

## **LAW WITH RESPECT TO FAIR DISCLOSURE**

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### **ABSTRACT**

In this paper, the law concerning fair disclosure in the Indian context is being analyzed. The limitation that comes with the adversarial system, the role of the investigating authority along with the courts and prosecutor, the practice in other countries and the principle adopted in the United States, as well as United Kingdom with respect to fair disclosure, has also been discussed.

The right to fair disclosure in the Indian context is being divided into two parts to make the understanding of the procedure more clear, disclosure concerning both the Prosecutor as well the Investigating agency is discussed to trace the limits imposed on our system. To enthrall and provide more clarity to the concept of fair disclosure several statutory principles in the Code of Criminal Procedure, 1973 along with the judgements of the courts in India finds mentioned in this paper and has been elaborated herein.

### **RIGHT TO FAIR TRIAL**

*“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 any criminal charge against him.”<sup>1</sup>*

The right to a fair trial is a cardinal principle of the rule of law. First, it must be recognized that fairness means fairness to both sides, not just one. The procedure adopted must give a fair opportunity for the prosecutor or claimant to prove his case as also to the defendant to rebut it.<sup>2</sup> Based on this principle, whether the procedure for the trials in India are fair in all aspects and is the ‘concept of a fair trial’ keeps pace with the requirement of the society are some of the fundamental questions that are addressed in the paper.

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<sup>1</sup> Article 10, Universal Declaration of Human Rights, 1948.

<sup>2</sup> Tom Bingham, *the Rule of Law* 90 (Penguin Books India Pvt. Ltd., Panchsheel Park, New Delhi, 2011).

Adversarial system and Inquisitorial system are two major criminal justice systems and in India, we follow the adversarial system where the role of a judge is to facilitate the trial unlike the inquisitorial system where the judge is not a passive recipient but rather takes an active involvement in the trial. In this paper we will limit the discussion to ‘right to fair disclosure’ in a criminal trial, the impact it has on the fair trial principle and the process followed in India.

## **CRIMINAL TRIAL: AGENCIES INVOLVED AND ROLE OF INVESTIGATING OFFICER**

We the people of India have given to ourselves a written constitution that ensures the procedure established by law. To maintain this stance several agencies work to ensure the rule of law and for that, the criminal justice system in India has four important components, namely, the Judiciary, the Investigating agency (Police), the Prosecution Wing and the Prison and correctional authorities. Each agency works within the limits assigned to them and ensures a swift criminal trial. One of the responsibilities of the police is the protection of the life, liberty, and property of citizens.

In the criminal justice system, the investigation of an offence is in the domain of the police. The aim of the investigation is ultimately to search for truth and bring the offender to book.<sup>3</sup> The power granted to police must be exercised in consonance with the Code<sup>4</sup>, there are several safeguards provided within the Code which restricts the power of the police to ensure a fair trial. The Code also granted the power to the police to drop the investigation against the accused when no offence is made out. Subsection (b) to the first proviso of Section 157(1) of the Code of Criminal Procedure, 1973 which is a stage before investigation, specifies, “If it appears to the officer in charge of a police station that there is no sufficient ground for entering on an investigation, he shall not investigate the case.”

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While section 169 of the Code also clearly mentions if no reasonable ground of suspicion exists against the accused or after the investigation the evidence found is not sufficient to justify the forwarding of the accused to a magistrate then-Police officer may himself release him on bond, with or without sureties and police can file a closure report under section 173 of the Code of criminal procedure, 1973.

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<sup>3</sup> *Manohar Lal Sharma V. Union of India* (2014) 2 SCC 532.

<sup>4</sup> The Code of Criminal Procedure, 1973 (Act 2 of 1974).

## FAIR DISCLOSURE: LAW IN OTHER COUNTRIES

Is secrecy a new law? If not, then to what extent the parties are allowed to view the evidence collected by the investigating agency? What is the procedure followed in other countries?

In *Brady V. Maryland*<sup>5</sup> the issue that arose before the court was did the suppression of evidence by the state violated Brady's rights under the due process clause? The Supreme Court answered it in the affirmative and held that regardless of the bad or good faith of the state the evidence which is material to the guilt of the accused if suppressed violates the due process clause.

