act according to the advice of the majority, in judicial matters he was under an obligation to accept the advice of the judicial officers.[28] The philosophy of *Rajdharma* in this sense was truly the constitutional law of ancient India, a philosophy that suggested the limitations of power of the monarch while providing him with a conception of welfare state as a vision to aspire for.

The philosophy of 'supremacy of law' has found adequate expression in our system of constitutional polity. Dr. Ambedkar once observed in the Constituent Assembly:

> The Constitution is *a fundamental* document. It is a document which defines the position and power of the three organs of the State - the executive, the judiciary and the legislature—In fact, the purpose of a constitution is not merely to create the organs of the State but to limit their authority, because, if no limitation was imposed upon the authority of organs, there will be complete tyranny and complete oppression.[29]

The philosophy of the supremacy of the Constitution soon found its judicial patronage too. The principle was also reiterated by Gajendragadkar C.J., who suggested:

[u] *Id.*
[25] *Id.*, at 26.
[26] See *Seeds*, supra n., 22 at 57.
See *Constitutional History* at 35-6. [a] *Id.*, 36. [29] Quoted in *Constitutional History*, *supra* n., 22 at 23.

> In a democratic country like India which is governed by a written Constitution, it is the Constitution which is supreme and sovereign—. Therefore, there can be no doubt that the sovereignty which can be claimed by the Parliament in England, cannot be claimed by any Legislature in India in the literal absolute sense.

In *Keshavananda Bharati* v. *State of Kerela,* the majority in explaining the doctrine of basic structure regarded the supremacy of the Constitution as evidence of the doctrine.[32] Sikri C.J., provided a hierarchy to his explanation of the basic structure, observing that the supremacy of the Constitution was crucial.[3] Similarly, Shelat and Grover JJ.[34] and Jaganmohan Reddy J.[35] also emphasized on the supremacy of the Constitution as evidence of basic structure. In *Indira Nehru Gandhi* v. *Raj Narain,*[36] commenting on the supremacy of the Constitution Beg J., observed:

> We can say that the concept of the supremacy of the Constitution is, undoubtedly, more suited to the needs of our country that any other so put forward. It only places before us the goals towards which the nation must march but it is meant to compel our Sovereign Republic, with its three organs of Government to proceed in certain directions. It assumes that each organ of the State will discharge its trust faithfully. Can we deny it that supremacy which is the *symbol and proof of the level of our civilization?*[37]

[30] *In* Special Reference No. I of 1964, AIR 1965 SC 745 *at* 746.
[31] (1973) 4 SCC 225.
[32] *Id.*, at 287.
[33] *Id.*
[34] *Id.*, at 580.
[35] *Id.*, at 666.
[36] 1975 (Supp) SCC 1,520.
[37] *Id.* para. 569.

The court was, therefore, of the opinion that limited government was fundamental to the democratic polity of India, a feature that could not be annihilated in pursuance of the amending powers of the Parliament.

What is the significance of the recognition of the philosophy of *Rajdharma* as part of modern Indian constitutional law? If supremacy of law is to be meaningful, there must exist an independent mechanism to adjudicate an assault on its supremacy. Independence of judiciary is the *sine qua non* of democracy. [8] Without any such independent structure, one may violate the supremacy with impunity creating lawlessness, weakening at the very foundations of democracy. What, therefore, gives meaning to the philosophy of constitutional supremacy is the independence of judiciary. While there was no *strict* separation of powers in the institution of monarchy in ancient India, the King was required to exercise his judicial authority in accordance of the opinion of the judicial officers of the court.[39] However, none could be appointed Judges in the administration of justice if they did not possess fearlessness, impartiality and independence.[40] They were under a clear mandate not to connive with the king when he acted unjustly[41] but to beseech the king against the order, which will lead 10 injustice.[42] The judges, said the ancient texts, were under an obligation to protect the *Dharma* even if their decisions were against the wishes of the King.[43] Independence of the judiciary was, therefore, prevalent in the sense that judges were under a mandate to uphold the *Dharma* and not dispense justice according to the whims and caprices of the regal power. It was not independence in the structural sense of the term, implying three separate organs of government but the nature of working of the judicial officers that created an independent judiciary. Modern constitutional law in India too has safely secured the independence

[m] **Per.** Kuldip Singh J., in *S.C. Advocates on Record v. Union of India*, (1993) 4 **SCC** 331.
* *Constitutional History, supra* **n.** 22 at 36.
* ***Seeds,*** *supra* n. 22 at 497.
* *Id.* at 496.

of the judiciary in its Constitution. Commenting on tt significance of the independence of the judiciary, Pandian observed[44]:

> —[I] t is the cardinal principle of the Constitution that an independent judiciary is the most essential characteristic of a free society like ours— To have an independent judiciary is to meet all challenges, unbending before all authorities and to uphold the imperatives of the Constitution at all times, thereby preserving the judicial integrity, the person to be elevated to the judiciary must be possessed with the highest reputation for independence, uncommitted to any prior interest, loyalty and obligation and prepared under all circumstances or eventuality to pay any price, bear any burden and to meet any hardship and always weeded only to the principles of the Constitution and 'Rule of Law.[45]

Explaining the task of the judiciary in a democratic polity, tl learned Judge held:

> Each of the functionaries is independent and supreme within its allotted sphere and none is superior to the other. Justice has to be administered through the courts and such administration would relate to social, economic and political aspects of justice as stipulated in the Preamble of the Constitution and the judiciary, therefore, becomes the most prominent and the outstanding wing of the constitutional system for fulfilling the mandate of

[4] *Supreme Court Advocates on Record Association* v. *Union of India, supra* n 38.

[45] *Id.,* para. 63 quoting (I-B) B. Shiva Rao, *The Framing of India's Constitution* 196 He further added: This motivated selection of men and women to th judiciary certainly undermines public confidence in the rule of law an resultantly the concept of separation of judiciary from the executive a adumbrated under Article 50 and the cherished concept of independence *a* judiciary untouched by the executive will only be forbidden fruits or a **myt** rather than a reality.'

> the Constitution. The judiciary has to take up a positive and creative function in securing socio-economic justice to the people.

We would submit that the jurisprudential basis for the recognition of the right to access to justice lies in the principles of the supremacy of law and the independence of the judiciary. The latter is a tacit recognition of the principle that the judiciary would uphold the majesty of law without fear or favour, whether assaulted by the state or otherwise. The Constitution recognizes the freedom of speech and reasonable restrictions that may be imposed in the exercise of the said freedom. But with freedom of speech and expression and no corresponding duty to obey the law, man may be retracing his steps to the state of nature Hobbes contemplated.[47] The existence of an independent judicial mechanism may, therefore, be seen as a compromise between the freedom of speech that the state ensures and the duty to obey the law. While an individual has the freedom to express himself, the freedom is circumscribed by the duty one owes to the state to obey the law. In other words, in pursuance of the freedom of speech guaranteed to him, one may comment upon the character of another individual in society only so long as the same does not amount to defamation. Once an individual exceeds the limits of his freedom of speech, the independent judicial mechanism must impartially adjudicate on the wrong done to another in exercise of one's freedom of speech. The absence of any such mechanism is an open invitation to lawlessness and the rule of might, contrary to the supremacy of law we discussed earlier.

