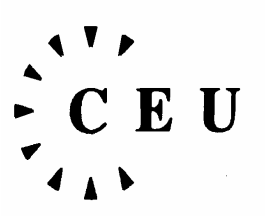

EQUALITY OF ARMS AS A FAIR TRIAL GUARANTEE- A COMPARATIVE STUDY OF INDIA AND EUROPEAN COURT OF HUMAN RIGHTS

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ABSTRACT

This study is aimed at analyzing the extent of application of the principle of equality of arms as evolved by the jurisprudence of European Court of Human Rights as an effective mechanism of fair trial guarantee under Article 6(3) of ECHR on a comparative perspective with that of India. It identifies in the light of Convention, Constitutional provisions, legislative framework, the analysis of case law as well as writings of the scholars that India has been effective and enthusiastic in the application of the principle of 'equality of arms' in criminal trials greater protection than the standard and extent of procedural compliance guaranteed by the European Court of Human Rights. More particularly, the thesis examines procedural protection guaranteed of the rights of accused to defend their side on par with that of prosecution between these two legal systems, viz., national in the case of India and super national in the case of ECtHR. The enthusiasm for the application of the procedural equality by India has not been found with the ECtHR until recently. It is concluded that procedural equality that is guaranteed by India from the time of informal accusation until the time of final acquittal and at all stages whether pre-trial, trial, appeal or post-trial proceedings.

INTRODUCTION

Criminal Justice Administration aims not only at protecting society by sanctioning baneful acts of its members but equally it intends to ensure that no innocent member of the society would be punished for the disapproved act he has not committed. It has always been a difficult arena to find the guilty and punish them without tampering the interest of innocents. The significance of the maxim "let a hundred criminals run away but no innocent shall be punished"[1] lies on this aspect of criminal justice dispensation. Criminal trails have been controversial for their non-compliance of at least the procedural requirement whereby the accused are put in peril to prove their innocence. Attempts were always made to make the trials fair and free from external influence so that the minimum protection to the accused could be guaranteed. A fair trial procedural guarantee is an essential element to ensure that the accused are given sufficient opportunity to defend their case.

Convention for the Protection of Human Rights and Fundamental Freedoms provides under a separate heading[2] for fair trail rights for an accused in civil or criminal cases[3]. This study is confined only to criminally charged persons to defend their cases before a Court of law. The European Court of Human Rights in its application has extended the principle by stating that it is not only the opportunity to defend the case, but it should be to defend on equal level with that of the accuser[4]. In this process, the Court evolved the principle of equality of arms in criminal trials which implied that the prosecution and defendant should equally be placed to present their case before any court or tribunal that is impartial in order to guarantee procedural fairness.

In any criminal trial the accused is not pitted against another individual, but against the State.[5] Unlike in civil cases, where non-State plaintiff and pecuniary damages are the

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[1] *Letter from Benjamin Franklin to Benjamin Vaughan* (Mar. 14, 1785), *in* Benjamin Franklin, Works 293 (1970). According to Franklin, "even the sanguinary author of the *`Thoughts'* agrees to it," citing Martin Madan, Thoughts on Executive Justice 163 (2nd ed. 1785); See *www.wekipeadia.com*

[2] Heading added according to the group of provisions by Protocol No. 11(ETS No.155).

[3] Article 6, The European Convention of Human Rights and Fundamental Freedoms.

[4] *Delcourt V. Belgium*, Judgment of 17 January 1970 (Chamber); (1970) 1 EHRR 355

[5] There are exceptions in certain cases of private complaints.

remedy, criminal trials involve punishments that affect the very basic and fundamental freedoms and liberties of persons and in some cases loss of life too. Therein lies the seriousness of why should there be utmost care in at least procedural fairness in criminal trials. The principle of 'equality of arms' is meant to confer an indispensable guarantee of equal opportunity for the accused in presenting their cases on equal footing with the prosecution. By so doing, the principle provides safeguards of fair hearing to the accused that are placed in disadvantageous positions as compared to the prosecution where all the State machineries, namely the police, the prosecution and the administration are at its disposal against the accused.

European Court of Human Rights (ECtHR) functions over two legal systems *viz.*, Continental legal system and Common law system. The Court was passive until 1980s in applying the principle of equality of arms[6] that was not very common in the continental systems which provided for the same person or body of persons acting as investigator, prosecutor and judge. But the court slowly became active and interpreted the principle as one of the important components of fair trial guarantee and defendants rights.[7]

India has adopted her Constitution in 1950 amidst communal civil war caused due to partition in 1947[8] aggravating the situation on already poor, illiterate and ignorant mass of India. Considering the circumstances and socio political aspects such as feudalism, the framers of Indian legal system were concerned about the rights of individuals particularly on the right to life and liberty[9] and the rights of arrested and accused persons[10] in criminal cases and hence specific protection were given in the Constitution. The Supreme Court of India extended the scope of application of the rights enshrined in the Constitution and statutes in such a way as to give the rights maximum protection to the possible extent to

[6] Nadelmann, Kurt, *Due Process of Law before the European Court of Human Rights: the Secret Deliberation*, The American Journal of International Law, Vol. 66, No.3. (Jul., 1972), PP 509-525; *see Delcourt V. Belgium*, (1970) 1 EHRR 35; *See also Neumeister v. Austria,* (1968) 1 EHRR 83, Matznetter *v Austria*, (1969) 1 EHRR 198.

[7] *Bonisch v Austria* (1987) 9 EHRR 191, Judgment of 6 May 1985 (Chamber); *Pakelli v Germany* (1984) 6 EHRR , Judgment of 25 April 1983 (Chamber)

[8] Partition of India and Pakistan in 1947 after India got freedom from colonial British rule.

[9] Constitution of India, Article 21

[10] Ibid. Article 22

the accused persons. A comparative study between India and ECtHR would be of significance on the extent of protection of the rights of accused in the application of principle of 'equality of arms' during criminal proceedings in these two legal systems, *viz.*, national and super national.

There are works on the principle of equality of arms on the ECHR[11] and also on the procedural equality of the rights of accused persons in India[12]. But no comparison has so far been made on the application of equality of arms principle in relation to the extent of protection of the right of defense between these two legal systems. The main theme of the study will be to compare the two legal systems on this aspect. Hence the study focuses on the gap how far the Indian Constitution, Statutes and Supreme Court are able to guarantee the principle of equality of arms as evolved by the ECtHR in the trial for the protection of rights of defense. The Indian Supreme Court has been following the content of the principle of equality of arms though the principle as such is unknown to it.[13] The Indian legal system and the Supreme Court, which basically follows the footsteps of common law, have guaranteed this right in the embodiment of a legal system and to that extent the principle of equality of arms cannot be considered to be new to the Indian legal system.

This thesis is aimed at analyzing the extent of application of the principle of equality of arms as evolved by the jurisprudence of European Court of Human Rights as an effective mechanism of fair trial guarantee under Article 6(3) of ECHR on a comparative perspective with that of India. Since the study to be conducted is on different legal systems *viz.*, national legal system in the case of India and super national system in the case of European Court of Human Rights, the similarities and differences of such legal systems in relation to the application of the principle of equality of arms are to be

[11] Mahoney, Paul, *Right To A Fair Trial In Criminal Matters Under Article 6 E.C.H.R*, Judicial Studies Institute Journal, (2004); *See* also supra note 6; Berger, Vincent, *Case Law of the European Court of Human Rights*, (Vol. I, 1860-1987) (1991)

[12] Seervai, H.M. *Constitutional Law of India: A critical Commentary*, (1997) at pp 1088-89; Saharay, K.K., *Cases and Materials in the Indian Constitutional law*, (1987); Singh, M.P,*V.N. Shukla's Constitution of India*,(1998) at pp.182-184

[13] *State of M.P V. Sobharam*, AIR 1966 SC 1910; *Nandini Satpathy V. P.L. Dany*, AIR 1978 SC 1025; *Hussainara Kahtoom V. State of Bihar*, AIR 1979 SC 1377

analyzed comparing those systems for a proper evaluation to assess the effectiveness of the constitutional and legal provisions in the protection of the right and of the role of courts in interpreting and applying such provisions. Case law analysis is essential in this research in order to compare the activism of the courts in the application of the principle of equality of arms as the principle is the jurisprudential invention of the European Court of Human rights for ensuring fair trial guarantee and the Supreme Court of India also stands for applying procedural equality for protecting the rights of accused persons in the trials. The non availability of the Indian journals, books and case laws particularly after year 2000 within the time bound program was the limitation of the study.

The thesis is divided into *two chapters*. The *First* C*hapter* aims at conceptualizing the principle of 'equality of arms' and rights of accused in criminal trials, analyzing the legal frame work in India by referring Constitutional provisions and legislative enactments on the other hand and European Convention on Human Rights and Fundamental Freedoms (ECHR) on the other. The *Second* C*hapter* will analyze the activism of European Court of Human Rights and that of the Indian Supreme Court in furthering the protection as ensured by the principle of equality of arms on a comparative perspective. Relying on the case law and connected legal and constitutional provisions it would be established that apart from the socio economic backwardness of Indian situation the right of the accused to defend his side on equal footing with that of the accuser in criminal trials is protected by the Indian legal system *on greater* level than that of ECtHR.

Chapter I

LEGAL FRAMEWORK FOR THE PROTECTION OF RIGHTS OF ACCUSED

Criminal trials involve the risk of life and liberty of persons who may not have committed the crime and by the two known trial systems viz., Adversarial system[14] and the Inquisitorial system,[15] culprits are punished and innocents are set free. In adversarial system each side, acting in its self-interest, is expected to present facts and interpretations of the law in a way most favorable to its interests before an impartial tribunal and the Inquisitorial system, is characterized by a continuing investigation conducted initially by police and then more extensively by an impartial examining magistrate. The adversarial approach presumes that the accused is innocent[16], and the burden of proving guilt rests with the prosecution.[17] The Inquisitorial system assumes that an accurate verdict is most likely to arise from an exhaustive investigation and the examining magistrate serves also as investigator who directs the fact-gathering process by questioning witnesses, interrogating the suspect, and collecting other evidence.[18] Due to the different operating style of these two systems, there are differences in the role of the accused in the trial proceedings viz., in adversarial proceedings the accused has great role in defending his case and in inquisitorial trials he has only limited role in defending his case.