The provision with fair disclosure also finds a place in the statute of New South Wales which states<sup>6</sup>, "Law enforcement officers investigating alleged offences must disclose to the director all relevant information, documents or other things obtained during the investigation that might reasonably be expected to assist the case for the prosecution or the case for the accused person." In the United Kingdom (applicable specifically to Wales and England), the practice of how police officers should disclose material to the prosecution is specifically mentioned<sup>7</sup> and stated as under:-

1. The function of the investigator, the officer in charge of an investigation and the disclosure officer are separate.
2. In any criminal investigation, one or more deputy disclosure officers may be appointed to assist the disclosure officer.
3. It is an essential part of their duties to ensure that all material that may be relevant to an Investigation is retained, and either made available to the disclosure officer or in exceptional circumstances revealed directly to the Prosecution.

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If the pre-trial disclosure requirements are not complied with, then there is the imposition of sanctions<sup>8</sup>. The aim is to introduce two-fold disclosure by both the police and the prosecutor. It can be seen clearly that in other discussed countries the law concerning fair disclosure is somewhat extensive and clear.

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<sup>5</sup> 373 U.S. 83.

<sup>6</sup> Director of Public Prosecutions Act 1986, s. 15A.

<sup>7</sup> Criminal Procedure and Investigations Act 1996 (Code of Practice) Order 2020, s. 3.

<sup>8</sup> Criminal Procedure and Investigations Act 1996, s. 146.

## FAIR DISCLOSURE PRACTICE FOLLOWED IN INDIAN CRIMINAL SYSTEM

In Indian practice, the right concerning fair disclosure has no specific legislation. Article 21 talks about 'procedure established by law' which is to be achieved by 'due process of law' as held by **Justice Bhagwati** in *Maneka Gandhi V. Union of India*<sup>9</sup>.

In the Indian criminal justice system, the law concerning fair disclosure can be divided into two categories:-

- 1- Disclosure by Prosecution
- 2- Disclosure by the Investigating Authority

The law concerning disclosure by Prosecution is made clear in the case of *V.K. Sasikala vs State Rep. By Superintendent Of Police*<sup>10</sup> where the situation has arisen before the court was whether the unmarked and uninhibited documents of the case that are being demanded by the accused which had been forwarded to the court under section 173(5) but are not being relied on by the prosecution can be claimed by the accused to fetch him the defence in the trial?

The primary duty of a Public Prosecutor is to ensure that an accused is punished, his duties extend to ensuring fairness in the proceedings and to ensure that all relevant facts and circumstances are brought to the notice of the court for a just determination of the truth<sup>11</sup> so that due justice prevails as also ensured by Article 19 and 21. To ensure the fairness of the trial is the major responsibility of the courts as well as the investigating agency. The major schemes of the Code are: -

1. In accordance with section 2(h) of the Code of Criminal Procedure, 1973 "investigation" includes all the proceedings for the collection of evidence conducted by a Police Officer, or any person authorised by the Magistrate. It is the solemn responsibility of the investigating agency to collect all the evidence and put it before the court to establish the guilt of the accused. The investigating agency must exercise the above power keeping in mind their power concerning section 157(1) Proviso (b) and section 169 of the Code of Criminal Procedure, 1973.

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<sup>9</sup> AIR 1978 SC.

<sup>10</sup> AIR 1978 SC.

<sup>11</sup> *Sidhartha Vashisht @ Manu Sharma V. State (NCT of Delhi)* (CRL.) NO. 179 OF 2007.

2. The police officer may examine any person orally who is supposed to be acquainted with the facts of the case. The statement under section 161 of the Code of Criminal Procedure, 1973 is not evidence per se under section 162 of the Code. The Proviso to Section 162(1) bestowed the statutory right on the accused to confront the witnesses with the statements recorded under section 161 of the Code.

3. The Code ensures vide Section 207 and 208 that all the documents and evidence collected by the investigating agency, both in the trial based on Complaint case and trial on Police report after the cognizance is taken by the magistrate must also be forwarded to the accused.<sup>12</sup>

4. Section 91 along with section 243 of the Code ensures the right to fair defence to the accused as well; the power is given to the court to summon any document which the court considers necessary.