Supra n. 44, para. 83. [47] Thomas Hobbes, Leviathan, Chapter XIII (1651) He argued: Hereby it is manifest that during the time men live without a common power to keep them in awe, they are in that condition which is called war; and such a war as is of every man against every man... Whatsoever, therefore, is consequent to a time of war, where every man is enemy to every man, the same is consequent to the time wherein men live without other security than what their own strength and their own invention shall furnish them withal. In such condition there is no place for industry... no arts, no letters, no society, and, which is worst of all, continual fear and danger of violent death; and the life of man, *solitary, poor, nasty, brutish and short.*

An independent judicial mechanism is a consideration that the state makes to its members for obeying the law.[48] When a man gives up his right to settle a dispute, by might or otherwise, the state is under a considerable obligation to provide him with an effective forum for seeking justice.[9] Ancient Indian jurisprudence stressed that the very object with which the institution of 'kingship' was conceived and brought into existence was for the enforcement of *Dharma by* the use of the might of the King (State) and also to punish individuals for contravention of *Dharma* and to give protection and relief to those who were subjected to injury and in whose favour Dharma (law) lay.[50] The *Smritis* greatly emphasized that it was the responsibility of the king to protect the people through proper and impartial administration of justice. The institution of kingship, as is evident from the *Smritis,* finds its legitimacy in the ability of the regal authority to provide justice to the people. A similar conception of political governance has been provided by the Social Contractuals too. Explaining the fundamental law of nature, Hobbes states:

> —[I] t is a precept or a general rule of reason that *every man ought to endeavour peace,* as far as he has hope of obtaining it; and when he cannot obtain it, that he may seek and use all helps and advantages of war...From this fundamental law of nature, by which men are commanded to endeavour peace, is derived this second law: that a man be willing, when are so too, as far forth as peace and defense of himself he shall think it necessary, to lay down this right to all things, *and be contended with so much liberty against other men as he would allow other men against himself.'*[52]

[48] See P. J. Fitzgerald (ed.), *Salmond on Jurisprudence,* 89 (1999). The author argues that a modern state's system of administration of justice ensures that private vengeance is transmuted into the administration criminal justice; while civil justice takes the place of violent self-help.
[49] D. Harris, *Justifying Welfare State,* 145 (1987).
[50] *Seeds, supra* n. 22 at 489.
[51] *Id.*
[52] *Supra* n. 47 Chapter XIV.

The peace in society that Hobbes regards as a precept for every man can become an actuality only if the 'social contract' can provide for an impartial judicial mechanism. Though contextually different, even Locke in his theory of social contract recognised the absence of a common superior to appeal to in times of application of force. He observed:

> Men living together according to reason, without a common superior on earth with authority to judge between them, are properly the state of nature. But force, or a declared design of force, upon the person of another, where there is no common superior on earth to appeal to for relief, is the state of war; and it is a want of such an appeal [that] gives a man the right of war even against an aggressor, though he be in society and a fellow subject—Want of a common authority puts all men in a state of nature; —But where no such appeal is, as in the state of nature, for want of positive laws and want of positive laws to appeal to, the state of war once began continues with a right to the innocent party to destroy the other whenever he can, until the aggressor offers peace and desires reconciliation on such terms as may repair any wrong he has already done—.[53]

Locke argued that the presence of an authority on earth to appeal to for relief is one great reason of men's putting themselves into society and quitting the state of nature.[54] It is the presence of the authority that will exclude the continuance of the state of war, enabling the power to decide the controversy.[55] Its effectiveness is pertinent consideration in ensuring that members of a state decide not to seek justice by the law of force. Left to fend for themselves, instincts of self-preservation would drive individuals to seek shelter in the abode of the mighty.[56] However, orderly a society

[53] See John Locke, *Second Treatise on Government*, Chapter II (1690).
[54] *Id.*

Id. at Chapter 3. The author suggests that '—in the state of nature the law of nature is alone in force, and every man is in his won case charged with the

may be, and to whatever extent men may appear to obey the law c reason rather than that of force, the element of force is nonetheles present and operative. Without the institutionalized lav enforcement mechanism, one would tend to redress his wrong b; the otherwise, latent appeal to force.[57]

An effective dispute resolution mechanism is at the heart of ai efficacious democracy. The same may only be achieved if the stati decides to uphold the rule of law without fear or favour. Th< underlying idea of an effective independent judiciary is not t< satisfy dissent but to ensure a security of feeling that the state i: committed to protecting the weak and the infirm against an} injustice that may have been caused. To the strong and the mighty it is a caveat; an expression of caution that the arm of law is lonj enough to humble its might. The state would lose its mora authority to aspire for the strict adherence to the law unless it car correspondingly provide for an instrument that may uphold the lav* without fear or favour. The right to access to justice grants legitimacy to the institution of state while providing meaningful content to the philosophy of supremacy of law. It is the right tc access to justice which grants legitimacy to the institution of state while providing meaningful content to the philosophy ol supremacy of law. The justice delivery system is in a perilous state of affair today. Inequities, impartialities, delays and injustice form the principal order of the day. It is not long before the foundations of democratic polity will meet new challenges, threatening the integrity and sovereignty of this nation. The legitimacy of the state lies in promoting *equal* and *impartial* access to justice. If *Dharma* is to find an eternal place in our social existence, *Rajdharma* is the means to it. It is the command of the law and *not* the king that ensures *Dharma,* its rightful place in society. If the prosperous future of this nation is to be safely secured and the cherished ideals of democracy passed on to the progeny, judicial fraternity must stand up to the challenge of recreating an order of justice

execution of it. In the civil state, on the other hand, the law of nature is supplemented by the civil law, and the maintenance of the latter by the force of the organised community renders unnecessary and //Mpermissible the maintenance of the former by the forces of private men.' *Supra* n. 52

mechanism that shall stand out as a true tribute to the constitutional values of equality, impartiality and independence.

The question, therefore, assumes crucial significance is the meaning of the right to access to justice. What is protected in the name of right to access to justice? What are its components? We would submit that the right to access to justice includes rights that are both procedural and substantive in nature. While the right to access to the court and the right to speedy trial may be regarded as rights of procedural nature, right to fair trial and the right to legal aid may be said to fall in the category of the latter, i.e. substantive rights. It is true that speedy trial is indeed a facet of fair trial. However, we would submit that the considerable amount of evolving jurisprudence of the nature and content of the right to legal aid requires that we embark on a separate discussion rather than as part of right to fair trial. In each of the subsequent parts of the paper, we make an endeavour to discuss the nature and content of each of the constituents of the right to access to justice that I have suggested forms part it.

3. RIGHT TO ACCESS THE COURT

The efficacy of a functioning democracy is built upon the edifice of the right to access to courts, i.e., the right to remedy. A right without a remedy for the enforcement of the right is of little avail.[58] Rights find meaning only when they can be effectively enforced. The right to access the court is the right to approach the court seeking a remedy. All other rights, including the right to fair trial, the right to speedy trial and the right to legal aid would be of little consequence if the primacy right to access the court is not available. It is clearly the fountainhead of all other rights that form the core of the right to access to justice.

The makers of the Constitution appreciated the enormous significance of a fundamental right to a remedy. They guaranteed not only fundamental rights but also the right to a remedy.[59] Their

" See generally *Rudal Shah* v. *State of Bihar,* AIR 1983 SC 1086.

