

Article 35: Does it ensure Right to Fair Trial or Resemble?

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Abstract

Although the rule of law cuts across various policy fields and comprises political, constitutional, and legal as well as human rights issues, there is no absolute consensus on all its elements. In the first place, the rule of law was expressed as “the restriction of the arbitrary exercise of power by subordinating it to well-defined and established laws.” Hence, the state has to establish an equitable legal system that ensures ‘the right to a fair trial’ also known as ‘fair administration of justice.’ Although the Constitution of Bangladesh, in the preamble, pledged to secure a socialist society “in which the rule of law, fundamental human rights and freedom, equality, and justice, political, economic and social, will be secured for all citizens,” but it has curbed itself from assuring “the right to a fair trial” as one of the constitutional rights. Hence postulating that the right to a fair trial is one of the cardinal requirements of a democratic society abiding by the ‘rule of law,’ the paper examines whether ‘the right to fair trial’ endorses a procedure for administering a fair trial. Thereby, the paper first explores, whether ‘the right to fair trial’ instigates any principal rights and privileges; secondly, giving special attention to Africa and EU practice, the paper examines whether these rights and privileges instigate a due process of law; and finally, discusses the rationales of assuring the right to a fair trial as a fundamental right. Eventually, by identifying the principle rights, the paper will manifest how these rights instigate indispensable obligations and accountability of the different stakeholders of the Judiciary. Additionally will evince how these rights can constitute the foundation of an equitable legal system endorsed by the ‘rule of law’.

Keywords: Due process of law, fair administration of justice, right to fair trial, rule of law

Introduction

The universal principle rule of law is derived from the Latin phrase ‘La Principe de Legality’, i.e. “The King himself ought not to be subject to

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man, but subject to God and the law, because the law makes him King" (The Case of Proclamations, 1610) and in democratic locution 'the Government is based on the principles of law and not of men' (Massachusetts Constitution, 1780). Illustrating the principle A V Dicey stated rule of law means a) no man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary Courts of the land, i.e., the rule of law is contrasted with every system of government based on the exercise by persons in authority of wide, arbitrary, or discretionary powers of constraint (Dicey, 1915); b) no man is above the law, but (what is a different thing) that here every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals (Ex parte Lambdin P. Milligan, 1866); and c) a formula for expressing the fact that with us the law of the constitution, the rules which in foreign countries naturally form part of a constitutional code, are not the source but the consequence of the rights of individuals, as defined and enforced by the Courts (Dicey, 1915). In other words, it can be stated that the Dicey elaborated the rule of law as a procedure for setting up a justice system by endorsing some fundamental principles, such as supremacy of law, protection of law, due process of law, equality before the law as the essential characteristic of the rule of law. Though these fundamental principles emerge as discrete, but their intersection point ensures the fair administration of justice.

The fair administration of justice triggers 'the right to fair trial' which not only establishes victim's rights but also initiates accused person's rights. However, to determine the purview of the right, we increasingly look for the court's guidance and legislation. In Bangladesh context, although the Constitution, in the preamble, pledged to secure a socialist society "in which the rule of law, fundamental human rights and freedom, equality, and justice, political, economic and social, will be secured for all citizens," it has curbed itself from assuring "the right to a fair trial" as one of the constitutional rights. However, the judiciary restricting itself within the parameter of Article 35 has reconciled with 'the right to fair trial'. At this backdrop, it appears to be imperative to make an evaluation of the approach acquire by the Constitution and its impact on fair administration of justice.

In this context, the paper starts discussing the right to fair trial in Bangladesh. Then the author has tried to inquire in to the question-whether 'the right to fair trial' instigates any principle rights and privileges that endorses a procedure for administrating a fair trial. The author has explained how these rights instigate indispensable obligations and accountability of the different stakeholders of the Judiciary. The paper has also discussed some of the rationales of assuring the right to a

fair trial as a fundamental right. And finally giving special attention to practice Africa and EU the paper manifests how these rights endorse 'due process of law'. Finally the paper argues, article 35 of the Constitutes contains some of the associate rights of 'the right to fair trial' and cannot be considered as the provision endorsing the right. Because 'the right to fair trial' is not limited within the rights mentioned in article 35 of the Constitution rather it endorses a procedure for administrating a fair trial. The author found that though the Constitution of Bangladesh has curbed itself from assuring 'the right to a fair trial', it has acknowledge some the associated rights scattered in its criminal law for the regular trial. However, the country has chosen to ensure the maximum associated rights for the ICT trials.

