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The Rights of an Accused: Constitutional Provisions

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The discovery and the punishment of crime are functions which produce a dramatic preponderance of power of part of the state. Against the resources of the state, the accused stands relatively poor and alone. In fact, many of the rights, liberties and immunities which the law declares and the constraints on the police and prosecution which their protection imposes originated not in any concern for individual rights so much as in response to the relatively weaker position of the defendant vis a vis the crown. It is to prevent abuse by officials and others who wield power in the criminal system, that a number of rights are conferred upon an accused.

There are distinctly two types of rights conferred upon an accused – those which aim to counter balance his disadvantageous position e.g. the right to silence and the right not to be subjected to torture and those aim to torture and those which aim to protect certain principles and which remain unaffected by all factual contingencies e.g. the nulla poena sine lege principle, or the presumption of innocence and so on. These very rights assume a different character in the administration of criminal justice wherein we meet rights asserted in the character of human rights and also rights asserted in the name of fairness and natural justice.

Who is an Accused?

The protection of Art 20 (3) is available to a person 'accused of an offence'. This means a person against whom a formal accusation relating to the commission of an offence has been leveled, which in normal course may result in his prosecution.

The privilege of Article 20(3) is undoubtedly at the trial stage in the court room. But it is available even at the pre-trial stage, i.e. during the course of police investigation if the person concerned can be regarded as an accused. Nandani Satpathy was directed to appear at the police station for being examined in connection with a case registered against her under the Prevention of Corruption Act. On the basis of FIR, investigations were commenced against her and she was interrogated by the police with reference to a long string of questions, but she

refused to answer, claiming protection of Art. 20(3). The Supreme Court held that Section 160(1), Cr. P.C, which bars of calling women to a police station, was breached in this case. Bu the court took the opportunity to dilate the length of the scope of Art. 20(3).

What is compulsion?

Art. 20 (3) comes into operation only when the accused is compelled to give evidence against himself. Duress is where a man is compelled to do an act by an injury, beating or unlawful imprisonment. It also includes threatening, beating or imprisoning of the wife, parent, of child of a person.

The article enacts a measure of protection against testimony compelled through police torture, violence or overbearing methods. Art. 20 (3) is not violated when the accused volunteers evidence against himself. Since the article only gives a privilege, the accused may waive it if he so likes.

The Meaning of "to be a witness"

To be a witness" means making of oral or written statements in writing, made or given in as court or otherwise. If means imparting knowledge in respect of relevant facts by an oral statement or a statement in writing.

To be a witness" is not equivalent to 'furnishing evidence' in its widest significance, i.e. to say as including not merely making or oral or written statement, but also production of documents or giving materials which may be relevant at the trial to determine the guilt or innocence of the accused. Judicial opinion has wavered over the term 'to be a witness'. The Supreme Court said "to be a witness means to furnish evidence and this could be done through lips or by production of a thing or a document or by giving oral evidence but also by producing documents or making intelligible gestures as in the case of dumb witness.

1. **Immunity from Retrospective Criminal Legislation (Article 20)**

It has always been thought to be of primary importance that a man should be able to know in advance what conduct is and what is not criminal, particularly when punishments and penalties are involved. A conduct may not be an offence by the State. Ex-post facto laws are laws which punish for what had been lawful when done. "There can be no doubt", said Jagannath Das J., "as to the paramount importance of the principle that such ex-post facto

laws which retrospectively create offences and punish them are bad as being highly inequitable."