But see art. 32(4): The right may however be suspended in a manner provided mder the Constitution.

vision found prominence in art. 32 that provides for the right to move the Supreme Court for the enforcement of the fundamental rights guaranteed in the Constitution. Commenting on the inclusion of the said article in the Constitution, Srimati G. Durgabai observed:

> —[T] he right to move the Supreme Court by appropriate proceedings for the enforcement of a person's rights is a very valuable right that is guaranteed under this Constitution. In my view that is a right which is fundamental to all fundamental rights guaranteed under the Constitution. The main principle of this article is to secure an effective remedy. Without it a right serves no purpose at all, nor is it worth the paper on which it is written.[60]

The inclusion of the article has been spoken of by others in glowing terms too. Prof. Shibban Lai Saksena regarded the article as the 'crowning section of the whole chapter,'[61] while Rev. Jerome D' Souza considered the same to be 'of the gravest character, and of the most far-reaching importance.' Similarly winding up the debate on article 25 of the Draft Constitution Dr. Ambedkar commented thus;

> If I was asked to name any particular article in this Constitution as the most important-an article without which this Constitution would be a nullity-I could not refer to any other article except this one. *It. is the very soul of the Constitution and the very heart of it.*"

In exercise of its power under article 32(1), the Supreme Court may order writs *in the nature of* habeas corpus, mandamus, prohibition, *qua warranto* and *certiorari.* The Supreme Court has also accorded immense significance to the vision of the

[60]IV CAD, 937 [9th Dec, 1948].
[61] *Id.,* at 938.
[62] *Id.,* at 943.
[63] *Id.,* at 953.

Constitution makers. In *Romesh Thappar* v. *State of Orissa* referring to the importance of the article Patanjali Shastri J., observed:

> Article 32 provides a 'guaranteed' remedy for the enforcement of these rights, and this remedial right is itself made a fundamental right by being included in Part III. This court is thus constituted the protector and guarantor of fundamental rights and it cannot, consistently wit the responsibility so laid upon it, refuse to entertain applications seeking protection against infringement of such rights.

The status of the right to remedy was further elevated in *Fertilizer Corporation Kamgar Union* v. *Union of India.* The Court regarded the jurisdiction conferred by art. 32 as an 'important and integral part of the Constitution.'[66] The court reiterated that a right without a remedy was a legal conundrum of the most grotesque kind[67] and fundamental rights would be meaningless without an effective remedy. It follows then that the right to remedy provided under art. 32 is beyond the amending powers of the 'constituent assembly'. Therefore, no amendment can destroy or repeal, to borrow from Dr. Ambedkar, the 'very heart and the very soul' of the Constitution.

Notwithstanding the high status of the right to remedy under the Constitution, how real is the right? Do the people of India have a true and meaningful access to an effective remedy? Or is the right more imaginary than real? We propose that there are three primary aspects that destroy the meaningful exercise of the right to a remedy. They are: limitations of language, limitations of technicalities and limitations of territory. The limitations are grave enough to stultify the exercise of the right, jeopardizing thereby all other rights that form part of the right to access to justice.

****AIR** 1950 SC 440.
[45] (1981) 1 SCC 568.
** *Per* Chandrachud J., para. 11.
*'*Id.*

Part XVII of the Constitution deals with provisions relating to Official Language. Chapter III deals with the language of the Supreme Court and the High Courts. Article 348(1) provides that all proceedings in such courts shall be in English unless Parliament by law otherwise provides. Article 348(2) provides that the use of Hindi or any other language used for the official purposes of the State may be used in the proceedings of such High Court if the Governor with the previous consent of the President authorizes such use. However, such provision would not apply to any judgment, decree or order passed by such High Court. The priority given to the use of English in the proceedings of the court over regional languages is evident from the very language of the article. It has the effect of making the knowledge of English a precondition for the effective enforcement of the right.

In law, every person has the right to represent his case without the services of a lawyer. Under the current system of court functioning, a petition must be drafted in English, argued in English unless otherwise provided and the judgment and order be made in English. The access to an effective remedy of an illiterate person or more appropriately a person illiterate in English is more illusory than real unless one decides to hire the services of a lawyer. Primacy to the use of English language seriously inhibits the successful enjoyment of the right by people to whom it matters the most. The Constitution itself recognizes the limitations of language as an index of impediment to an effective access. It is evident from art. 350 which provides that every person shall be entitled to submit a representation for the redress of any grievance to any officer or authority of the Union of a State in any of the languages used in the Union or in the State, as the case may be. The inclusion of such a provision in the supreme *lex* illustrates the concern of the framers about the singular importance given to the use of English language in the justice delivery mechanism. However, if the Constitution recognizes the right to make a representation of grievances in any language used in the Union and the judiciary of the most important organ entrusted with the task of redressing grievances, it belies logic to allow representation in any language to any authority except a judicial authority. The rationale of the same must be reconsidered if right to access the court is to

find meaningful expression in the lives of ordinary people. *Democratization* of the right to remedy will remain a cherished value unless issues of limitations of language are adequately addressed.

Limitations of technicalities are of as much importance in a discussion on the right to access to the court. If the right to access to courts is to be exercised without the services of a lawyer, technicalities of law that makes it an esoteric discipline is the single most crucial factor. The jurisdiction of the Court under art. 32 is limited only to fundamental rights and in matters involving violation of such rights there is a need to *humanize* the justice delivery system. The Court must be made accessible even without ;he procedural technicalities usually attached to litigation in court. Otherwise, people would have to remain dependent on the services of lawyers even for the enforcement of fundamental rights. The jurisdiction of the Court under art. 32 is sufficiently wide to entertain petition without insisting on technicalities.

The Supreme Court has taken appreciable steps in humanizing justice by not insisting on procedural technicalities, otherwise attached with court work. The Court has accepted letters,[68] postcards[69] or notes addressed to judges of Supreme Court revealing a *prima facie* violation of a fundamental right as writ r^titions. Similarly, the Court has enlarged the scope of *locus standi*[70] to allow persons not directly affected as petitioners. In a country yet to grow out of the abyss of illiteracy and poverty, the same by the Supreme Court to allow public-spirited individuals to :ake up the cause of the distressed and downtrodden can be hailed JS exemplary. Public Interest Litigation (PIL) is 'humane justice' *m* work and its recognition by the Court has led to the development of a novel jurisprudence on constitutional law and at the same time

" *Tushar Arun Gandhi* v. *State of Orissa,* (1997) 1 SCC 1; *Upendra Baxi* v. ***Slate*** *ofU.P.,* (1981) (3) Scale 1136; *Sunil Batra* v. *Delhi Administration,* (1980) 3 SCC 488.

* *Bandua Mukti Morcha* v. *Union of India,* (1984) 3 SCC 161. ""£/>. *Gupta* v. *Union of India,* AIR 1982 SC 149; *Bar Council of Maharashtra* » M *V. Dhabolkar,* (1976) 1 SCR 306, and *Mumbai Kamgar Sabha* v. *Abdul* ***thai,*** AIR 1976 SC 1465.

brought succor to thousands if not millions of Indians. Yet we are far from the time when all Indians can claim a rightful place in the justice delivery system. Implementation of orders passed under petitions filed under art. 32 remains still remains a matter of grave concern.[71] Judicial orders require energetic enforcement. Mere words of concern will do no more than console victims of state atrocities. Justice will remain a far cry until the judiciary takes active interest in ensuring that its orders find obedience with the executive and other authorities.