An important aspect of modern trial proceedings is that of guaranteeing fair trial to an accused person and the right to a fair trial is a fundamental safeguard to ensure that individuals are protected from unlawful and arbitrary deprivation of their human rights fundamental and freedoms, most importantly of the right to liberty and security of person. It is an important aspect of the rights which enable effective functioning of the

[14] Also known as accusatorial or the common law system
[15] Also known as Continental or the Civil law system.
[16] *See* Lord Sankey LC in *Woolmington v DPP*, [1935] AC 462
[17] *Trial system*, http://www.judiciary.gov.bt; *See also* Mc Ewan, J, *Evidence and the adversarial process-The Modern Law*, (1998), Hart Publishing, p.2
[18] *Ibid.*

administration of criminal justice.[19] International standards[20] provide for a number of minimum guarantees which apply to the determination of criminal charges against persons and that includes right of the accused to defend his case. The Jurisprudence of European Court of Human Rights has stretched this right of the accused to the extend that it is not a mere right to defend the case in criminal trials but it must be on equal footing with that of the prosecution which is popularly known as principle of "equality of arms".

Equality of arms means that both the parties, namely, the accuser and the accused, are treated in a manner ensuring that they have procedurally equal position during the course of the trial, and are in an equal position to make their case.[21] It means that each party must be afforded a reasonable opportunity[22] to present its case and no party should be placed at a disadvantageous position. In criminal trials, where the prosecution has all the machinery of the state behind it, the principle of equality of arms is an essential guarantee of the right to defend the case of accused on par with the prosecution. It requires procedural fairness in affording opportunity to the accused either himself or with legal Counsel to defend the case, confront witness, examine documents etc.

This chapter analyzes on comparative perspective the Indian legal frame work in the protection of the rights of accused regarding the procedural equality in criminal trials with that of the European Convention of Human Rights and Fundamental Freedoms in the light of international standards.

India as a national jurisdiction predominantly follows the adversarial system for trial proceedings in the determination of criminal charges.[23] European Court of Human Rights (ECtHR), on the other hand, stands as a Super national Court among the member countries of the Council of Europe, some of which follow adversarial system such as

[19] The right to a fair trial applies not only to procedures for the determination of criminal charges against individuals but also to procedures to determine their rights and obligations in a suit at law as per the provisions of Article 6 of ECHR and Article 14 of the ICCPR

[20] *See* The Universal Declaration of Human Rights (UDHR); The International Covenant on Civil and Political Rights (ICCPR); The European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).

[21] Fair Trial Manual, Amnesty International, USA

[22] *Ibid.*

[23] Vibhute, K.I., *Criminal Justice: A Human Rights Perspective Of The Criminal Justice Process In India*, (2004), Eastern Book Company, Lucknow

England, Ireland and Scotland while some others follow inquisitorial system such as German, France, Italy, Belgium, Italy and so on. In order to understand the protection guaranteed to accused in the trial procedures between India and ECtHR it would be easier to analyze separately in these two jurisdictions.

1. European Convention on Human Rights and Fundamental Freedoms (ECHR)

The European Convention on Human Rights and fundamental Freedoms (ECHR)[24], by Article 6 guaranteed minimum standards of fair trail in civil and criminal matters and the article is one of few provisions that goes into some detail as to the scope of safeguard in accusations and prosecutions[25]. Article 6 sub-section 3 expressly provides for protection to everyone charged with criminal offence with minimum rights. The text of Article 6 (3) reads:

> Everyone charged with a criminal offence has the following minimum rights:
> (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
> (b) to have adequate time and the facilities for the preparation of his defense;
> (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
> (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
> (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

Second World War that witnessed large number of human rights violations world wide, particularly in Europe and its aftermath have made it imperative for new human rights jurisprudence inter alia on the protection of fair trial procedures and to have clear and concrete procedural safeguards that guarantees minimum fairness in the trail proceedings particularly in criminal cases on international perspective can be considered as a back ground for the incorporation this specific provision in the Convention. Though the UDHR which has been adopted in 1948 set forth right to fair hearing but did not elaborate the rights of fair hearing especially on the rights of accused in defending their

[24] Adopted by the Council of Europe in 1950
[25] *See supra* note 6.

case. The text of Article 10 of UDHR reads "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."

Considering the non elaboration of right of fair hearing in UDHR, when the ECHR was adopted detailed provisions were incorporated on the right of fair hearing and particularly on the rights of the accused.[26] Though the provision in UDHR is too general in terms yet this has made a milestone in the human rights history of fair trial and has since then been a basis for further elaboration of rights of accused in trial proceedings. When there was the demand for separate international standards[27] and protection for civil and political rights elaborate protection was given in the International Covenant on Civil and Political Rights (ICCPR) regarding the fair trial and of rights of accused which may seem similar to that of the ECHR. The International Covenant on Civil and Political Rights which was adopted by the UN General Assembly in 1966 also contains a catalogue of rights under Article 14 guaranteeing rights of accused in criminal trials. Article 14 sub-section (3) provides:

> In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:
> (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him
> (b) to have adequate time and facilities for the preparation of his defense and to communicate with counsel of his own choosing;
> (d) to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;
> (e) to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
> (f) to have the free assistance of an interpreter if he cannot understand or speak the language used in court;

Article 14 (3)of the ICCPR is more elaborate and detailed than the Article 10 of UDHR in relation to rights of accused in criminal cases and could resolve the gap in the UDHR. The UDHR did not specifically ensure the rights of accused in defending his case except providing generally regarding the fair trial right. Hence from the scope of Article 10 it

[26] *See* Article 6, European Convention of Human Rights and Fundamental Freedoms.
[27] Office for Democratic Institutions and Human Rights, *A matter of international concern*; *See also* http://www.legislationline.org

could not be inferred that there was room for specific protection of rights of accused in criminal trials on the application of principle of equality of arms. Article 6 (3) of the ECHR and Article 14 (3) of ICCPR provided some detailed provisions regarding the minimum guarantee for the protection of rights of accused. These provisions also did not provide expressly and specifically that there existed a right of equality of opportunity in defending the case but has narrated only the rights of accused in the criminal proceedings.

2. INDIA

2.1 Constitution and Criminal Procedure Code

The legal frame work in relation to the protection of rights of accused in India can be found in the Constitution of India, Code of Criminal Procedure, 1861, as amended in 1930 and in 1973, and Special Acts such as Human rights Act, 1993 and Legal Service Authorities Act 1987.

When Indian Constitution was adopted in 1950, it provided two clear provisions in relation to rights of liberties and security of person, namely Article 21 which deals with protection of life and personal liberty and Article 22 which deals with safeguards against arbitrary arrest and detention. Article 21 of the Indian Constitution which is considered to be equivalent provision of 'due process' clause of US Constitution[28] and it provides "No person shall be deprived of his life or liberty except according to procedure established by law." It can further be evidenced from the Article 22 (1) of the Constitution of India that the framers of Indian Constitution had in their mind to provide a protection for the accused person to defend the case in a criminal proceeding initiated against him and to bring out the truthfulness of the accusation. Framers had taken the experience of colonial feudalism that persisted in wide abuse of power to prosecute and imprison persons arbitrarily with out proper trial.[29]

[28] US Constitution, Amendment V, which provides "No person shall…..be deprived of life, liberty, or property, without due process of law"

[29] Kolsky, E, *Codification And The Rule Of Colonial Difference: Criminal Procedure In British India*, (2005), 23 law & hist. rev. 631; See also Kalhan. A et al, *Colonial Continuities: Human Rights,*

Article 22 which safeguards arbitrary arrest and detention in sub Article (1) provides expressly the rights and protections for the arrested or accused persons, which, *inter alia*, provides the rights of the accused person to defend his case. The text of Art.22 (1) reads, "No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult, and to be defended by, a legal practitioner of his choice"

Immediately after the adoption of Constitution of India in 1950, crucial questions of rights and liberties of accused person arose in *A.K. Gopalan v. State of Madras*[30] and the Supreme Court dynamically interpreted the provisions of Article 21 and 22 in so far as that led to the development of human rights jurisprudence of arrested and accused person in India. Elaborating on the scope of 22, Kania J held "Article 22 is not a complete code and is to be interpreted as being supplemental to Article 21 and to the extent that points are dealt with and included or excluded, Article 22 is a complete code."[31] The Supreme Court was interpreting to connect protection of life and liberty in Article 21 with that of the protection guaranteed under Article 22 in relation to the rights of accused persons as supplemental.

It is worth noting that a similar provision to Article 22(1) can be found under Article 303 of the Code of Criminal Procedure[32] of India. Section 303 of Code reads "any person accused of an offence before a Criminal Court, or against whom proceedings are instituted under this Code, may of right be defended by a pleader of his choice".

Regarding the analogous nature of the provision of 22(1) of the Constitution with that of the Section 303 Das, J, in the same case held:

> The four procedural requirements in Article 22 are very much similar to the requirements of procedural due process of law. Some of these salutary protections are also to be found in the Code of Criminal Procedure. If the procedure has already been prescribed by Article 21 incorporating the principles of natural justice or principles underlying the Code of Criminal Procedure what was the necessity of repeating them in clauses 1 and 2 of Article 22. The

Terrorism, And Security Laws In India, (2006), 20 Colum. J. Asian L. 93 fall 2006; See West Law data base.

[30] AIR 1950 SC 27 ; (1950) S.C.R. 88.

[31] Ibid.

[32] Indian Code of Criminal Procedure was originally enacted in 1861 and the amended in 1930 and 1973.