An ex-post-facto law is a law that penalizes retrospectively and already done or increase the penalty for such acts. Article 20 (1) imposes a limitation on the law-making power of the legislature. C1 [i] of Article 20 runs as follows:

"No person shall be convicted of any offence expect 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 that which might have been inflicted by the law in force at the time of the commission of the offence".

a) Protection against Double Jeopardy

Clause (2) of Article 20 says "No person shall be prosecuted and punished for the same offence more than once." The clause embodies the English Common Law Rule of "nemo debet bis vexari" which means no man should be put twice in peril for the same offence and if he is prosecuted again for it for which he has already been prosecuted. He can take the complete defence of his former acquittal." Technically expressed as the plea of autrefois acquit' or 'autrefois convict' the plea avers that the defendant has been previously convicted or acquitted on a charge for the same offence as that in respect of which he is arraigned now.

b) Protection against compelling self-incriminating evidence

Article 20 (3) runs as "No person accused of any offence shall be compelled to be a witness himself".

This provision embodies one of the fundamental canons of Common Law on Criminal jurisprudence, that the accused is presumed to be innocent that it is for the prosecution to establish his guilt by collecting evidence from sources other than the accused and that the accused need not make any statement against his own will. These propositions emanate from an apprehension that if compulsory examination of an accused were to be permitted, then force and torture may be used against him to entrap him into fatal contradictions.

2. Right to Life and Personal Liberty (Article 21)

Of all the rights of an accused providing in our Constitution and the Criminal Procedure code, the most important one is enshrined in Article 21 of our Constitution which goes as:

"No one shall be deprived of his life or personal liberty expect according to procedure established by law".

Art. 21 was for a long period of time lifeless incarnation of the right to life and personal liberty which had very little positive content. The Supreme Court had for almost twenty seven years after the enactment of the Constitution, taken the view that it merely embodied a facet of the Diceyean Concept of the Rule of Law that no one can be deprived of his life and personal liberty by executive action unsupported by law. It was a protection against executive action which had no authority of law. If there was a law which provided some sort of procedure, it was enough to deprive a person of his life and persona liberty. Justice S.R. Das gave an illustration that if a law provided that the cook of the bishop of Rochester be boiled in oil, it would be valid in Art. 21. but in famous declaration in Maneka Gandhi which according to many jurists marks a watershed in the history of the Constitutional Law of the country, the Supreme Court for the first time took the view that Art. 21 affords protection not only against executive action but also against legislation and no law can deprive a person of his life and personal liberty unless it prescribes a procedure which is reasonable, fair and just and if it is not, the court will strike down the law as invalid.

3. Right to Be Informed on Grounds of Arrest (Article 22)

The right to be informed of the grounds of arrest is a precious right of the accused person. Article 22 of the Constitution as well as Section 50 of the Code of Criminal Procedure, 1973 have adequately protected this aspect of personal liberty of an accused. Timely information of the grounds of arrest serves him in many ways. It enables him to move the proper court for bail or in appropriate circumstances for a writ of "habeas corpus" or to make expeditious arrangements for his defense. Art.22 (1) guarantees that:

"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".

4. Accused Person's Right to Counsel

An individual allegedly accused of a crime is morally and mentally a depressed person. Segregated from his friends and family, lying behind the police lock up, he, in reality, feels extremely helpless and scared about his fate. In India, where a majority of offenders are from

poor and illiterate strata of the society, it would be fool hardy to expect of them to look for legal advise for the preparation of their defence. Resultantly, extremely shabby treatment is meted out to them by police officials, jail authorities as well as our judges. 'Hussainara Khatoon' is a glaring example of "scores of men, women and children reeling behind bars for petty offences only because of the inability to arrange for their defense and release on bail.

This despite the Constitutional guarantee laid down in Art. 22 (1) which reads as:

> "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".

The right of the accused to have a counsel of his choice is fundamental and essential to fair trial. The right is recognized because of the obvious fact that ordinarily an accused person does not have the knowledge of law and the professional skill to defend himself before a Court of law wherein the prosecution is conducted by a competent and experienced prosecutor.