The last of the limitations that hinders an effective access to court; is that of territoriality. The limitation was recognised as early as in ; the Constituent Assembly when members spoke of the inaccessibility of Court to people in remote areas when it is located far away in Delhi.[72] Enforcement of fundamental of rights by issuing writs is limited to the Supreme Court and appropriate High Courts. Article 32(3) provides that the Parliament may by law empower any other court to exercise within its local limits the power exercisable by the Supreme Court under art. 32(2). After five and half decades of constitutional governance, the aspiration remains unfulfilled. The need to allow local courts power to enforce fundamental rights was echoed in the Supreme Court when Naziruddin Ahmed observed:

> All courts should be open to the people. If there is a fundamental right which is violated, and if the man whose right is violated is a poor man, it would be wrong to drive him to the Supreme Court or some other Court duly empowered in this behalf, which will be superior Court. I want to see al courts have the power to decide fundamental rights or breaches of fundamental rights or breaches of fundamental rights and this should be given to all Courts civil or criminal. If a difficult point of constitutional right is raised in any civil and criminal Court in a small

See generally Arun Shourie, *Courts and their Judgments*, Chapter 3 (2001).

[12] *Supra n.* 60 *at* 931.

> case, then that court should be enabled to decide it immediately.[73]

An effective solution may lie in a law by the Parliament that empowers local courts to enforce fundamental rights at a local level. But until that is achieved, the right to access the court shall remain in a stale state providing access only to the economically well off. As the fountainhead of all other rights, the right to access the court sustains legitimacy in a democracy. The right is too fundamental, too basic to restrict its availability to the upper echelons of society. One may only recall the words of Chief Justice Ronald H. George who once commented, "If the motto 'and justice for all' becomes 'and justice for those who can afford it,' *we threaten the very underpinnings of our social contract.'"*

4. RIGHT TO FAIR TRIAL

Right to fair trial enjoys a pride of place in our scheme of rights' jurisprudence under the Constitution. But what does a fair trial imply? What are the constituents of a fair trial? Ronald Dworkin argues that words such as 'equality' and 'liberty' connote abstract values, the application of which to precise circumstances has to be performed by the courts.[75] The same is true even for a value as abstract as 'fairness'. Unlikely that any constitution in the world would ever endeavour to lay down the precise meaning of "fairness'. And, therefore, the courts are left with no option but to lest laws and state actions on the abstract touchstone of values, deciding whether *it* regards a law as fair or not. The right to fair •rial, similarly, is a compendium of principles that have found judicial patronage as evidence of fairness. Many of such principles have been statutorily recognised while others have been regarded by the court as components of reasonableness, equality and liberty. We would submit that the right to fair trial is *essentially* composed of six principles of fairness. The list is not an exhaustive

California Chief Justice Ronald M. George, State of the Judiciary speech, 2001 quoted in *supra (EqualJustice)* n., 19 at 3.

See generally Ronald Dworkin, *Freedom's Laws: Moral Reading of the American Constitution* (1999).

enumeration of the constituents of fair trial. However, we woi submit that the 'justice' jurisprudence evolved by courts and , occasions statutorily provided *upholds the following* as *the core* the right to 'fair trial.' They include the right to be presum< innocent until proven otherwise, the right to an open trial, tl impermissibility of evidence collected illegally as admissib during trial, the right to appeal, the right to speedy trial, and tl right to legal aid.

4.1 Presumption of innocence

The right to be presumed innocent until proven guilty has ofte been commented as being *fundamental* to a fair criminal justk system. In *Kali Ram* v. *State ofH.* P.[76] the court held that 'one < the cardinal principles which has always to be kept in view in *o*\ system of administration of justice for criminal cases is that person arraigned as an accused is presumed to be innocent unles that presumption is rebutted—,'[77] In *Ashish Batham* v. *State* < *M.P.* thet court observed that the 'basic presumption in th administration of criminal law and justice delivery system is th innocence of the accused and till the charges are proved beyon reasonable doubt on the basis of clear, cogent, credible c unimpeachable evidence, the question of indicting or punishing a accused does not arise—.[79] Commenting on the consequences c convicting an innocent person, Khanna J. observed that '[I] t is n doubt true that wrongful acquittals are undesirable and shake th confidence of the people in the judicial system, much worst however, is the wrongful conviction of an innocent person'[80] an the reverberations of the same 'cannot but be felt in a civilize society.'[81] It would indeed be unfair if the state coulci haul up , person for the alleged commission of an offence and require tha he prove his innocence in a court of law. Every person has ai obligation to justify the consequences of his actions. Therefore

[76] (1973) 2 SCC 808.
[77] *Per* Khanna J., *id.* para. 23.
[78] (2002) 7 SCC 317.
[79] Per D. Raju J., *id,* para. 8.
[80] *Supra* n. 2, para.27.
[81] *Id.*

one who alleges must provide evidence that the allegation is true. The necessity of the same becomes far more compelling when the person is no less than the omnipotent state with sufficient resources at its disposal to deny a person his right to life and liberty. The theoretical basis for the right to be presumed innocent until proven otherwise may be located in the same.

However, the perils of blindly emphasizing on proof beyond reasonable doubt are no less significant. The cherished principles or golden thread of proof beyond reasonable doubt which runs through the web of our law should not be stretched morbidly to embrace every hunch, hesitancy or degree of doubt.[83] It must not be forgotten that the excessive solicitude reflected in the attitude that a thousand guilty men may go but one innocent martyr shall not suffer is a false dilemma.[84] In *Lai Singh* v. *State of Gujarat*, the court rightly pointed out that while, 'it is true that under our existing jurisprudence in criminal matters, we have to proceed with presumption of innocence, but at the same time presumption is to be judged on the basis of conceptions of a reasonable prudent man. *Smelling doubts for the sake of giving doubts for the sake of giving benefit of doubt are not the law of the land'.*[86]

It must, therefore, be appreciated that while presumption of innocence is part of our criminal justice jurisprudence, the same has its own limitations. The requirement of 'proof beyond reasonable doubt' has its own restricted frontiers and the accused has the benefit of 'reasonable doubts of a *reasonable* man.' It is neither the fanciful doubts of a judge nor the capricious feeling of hesitation that the law aspires to protect. The principle is no more than a facet of fair trial, far less a mechanism to avoid incarceration in appropriate cases. Increasing rates of acquittal, even in apparently undeserving cases, has necessitated newer

" See 103, Indian Evidence Act, 1872: The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by any other law that the proof of that fact shall lie on any particular person.

Shivaji Sahabrao Bobade v. *State of Maharashtra,* (1973) 2 SCC 793, para. 6.