In doing this qualitative research, the paper considered both the primary and second resources. However, limited access to some of the resources is one of the limitations of the paper which hinder it from suggesting a guideline applicable for both civil and criminal justice. Hence, the paper suggests the guideline for the criminal justice system. Nonetheless, as both the justice system is different from each other, distinct guideline would help them to functional more efficiently. Above that, this paper will instigate further research on the field.

Right to Fair Trial in Bangladesh Context

In Bangladesh context, although "*to be treated in accordance with law, and only in accordance with law,*" i.e., due process of law is an inalienable right, it has curbed itself from assuring "the right to a fair trial" as an inalienable right. Ratherensured some of the related rights mentioned in different national, regional and international legal instruments in Article 35 of its Constitution. Under the title 'Protection in respect of trial and punishment', Article 35 states,

"(1) No person shall be convicted of any offence except for violation of a law in force at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than, or different from, that which might have been inflicted under the law in force at the time of the commission of the offence.

(2) No person shall be prosecuted and punished for the same offence more than once.

(3) Every person accused of a criminal offence shall have the right to a speedy and public trial by an independent and impartial Court or tribunal established by law.

(4) No person accused of any offence shall be compelled to be a witness against himself.

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(5) No person shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment.

(6) Nothing in clause (3) or clause (5) shall affect the operation of any existing law which prescribes any punishment or procedure for trial.”

Many scholars at different times have addressed Article 35 as the provision that ensures ‘right to fair trial.’ And the judiciary has always restricted itself within the parameter of Article 35 while addressing issues regarding the right to fair trial.

As the paper concentrates fair trial in criminal justice system, it scrutinized the criminal law of the country i.e., the CrPC, 1898 and PC along with the Constitution, ICT, 1973 and ICT Rules, 2010 to understand the application of the right to fair trial. It is been observed that complementing the rights mentioned in Article 35 of the Constitution, the regular trial contained provision ensuring certain rights and privileges such as the right to be brought promptly before a judge (CrPC, 1898 Section 167, sub section 1, Section 61& 60), right to adequate time and facilities to prepare a defence (CrPC, 1898 Section 265I & 265J), protection against double jeopardy (Constitution of Bangladesh, Article 35, sub-article 2; CrPC, 1898 Section 403), right to know the reasons for the judgment (CrPC, 1898 Section 367), right to appeal and review against both conviction and sentence (CrPC, 1898 Part VII) . However, the fair trial mechanism that ICT trial comply with is little different from the regular trial. It acknowledges the rights mentioned in the international human rights instruments and ensured in the international trial such as prohibition of prosecution on frivolous charges (ICT Rule, 2010 Rule 29 sub rule 1; *Crain vs. Commissioner* , 1984; *Washington vs. Alaimo*, 1996), right of the victims and witness to be protected (ICT Rule, 2010 Rule 58A; *HRC, 2007*, General Comment 32), right to have proper legal representation (ICT, 1973 Section 17sub section 2, Section 12; ICT Rule, 2010 Rule 43 sub rule 1 ; *HRC, 2007*, General Comment 32, §34;the Arab Charter, 2004 Article 16 sub article 4) and so on. Though some dissimilarity in rights and privileges are observed in both the trial system which is, may be, due to the nature of the crime both system deals. But this must be understood that a criminal trial, no matter dealing with international crimes or local crimes, should maintain an international standard (Friedmann, 1963).

Right to Fair Trial in European Context

A discussion about the concept and practice of “right to fair trial” in the European Context would be improper without analyzing Article 6 of the ECHR, 1953.

Like UDHR and ICCPR, the Article 6 of the ECHR entitles ‘everyone to have a fair and public hearing by an independent and impartial tribunal established by law’, but it emphasized on completing the trial ‘within a reasonable time’. While securitizing Article 6 a fair trial guideline is been observed which suggest how a fair trial can be conducted. Or in other words, we can say the guideline suggests a set of rules and practices for a mechanism to work accordingly to ensure ‘fair administration of justice’. The Article 6 suggests everyone charged with a criminal offence has the right: (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 defence; (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 (ECHR, 1953 Article 6). And European Court of Human Rights, through its continuous judicial practice proved that these other rights are also essential for a fair trial.

Recently, like Africa (Principles and Guidelines on the right to a fair trial and Legal Assistance in Africa, 2003) emphasizing the rules and practices ‘fair trial’ prescribes, the country has enacted “Guide on Article 6 of the European Convention on Human Rights” - criminal limb and civil limb. The guide focuses on the scope and application of Article 6 making the provision to work as a mechanism to administrate criminal justice system ensuring ferial.