5. **Equal Justice and Free Legal Aid**:

The State shall ensure that the operation of the legal system promotes justice on a basis of equal opportunity and shall, in particular, provide free legal aid, by suitable legislation or schemes 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. But the Article merely contains a directive principle of state policy. It lays a obligation o the State to provide a free Legal Aid, but it is not an obligation enforceable in a court of law and does not accrue as an Constitutional right on the accused to secure free legal assistance. The Supreme Court has filled this Constitutional gap through creative judicial interpretation of Art.21 following the Maneka Gandhi Case. It is held in M.H. Hoskot v. State of Maharashtra and Hussasinara Khatoon vs. State of Bihar that a procedure which does not make legal services available to accused person who is to poor to afford a lawyer and who would, therefore, have to go through trial without legal assistance cannot be possibly regarded as reasonable, fair and just. It is an essential ingredient of reasonable, fair and just procedure guaranteed under Art.21 that a prisoner who has to seek his liberation through the court process should have legal services made available to him. The right to free legal assistance is an essential element of any

reasonable, fair and just procedure for a person accused of an offence and it must be held implicit in the guarantee of Art. 21.the court thus spelt out the right to Legal Aid in a criminal proceeding from the language of Art.21 and held:

> "This is a 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 as incommunicable situation and the State is under a mandate to provide a lawyer to an accused person if the circumstances of the case and the needs of justice so require, provided of course the accused person does not object to the provision of such lawyer"

6. Right to be Produced before a Magistrate without Delay

Art. 22 (2) of the Constitution provides that:

> "Every person who is arrested and detained in custody shall be produced before the nearest Magistrate within a period of 24 hours of such arrest excluding the time necessary for the journey from the place of arrest to the in custody beyond the said period without the authority of a Magistrate".

Under Art.22 (2), every person arrested and detained in custody by an arresting officer must be produced before the nearest Magistrate within 24 hours of his arrest. This is a Fundamental right of very great importance, for it ensures that the executive cannot arbitrarily keep a person under detention at its own sweet will and pleasure for an indefinite period. Apart from this, the production of arrestee before a judicial officer ascertains judicial examination of the legality of the arrest. The right to be brought before a magistrate within a period of 24 hours of arrest has been created with a view:

(1) to prevent arrest and detention for the purpose of extracting confessions or as a means of compelling people to give information.

(2) to prevent police stations being used as though the were prisons – a purpose for which they are unsuitable.

(3) to afford an early recourse to a judicial officer independent of the police on all questions of bail or discharge.

7. Right of an Accused to Bail

Bail is the setting at liberty a person arrested or imprisoned on security being taken which ensures his appearance at his trial. It is a word that is equated with a sum of money. The court holds the bail money or a bond in lieu of money of money until the released accused appears for his trial. Upon the failure of the accused to so appear at the trial, this money stands forfeited. Sometimes, release on bail requires bond by a surety apart from being supported by the accused's bond.

Bail under Sec. 56, Cr. P.C:

A police officer making an arrest without warrant shall, without unnecessary delay and subject to the provisions contained as to bail take or send the person arrested before a magistrate. As per the provisions layed under Section 57 Cr.P.C no person can be detained more than 24 hours, he has to be presented before the Magistrate. So if the accused so arrested is accused of a bailable offence then the police officer arresting him has to release him on bail in view of sec. 436, Cr. P.C. if such a person is prepared to give bail. A police officer arresting a person cannot keep him in confinement in any place which the police officer might select but he should be send immediately to the police station and be placed in custody of the officer-in-charge of the police station who is the person entrusted by the Code of Criminal procedure to investigate the case. If the offence for which he is arrested is bailable and the accused is unable to furnish bail, the police officer has to send him before a Magistrate within 24 hours of his arrest. When a person arrested under Section 56 is accused of a bailable offence and his bail is refused, he is entitled to a writ of habeas corpus.

Conclusion

Prison figures over the years reveal a continuous gradation in the population of under trial prisoners in the country. This reflects upon the activities of our courts as it is they who determine the yearly average prison population. Given the increasing numbers committed and remands extended by the courts, the judiciary by sending more people to prison for longer periods of time, bears responsibility for the sharp increase in prison figures.