[u] *ld.*

[K] (2001) 3 SCC 221. [16]

Id., para. 88.

strategies to ensure that the principle of presumption of innocence does not become a means to an illegitimate freedom. Consequently, the last decade has seen a number of legislations that have sought to reverse the burden of proof on the accused, requiring that they prove their innocence in the court of law.[87]

It must be appreciated that such reversal of burden of proof is not a negation of the principle of presumption of innocence of the accused that we have already referred to as cardinal and fundamental. Even under legislations that have made an endeavour to reverse the burden of proof, the prosecution is under an obligation to satisfy the court about the existence of certain basic facts, subsequent to which a court may require that the accused prove his innocence. For example, under the Narcotics and Psychotropic Substances Act, 1988 mere possession of certain substances is a criminal offence. If certain nature of substances is found in the possession of a person, he shall be presumed to be guilty until he is able to satisfy the court of his innocence. What is of crucial importance is that at the stage of trial, the prosecution is under an obligation to conclusively prove that the substances were , indeed found in the possession of the accused. Until the j prosecution is able to discharge this initial burden, the court cannot proceed on the assumption that the person is indeed guilty under , the relevant provision of law. As is evident, the principle of j presumption is as much applicable even in cases where the burden j of proof is sought to be reversed. It is only the limitation of its j scope or applicability that is relevant in such legislations, j However, if the law were to provide that the prosecution is under j no obligation to even satisfy the court that the substances were j indeed found in the possession of the person, it is unlikely that the i law will stand the test of constitutional challenge. Clearly, such a j law would be an affront to the very essence of presumption of *i* innocence and therefore, on the right to fair trial.

j

[87] For example see the Prevention of Terrorism Act, 2002 and the Narcotics **and** Psychotropic Substances Act, 1988.

4.2 Public trial

Trial in open court is an indispensable attribute of fair trial. Most textbooks define crime as a wrong against community in contradistinction to tort, which is a private wrong. A crime is, in other words, a wrong that shocks the conscience of a community. It is in the communal nature of its consequences that justifies the intervention of the state on behalf of the victim. Consequently, community must have an interest in the manner in which a trial is conducted against an alleged offender. Such access reiterates the communal nature of a crime and the right of the community to participate in the process that may decide to deny the alleged offender his right to personal liberty. The characteristic of open trial also flows from the 'therapeutic value' to the public of seeing its criminal laws in operation, purging the society of the sense of outrage felt with the commission of many crimes. ° Without a right to access any such process, inconsistent would be the assertion that a crime is a wrong against a community and, therefore, against the right of the state to intervene on behalf of the victim.

Public trial as a procedural principle of criminal trial embodies the value of fairness for the offender. Community participation during trial ensures a check on the possibility of judicial excess, or worse, on any connivance between the prosecution and the judicial authority. Public trial provides the alleged criminal with an air of confidence that his right to personal liberty shall not be deprived without the due process of law. The right of the media to participate in the trial process ensures that the process is carried on in a fair and just manner. A courtroom is a temple of justice and everybody has a right of access.[91] A judge may regulate but cannot prohibit access to it.[92] The principle of public trial has found statutory recognition under sec. 327 of the CrPC.

" *Kartar Singh* v. *State of Punjab,* (1994) 3 SCC 569 at para. 269.
K See Michael Jefeerson, *Criminal Law,* Chapter 1 (2001).
90 *Supra* n. 14.
" *Chatisgarh Mukti Morcha* v. *State ofM. P.,* 1996 Cr. L. J. 2239.
92 Proviso to sec. 327(1), CrPC.
93 Sec. 327(1) CrPC: The place in which any Criminal Court is held for the purpose of inquiring into or trying any offence shall be deemed to be an open

The right to an open trial, however, is not an absolute one. Sectioi 327(2) provides that the inquiry into and trial of rape or an offena under sec. 376, sec. 376A, sec. 376B, sec. 376C or sec. 376D d the Indian Penal Code, 1860 (IPC) shall be conducted *in camera* There are occasions when the right of accused is supplanted by ai overriding public interest. In *Vineet Narain* v. *Union of India,* accepting the submission of the Solicitor General that a part of th proceedings be held *in camera,* the Verma C.J. observed that '[i] is settled that the requirement of a public hearing in a court of la? for fair trial is subject to the need of proceedings being held ii camera to the extent necessary in public interest and to avok prejudice to the accused.' Echoing similar sentiments, the court i *Naresh* v. *State of Maharashtra*[95] while emphasizing on th importance of public trial suggested that the court 'cannot overlool the fact that the primary function of the Judiciary is to do justic between the parties who bring their causes before it'.[96] Therefon if the principle that all trials before the courts be held in public i treated as universal and it is held that it admits of no exception whatever, cases may arise where by following the principle justice itself may be defeated.[97]

4.3 Impermissibility of evidence collected illegally

Is a trial based on evidence collected in contravention of la unfair? Simple as the answer may seem, an analysis of tt evolution of the law would suggest that the matter is not free froi polemics, far less settled. The power of search and seizure in ai system of jurisprudence is an overriding power of the State for tl protection of social security and that power is *necessarily* regulat< by law.[98] Sections 91-105 of CrPC deal with provisions relating search and seizure. However, there is no explicit provision th makes evidence collected in contravention of law inadmissib

Court, to which the public generally may have access, so far as the same c conveniently contain them.

[94] (1998)1 SCC 226.

[95] AIR 1967 SC 7.

"Id.

[97] See *id.,* see also *supra* n. 63.

[98] *Pooran Mai* v. *Director of Inspection,* (1974) 1 SCC 345.

during trial. In *Poor an Mai* v. *Director of Inspection,* the appellant submitted that the search and seizure conducted by the authorities was illegal for being in contravention of sec. 132 of the Income Tax Act, 1961 and, therefore, could not be used before the Income Tax Authorities against the person from whose custody it was seized. Rejecting the contention the court held that 'even *assuming* that the search and seizure were in contravention of the provision of section 132—they still liable to be used *subject to law*—and therefore, *no Writ of Prohibition in restraint of such use could be granted.'*[100] In the event that the court had found on facts that the search was not vitiated by illegality, it is difficult to appreciate as to why the court went ahead with an observation on an issue not warranted by the facts of the case. Explaining its rationale on the consequences of an illegal search, the court held:

> Now, if the Evidence Act, 1872 which is a law consolidating, defining and amending the law of evidence, no provision of which is challenged as violating the Constitution- permits relevancy as the only test of admissibility of evidence and, secondly, that Act or any other similar law in force does not exclude relevant evidence on the ground that it was obtained under an illegal search or seizure, it will be wrong to invoke the supposed spirit of our Constitution for excluding such evidence.[101]

There seems to be two propositions on the basis of which the court reached its conclusion. First, that no provision of the Evidence Act had been challenged as violating the Constitution and secondly that there is no explicit provision in the Evidence Act that excludes the admissibility of relevant evidence. On the first argument, it may suffice to state that by the same reasoning, the conclusion may have been different if the relevant provisions of the Act had been challenged as being constitutionally invalid. The second reasoning appears to have followed from the first one itself, i.e. since no provision was challenged as being violative of the Constitution, no

(1974)1 SCC 345.
°W, para. 25. [1] *Id,*
para. 23.