> truth is that Article 21 does not prescribe any particular procedure but in defining the protection to life and personal liberty merely envisages or indicates the necessity for a procedure and in Article 22 lays down the minimum rules of procedure that even Parliament cannot abrogate[33]

The duplication of rights under Article 22(1) of Constitution of India and Section 303 in Code of Criminal Procedure was conscious insertion and the framers of the Constitution intended to provide greater protection for the accused to defend his case in criminal proceedings.[34] In this context it is significant to note the explanation given by Dr. B.R. Ambedkar[35] in the deliberations before the Constituent Assembly regarding the insertion of Art. 15-A (Article 22),[36]

> Article 15A merely lifts from the provisions of the Criminal Procedure Code two of the most fundamental principles which every civilized country follows as principles of international justice. It is quite true that these two provisions contained in clause (1) and clause (2) are already to be found in the Criminal Procedure Code and thereby probably it might be said that we are really not making any very fundamental change. But we are, as I contend, making a fundamental change because what we are doing by the introduction of Article 15A is to *put a limitation upon the authority both of Parliament as well as of the Provincial Legislature not to abrogate these two provisions*, because they are now introduced in our Constitution itself.[37]

It shows that the constitution makers had concern for providing protection to accused in defending his case and hence Article 22(1) is provided in addition to Article 21 and Section 303. This implies that greater safeguard was envisioned considering socio economic conditions such as poverty, illiteracy and ignorance of the majority people of the country.

Crl.P.C, under Section 204 sub-section (3) provides that when the case is instituted upon a written complaint,[38] the summons[39] or warrant[40] issued by the court must accompany

[33] *See Supra* note 30

[34] Code of Criminal Procedure 1861 as amended in 1930 was already in existence when the Constitution of India was drafted and adopted.

[35] Chairman, The Drafting Committee for Constitution of India after its independence in 1947

[36] In the draft Bill of Constitution it was numbered as 15A which corresponded to present Art. 22,

[37] As quoted in *In re Madhu Limaye*, 1969 SCR (3) 154 at p. 163

[38] There are cases in which the police are empowered to take *suo moto* case without a formal complaint.

[39] *See* Section 61 of Indian Code of Criminal Procedure, 1973 provides that 'summons' is an order of Court in writing, signed by the presiding officer of the court or such other officer as are authorized from time to time and bearing seal of the court for the attendance of a person. Code of Criminal Procedure, 1973 under article 204 subsection (1) provides that if in the opinion of a Magistrate (Magistrate is a Judge dealing with Criminal cases as against Munsiff or Civil Judge).taking cognizance of an offence there is sufficient ground for proceeding, and the case appears to be a summons-case(Section 2 (w) of the Indian

the copy of the complaint. This provision specifically and expressly requires furnishing a copy of complaint and is incorporated in order to afford an opportunity to the accused not to take the case by surprise when he appears or is brought[41] before the court. This may also afford the defendant sufficient time to prepare himself or consult a lawyer for answering or defending his case.

Article 39-A which comes under the Part IV of Constitution of India,[42] in the form of directives to State further provides equal justice and free legal aid to economically backward classes[43]. Article 39-A directs the State to ensure that the operation of the legal system promote justice, on the basis of equal opportunities and shall, in particular, provide free legal aid, by suitable legislation or scheme or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities. Insertion of this provision in Constitution shows the commitment of the India, though economically undeveloped, to provide equal justice by providing a State policy of the Government in upholding the rights of defendant particularly in criminal cases.[44] Though Article 39-A is not enforceable as it is a directive policy for the State but works as a reminder for the State to provide legal aid and assistance in order to protect the rights particularly enshrined under Article 22(1).

2.2 Special Acts

2.2.1 Legal Services Authorities Act, 1987

Legal Aid scheme was first introduced by Justice P.N. Bhagwati under the Legal Aid Committee formed in 1971. According to him, "legal aid means providing an

Code of Criminal Procedure, 1973 defines Summons cases as relating to an offence not being punishable with death, imprisonment for life or imprisonment for a term exceeding two years), he shall issue summons for the attendance of the accused, or in warrant-case(Section 2 (x) of the Indian Code of Criminal Procedure, 1973 defines "Warrant-case" means a case relating to an offence punishable with death, imprisonment for life or imprisonment for a term exceeding two years) a warrant.

40 Section 70(1) provides every warrant of arrest issued by a court under this Code shall be in writing, signed by the presiding officer of such court and shall bear the seal of the court.

41 When warrant is issued by a magistrate as per the provisions of Criminal Procedure Code, the defendant can be arrested and must be brought before the court.

42 Constitution of India, Part IV, deals with Directive Principles of State Policy where as Part III of it deals with Fundamental Rights.

43 Added by the 42nd Amendment Act, 1976

44 Pandey, J.N, *Constitutional Law of India*, (2007), at p.391.

arrangement in the society so that the missionary of administration of justice becomes easily accessible and is not out of reach of those who have to resort to it for enforcement of its given to them by law."[45] Article 12 of the Act provides that legal aid will be available for a person in custody accused in a crime or a women or a child etc. whose income does not exceed 18,000 Indian rupees.[46] The benefit of this Act is available for all persons who are socially and economically backward but is widely helpful for the accused persons in the criminal proceedings to defend the case against him.

2.2.2 Human Rights Act, 1993

The Human Rights Act in 1993 was enacted by the Indian Parliament in order to give effective remedy in the case of human rights violations and stronger protection of the human rights by establishing Human Rights Commission. In defining human rights, the Act apart from constitutional provisions specifically provides as embodied in the International covenants. The right to fair trial is explicitly recognized as a human right in terms of Article 14 of the International Covenant on Civil and Political Rights (ICCPR) which has been ratified by India and which now forms part of the statutory legal regime explicitly recognized as such under Section 2(1) (d) of the Protection of Human Rights Act, 1993. Section 2 (1) (d) reads "human rights mean the rights relating to life, liberty, equality and dignity of the individual guaranteed by the Constitution or embodied in the International Covenants and enforceable by courts in India."

Section 2 (1) (f) of the Act further explains that the 'International Covenants' means "the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights adopted by the General Assembly of the United Nations on the 16th December, 1966."

Thus the concept of fair trial significant place in India and the right of accused has been effectively protected by the legal framework of India. The Constitution of India under Article 22(1) provides the right to defend in criminal cases. The Code of Criminal

45Agarval, D, An introduction to the Legal Services Authorities Act, 1987, (2006); See also http://www.legalserviceindia.com/articles/legaut.htm

46 It is equivalent to 300 Euros.

Procedure of India provides statutory protection of rights of accused in criminal trials in effectively defending their case. These provisions are similar to that of the Article 6 of the European Convention on Human Rights and Fundamental Freedoms. But since these rights are guaranteed by the Constitution of India, equality of procedure must be complied with in all circumstances. Hence, Indian Constitution, Code of Criminal Procedure, and Special Acts such as Legal Services Authorities Act, 1987 and Human Rights Act, 1993 safeguard the right of accused to defend his case on equal footing with that of prosecution in criminal cases. It would rather significant here to understand the judicial activism between Supreme Court of India and ECtHR in the application of equality of arms in trial proceedings.

Chapter II

EQUALITY OF ARMS AND COMPARATIVE JUDICIAL ACTIVISM

Article 6 (3) of the ECHR enumerates 5 specific rights of defense and are provided to ensure that prosecution and the defense are on the same footing in relation to of criminal trials. These rights are i) right to be informed promptly of the accusation, ii) right to have time and facility for the preparation of the defense, iii) right to defend him self or through legal assistance, iv) right to confront the witnesses, and v) right to have free assistance of the interpreter if the accused cannot understand the language of the court. A comparison of analysis of the judicial activism of the Supreme Court of India with that of European Court of Human Rights (ECtHR) regarding the extent of protection afforded to the accused in the application of the principle of equality of arms will be made in this chapter. It would be easier to deal with each one of these rights separately and compare between India and ECtHR for a better comparative analytical purpose.

1. Right to be informed promptly of the Accusation.

In criminal trials it is essential that the accused should know prior hand the accusation that has been made against him as he should not take the accusation by surprise in the proceedings. Hence, it is the right of the accused that the accusation shall be communicated promptly in a language understood by him so that he can take a defense effectively.

1.1 Indian Position

Indian Constitution under Article 22(1) makes it mandatory to inform the grounds of arrest and accusations. Code of Criminal Procedure clearly spells out elaborate provisions for charge or formal accusations. It is worth noting that in India 'framing of charge'[47] is

[47] Criminal Procedure Code, 1973, Section 228

not made by the prosecution but by a judicial magistrate[48] or a Judge, in more serious crimes.[49] The prosecution can only facilitate the court to charge a case. This has been made with a view to provide greater protection for the accused from unwanted harassments and concocted criminal charges and trials. The prosecution and the police as State agencies may have inclination to support the State and, therefore, manipulations are possible particularly a country like India where vast majority of the population are poor, illiterate and ignorant of their basic rights. The procedure of formal accusation by an impartial tribunal is appreciable in so far as that affords a protection to the accused to defend even in pre-accusation stage.

As per Criminal Procedure Code, there are three kinds of trials *viz.*, the session's trial[50] or trial of a warrant case[51] or a summons case[52]. In each case it is essential that the prosecution has to establish that there is a *prima facie* case before making a formal accusation against the accused. Section 226 of the Code provides "no court takes note of a case unless the prosecution describes the charge brought against the accused and state by what evidence the guilt of the accused would be proved." During this stage if the accused intends to rebut the argument of the prosecution he can do so. Supreme Court of India stressed this point in *Satish Mehra v. Delhi Administration*[53]. The Court examined the purpose of Section 239 and observed:

> Similar situation arises under Section 239 of the Code (which deals with trial of warrant cases on police report). In that situation the Magistrate has to afford the prosecution and the accused an opportunity of being heard besides considering the police report and the documents sent therewith. At these two stages the Code enjoins on the court to give audience to the accused for deciding whether it is necessary to proceed to the next stage. It is a matter of exercise of judicial mind. There is nothing in the Code which shrinks the scope of such audience to oral arguments. If the accused succeeds in producing any reliable material at that stage which might fatally affect even the very sustainability of the case, it is unjust to suggest

[48] Magistrate as defined under Criminal Procedure Code, 1973 dealing with Criminal cases.
[49] Serious crimes are categorized under first schedule of the Code of Criminal Procedure.
[50] Trial conducted under section 227 and 228 in a Court of Sessions constituted under Section 9 of Criminal Procedure Code.
[51] Trial conducted under section 239 and 240 Code of Criminal Procedure; Section 2 (x) of the Cr.P.C, 1973 (India) defines "Warrant-case" means a case relating to an offence punishable with death, imprisonment for life or imprisonment for a term exceeding two years
[52] Trial conducted under section 245(1) and (2) Cr.P.C; Section 2 (w) of the Code of Criminal Procedure, 1973 defines Summons cases as relating to an offence not being punishable with death, imprisonment for life or imprisonment for a term exceeding two years
[53] (1996) 9 SCC 766; 1996 SCC (Crl.) 1104