Right to Fair Trial in South African Context

South Africa has a history of human rights abuses particularly with regard to criminal trial. Though the criminal justice system of Africa has been changing radically since 1994 due to the inception of first the Interim Constitution and later the Constitution of Republic of South Africa , 1996 (Walt, 2010), the country is presumed to be the pioneer of having detailed guidelines on the right to fair trial. Due to its past experiences, the Country in Article 33 to 35 of its Constitution has constitutionally enshrined and protected the right to fair trial as a set of rules and practices for the criminal trial.

Strengthening the right to fair trial, the African Commission adopted a Resolution on the Right to Fair Trial and Legal Assistance in Africa during its 26th ordinary session in November 1999. Followed by the resolution, the African Commission proclaimed the Principles and Guidelines on the Right to Fair Trial Legal Assistance in Africa (The

African Guidelines), 2003. With the known and commonly associated rights, the African guidelines emerged containing some unique features. For instance, rules for judicial training, court records and public access, locus standi, access to judicial services, arrest and detention, legal aid and legal assistance and so on. And by addressing a set of rules and practices for the different stakeholders of the criminal justice system (Udombana, 2006), the Guideline developed a mechanism abiding by 'due process of law' for administering fair trial.

Apart from that the guideline expressed concerns on the independence of lawyers, role of the prosecution, juvenile trial and sentencing. Hence, prescribed rules in this regard. Nonetheless, the Guideline mandated the state to adopt safeguards during the pre-trial process. The Guideline instructs the states to have a detail records of interrogations, includes identity proof, and to consider video or audio interrogations. One of the unique features of the Guidelines is, it states, no derogation of fair trial elements are allowed in any circumstances i.e, threat of war, a state of international or internal armed conflict, internal political instability or any other public emergency. This approach shows the commitment to ensure fair trial in Africa. Hence, African Fair Trial initiatives can be regarded as a standard, as it encompasses a broad spectrum and deals with many issues which are not dealt in the same manner in other regions.

Right to Fair Trial: A Set of Practices or a Singular Individual Right

"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."- Article 10 of the Universal Declaration of Human Rights

Various rights associated with the notion "right to fair trial" can be traced all the way back to the *Lex Duodecim Tabularum* – the Law of the Twelve Tables – which was the first written code of laws in the Roman Republic around 455 B (Robinson, 2009). These rights were the right to have all parties present at a hearing, the principle of equality amongst citizens, and the prohibition against bribery for judicial officials (Robinson, 2009). The Magna Carta Libertatum , 1215 (Walker, 2004) and Treaty of Arbroath of 1320 (Mitchison, 2002)are the two important historic document the induced the development of the notion "right to fair trial". The scope of the right to a fair trial got further developed and codified during the period of the Enlightenment of the 18th Century with the Virginia Declaration of Rights drafted in 1776. Later it influenced a number of national, regional and international human rights documents, including the United States Declaration of Independence, 1776, the United States Bill of Rights, 1789, the French Declaration of the Rights of Man, 1789 (Smith, 2007), Universal Declaration of Human Rights, 1948, European Convention on Human Rights, 1950,American

Convention on Human Rights, 1969, African Charter on Human and Peoples' Rights, 1981, Canadian Charter of Rights and Freedoms, 1982, Constitution of the Philippines, 1986 and Arab Charter on Human Rights, 2004 (Doswald-Beck, 2013). However, these associated rights together was recognized as the "right to fair trial" in the European Convention on Human Rights, (ECHR, 1950) for the first time and then in International Covenant on Civil and Political Rights, 1966 (ICCPR, 1966). What is surprising, however, is none of these national, regional and international human rights instruments have defined the notion "the right to fair trial", other than, addressing the associate rights.

Studying these documents suggests that "the right to fair trial" induces 3 associate rights - a) the right to equality before the law, b) the right to a fair and public hearing, and c) the right to an independent and impartial tribunal. This implies that "the right to fair trial" refers to an institutional framework or a mechanism for the justice system to prevent miscarriages of justice by a fair and effective legal process.

Hence, it can be argued that the right to fair trial does not mean a fair and public hearing, and the independence and impartiality of the tribunal. Rather, it prescribes a set of rules and practices that ensures fair administration of justice. On the other hand, due process of law means "certain minimum standards in the administration of justice of such elementary fairness and general application in the legal systems of the world that they have become international legal standards" (Friedmann, 1963). These precepts can apply in myriad settings, serving as "devices devoted to the enforcement of the rules of substantive law" or as "rules determining the organization, the competence and the functioning of [adjudicative] organs." (Robert Kolb, 2012)

So, it confers certain responsibility towards the government to establish an equitable legal system that ensures 'the right to a fair trial' also known as 'fair administration of justice' (Jurists, 2006).