implied limitation could be read into any of the provisions of the Act to exclude admissibility of relevant evidence. The reasoning on both counts is highly suspect. However, the harm committed was salvaged to a limited extent when the court in *Ali Mustaffa* v. *State ofKerela*[102] observed that the judgment in *Pooran Mai* could not be read as having laid down 'that a contraband seized as a result of illegal search or seizure, can be used to fasten that liability of unlawful possession of the contraband on the person on whom the contraband had allegedly been seized in an illegal manner.' The law on the issue was further mired into controversy when the court in *Prithi Chand* v. *State of Haryana*[103] relying on *Pooran Mal*[m] held that 'evidence collected in a search in violation of law does not become inadmissible in evidence under the Evidence Act--Even if search is found to be in violation of law, what weight should be given to the evidence collected is yet another question to be gone into." The same ratio was reiterated by the court in *State of Punjab* v. *Jasbir Singh.*[106] It finally fell upon the constitution bench in *State of Punjab* v. *Baldev Singh*[101] to clarify the position of law on admissibility of evidence collected illegally in the light of the conflicting decisions of the court earlier. Rejecting the argument that *Pooran Mal*[m] could be read as having laid down any general principle of law, Anand C.J. observed that:

> If Pooran Mai judgment is read in the manner in which it has been construed in State of H. P. v State of Prithi Chand, then there would remain no distinction between recovery of illicit drugs etc. seized during a search conducted after following the provisions of section 50 of the NDPS Act and a seizure made during a search conducted in breach of the provisions of section 50 of the NDPS Act.' [109]

[102] (1994) 6 SCC 569.
[103] (1996) 2 SCC 37.
[104] (1974)1 SCC 345.
[105] Supra n. 30, para. 14.
[106] (1996)1 SCC 288.
[107] (1999) 6 SCC 172.
[108] (1974) 1 SCC 345.
[109] *Supra* n. 34, para. 45.

The court observed that the prosecution cannot be permitted to take advantage of its own wrong.[110] Conducting a fair trial for those who are accused of a criminal offence is the cornerstone of our democratic society.[111] A conviction resulting from an unfair trial is contrary to the concept of justice."[2] *While considering the aspects of fair trial, the nature of the evidence obtained and the nature of the safeguard violated are both relevant factors.*[1] The court, therefore, concluded that it cannot allow admission of evidence against an accused where it is satisfied that the evidence has been obtained by a conduct of which the prosecution ought not to take advantage of. A conviction based on evidence collected in contravention of law is indisputably antithetical to any conception of a fair trial. To allow evidence of such nature as admissible would be to undermine the majesty of law and an open invitation to lawlessness on the part of authorities. Rule of law, the cornerstone of our constitutional democracy, requires that power be exercised with the authority of law and not without it.

4.4 Right to appeal

Generally speaking and subject to just exceptions, at least a single right to appeal on facts where criminal conviction is fraught with *long* loss of liberty is basic to civilized jurisprudence. [14] It is integral to fair procedure; natural justice and normative universality save in special cases."[5] The right assumes crucial significance and stands at a different pedestal because of the possibility of loss of personal liberty. As noted earlier, 'wrongful acquittals are undesirable'—'much worse, however, is the ! wrongful conviction of an innocent person.'"[6] It is the possibility i of such an omission that makes the right to appeal a cherished end in the administration of criminal justice. The theoretical basis of the right may be located in the possible deprivation of personal

[u0] *Id.*
[''] *Id.*
[1,2] *Id.*
[m] *ld.*
[1U] *M. N. Hoskot* v. *State of Maharashtra,* AIR 1978 SC 1548, paral 1.
[,u] *Id.*
Supra n. 6.

liberty attributing to the frailties of human mind. The same, however, need not be true in civil cases. Undeniably, judges may commit errors in civil cases too. But the consequences of errors in criminal matters are far more grave and repulsive, justifying a right to appeal on facts as part of fair trial.

The general scheme of appeal provisions in the CrPC indicates a similar approach. However, the Code bases itself on the presumption that the right to appeal is a creation of the statute.[117] The Code provides for a right to appeal to the High Court in cases where a person has been convicted with a sentence of imprisonment for more than seven years.[118] Similarly, the Code explicitly bars any appeal in petty cases especially where the sentence of imprisonment is for a term not exceeding three months or is only a sentence of fine.[119] The underlying philosophy as it becomes apparent from a plain reading of the provisions is that where the possibility of deprivation of personal liberty for a substantial period of time exists, the authors of the Code have deemed it fit to provide for an appeal to a higher authority. However, where the sentence of imprisonment is minimum or is limited to fine only, no such right to appeal has been provided for. It reiterates the earlier argument that on occasions where the trial includes the possibility of long deprivation of liberty, it is only just and fair that the process includes a right to appeal.

However, it is not to suggest that the right to fair trial is composed of an exhaustive list of these four rights. For example, the right not to be prosecuted after the statutory period of limitation is undeniable a facet of fair trial.[120] Similarly, when it is shown that public confidence in the fairness of a trial would be seriously undermined, a party to such trial may seek the transfer of a case anywhere within or outside the State. It is the right to have a trial transferred to a court in a different jurisdiction if fairness cannot be guaranteed in the former place of trial. The principles mentioned

[117] Sec. 372 CrPC.
[118] Sec. 374(2) CrPC.
[119] See sec. 376(b); sec. 376(c); sec. 376(d), CrPC.
[120] *State of Punjab* v. *Sarwan Singh*, AIR 1981 SC 1054.
[121] *Abdul Nazar Madam* v. *State of Tamil Nadu*, (2000) 6 SCC 205.

herein do not reflect any exhaustive enumeration of the right to fair trial but are merely illustrative.

4.5 Right to speedy trial

Right to speedy trial stands on a firm foundation in our constitutional law jurisprudence as evidence of right to fair trial. Any meaningful concept of individual liberty, which forms the bedrock of a civilized legal system, must view with distress patently long periods of imprisonment before persons awaiting trial can receive the attention of the administration of justice.[12] It is indisputable that an unnecessarily prolonged detention in prison of undertrials before being brought to trial is an affront to all civilized norms of human liberty.[123] Speedy justice is also a component of social justice since the community, as a whole, is concerned with the criminal being condignly and finally punished within a reasonable time and the innocent being absolved from the inordinate ordeal of criminal proceedings.[124] It is in the interest of all that guilt or innocence of the accused is determined as quickly as possible in all circumstances.[125] Speedy trial is the essence of criminal justice and there can be no doubt that delays in trial by hself constitutes denial of justice.[126] The right encompasses all stages, namely the stage of investigation, inquiry, trial, appeal, revision and re-trial.[127]

Right to speedy trial has not been specifically included in Part III of the Constitution. However, it is well settled that life and personal liberty can be deprived by a procedure that is 'reasonable, fair and just. No procedure that does not ensure a reasonably quick trial can be regarded as 'reasonable, just and fair' and would fall foul of art. 21. There can, therefore, be no doubt that speedy

[12>] *Hussianara Khatoon (I)* v. *Home Secretary,* (1980) 1 SCC 82, para. 7.
[123] *Id.*
"* *Babu Singh* v. *State of UP,* AIR 1978 SC 527.
[125] *A. R. Antulay* v. *R. S. Nayak,* AIR 1992 SC 1701, para. 54.
[126] *Hussianara Khatoon* v. *State of Bihar,* AIR 1979 SC 1360, para. 2.
[127] *Supra* n. 48.
[m] *Maneka Gandhi* v. *Union of India,* (1978) 1 SCC 248. [Q]*
Supra n., 124, para. 5.

trial is an integral part of the fundamental right to life and libe: enshrined in art. 21.[130] It is interesting to note that the Si> Amendment to the US Constitution recognizes the right of t accused to a speedy and public trial. However, the recognition the right raises many more perplexing questions of constitutior law than it answers.