Under trials, expectedly, and with some justification are fed up with the courts. Much of the simmering discontent within the penal establishment stems from the sense of injustice perpetrated by a legal process that has shown itself increasingly partison towards the

propertied class. Prison figures indicate the 85% of the Indian prison population comprises of poor, illiterate agriculturists, tribal or the economically disadvantaged.

Putting the entire blame on our pecuniary bail system would be unfair. Numerous other factors like arrears, understaffed, judiciary, understaffed, underpaid and unsophisticated police, scanty legal aid et al. are equally responsible for this situation.

It is a familiar finding of sociological inquiries that the actual behaviour of people working within a system is determined less by the formal rules and ideals of the system than by the operational demands of their role and their relationship with other people. In relation to the bail process, there is clear evidence of the respects in which the behaviour of the police, prosecution lawyers, magistrates and administrators is influenced by a desire to “ease” their own situation which works to the disadvantage of the individual defendant.

In the light of the practice of arresting the accused before his first court appearance, the physical condition of the police lock-up are of interest. Police lock ups generally are bare rooms with barred doors, a room set apart for locking up the accused, suspects, common drunks etc., in the premises of the police station. From my observations of lock ups – the lock up at Punjab (P.S. Adalat Bazar) was probably a urinal, such was the stench! It was situated a few metres away from the S.H.O.’s office. The one at Palasiya (P.S. Palasia, Indore) was a bare room with a barred door; at Mandavali (P.S. Mandavali, Delhi) and Tilak Nagar (Delhi) a room that was used for lodging police personnel was being used as a make-shift lock ups. There is a highly punitive atmosphere in the lock ups. Prisoners crouch or huddle together (like poultry in coops) speaking ever once in a while in hushed tones. There are no meals, not even tea. The prisoners’ opportunity to communicate with the outside world is trammeled at every turn. Prisoners are not allowed to use the telephone or inform anybody. It is probable that well dressed prisoners are allowed this concession. We can only pray that the mandates of D.K. Basu v. State of W.B. (AIR 1997 SC 610) reach every corner of the country.

The time spent in custody before the first court appearance is a most critical period. The accused often does not know of legal aid and becomes susceptible to improper police practice, is more likely to confess to his guilt and less likely to develop any legitimate defence he may have. He is often very confused or too mentally restricted to look after his own interests.

It is reasonable to assume that the first appearance is usually the occassion for the fullest

consideration of the bail question and that on subsequent occassions the court would normally only be concerned to consider any new matters that were not present or not known on the earlier occasion. Measured by the number of defendants, proceedings in magistrate' courts are by far the most important. Police officers and prosecuting witnesses who are waiting to testify mingle with spectators in the frequently crowded court room (which includes police personnel on escort and guard duty). The location, condition and lack of defence counsel produce an atmosphere which is ill suited to careful judicial determination.

After the police evidence has been presented, magistrates who have such information in the docket as: name, address, age, occupation and charge may interject questions to the defendant to elicit information on his criminal record, employment family background etc. Most however do not, they merely look to the severity of the offence charged to decide whether to hold the defendant or release him. The nature of the offence is in fact the basic standard which guides the decision as to the amount to be set. Recommendations are forwarded by the police as well as the public prosecutor on the amount of bail to be set. Administrative convenience is another reason for standardization of bail. A constant stream of new prisoners with little or no knowledge of their propensities do not leave the courts with much notice.

The ideal way of making a bail decision as put by J. Pathak in Hussainara seems though very sound but in reality it is difficult to follow its norms. The gulf which separates this ideal of individualisation from prevalent practices is so wide that it cannot be bridged. In lower levels of the judiciary it is ridiculous to expect that factors based on the history, character, standing, personality, community, residence, marital status and record of the accused are ever developed at hearings. Development of this kind of information would require a practice somewhat comparable to the pre-sentence investigation made by probation departments following convictions.