Principle Rights and Privileges under Fair Trial

Whether 'the right to fair trial' instigates any principle rights and privileges. Or, in other words, what is the purview of the right to fair trial?

To explore the answer we scrutinized some national and international laws including human rights instruments and judicial decisions namely, the Code of Criminal Procedure, 1898 (CrPC, 1898), the International Crimes (Tribunals) Act, 1973 (ICT, 1973), the International Crimes Tribunal Rules of Procedure, 2010 (ICT Rules, 2010), Penal Code (PC), the Universal Declaration of Human Rights, 1948 (UDHR, 1948), the International Covenant on Civil and Political Rights, 1966 (ICCPR,

1966), the European Convention on Human Rights, 1953 (ECHR, 1950), the Rome Statute of the International Criminal Court, 1998 (ICC, 1998), the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, 2003 (Principle of Africa, 2003), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT, 1985), UN Human Rights Committee CCPR/C/GC/32 (HRC, 2007). Absorbingly, the national, regional and international legal instruments have defined the rights related to fair trial, but are reluctant to define the concept of fair trial. These rights do not define fair trial rather prescribes procedural rules and practices for an institution to administrate justice. While scrutinizing these laws twenty-three (23) rights are discovered which are associated with criminal justice system. These rights mentioned below refer to set of rules and practices:

1. Equality before the law (Constitution of Bangladesh, Article 27, UDHR 1948, Article 10; ICCPR, 1966 Article 14)
2. Right to be brought promptly before a judge (CrPC, 1898Section 167, sub section 1, Section 61& 60; ICCPR, 1966Article 9sub section 3 & Article 9 sub section 5)
3. Right to trial by a competent, independent and impartial tribunal established by law (ICT, 1973Section 6 sub section 2A; UDHR, 1948, Article 10; ICCPR, 1966 Article 14 sub article 1; UN General Assembly resolutions 67/166, preamble §11 and 65/213, preamble §9).
4. Right to be presumed innocent (ICT Rule, 2010 Rule 43 sub rule 2 ;UDHR, 1948Article 11; ICCPR, 1966 Article 14 sub article 2;HRC, 2007, 2007General Comment 24, §8)
5. Right to adequate time and facilities to prepare a defence (CrPC, 1898Section 265I & 265J; ICT Rule, 2010 Rule 38sub rule 2; ICCPR, 1966Article 14 sub article 3b; HRC, 2007General Comment 32, §32.)
6. Right to protection against self-incrimination (Constitution of Bangladesh, Article 35, sub-article 4; CrPC, 1898 Section 163 and 164;ICT Rule, 2010 Rule 43 sub rule 7;ICCPR, 1966 Article 14 sub article 3g)
7. Right to examine Witness Evidence (ICT, 1973 Section 9, sub section 4, Section 17 sub section 3 & Section 18 sub section 4;ICCPR, 1966 Article 14sub article 3e;ECHR, 1953Article6 sub article 3d)
8. Prohibition of prosecution on frivolous charges (ICT Rule, 2010 Rule 29 sub rule 1) (Crain vs. Commissioner , 1984) (Washington vs. Alaimo, 1996)