When can a trial be said to have delayed? Is the nature of offen relevant in deciding the issue of delay in trial? Is the right violati on delay of trial or it is said to have been violated when there *unreasonable* delay? What are the consequences of a delayed tria Are the consequences same even if accused were to be responsib for the delay in trial? Is it relevant as to whether the accused WJ prejudiced by the delay in trial? Judicial minds have debated the: questions for long.[132] The questions are difficult and there are r easy answers. The apex court was faced with the dilemma of the; questions on many occasions, most notably in *A. R. Antulay* v. *i S. Nayak}*[33]

In *Sheela Barse* v. *Union of India,*[134] the Supreme Court observe that the consequences of violation fundamental right to speedy trii would be that the prosecution itself would be liable to be quashe on the ground that it is a breach of fundamental right. Th simplistic answer provided by the learned judges, however, ha subsequently posed many problems in implementing the right t specific situations. It must be appreciated that the right to spee trial is fundamentally different from the other rights recognisei under the Constitution. Explaining the differences, the Suprem Court in the *A. R. Antulay*[1 5] quoted the following observations o the US Supreme Court in *Barker* v. *Wingo*[136] as evidence o

[131] Sixth Amendment, US Constitution states: 'In all criminal proceedings, th< accused *shall* enjoy the right to a speedy and public trial.'
[132] See *Raghubir Singh* v. *State of Bihar,* (1986) 3 SCR 802.
"'(1992) 1 SCC.
[134] (1986) 3 SCC 632.
[135] *Supra* n. 135, para. 68.
[136] 33 L.Ed 2d 101.

differences between the right to speedy trial and other constitutional rights of the accused.

> *Firstly* while all other rights of the accused are for his protection, right to speedy trial includes a societal interest in providing a speedy trial which exists separate from and at times in opposition of the interests of the accused.
>
> *Secondly,* the deprivation of the right may work to the advantage of the accused for delay is not an uncommon defense tactic.
>
> *Thirdly* it is impossible to determine with precision as to when the right has been denied. It is difficult to say how long is too long in a system where justice is supposed to be swift but deliberate. *Fourthly,* the amorphous quality of the right also leads to the unsatisfactorily severe remedy of dismissal of the indictment when the right has been deprived.

On the basis of these noticeable differences, the Court formulated its understanding of the consequences of the violation of the right to speedy trial. The court suggested that in any case relating to the denial of speedy justice, the first question that needs to be answered is: who is responsible for the delay?[137] The court opined *at proceedings taken by either party in good faith, to vindicate Aeir rights and interest, as perceived by them, cannot be perceived as delaying tactics nor can time taken in pursuing such proceedings be counted towards delay of the trial.[138] In other words, an accused cm allege denial of the right to speedy trial only if he has not contributed to the delay of the trial. The court suggested in deciding the issue of violation of the right to speedy trial regard ■ust be had to the nature of the offence, the surrounding circumstances including number of accused and witnesses, workload of the court concerned, prevailing local conditions and so

Supra n. 135, para. 86.
[m] *ld.*

on. The court must employ a *balancing test* to determine whether the delay in trial had prejudiced the accused. The delay may have been occasioned by the tactic or the conduct of the accused himself. Accused later cannot be allowed to take advantage of his wrong.[140] The consequences of delay must be judged on the facts of each case. If the accused is found to have been prejudiced in the conduct of his defence and it could be said that the accused had thus been denied an adequate opportunity to defend himself, the conviction would certainly have to go.[141] In other words, if the cause of delay is the accused himself, he cannot have the benefit of the right to speedy trial. The court concluded that *ordinarily* speaking, where the court comes to a conclusion that the right to speedy trial of an accused has been infringed the charges or conviction as the case may be shall be quashed. However, cautioning against any easy approach, the court observed that not every causes are prejudice to the accused.[142] And, therefore, the court suggested that quashing of charges is *not the only course open.* The court observed that if the nature of the offences and other circumstances of the case may be such that quashing of charges may not be in the interests of justice, it may consider making an order regarding the conclusion of the trial within a fixed time or where the trial has concluded consider reducing the sentence.[143]

We would submit that the conclusion of the court regarding the consequences of violation of the right to speedy trial is indeed suspect. We would submit that if the court comes to the conclusion that the right to speedy trial has been violated the court has *no* option to quash the charges or conviction as the case may be. The court is patently erroneous when it suggests that *that is not the only option open.* We would submit that that is indeed the only course open. There *cannot* be any exception to the rule, as the court seems to suggest. It may be a completely different issue as to whether the right has been violated in the first place. And the same may be

[139] *Id.*, para. 86.
[140] See *id.*
[141] *Id.*
[142] *Id.*

decided in different cases in different ways taking into account the 'nature of the offence and other circumstances.' However, it is patently erroneous to suggest that the same are significant variables in deciding the consequences of the violation of the right. While they may be important variables in deciding whether the right has been violated or not, they have no consequences in deciding how the violation of the same can be remedied. Therefore, I would submit that the court is correct when it suggests that in deciding as to whether the right to speedy trial has been violated, it shall take into account the nature of the offence and other circumstances. However, it is as much incorrect when it suggests that even if there is a violation of the right to speedy trial, quashing of the charges or the conviction is *not* the only course open. Violation of fundamental right cannot be remedied by passing an order for concluding the trial with a given time frame. Nor can it be remedied by reducing the sentence of the accused. The only option is to undo the very process that led to the violation of the fundamental right. Therefore, We would submit that if the court comes to the conclusion that the right to speedy trial has been violated, it would be left with no option but to consider quashing of the charges or the conviction as the case may be.

4.6 Right to legal aid

Is right to legal aid an evidence of fair trial? When law recognizes the right of a person to represent himself in his own case, where does one locate the jurisprudential basis for a constitutional right to free legal aid? An accused has a right to assert his innocence in a court of law. But without professional legal services, the right may not be worth the paper that provides it. Even the intelligent and educated layman has small and sometimes no skill in the science of law. [44] If charges with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad.[145] Left without the aid of a counsel he may be put on trial without a proper charge, and convicted upon irrelevant, inadequate and

Per Douglas J., *Fort Richard Argersinger* v. *Raymond Hamlin*, 35 L Ed 2d 530 af 535-36.

inadmissible. If that be true of men of intelligence, how m more true is it of an ignorant, illiterate or feeble intellect persor Judicial justice, with procedural intricacies, legal submissions critical examination of evidence, leans upon professional expert and a failure of equal justice under the law is on the cards wl such supportive skill is absent for one side.[14] Free legal service the poor and the needy, therefore, are an essential element of 'reasonable, fair and just' procedure.[149]