Yet, ponder we must over what is practically possible to make improvements in our bail system. Regardless of what else is done with the bail system, one obvious change must be made; the magistrate deciding the bail must have sufficient knowledge on which to base on intelligent decision. Our bail system depends mainly on speculation, intuition, the view of the police and the magistrate's ability to judge the likelihood of the accused appearing for trial merely from looks in courts. The defendant's family, his character, social standing and his financial ability to raise bail is seldom taken into account. The onus of collecting such personal information about the defendant is on the police. Considering the responsibilities it

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shoulders, it is placing too tall an order on it. Resultantly this verification is perfunctory and unreliable.

If courts fear that defendant will commit further crimes if released on bail, the remedy is not preventive detention but a prompt trial. The incidence of bail jumping or committing another crime while on bail leads to criticism of the courts which is unjust since they are swore to uphold the Constitution and therefore, they must fix bail. The best way to eliminate a bad bail situation is the prompt trial of bail cases.

It is evident from the given scenario that until and unless immediate attention is paid to factors like delayed trials, improper police functioning, ineffective investigation and scanty legal aid, no far reaching improvements can be made in the bail process.

Suggestions

1. Expeditious Trials

Nothing can be more galling for an accused than the prospect of a long drawn out jail term even before he is pronounced guilty. It prompts him to "arrange" for bail anyhow and secure his freedom.

(1) After the completion of investigation, the trial of an under trial prisoner should be held speedily by arranging day to day proceedings without any interruption. It should be completed within a period of three months from the date of completion of investigation, for which Section 309(1) of the Criminal Procedure Code should be amended accordingly. Section 437(6) should also be amended to the effect that if the trial in a non-bailable case is not concluded within a period of three months from the date of completion of investigation and the under trial is in jail, he should be released on his personal bond. The trial courts should furnish periodical statements of cases in which the under trials are in custody and which are not concluded within the proposed time-limits.

(2) Although the law provides for expeditious proceedings and permits reasonable adjournments in exceptional circumstances, but in practice, the frequency of adjournments or postponements has increased very much. Non-appearance of accused, non-production of under trials, non-appearance of witnesses, non-availability or unpreparedness of defence counsel or prosecutor, non-availability of time with the court due to large number of cases fixed on a day and long cross-examinations, presiding officer being on leave, unscheduled

holidays, non-availability of lower court records or copies of documents and the like are the common grounds on which adjournments are often sought and granted. These factors unhesitatingly prolong incarceration for the under trial.

(3) Where the under trial prisoners are in jail, frequent adjournments of their cases should not be granted unless absolutely necessary. Further, all under trials should be physically produced before the presiding officers of the court on their dates of hearing. Before granting further remand, they should see its necessity and provide him with information of his right s of bail and legal aid to the under trials.

(4) Many persons are detained in jail with under trial prisoners under preventive provisions of the Code of Criminal Procedure because of their inability to furnish the requisite bond. These provisions should be amended suitably to restrict their use only in very genuine cases, which should be heard with due promptness. Efforts should be made to conclude these proceedings within three months.

(5) Persons detained under executive orders, such as, agitators defying law during agitations, cause a sudden increase in the number of under trial prisoners. Most of them do not offer bail. Such persons should be put up for trial soon after their arrest in order to avoid congestion in jails. Another suggestion is to keep them away from the convicts and under trials.

(6) There should be a periodic review of the cases of under trial prisoners pending in the Courts at district level and State level. The officers of the rank of Sessions Judge and Additional Sessions Judge must be entrusted this task of reviewing the above cases up to the Sessions Court level and High Court level.

(7) Where the same judicial officer exercises civil and criminal powers, normally he should not fix both types of cases on the same day. If such a course cannot be avoided, he should set apart separate time for civil and criminal cases.

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