> that no such material shall be looked into by the court at that stage. Here the 'ground' may be any valid ground including insufficiency of evidence to prove the charge.[54]

After framing the charge it shall be read out to the accused in a language understood by him. Thus the Indian legal system elaborately provides for the procedure for formal accusations and proper communication of it to the accused. The Supreme Court has widened the scope of it by providing non-compliance of it will vitiate the proceedings

1.2 ECtHR

The European Court of Human Rights had many occasions for the application of Article 6(3) (a) of ECHR. In *Feldbrugge v. The Netherlands*[55] (1986) the Court held that the equality of arms principle encompasses the notion that both parties to a proceeding are entitled to have information about the facts and arguments of the opposing party and that each party must have an equal opportunity to reply to the other. In 1989, in *Brozicek v. Italy*[56] the Court held violation of principle of equality of arms under Article 6(3) when a German resident who complained that an Italian Court's charges against him were never properly made known to him and that his trial in absentia was therefore invalid. He had been sent letters in Italian language and the Italian authorities were unable to prove that Brozicek had adequate fluency in that language sufficient to understand the charges brought against him. But in *Kamasinski v. Austria,*[57] the court did not accept the plea of the defendant that charges had been presented to him only orally rather than in written form. Court concluded that from the evidence and from the behavior of the defendant that he had sufficient knowledge about the charge and there fore his right has not been violated. But The Court has found violations of Article 6 (3) in *Brandstetter v. Austria*[58](1993), *Bulut v. Austria*[59](1996) and *Nideröst-Huber v. Switzerland*[60](1997) where the domestic courts based its judgment on submissions about which the defendants

[54] *Ibid.*
[55] (1986) 8 EHRR 425
[56] (1989) 12 EHRR 371 ; 167 ECtHR. (Ser. A) (1989)
[57] A/76 (1991) 13 EHRR 36
[58] (1993) 15 EHRR 378
[59] (1996) 24 EHRR 84
[60] (1997) 25 EHRR 709

had no knowledge. In *Mattoccia v. Italy*[61] the Court held the applicant's right to be informed in detail of the nature and cause of the accusation against him has been violated as at preliminary stage the prosecuting authorities did not convey all the available information of the accusation to the accused. In *Abbasov v. Azerbaijan*[62] where the accused has not been duly served with the summons by the domestic Court, the ECtHR reiterated "the concept of a fair trial includes the principle of equality of arms and the fundamental right that criminal proceedings should be adversarial. This means that both prosecution and defense must be given the opportunity to have knowledge of and comment on the observations filed and the evidence presented by the other party."[63]

Comparison between Supreme Court of India and ECtHR shows that both the courts were cautious about the information of accusations to the accused in criminal trials. The Supreme Court in tune with Article 22 of the Constitution and specific provisions of Criminal procedure Code[64] the right of the accused to be informed of the charges promptly as essential procedural safeguard in the application of equality of arms. Further, by giving the authority of formal accusation on the impartial court and the obligation of the prosecution to establish a prima facie case before a charge can be framed against the accused, a greater protection is ensured than ECtHR of the right to be informed of the accusations.

2. Time and facilities to prepare defense

It is not only sufficient that the accusation has been promptly communicated to the accused but should also be essential to ensure that he has been afforded sufficient opportunity to defend the case before the court. It involves adequate time and facility for the preparation of his defense. Cases generally are conducted by lawyers and may require more time as they are engaged in many cases. They may also require 'facilities' for the

[61] Human Rights Case Digest, Volume 11, Numbers 7-8, 2000, pp. 423-426(4).
[62] Judgment of 17 January 2008
[63] *Ibid*. at § 30; *See also Metelitsa v. Russia*, no. 33132/02, § 33, 22 June 2006; *Brandstetter v. Austria*, judgment of 28 August 1991, Series A no. 211, p. 27, §§ 66-67
[64] Section 226, 211 of Criminal Procedure Code; Section 211 (1) provides that every charge under this Code shall state the offence with which the accused is charged

preparation of the case. The facilities may be defined as the opportunity for an accused to acquaint themselves with the results of investigations carried out throughout the proceedings, whenever and wherever they occur.[65] Time and facility to prepare defense case are significant in criminal trials in order to attain the fullest extent of the right to defense and in the application of principle of equality of arms.

2.1 Indian position

Criminal Procedure Code casts an obligation to the Court for the supply of the copy of charge free of cost to the accused after formally 'framing a charge'[66] well in advance of the trial. This is provided with a view that the accused should have sufficient time to engage a lawyer and prepare his defense. Code, further, ensures provision for adjournment of cases in appropriate circumstances when there is a sufficient cause with the leave of the court. Sub-section (2) of section 309 of the Code provides:

> If the court after taking cognizance of an offence, or commencement of trial, finds it necessary or advisable to postpone the commencement of, or adjourn, any inquiry or trial, it may, from time to time, for reasons to be recorded, postpone or adjourn the same on such terms as it thinks fit, for such time as it considers reasonable…

The Supreme Court of India in *Shambhunath Bhattacharjee v. State of Sikkim*[67] held that the action of trial court violated of Article 22(1) when the application for the adjournment to engage a lawyer was denied by it. Supreme Court interpreted that Article 22(1) to contain the right of the accused to be afforded opportunity to engage a lawyer until sufficiently the accused finds one of his choice. By not adjourning the case the trial court violated the constitutional protection guaranteed to an accused in defending his case with a lawyer of his own choosing.

2.2 ECtHR

Article 6(3) (b) of the ECHR expressly provides for adequate time and facilities for the preparation of the defense. To meet the standards of this provision, the prosecution is

[65] *Jospers v. Belgium*, Report of the European Commission of Human Rights, 1981; *See also* infra note 73
[66] *See supra* Note 47.
[67] 1980 Cr LJ 789 ; See also *"Rights of arrested persons"* in http://openarchive.in/drupal/?q=node/9

required to allow access to all relevant documentation.[68] The ECtHR in *Kerojarvi v. Finland*[69](1995), *McMichael v.The United Kingdom*[70](1995) and *Foucher v. France*[71] (1997) held violation of Article 6(3) where defendant was denied access to relevant documents contained in the case-file and observed that it is a repudiation of principle of equality of arms. One of the important "facilities" for the preparation of a defense is the opportunity to confer with one's legal counsel[72]. The ECtHR in these cases took a view different from its earlier decisions in 1960s in *Neumeister case*[73] and *Matznetter case*[74] that the principle of equality of arms is applicable only in the determination of charges.

In the cases of *Campbell and Fell v. the United Kingdom*[75], the applicant claimed that the presence of police or other authorities at interviews between legal counsel and criminal defendant violated the right to adequate facilities guaranteed by Article 6 (3) (b). The Court observed that in certain exceptional circumstances the State may restrict such private consultations, for example where there are sound reasons to suspect that a given counsel is abusing his professional position, for example by colluding with his client to hide or destroy evidence or by otherwise obstructing the legal process in a serious way. But the Court in *Domenichini v. Italy,*[76] the Court has found that a delay in sending a letter from a prisoner to his lawyer constituted a violation of Article 6 (3) (b). Consistent with the notion of the "determination" of a charge discussed above, the "adequate time and facilities" requirement of Article 6 (3) (b) extends to appellate proceedings. The Court in *Hadjianastassiou v. Greece*[77] found a violation of this provision in conjunction with Article 6 (1) where a military court provided inadequate reasoning in its judgment and permitted only a short period of time to file an appeal. In *Mattoccia v. Italy*[78]

[68] Robertson, A.H. and Merrills J.G, *Human Rights in Europe, a Study of the European Convention on Human Rights*, (1993), Manchester University Press, p.110
[69] 19 July 1995, Series A no 322
[70] (1995) 20 EHRR205
[71] 25 EHRR 234
[72] Gomien D., *Short guide to the European Convention on Human Rights*, (2002),Council of Europe Press; *See also* www.coe.int/T/E/Human_rights/h-inf(2002)5eng.pdf
[73] *See infra* note 118.
[74] *See infra* note 119
[75] (1984) 7 EHRR 165
[76] (2001) 32 EHRR 4; *See also supra* note 72
[77] [1993] 16 EHRR 219
[78] HR Case Digest, Volume 11, Numbers 7-8, 2000 , pp. 423-426(4).

applicant pleaded that his right to have adequate time and facilities for the preparation of his defense had been violated and ECtHR observed that 'fairness required that the applicant should have been afforded greater opportunity and facilities to defend himself in a practical and effective manner, for example by calling witnesses to establish an alibi' that has not been afforded by the domestic Court.

Thus Supreme Court of India has interpreted the time and facility as mandatory procedures that had to be complied with in affording opportunity for the accused to engage a lawyer and defend his case. Otherwise, there will be procedural violation as it may place the accused in a disadvantageous position. Further the under legal system, communication with the lawyer by the client is protected in all circumstances[79] where as the view of the ECtHR is that in certain circumstances it can be restricted. This analysis shows that greater protection is afforded by Indian legal system and Supreme Court than ECtHR in affording time and facilities for the preparation of defense.

3. Right to defend oneself or through Legal Assistance

Right to defend is an essential element generally and in criminal trials particularly in the administration of justice. This right may have root in the natural justice principle of *audi alteram partem* which literally means 'hear the other side' and implies that no person shall be punished with out affording an opportunity of being heard. The modern human rights jurisprudence has established right of the accused to defend the case either himself or through legal assistance of his own choosing.