5. The statutory as well the equitable right of the accused under the Indian constitution is not absolute as vide Section 173(6) of the Code the police officer is empowered to withhold any statement as to the subject matter of the proceedings or if the interest of the justice demands and is inexpedient in the public interest.

The liberty of an accused cannot be interfered with except under due process of law. The expression due process of law shall deem to include fairness in the trial. The court gives a right to the accused to receive all documents and statements as well as to move an application for production of any record or witness in support of his case. This constitutional mandate and statutory rights are given to the accused place an implied obligation upon the Prosecution to make fair disclosure. The concept of fair disclosure would take in its ambit furnishing of a document which the prosecution relies upon whether filed in court or not. That document should essentially be furnished to the accused and even in the cases where during the investigation a document is bona fide obtained by the investigating agency and in the opinion of the Prosecutor is relevant and would help in arriving at the truth, that document should also be disclosed to the accused.<sup>13</sup>

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<sup>12</sup> *Miss "A" Vs. State of Uttar Pradesh*, (CRL.) NO. 10401 OF 2019.

<sup>13</sup> *Sidhartha Vashisht @ Manu Sharma V. State (NCT of Delhi)* (CRL.) NO. 179 of 2007.

## **RIGHTS OF THE ACCUSED IN PRE-TRIAL DISCLOSURE**

In the Indian context, the sole authority in the collection of the evidence is bestowed on the Investigating authority and that there is nothing in the Code of Criminal Procedure, 1973 authorising the accused to claim pre-trial disclosure.

The lacuna in the Code makes the Investigating authority sole judge withhold any relevant information from going into the charge sheet. The Investigating authority can withhold the information that can exculpate the accused. The entire foundation of the charge sheet is based on the discretion of the police officer and the accused can claim no right in this regard. So, Can the Investigating officer file a charge sheet based on the evidence he chose to disclose or to hide or is there any safeguard available to the accused?

The court is the sole repository of justice, and a duty is cast upon it to uphold the rule of law and, therefore, it will be inappropriate to deny the existence of such powers with the courts in our criminal justice system where it is not uncommon that the real accused, at times, getaway by manipulating the investigating and/or the prosecuting agency<sup>14</sup>.

With this, one thing is clear that the court can exercise ample power to reach out the truth and to preserve the sanctity of the trial and so the power under section 91 of the Code has been granted to the court.

While ordinarily the court must proceed based on material produced with the charge sheet for dealing with the issue of charge but if the court is satisfied that there is the material of a sterling quality that has been withheld by the investigator/prosecutor, the court is not debarred from summoning or relying upon the same even if such document is not part of the charge sheet. It does not mean that the defence has a right to invoke Section 91 of the Code of Criminal Procedure, 1973 de hors the satisfaction of the court.<sup>15</sup>

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<sup>14</sup> *Hardeep Singh Vs. State of Punjab and Ors.* (2014) 3 SCC 92.

<sup>15</sup> *Nitya Dharmananda @ k. Lenin vs. Sri Gopal Sheelum Reddy*, (CRL.) NO. 8279 OF 2016.

## CONCLUSION

Based on the above discussion, it can be seen that not many safeguards are there for the disclosure of all the evidence by the investigating authority and much of it is still within the sole discretion of the investigating authority. In the Indian system, the prosecutor only gets involved during the process of trial. Thus, the possibility of concealment cannot be ignored at the stage of investigation too. The law must provide for the accountability of police and the prosecutor for any misconduct. Also, there must be competent prosecution lawyers and effective coordination between the prosecutors and investigators in the purview of the authority a prosecutor has.

An acquittal is not enough for wrongful prosecution and a need for proper compensation and assistance for leading a respectful life is also vital. The right to fair disclosure needs to be drafted to conduct the trial in India to intact the Rule of Law. However, the number of changes required should not deter us from aiming for an ideal fair system. A dire need for optimism, pragmatism, transparency, and accountability is the need of the hour and the same must be effectively mechanised in the present system rendering justice in our country.



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