In *Hussianara Khatoon* v. *State ofBihar*[i5°] the court held that right to free legal services is clearly an essential ingredien reasonable, fair and just procedure for a person accused ol offence and it must be held to be implicit in the guarantee of 21. Though the constitutional basis for providing free legal ai found in art. 39-A, the same is also a constitutional right of c accused person who is unable to engage a lawyer and secure 1 services on account of reasons such as poverty or indig< situation.[151] A fair representation is at the core of the right to trial. With effective representation, the celebrated aspiratioi fairness in trial would only be 'sound and fury signifying nothi When only the rich can enjoy the law, as a doubtful luxury and poor, who need it most- cannot have it because its expenses p beyond their reach, the threat to the continued existence of democracy is not imagery but very real. ' Unmistakably, the of democracy depends upon making the machinery of justic effective that every citizen shall believe in and benefit bj impartiality and fairness. The recognition of the pressing i for legal aid to ensure the legitimate administration of crin justice is a tacit recognition of the extent to which law is divo from the reach of the teeming millions of our nation, institution of law still remains an esoteric discipline, provi

147 *Id.*
148 *M. N. Hoskot* v. *State of Maharashtra,* (1978) 3 SCC 544.
149 *Hussianara Khatoon (IV)* v. *Home Secretary,* (1980) 1 SCC 82, para. 6.
150 *Id.*
151 *Id.*, para. 7.
152 *M. N. Hoskot* v. *State of Maharashtra, supra* n. 148, para. 15.

little succor to persons who need it the most. In *Khatri* v *State of Bihar*[154] Bhagwati J. observed that the Magistrate or the Sessions Judge before whom an accused appears must be held to be under an obligation to inform the accused that if he is unable to engage the services of a lawyer on account of poverty or indigence, he is entitled to obtain free legal services at the cost of the State. In the instant case, the court deplored the action of the Judicial Magistrate who failed to discharge his obligations and contended himself by merely observing that no legal representation had been asked for by the blinded prisoners and hence none was provided. The 'demand rule' is clearly inapplicable in case of right to free legal aid. A person does not waive his right merely on account of his failure to demand for the same. It is an obligation on the State to provide him with the same unless he expressly desires not to avail such service. Explaining the consequences of an unrepresented defense, Bhagwati J., observed

> The result was that the appellants remained unrepresented by a lawyer and the trial ultimately resulted in their conviction. This was clearly a violation of the fundamental right of the appellants under Article 21 and the trial must accordingly be held to be vitiated on account of a fatal constitutional infirmity, and the conviction and sentence recorded against the appellants must be set aside.[155]

Are all accused persons entitled to the constitutional right to free legal aid? In *Suk Das* v. *Union Territory*[156] Bhagwati J., observed that 'of course, the right to free legal aid *does not* call for universal application.' There may be cases involving offences, such as economic offences or offences against law prohibiting prostitution or child abuse and the like, where social justice may require that free legal services may not be provided by the State.[157] It is

[154] AIR 1981 SC 928. See generally *Ranjan Dwivedi* v. *Union of India,* AIR 1983 SC 623.
[155] *Suk Das* v. *Union Territory,* AIR 1986 SC 991, para. 6.
[156] AIR 1986 SC 991.
[157] *Hussianara Khatoon* v. *State of Bihar,* AIR 1979 SC 1360, para. 5.

submitted that law calls for a far stronger foundation if a constitutional right is to be denied to a person. 'Social justice' as a reason for denying the right to free legal aid to persons charged with certain kinds of offences is vague formulation to say the least. Is such a classification, a just and fair one? Would such a classification stand the test of reasonableness? Should the law recognize greater rights for a murderer that for a person who commits fraud? Should law regard a rapist as more benevolent than a pedophile? Is offence against law prohibiting prostitution more heinous that an offence against law prohibiting the use of drugs? If one were to regard the classification suggested by Bhagwati J. as valid, one must answer all of these questions in the affirmative. Any such classification is indeed suspect.

We would submit that all persons, without exception are entitled to their constitutional right to free legal aid. lSlot only precedents but also reason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer cannot be assured a fair trial j unless counsel is provided for him.[158] We would submit that the rationale of ensuring fair trial cannot be buried even if the offence is heinous or a felony. The nature of the offence committed cannot be a basis for denying an accused the right to fair trial. Fairness in trial is a constitutional aspiration that cannot be lost merely because the offence involved is a heinous one.

5. EPILOGUE: BREAKING THE BARRIERS

The relationship between access to justice and the success of democracy is direct and if one may add, *proportional.* Right to access to justice is a complex whole, on the efficacious implementation of which rests the edifice of a true democracy. The effectiveness of the right reflects the strength of our social contract. An exhaustive enumeration of the principles and components that constitute the facets of the right to access to justice is difficult, if not impossible. The Endeavour of this paper was to highlight the components that may be regarded as the core,

[158] *Gideon* v. *Wainwright,* 9 L Ed 2d *at* 799.

the *fundamentals* of the right to access to justice. Evidently, the need of the hour is to democratize these fundamentals so as to ensure their effective implementation. The high rhetoric of justice philosophy in the Constitution and in statutes means little without the possibility of its effective implementation.

A broader reading of the nature of justice administration in India suggests that the same remains supremely prejudiced in favour of the accused. Not surprising, therefore, that all aspects of fair trial that I have discussed in section III of the paper relate to an accused. The victim is an equal stakeholder in the process of criminal justice administration. Undue emphasis on the rights of the accused with little or no concern for that of the victim is bound to create an imbalanced order of justice, the repercussion of which will undoubtedly be severe. The victim's claim for the fairness needs recognition and energetic implementation. Participation of the state in the administration of criminal justice does not obviate the necessity of upholding the victim's rights. The bankruptcy of legal jurisprudence in failing to protect the victim may cost the system dear. The caveat was put to words, decades back, when Brenan J. observed *'[NJothing rankles more in the human heart than a brooding sense of injustice.'* The 'brooding sense of injustice' that Brenan J. spoke of is potent and sufficiently incisive to test the legitimacy of justice administration. The onus of evolving standards of 'fairness' beyond that of the accused now lies on the legislature and the courts. Fairness needs a novel meaning; one that is fair to the victim too. But even beyond realigning the principles of justice administration with that of the interests of the victim, justice administration requires drastic changes. We would suggest the following as a modest blue print for administering meaningful access to justice.

1. Implement the mandate of art. 32(3) of the Indian Constitution.[159]

Article 32(3), Constitution of India: Without prejudice to the powers conferred on the Supreme Court by clauses (1) and (2), Parliament may by law empower any other court to exercise within the local limits of its jurisdiction all or any of the powers exercisable by the Supreme Court under clause (2)

2. Implement the mandate of art. 348(1) and 348(2) of the Indian Constitution. In other words, recognize and promote the use of regional languages in any court of law, especially at the appellate forums.

3. Establish circuit benches of the Supreme Court at regional centres. An apex court established far away at the heart of the capital does not necessarily promote the sensitivity required to judicially address issues of regional or local concern.

4. Recognize the right to victims to intervene in cases where the prosecution fails to act in an impartial and fair manner.

5. Implement measures that can ensure speedy trial. As suggested earlier, the significance of ensuring speedy trial is not limited to the interest of the accused alone. Even the victim has a reasonable stake in ensuring that a trial is completed without undue delay. The introduction of 'fast track' courts is undoubtedly a step in the positive direction.

6. Constitute a compensation fund that can provide financial succor to victims of crime without the necessity of litigating for the same in other civil forums.

7. Recognize the right to free legal aid for all accused persons irrespective of the nature of offences. The jurisprudence developed by the Court in creating exceptions to the right does not stand the test of reasonableness.

8. Recognize the duty of lawyers to provide free legal aid as a statutory mandate.