3.1 Indian Position

The Supreme Court of India has, ever since it's coming into existence in 1950, been very creative in the protection of rights of accused on procedural compliance on equal level with that of the prosecution. The enthusiasm of the Supreme Court of India on this aspect and of under trials can be found from the famous case of *A.K. Gopalan v. State of*

[79] Indian Evidence Act, 1872, Section 126

Madras[80] in 1950. The case primarily involved questions related to arrest and detention and the Supreme Court interpreted 22 (1) in the light of Article 21 dealing with right to life and liberty. The majority Judges made positive expositions on the right to defend and legal representation principle as contained in Article 22(1) and as supplemented by Article 21. The Court said:

> It is, therefore, clear that Article 21 has to be read as supplemented by Article 22…to the extent the procedure is prescribed by Article 22 the same is to be observed ; otherwise Article 21 will apply. But if certain procedural safeguards are expressly stated as not required, or specific rules on certain points of procedure are prescribed, it seems improper to interpret these points as not covered by Article 22 and left open for consideration under Article 21. To the extent the points were dealt with, and included or excluded, Article 22 is a complete code. On the points of procedure which expressly or by necessary implication are not dealt with by Article 22, the operation of Article 21 will remain unaffected.[81]

The court made it clear that procedural safeguard as provided under Article 21 which sets out that the liberty and life of a person can be deprived only when there is an established procedure and from the above construction of the court Article 22 is not a self contained code and is supplemented by Article 21 shows that right to defend and right to legal representation of the accused must be complied with in all circumstances, other wise that would violate Article 21.

In *Janardhan V State of Hyderabad*[82] decided by the Supreme Court in 1951, the question involved was in relation of the rights of accused to defend the case by a lawyer. Fazl Ali J. delivering the judgment had observed:

> The proper view seems to us to be: (1) that it cannot be laid down as a rule of law that in every capital case where the accused is unrepresented, the trial should be held to be vitiated; and (2) that a court of appeal or revision is not powerless to interfere, if it is found that the accused was so handicapped for want of legal aid that the proceedings against him may be said to amount to negation of a fair trial.[83]

[80] *See supra* note 30
[81] *As quoted* by H.M. Seervai, *Constitutional Law of India: A critical Commentary*, (1993), Vol.2, p.1088-89
[82] AIR 1951SC 217, 1951 SCR 344
[83] 1951 SCR 344 at p. 358; The observation was in regard to the requirements of s. 271 of the Hyderabad Criminal Procedure Code, (which corresponds to s.340 of the Indian Criminal Procedure Code) which gives the accused the right to be defended by a pleader.

The petitioners were convicted by a Special Tribunal of Hyderabad of murder and other offences and sentenced to death by hanging and the convictions and sentences had been confirmed by the Hyderabad High Court. It was contended on behalf of the petitioners that the whole trial was bad, because the accused were denied the right of being defended by a pleader. The trial Court never offered to facilitate communication with one of the petitioner's relations and friends or to adjourn the case or to appoint counsel at State expense for his defense.[84] The Supreme Court held the trial violated of Article 22(1)of the Constitution and explained the significance of the right to defend by a counsel by quoting from the American decision in *Powell v. Alabama*[85] in which the US Supreme Court had observed:

> In a capital case where the defendant is unable to employ counsel, and is incapable of adequately making his own defense because of ignorance, feeble-mindedness, illiteracy or the like, it is the duty of the Court whether requested or not, to assign a counsel for him as a necessary requisite of due process of law.

In *Moti Bai v State*[86] the Court expanded the quality of the right to legal representation by holding that the significance of a right of the accused to consult a legal adviser of his own choice. Justice Madgavkar relied on the earlier decision of Bombay High Court as early as in 1926 *In Re Llewellyn Evans*[87]

> [I]f the ends of justice is justice and the spirit of justice is fairness, then each side should have equal opportunity to prepare its own case and to lay its evidence freely and fairly before the Court. This necessarily involves preparation. Such preparation is far more effective from the point of view of justice if it is made with the aid of skilled legal advice- so valuable that in the gravest of criminal trials when life or death hangs in the balance, the very State which undertakes the prosecution of the prisoner also provides him, if poor, with such legal assistance.[88]

In *State of Punjab v. Ajaiba Singh*[89]the Supreme Court held that a statutory Act that does not provide for the defendant's right to defend the case by a legal practitioner of his choice cannot be considered as in tune with the spirit of the Constitution.

[84] 1951 SCR 344 at p. 357
[85] 287 U.S. 45 (1932)
[86] AIR 1954 Raj 241
[87] AIR 1926 Bom. 551, See also Rao, Jagannadha , *Access to justice*, Indian Law Commission Paper, Chairman, Law Commission of India; See also *http://mjrao.com/docs/Access%20to%20Justice.doc*
[88] *Ibid*
[89] AIR 1953 SC 10

It is to be noted that all these cases have been decided by the Supreme Court within five years after India became republic and the new Constitution has been adopted. This shows that the Supreme Court's concern over accused being underprivileged and unrepresented in the trial proceedings. Even the Court relied on the cherished experience of US Supreme Court in upholding the rights of the accused.

State of Madhya Pradesh v. Shobharam[90] was a case that involved the question of validity of the trial and a Statute that prohibited legal representation. The Supreme Court explained the significance, scope and impact of non-complying the provision of Article 22(1). The respondents in this case were arrested and tried for the offence of trespass were sentenced to pay a fine by the Nyaya Panchayat,[91] a court established under a local Act[92] with powers to impose only a sentence of fine. The Supreme Court held that Section 63 of the Act, which provided that no legal practitioner shall appear on behalf of any party in a proceeding before the Nyaya Panchayat, violated Art. 22(1) of the Constitution and was therefore void to the extent that it denies any person who is arrested the right to be defended by a legal practitioner of his choice in any trial for the crime for which he is arrested.

The reasoning given by the Court was that as soon as the respondents were arrested without warrants issued by a court, they acquired the rights guaranteed by Art. 22(1) and they continued to have those rights though they were released on bail at the time of trial. The rights included the right to be defended even in a trial in which they were in jeopardy of only being sentenced to a fine as the "clear words of Art. 22 furnish no basis for limitation."[93]

Hidayatullah J, delivered a dissenting judgment which is worth analyzing in some detail for the sound reasoning he provides. He took the view that when the Constitution lays down in absolute terms a right to be defended by one's own counsel, it cannot be taken

[90] AIR 1966 SC 1910, 1966 SCR 240
[91] Local Court to try trivial offences
[92] The Madhya Bharat Panchayat Act, 1949
[93] 1966 SCR 240 at p. 257

away by ordinary law, whether or not the accused who was deprived of the right, stood in danger of losing his personal liberty. He further stated that by including the prescriptions already available in the Code of Criminal Procedure in the Constitution, the framers of the Constitution have put it beyond the power of any authority to alter it without the Constitution being altered. [94]

The activism of the Court can be found in this case where the sentence was one of fine but the Court held that the constitutional right of the accused cannot be denied even in such cases though it may be only of sentence of fine. Thus the Court has extended the scope of the right even in cases where the liberty of may indirectly be affected such as non payment of fine.

3.1.1 Right to Free Legal Aid in India

It is not specifically enumerated under the Indian Constitution that there is a constitutional right to legal aid for an accused person. Article 22(1) only provides that no person …. shall be denied the right to…….be defended by legal practitioner of his choice. The interpretation as given by the Supreme Court in *Janardhan*[95] was that this provision does not carry with it the right to be provided the services of legal practitioners at State cost[96]. Article 39-A introduced in 1976 enacts a mandate that the State shall provide free legal service by suitable legislations or schemes or any other way, to ensure that opportunities for justice are not denied to any citizen by reason of economic or other disabilities. This provision however remains a Directive Principle of State Policy[97] which while laying down an obligation on the State does not lay down an obligation enforceable in Court of law and does not confer a constitutional right on the accused to secure free legal assistance.

However the Supreme Court filled up this constitutional gap through creative judicial interpretation of Article 21 following *Maneka Gandhi case*. [98] The Supreme Court held in

[94] *Ibid* at p. 252
[95] *See supra* note 82
[96] Maheshwari V, *Right to Bail as a Constitutional Right*, http://www.goforthelaw.com
[97] Directive Principles of State Policy are contained under Part IV of the Indian Constitution where as Fundamental Rights are provided under Part III of the Constitution.
[98] *Maneka Gandhi v. Union of India,* AIR 1978 SC 597

M.H. Hoskot[99] and *Hussainara Khatoon*[100] *case* that a procedure which does not make legal services available to an accused person who is too poor to afford a lawyer and who would, therefore, go through the trial without legal assistance cannot be regarded as reasonable, fair and just procedure as laid down in *Maneka Gandhi*.[101] The significance of free service to accused was explained by Krishna Iyer J., in *M.H Hoskot v State of Maharashtra*,[102] "Judicial justice, with procedural intricacies, legal submissions and critical examination of evidence, leans upon professional expertise; and a failure of equal justice under the law is on the cards where such supportive skill is absent for one side".[103]

The need for free legal aid at State expense especially in the light of widespread illiteracy and poverty prevalent in India was highlighted upon by Justice Bhagwati in *Suk Das* [104]

> Even literate people do not know what are their rights and entitlements under the law. It is this absence of legal awareness which is responsible for the deception, exploitation and deprivation of rights and benefits from which the poor suffer in this land. Their legal needs always stand to become crisis oriented because their ignorance prevents them from anticipating legal troubles and approaching a lawyer for consultation and advice in time and their poverty magnifies the impact of the legal troubles and difficulties when they come. Moreover, because of their ignorance and illiteracy, they cannot become self-reliant: they cannot even help themselves. The law ceases to be their protector because they do not know that they are entitled to the protection of the law and they can avail of the legal service program for putting an end to their exploitation and winning their rights. The result is that poverty becomes with them a condition of total helplessness.[105]

The Supreme Court in *M.H Hoskot*[106] held that Article 21 read with Article 39-A and Article 142 of the Constitution[107] *require* that where an accused prisoner is under a disability, he must be provided with free legal aid at State expense. In this case the accused was not supplied with a copy of judgment that failed his attempt to file an appeal to Supreme Court. Iyer J held:

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[99] *See infra* note 102
[100] *See infra* note 108
[101] *See supra* note 98
[102] 1979 SCR (1) 192
[103] *Ibid*. at p. 205
[104] 1986 SCR (1) 590
[105] *Ibid* at p. 596
[106] *See supra* note 102
[107] Constitution of India, Article 142 (1) provides "The Supreme Court in the exercise of its jurisdiction may pass such decree or make such order as is necessary for doing complete justice in any cause or matter pending before it, and any decree so passed or order so made shall be enforceable throughout the territory of India in such manner as may be prescribed by or under any law made by Parliament and, until provision in that behalf is so made, in such manner as the President may by order prescribe."