9. Right to bail if investigation is not completed within a specified period (CrPC, 1898 Section 496; ICT Rule, 2010 Rule 9 sub rule 5) (Hitendra Vishu Thakur vs. State of Maharashtra, 1994)
10. Rights to humane detention conditions and freedom from torture and other ill-treatment (Constitution of Bangladesh, Article 35, sub-article 5; ICT Rule, 2010 Rule 16 sub rule 2; ; UN General Assembly resolutions 45/111 the Basic Principles for the Treatment of Prisoner, 1990 Principle 5)
11. Right to inspect documents (ICT, 1973 Section 16 sub section 2)
12. Right to have proper legal representation (ICT, 1973 Section 17 sub section 2, Section 12; ICT Rule, 2010 Rule 43 sub rule 1 ; HRC, 2007, General Comment 32, §34; Arab Charter, 2004 Article 16 sub article 4)
13. Right to conduct own defence (ICT, 1973 Section 17 sub section 2; UDHR, 1948 Article 11 sub article 1; ICCPR, 1966 Article 14 sub article 3d)
14. Right of the accused to explain charges (ICT, 1973 Section 16 & Section 17 sub section 1 ; ICC, 1998 Article 61)
15. Right to call their own defence witnesses (ICT, 1973 Section 10 sub section 1f & Section 17 sub section 3 ; ICCPR, 1966 Article 14 sub article 3e)
16. Right of the victims and witness to be protected (ICT Rule, 2010 Rule 58A; HRC, 2007, General Comment 32)
17. Burden of Proof on prosecution beyond reasonable doubt (ICT Rule, 2010 Rule 50; Principle of Africa, 2003 Principle N(6)(e)(i); HRC, 2007 General Comment 32, §30)
18. Right to speedy trial (Constitution of Bangladesh, Article 35, sub-article 3; ICT Rule, 2010 Rule 43 sub rule 5 ; ICCPR, 1966 Article 14 sub article 3c)
19. Protection against double jeopardy (Constitution of Bangladesh, Article 35, sub-article 2; CrPC, 1898 Section 403; ICT Rule, 2010, Rule 43 sub rule 3; ICCPR, 1966 Article 14 sub article 7)
20. Right to know the reasons for the judgment (CrPC, 1898 Section 367; HRC, 2007 General Comment 32, §29)
21. Right to have a sentencing hearing (UNCAT, 1985 Article 4 sub article 2)
22. Right to appeal and review against both conviction and sentence (CrPC, 1898 Part VII; ICT, 1973 Section 21 sub section 1; ICT Rule, 2010 Rule 26 sub rule 3; ICCPR, 1966 Article 14 sub article 5)
23. Right to an effective remedy (Principle of Africa, 2003, Principle C)

Due Process of Law, A Prerequisite to The Right to Fair Trial

“To enjoy the protection of the law, and to be treated in accordance with law, and only in accordance with law, is the inalienable right of every citizen.”- Article 31 of the Constitution of Bangladesh.

The above quotation can be called as "the due process clause" of the Constitution of Bangladesh. Unlike the Amendment V to the Constitution of the United States, the Constitution of Bangladesh does not address the principle "due process of law" explicitly. But the phrase "*to be treated in accordance with law, and only in accordance with law*" convey the same meaning as the principle "due process of law". What is surprising - the principle "due process of law" is always seen to be defined as a fundamental principle of fairness in all legal matters, and understood as, limitations upon the powers of the government (Friedmann, 1963). However, it also suggests limitations upon the powers of the different stakeholders of the judicial system. In other words it acts as a device to prevent any arbitrary treatment and abuse of power.

In broader sense, here, due process of law demands a mechanism where it acts as a fuel so that all the functional equipment are connected and work accordingly. And right to fair trial, in broader sense is defined, here, as a mechanism that set of procedural rules and practices, i.e., substantive law, for both civil and criminal justice system to ensure the fair administration of justice. And when it comes to make the mechanism i.e., the right to fair trial, function accordingly, due process of law become prerequisite so that all the procedural rules are followed.

Conclusion

The 'right to fair trial' is always presumed to be about protecting victim's confidence towards the justice system, but it is also about protecting the confidence of the accused person that the justice system is not bias towards the alleged victim. So, fair trial establishes equitable rights and privileges for both the parties in a dispute. Hence it is responsibility of the government to establish a mechanism to create an equitable legal system to ensure 'fair administration of justice'. Securitizing different national, regional and international legal instruments along with Europe, Africa and Bangladesh experience, the present paper wants to offer three important points here.

Firstly, 'the right to fair trial' works as a mechanism for fair administration of justice by prescribing a set of rules and practices. Hence, it is a substantive law for both civil and criminal justice system to ensure the fair administration of justice. And when it comes to make the mechanism function accordingly, due process of law become prerequisite so that all the procedural rules are followed.

Secondly, scrutinizing national, regional and international legal instruments the paper discovered twenty-three (23) rights, but not limited, associated with criminal justice system that suggests procedural rules applicable for criminal trial.

Thirdly, the paper observed Bangladesh has not ensured right to fair trial as an inalienable right rather ensured some commonly known associate rights in its constitution and criminal law. It is also been observed that instead of maintaining a similar standard in all criminal trial the country has maintain two standard. Furthermore, the country does not have any substantive law like Africa and Europe that guides the whole criminal justice system and ensures fair administration of justice. Hence, the government has to take the initiative to develop an equitable legal system by ensuring the right to fair trial where justice is done not only from the victim's side but also from the accused side (Silvee, 2018).

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