> [S]ervice of a copy of the judgment to the prisoner in time to file an appeal and provision of free legal services to a prisoner who is indigent or otherwise disabled from securing legal assistance were the ends of justice both are State responsibilities under Art. 21 and apply where procedural law provides for further appeals as well.[108]

His reasoning was that the accused has a right to counsel not in the *permissive* sense of Article 22(1) and its wider amplitude but in the *peremptory* sense of Art. 21.[109]

But the Supreme Court in the case of *Hussainara Khatoon v. Home Secretary, State of Bihar*[110]did not accept the view of permissive nature of Article 22(1) as given in *H.M Hoskot* and made it categorical as a constitutional right of accused to free legal service and Justice Bhagwati explaining the scope of Article 22(1) held:

> [i]t's the constitutional right of every accused person who is unable to engage a lawyer and secure legal services on account of reasons such as poverty, indigence or incommunicado situation, to have free legal services provided to him by the State and the State is under a constitutional mandate to provide a free lawyer…….. If free legal services are not provided to such an accused, the trial itself may run the risk of being vitiated……

In *Khatri V State of Bihar*[111] Justice Bhagwati further declared that "the State cannot avoid its constitutional obligation to provide free legal assistance to indigent accused by pleading financial or administrative difficulties."

In *Ranjan Dwivedi Vs. Union Of India*[112] the petitioner, accused in the Samastipur Bomb Blast case, submitted that the prosecution case against him was being conducted by a galaxy of lawyers specially engaged by the State on large sums of fee but he did not have the means to engage a competent lawyer for his defense, that no lawyer of sufficient standing would find it possible to appear as *amicus curiae* on a fee of Rs. 24 per day[113] fixed by the Delhi High Court. It was his contention that while Art. 22(1) of the Constitution comprehends the right of an accused to be supplied with a lawyer by the State, under Art. 39-A, as a matter of procedural fair play, it is incumbent on the State to provide him with a counsel on a basis of equal opportunity; and therefore, the respondent

[108] 1979 SCR (1) 192 at p. 204
[109] *Ibid.* at.p210
[110]AIR 1979 SC 1377
[111] AIR 1981 SC 928
[112]1983 SCR (2) 982
[113] Approximately 40 Euro cents per day

State should be directed to give financial assistance to him to engage a counsel of his choice.

It was held that the traditional view of Art. 22(1) that "the right to be defended by a legal practitioner of his choice" could only mean a right of the accused to have the opportunity to engage a lawyer and does not guarantee an absolute right to be supplied with a lawyer by the State, has undergone a change with the introduction of Article 39-A in the Constitution, the enactment of 304(1) Criminal Procedure Code and a reading of Article 39-A with Article 21 of the Constitution by the Courts. Thus, when the accused is unable to engage a counsel owing to poverty, the trial would be vitiated unless the State offers free legal aid for his defense to engage a lawyer, whose engagement the accused does not object.[114] In this case, the Court had, by an interim order, directed the State to provide assistance at the rate of Rs 500 per day[115] for a senior counsel and Rs 250 per day for a junior counsel.

The decision of the Supreme Court is very dynamic in the field of right to free legal aid to defend the case of accused in trials. The Court though considering the poor economic condition of the State but was emphasizing the fact that the constitutional right of the accused to be defended by a lawyer in criminal cases was more important than any other function of State and it cannot escape from the inherent obligation of protecting innocent persons by saying economic difficulties.

The Supreme Court further extended the scope by holding that it is not mandatory that the accused should demand for legal aid in a case, but is the obligation of the court to make sure that the accused is effectively represented. In *Suk Das v Union Territory of Arunachal Pradesh*[116] the Supreme Court addressed the question as to whether the right to free legal assistance was conditioned upon the accused applying for free legal assistance. The factual context was that the appellant and five other accused were charged in the Court of Deputy Commissioner for an offence under section 506 of Indian Penal

[114] 1983 SCR (2) 982 at pp. 986-7
[115] Approximately 8.33 Euro cents
[116] 1986 SCR (1) 590

Code. The appellant was not represented by any lawyer since he was admittedly unable to afford legal representation on account of his poverty and the result was that he could not cross-examine some of the witnesses of the prosecution. At the end of the trial, four of the accused were acquitted but the appellant and another accused were convicted

The High Court rejected the appeal on the ground that no application for legal aid was made by the accused. The Supreme Court, setting aside the conviction as having been vitiated, held:

> It is settled law that free legal assistance at State cost is a fundamental right of a person accused of an offence which may involve jeopardy to his life of personal liberty and this fundamental right is implicit in the requirement of reasonable, fair and just procedure prescribed by Article 21. [117]

Thus, the right to be defended oneself or by a legal practitioner is well protected by the judicial activism of the Supreme Court of India. It includes the right to legal representation at the State's expense in order to comply with the protection of constitutional right of the accused and implies that the accused should be placed on equal level with prosecution in criminal trials. Supreme Court of India has been zealous widening the scope of the right of accused on equal footing with that of the accused.

3.2 ECtHR

The European Court of Human Rights was not active until 1980s in appreciating the principle of equality of arms. This may be due to the fact that the court existed in between two known procedural systems *viz.*, adversarial and inquisitorial and was trying to reach a conclusion not affecting the civil law systems. The Margin of appreciation left with the Member State also influenced the Court negatively in becoming enthusiastic in the application of the principle of equality of arms. This can be evidenced from the case law of the ECtHR.

[117] *Ibid*. at p. 594; See also *supra* note 98; *National Human Rights Commission v. State of Gujarat*, SC Cri.M.P. No. 8797/2003 dt. 08/08/2003, See also *http://www.combatlaw.org*

In an earlier cases, *Neumeister v. Austria*[118], decided in 1968, and *Matznetter V Austria*[119]in 1969 the ECtHR though found there was violation of the principle of equality of arms but refused to apply the principle in the case as the requirement was limited only to the 'determination of a criminal charge'. *Neumeister* involved criminal proceedings for the release from the custody of the accused but his plea of violation of equality of arms was not entertained by the Court on the technicalities and procedural aspect. Similarly, in *Matznetter* the accused was arrested and charged for abetting others to commit the crime of aggravated fraud and his plea for non compliance of equality of arms on the application for release from custody was not accepted by ECtHR due to the same reasons in *Neumeister*. The Court took a stand that these cases were not in the determination of charges as provided under the Article 6 (3) and hence did not come within the purview of the application of principle of equality of arms.

The attitude of the court was to confine only in the determination of the charge thereby limiting the scope of application of the principle of equality of arms not extending in the hearing of application for release orders. But it is interesting to note that a year later when the Court actually had the opportunity in *Delcourt V. Belgium*[120] to decide *inter alia* on the principle of equality of arms in the determination of charges, the Court did not utilize that chance in the application of the principle of equality of arms.

The factual circumstance in *Delcourt* case was that the Belgium court of cassation, while deliberating in chamber in the absence of the accused, allowed presence of representative from the *Ministere Public* whose other department conducted the case at the trail stage and finally the court of cassation rejected the application of the accused. The ECtHR decided that the presence of representative of *Ministere Public* did not violate the Art 6(1) of the European Convention on Human rights. The reasons given by the Court is that i) the court of cassation dealt with only cases connected with errors of law and ii) the representative who attended the chamber for the deliberation of the case was independent

[118] (1968) 1 EHRR 83
[119] (1969) 1 EHRR 198
[120] (1970) 1 EHRR 355

in themselves than those who conducted the case at the trial stage from a different department though under *Ministere Public.*

The view taken by the European Court of Human Rights is not dynamic that suits for contemporary situations[121]. The secret deliberation in the absence of the accused where as the accuser is given chance to be present at does not hold good in as much as that it failed to comply with the adage "Justice must not only be done but it seem to be done".[122] Though the court in *Neumeister* and *Matznetter* was reluctant to apply the principle of equality of arms on the ground that the principle can be applied only in so far the case involved the determination of the charge, *Delcourt* involved direct determination of the charge and the equality of arms principle was not complied with when the chamber arrived at a decision in the absence of the accused[123]. The decision is limiting the application of due process and the application of the equality of arms principle to the lowest level[124]. This decision has also impeded the opportunity of law reform that could have been done by the court and in effect the court has set a bad precedent even when the circumstances were favorable for the court for the application of the principle. Fair trail guarantee is included in the convention in too general terms[125], with the awareness of its deficiencies and thus Art 6 (1) needs to be read in the light of contemporary thinking. *Delcourt* was a timely reminder of the need for continuous re-examination of the institutional set up[126] and the court's passive attitude in applying the principle of equality of arms.

However, in the beginning of 1980s the court started applying the principle that the accused shall be placed on equal footing in criminal trials. The situation in *Pakelli v. Germany* [127] was flagrant violations of the principle of equality of arms in as much as the domestic court, in the absence of the defense counsel, went on to decide the case. The

[121] *See supra* note 6
[122] per Lord Hewart CJ, *Rex* v. *Sussex Justices, Ex parte McCarthy* ([1924] 1 KB 256, [1923] All ER 233; see also www. *en.wikipedia.org*
[123] *See supra* note 6
[124] *Ibid.*
[125] *Ibid*
[126] *Ibid.*
[127] (1984) 6 EHRR 1

ECtHR held that refusal of the German Federal Court of Justice to appoint official defense Counsel to assist the accused at the hearing in the appeal on point of law violated the principle of equality of arms as guaranteed by Article 6 of ECHR. However, the Court refused to grant any remedy under Article 50.

But *Sutter V. Switzerland*[128] was a set back to the application of the principle. The case involved proceedings before the Military Court of Cassation and there was no public hearing, only written submissions. Sutter *inter alia* contended before ECtHR that the principle of equality of arms had been infringed since he had no access to the report of the grand judge nor to the submissions of the Chief Military Prosecutor; the prosecution had thus had the last word in the case, and he had not even been notified of the arguments which it had presented to the Military Court of Cassation. But the Court dismissed the contention of accused in relation to equality of arms in this case as the public hearing was afforded to defendant in the lower Court. This reasoning of the Court sounds irrational so as to give meaning to the principle of equality of arms, equal opportunity should be offered at all level to the parties particularly to the accused who is at peril as he is accused in criminal trials. This decision can only be considered as a major set back to the development of application of principle of equality of arms by the ECtHR.

In *Bonish v. Austria* [129], in 1985 the ECtHR unanimously held there was violation of principle of equality of arms when the Austrian Court, in a criminal proceedings brought against the applicant, had heard as an "expert", the Director of the Federal Food Control Institute, who drafted the report which set in motion the criminal proceedings against Bonisch. He also raised objections against the appointment as court expert of the very person who made reports of the case to the prosecuting authorities, and complained that this person had been heard as a court expert whereas defence expert had appeared as a mere defence witness. Court opined that the Director had drafted the Institute's reports, the transmission of which to the prosecuting authorities had set in motion the criminal

[128] ECHR (1984) Series A, No. 74

[129] ECHR Ser. A No. 92 (1985) 41; See *also Stoimenov v. the Former Yugoslav Republic of Macedonia,* Judgment of ECtHR 5 April 2007; *Brandstetter v. Austria,* judgment of ECtHR 28 August 1991, Series A no. 211, p. 27, §§ 66-67

proceedings against Mr. Bonisch.[130] He was, then, designated as expert by the Vienna Regional Court in pursuance of section 48 of the Food Act, 1975[131]; under the terms of this section, he had the duty of "explaining and supplementing the findings or the opinion" of the Institute[132]. Court held:

> It is easily understandable that doubts should arise, especially in the mind of an accused, as to the neutrality of an expert when it was his report that in fact prompted the bringing of a prosecution. In the present case, appearances suggested that the Director was more like a witness against the accused. In principle, his being examined at the hearings was not precluded by the Convention, but the *principle of equality of arms* inherent in the concept of a fair trial.[133]

Court further observed that paragraph 3 (d) of Article 6 the person required equal treatment as between the hearing of the Director and the hearing of persons who were or could be called, in whatever capacity, by the defence[134] and his statements must have carried greater weight than those of an "expert witness" called by the accused. The Court has in this case clearly analysed the significance of principle of equality of arms and was ready to accept the spirit of the principle as contained in Article 6 (3) of the ECHR and concluded that there has been a breach of Article 6 (1) fair trial.

The Court during 1990s had shown its activism in extending the scope of application of the principle of equality of arms. In *Alimena v. Italy*[135] the Court held that representation of the counsel must be effective in conducting the case and if the counsel is absent in trial it cannot be considered complying with the application of the principle of equality of arms. The Court has found violations of Article 6 (3) (c) where the domestic court dismissed an appeal at a hearing at which defense counsel was absent, having not been informed about the date of hearing. Similar view has been taken by the ECtHR in

[130] *Ibid* at § 10 and 15

[131] The Section 48 provides: "If the court has doubts concerning the findings or the opinion of a Federal Food Control Institute or if it considers that such findings or opinion need to be amplified or if justifiable objections have been raised in respect thereof, it shall hear as expert the official of the said Institute who carried out the analysis or drew up the report for the purpose of explaining and supplementing the findings or the report ... In all other respects, expert evidence shall be governed by the provisions of the Code of Criminal Procedure ..."

[132] *Ibid.* at § 31

[133] *Ibid* at §.32; italics supplied.

[134] *Ibid* at § 32.

[135] Judgment of 19 February 1991, Series A no. 195-D

Poitrimol v. France [136](1993), *Lala v. The Netherlands* [137](1994), and *Pelladoah v. The Netherlands* [138](1994) in which courts refused to permit counsel to represent clients who were not themselves in attendance at the hearings.[139] In *S v. Switzerland* [140](1991)) the ECtHR held that defense counsel and defendant must be able to communicate freely and with confidentiality, whether written or oral. Further, in *John Murray v. The United Kingdom*[141] (1996) the Court held that the accused and the Counsel must be able to communicate at the time of arrest or detention. In *Kremzow V. Austria*[142] Friedrich Kremzow, approached ECtHR on the ground that he was not given opportunity to defend his case in person before the Austrian Supreme Court which upheld the lower court (the Court of Assizes) conviction and enhanced it to life imprisonment in the murder case. ECtHR found it violated his right under Art 6 (3) of the European Convention for Human Rights and Fundamental Freedoms as the principle of equality of arms extends even in appeal stages.

The ECtHR has changed the earlier rigid view taken in *Neumeister*[143] and *Matznetter*[144] that the principle of equality of arms is applicable only in the determination of criminal charge and applied the principle to pre trial proceedings. In *Kremzow*[145] (1997), the court further extended the application of principle in appeal proceedings too. The Supreme Court's activism declared the same guarantee of procedural equality provided by Constitutional and statutory provisions must be complied in all proceedings of pre- trial, trial or appeal cases as early as 1950 in *AK Gopalan*.[146] The Supreme Court extended procedural fairness even in cases of proceedings which involved a sentence of fine only and the reasoning given was that sentence of fine may indirectly affect the liberty of the

[136] (1993) 18 ECHR 130
[137] (1994) 18 EHRR 586
[138] A 297-B (1994), 19 EHRR 81
[139] *As quoted* in *supra* note 73
[140] (1991) 14 EHRR 670
[141] (1996) 22 EHRR 29
[142] Case C- 299/95, 3 C.M.L.R. 1289 (1997); *See also Hajiyev v. Azerbaijan*, no. 5548/03, § 32, 16 November 2006
[143] *See supra* note 6
[144] *Ibid.*
[145] *See supra* note 142
[146] *See supra* note 30

accused in case of non payment of fine. Hence the activism of the Supreme Court can be considered greater in this respect with that of the ECtHR.

4. The right to confront witnesses

An important procedural requirement is proving the guilt of the accused by prosecution by producing witnesses at trial stage. If witnesses are brought by the prosecution it is the right of the defendant to contest or cross-examine the witnesses. This may be done with a view to demolish the credibility of the statement given against the accused or discredit witness if they are tutored or influenced to falsely implicate the accused.

4.1 Indian Position

Section 138 of the Indian Evidence Act, 1872 provides for cross examination of witnesses by the opposite party against whom the witness appears. This is an important provision under Indian legal system for the accused to defend his case. As the burden of proof in criminal cases lies on the prosecution, the accused or his legal counsel can take the advantage of cross examining the witnesses in order to bring out the truth.

In *Shambhunath Bhattacharjee v State of Sikkim*[147], where an adjournment to engage a lawyer was denied, the Supreme Court held that the right enshrined in Art. 22 (1) of being defended by a lawyer includes the *right to cross examine* the prosecution witness. It also includes the *right to copies of the statement* of the prosecution witness. Similarly, refusal to adjourn the case in a genuine circumstance would amount to denial of opportunity to the accused of being defended.

4.2 ECtHR

Article 6(3) (d) of the ECHR provides the right of the accused to confront the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him. In a recent case *M.S. v. Finland*[148]

[147] 1980 Cr LJ 789
[148] Judgment of ECtHR 22 March 2005, *No. 46601/99*

(2005) the Court held there has been violation of principle of equality of arms on the Court of Appeal's failure to give the accused an opportunity to respond to a statement submitted and later withdrawn by his ex-wife without his knowledge to the Court of Appeal. The court observed "the principle of equality of arms required that he be given an opportunity to evaluate the relevance of the statement and its withdrawal and to comment if he considered it proper to do so."

The question of anonymous witnesses arose before the ECtHR in *Unterpertinger v. Austria*[149] (1986). Unterpertinger was convicted on the testimony given by his wife and stepdaughter, evidence he could not challenge since they had been granted special status under Austrian law. The Court held that the defendant's right under Article 6 (3) had been violated, since the local court had allowed the witnesses in support of several key accusations against the defendant, who had been prohibited from confronting his accusers[150]. The *Unterpertinger case* presents a different set of issues. Here the defendant was convicted of bodily harming his wife and stepdaughter, both of whom made statements to the police, neither of whom would testify in the actual case. The statement of them was major piece of evidence against Unterpertinger. According to Robertson and Merrills "examining the circumstances of the applicant's trial, the Court pointed out that his conviction was based mainly on the statements of his wife and stepdaughter which had been treated by the Austrian courts not simply as items of information, but as proof of the truth of the accusations against him and convicted him. [151] The ECtHR held that there was violation of Article 6 (3) (d).[152] Court Observed:

> If the defense is unaware of the identity of the person it seeks to question, it may be deprived of the very particulars enabling it to demonstrate that he or she is prejudiced, hostile or unreliable. Testimony or other declarations inculpating an accused may well be designedly untruthful or simply erroneous and the defense will scarcely be able to bring this to light if it lacks the information permitting it to test the author's reliability or cast doubt on his creditability. The dangers inherent in such a situation are obvious.[153]

[149] (1986) 13 EHRR 175; *See also Kostovski v. Netherlands,* (1989) 12 EHRR 434; *Windisch v. Austria,* (1990) 13 EHRR 281

[150] *See supra* note 73, pp. 48-49

[151] *See supra* note 69 at p. 117

[152] *Ibid*

[153] Kostovski judgment of November 20, 1989, Series A. No. 166, p. 20, para 42; see also http://usinfo.state.gov/products/pubs/

The Court was very consistent in determining the extent of the right to confront the witnesses by the accused as the anonymous witnesses could not be questioned directly by the accused or his representative during trial proceedings. But in certain cases it was allowed considering the sensitivity of the case. But in India anonymous witnesses are not allowed in any circumstances as confronting witness is the constitutional right of the accused by virtue of Article 22(1) and 138 of the Indian Evidence Act, 1872. This can be viewed as greater protection than ECtHR.

5. To have the free assistance of an interpreter

In criminal trials it is essential that accused knows the accusations clearly in order to answer and to defend his case. It is true that the accused may not know the trial proceedings due to lack of knowledge of the language of the court. Unless the accused knows the accusation and the trial proceedings, it would be inconsistent with the principle of equality of arms and a mockery of fair trial. This warrants the assistance of an interpreter in criminal proceedings.

5.1 Indian Position

Constitution of India does not specifically guarantee about providing interpreter, but provides that the arrested person has a right to be informed of the grounds of his arrest[154] and this implies that if the accused does not know the language, the constitutional guarantee is that he should be informed of his accusations through an interpreter. Criminal Procedure Code by section 279 makes it express that the accused or his pleader should be interpreted if they do not understand the language of the court or any piece of evidence in which it was offered. Section 279 provides:

> Interpretation of evidence to accused or his pleader
>
> (1) Whenever any evidence is given in a language not understood by the accused, and he is present in court in person, it shall be interpreted to him in open court in a language understood by him
>
> (2) If he appears by pleader and the evidence is given in a language other than the language of the court and not understood by the pleader, it shall be interpreted to such pleader in that language.
>
> (3) When documents are put for the purpose of formal proof, it shall be in the discretion of the court to interpret as much thereof as appears necessary.

[154] *See supra* note 10, Sub article (1)

Indian Criminal Procedure Code makes it mandatory by the words "shall"[155] for the procedural requirement of providing interpreter in criminal trials both for the accused and his counsel. It casts an obligation for the court to ensure that free assistance of the interpreter in provided.

5.2 ECtHR

Article 6 (3) (e) of the ECHR provides the accused person's right to have the free assistance of an interpreter if he cannot understand or speak the language used in the court. The ECtHR had occasions to deal with cases that had questions involved of interpretation in a language understood by the accused. In the case of *Luedicke, Belkacam and Koc v. Germany*[156] the accused were ordered to pay the cost of interpreter and ECtHR had to decide the meaning of "free assistance" and held that 'free' means 'free'. The Court observed that Article 6(3) (e) grants neither a conditional remission, nor a temporary exemption, nor a suspension, but once-and-for-all exemption or exoneration, otherwise there is a risk of declining the interpretation by the accused for want of sufficient financial consequences.[157] Further in *Ozturk v. Germany* [158] the applicant complained that he was ordered to pay the interpreters fee and the court held that it violated Article 6(3) (e) of ECHR and in *Kamasinski*[159] the court held that the protection extends to the interpretation or translation of all documents or statements that are necessary for the trial.

It is well accepted under Indian legal system and the ECtHR the significance of the free legal assistance of interpreter. Indian Criminal procedure Code mandates that in all proceedings and evidential matters the free assistance of the interpreter to the accused or to his lawyer if he cannot understand the language of the court. The same protection is guaranteed by the ECtHR. Hence, the Indian legal system and ECtHR are on equal level in this aspect of right of the accused.

[155] The usage of "Shall" or "May" are defined in the definition clause, section 2 of the Indian Evidence Act, 1876 for interpretation.
[156] (1980) 2 EHRR 433: [1980] ECHR 6210/73
[157] *Ibid*; *See also supra* note 11
[158] (1984) 6 EHRR 409
[159] *See supra* note 57

Thus, on a comparison of judicial activism between Supreme Court of India and ECtHR shows that Supreme Court activism far reaching than that of the ECtHR in the application of the procedural equality. In the light of case law it is clear that ECtHR was not active in the application of the principle until 1980, where as Supreme Court of India was enthusiastic since 1950 from the case of *AK Gopalan*.[160] It can be seen from the above analysis that the Supreme Court of India afforded greater protection than that of ECtHR in complying procedural equality in relation to rights of accused to prompt information regarding accusation, time and facility for the preparation of the defense, right to defend oneself or through a lawyer and the right to confront witnesses and equal level with that of ECtHR on the right to have free assistance of an interpreter.

[160] *See supra* note 30

CONCLUSION

The Indian legal system that followed the adversarial trial contained Constitutional and statutory protection of the right to defend in criminal trials. The Framers of Indian Constitution had thoughts about the protection of rights of accused from false inculpation and vexatious prosecution in criminal trials due to the poor, illiterate and ignorant masses on the one hand and the feudal lords and their dreaded liaison with colonial police and prosecutions on the other. The framers had serious concern about the protection of arrested and accused persons due to the avoidance of due process clause from the Constitution of India.[161] This made the framers to provide an additional provision of Article 22 dealing with rights of accused persons in addition to Article 21 dealing with right to life and personal liberty in order to better safeguard the rights of accused in defending their case either themselves or by legal practitioner of their choice which right was further ensured by Criminal Procedure Code, 1861, 1930 and 1973, Legal Services Authorities Act, 1987 and Human Rights Act, 1993. India's anxiety for the protection of the right of the accused on equal footing can be evidenced from the fact that the authority for the 'formal accusation' is entrusted with the non-partisan Court rather than with the prosecution.[162] Legislature's concern can be seen from the provision that the prosecution before requesting the court for the framing of charge, must show to the court that there exists a *prima facie* case against the accused[163] and it seems a unique protection that has been provided to ensure that the accused will be placed on equal footing even in the accusation stage where he will have a chance to show his side.

The jurisprudential invention of the principle of equality of arms by the ECtHR bases five different rights of accused as provided Article 6(3) of the ECHR. Indian legal system and the Supreme Court have been applying the same principle though with different nomenclature in the protection of the rights of accused in criminal proceedings. As regards the right to have prompt information of the accusation, Article 22(1) Indian

[161] *See supra* note 30
[162] *See supra* note 47
[163] *Ibid.*

Constitution and Criminal Procedure Code[164] ensures it as mandatory procedural safeguard of accused to know of the grounds of arrest and accusation. Further, by giving the authority of formal accusation on the impartial court and the obligation of the prosecution to establish a *prima facie* case before a charge can be framed against the accused, greater protection is ensured by Indian legal system in this regard than the ECtHR

As to the time and facility for the preparation of case, Criminal Procedure Code provides for affording sufficient time for the preparation of the case and adjournment of cases in appropriate cases. Supreme Court has extended its scope by declaring that sufficient time shall be given in order to engage the lawyer, prepare the case and afford facility for verifying the documents in order to make meaningful the right to defend on equal level with that of prosecution[165]. ECtHR observed that private communication with the lawyer is essential in affording opportunity except in cases where the situation is such as doubt of collusion between the lawyer and the client. In India, Section 126 of the Indian Evidence Act provides that communication between lawyer and client is protected in all circumstances in order to have free and open discussion that makes the right to defend through legal counsel on equal footing significant and meaningful. The protection afforded in India can be viewed greater than that provided by ECtHR.

India provides Constitutional guarantee under Article 22(1) of the right to defend oneself or through a lawyer of his own choice in addition to statutory protection of Section 304 of Criminal Procedure Code. The Supreme Court was very enthusiastic with the right of the accused extending the scope of application as a procedural requirement without which trial will be vitiated even when the offence is punishable with fine only or when the Local Court has jurisdiction only to determine cases punishable with fine. The ECtHR was not enthusiastic until 1980 in the application of the principle and has interpreted to confine the principle of equality of arms applied only to cases in the determination of criminal

[164] *See supra note* 47
[165] *See supra note* 68

charges. But in *Delcourt*[166] which involved the determination of charge and there was flagrant violation of principle too, the Court was reluctant to apply the principle.[167] The view of the Supreme Court since its existence in 1950 was that procedural equality must be complied with in all proceedings that involved the criminalization of the accused.

ECtHR and India has the same view with regard to right to confront witnesses. Section 138 of the Indian Evidence Act provides that right to cross examine the witnesses produced by the prosecution. But ECtHR view is that anonymous witnesses can be admitted in certain cases and right to confront may not be allowed.[168] But India does not in any circumstances permit anonymous witnesses as that may take away the right of the accused guaranteed by the Constitution in defending the case and sticks on the common law dictum of "Justice must not only be done it must seem to be done".[169] Here too greater protection than ECtHR is guaranteed by Indian legal system.

As regards interpreter, Section 279 of the Criminal Procedure Code makes it mandatory to provide an interpreter free of cost where the accused or the Counsel do not understand the language of the Court in all cases irrespective of the nature of the offence. ECtHR is also of the same view in relation to free assistance of the interpreter.

ECtHR and India are on the view that free legal aid should be given to accused who is indigent. But the Supreme Court's activism in the application of principle of equality of arms can be found in the State assisted legal aid to the accused person rejecting the argument of the poor economic situation of the State. Court went to the extent of enhancing the small amount of fee fixed[170] for legal counsels who would appear for the accused in case he cannot engage a lawyer of his choice. The court's view is that where the State engages lawyer for prosecution with considerable experience and standing at the bar, it would be obligatory for the State to see that fee fixed would suit for engaging a

[166] *See supra note* 4
[167] *See supra note* 6
[168] *See supra note* 149.
[169] *See supra* note 122
[170] *See supra* note 113; the Court enhanced this amount to 500 Indian rupees which is equivalent to 8.33 Euro per appearance.

lawyer for accused of similar experience and standing at the bar. The Court had gone to the extent of saying that the State cannot escape its obligation by saying that economic difficulties in such cases as it affect the life and liberties of persons. The Supreme Court has arrived at such a conclusion by combining Article 39-A (which provides State's policy to provide legal aid) under Part IV dealing with Directive Principles of State Policy which is not enforceable in any Court, with Article 21 (right to life and personal liberty) and Article 22 (rights of arrested and accused persons) which form Part III dealing with fundamental rights and are enforceable. The Court has dynamically interpreted by combining these provisions saying that the Constitutional right guaranteed under Article 21 and 22(1) in relation to free legal aid will not be meaningful unless the obligation of State under Art 39-A is enforceable. The Court considered the protection of the rights of accused on equal level to defend his case with that of the prosecution in criminal cases as important as any other function of the State.

Considering the above facts it can be seen that India has been enthusiastic in comparison with ECtHR in the protection of the rights of accused in the application of the principle of equality of arms though not by the same nomenclature. Indian legal system and Supreme Court have been affording greater protection in the application of the principle of equality of arms than that of ECtHR in many aspects such as right to have prompt information of the accusation, right to time and facility for the preparation of defense, right to defend oneself or though lawyer and right to confront witnesses against accused and on equal level protection with respect to right to free assistance of the interpreter. Indian approach is that procedural equality is the right of the accused to stand against the prosecution on equal level at all stages, whether it is informal or formal accusation, arrest, preventive detention, pre-trial, trial, appeal or post trial stages. It is submitted that ECtHR should adopt the view of India in criminal proceedings to ensure maximum protection for the accused in the application of the procedural equality.

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