

Criminal justice and constitutional guarantees

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Abstract

The most vital and enduring transformation in the nature of the Rule of Law in India occurred in the 1950's, with the coming into force of the Constitution of India, 1950.² The Constitution provided legitimacy to the pre-independence British law's such as the Indian Penal Code, 1860, the Indian Evidence Act, 1872 and the Criminal Procedure Code, 1898, on the one hand, and served as the legal touchstone for all the future criminal justice laws, on the other. Such a close and integral relationship between the Constitutional guarantees and the constituent laws comprising the CJA has hitherto remained unexplored and ignored, by and large. Mr. A.G. Noorani, has lamented this tendency in these words (in the Foreword to Handbook of Human Rights and Criminal Justice in India, SAHRDC, O.U.P., 2007): "While every work on British constitutional law discusses at length the status and powers of police, books on Constitution of India ignore the profound importance of the police is a polity governed by the rule of law." (p.xii). Similar disconnect obtains in the text books on criminal law and criminal procedure laws too, when, unlike most of the modern British text books, our books do neither care to cite nor recognize the constitutional guarantees as the foundations of the CJA principles and policies. The implementation level realities strengthen the state of dis-connect between the constitutional norms and the CJA further, thereby broadening the disjuncture between the juridical reality and the existential reality. The present module endeavors to remind the readers of the close link between the constitutional guarantees and CJA norms and explore also the reasons for the growing gap between the normative promises and the existential realities.

What – provisions constitute the 'Constitutional Foundations'

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² INDIA CONST.

The Constitution of India as the basic law of the land confers wide range of powers on the state officials to preserve the social peace and order and at the same time recognizes and guarantees certain rights and freedoms to the citizens, as well as non-citizens, including accused persons. The balancing of the apparently conflicting interests is reflected in the measures such as Article 372³ that provides for the adaptation all the existing substantive and procedural criminal laws and other civil liabilities laws that confer powers on the state and its functionaries to criminalize behaviors and subject the suspects to the duly laid down procedure for guilt determination and award of punishments. Such wide and sweeping powers in the hands of the states are counter-balanced by the Fundamental Rights enshrined in Part-III. In particular, the basic balancing principle laid down in clause (1) and (2). Article 13(1)⁴ lays down that all the existing and enforced laws shall be subjected to a test for inconsistency with the Fundamental Rights and any such inconsistency shall render the law void to the extent of the inconsistency. Similarly, Article 13(2)⁵ prohibits the state from making any law that tends to abrogate or abridge any fundamental right and by virtue of 13(2)⁶ that shall be rendered as void. Thus, the wide range of Fundamental Rights guaranteed in the Part III of the Constitution constitute the bulwark of individual freedoms. The following Fundamental Rights can be specially discussed in terms of their ‘foundational’ character:

Right to life and personal liberty

Article 21⁷ lays down: “No person shall be deprived of his life or personal liberty except according to procedure established by law”. The provision ensures that the life or personal liberty of any person, citizen or non-citizen, may not be taken away or interfered with and that such taking or interference may be permissible only if the authorities have followed a procedure laid down by laws. This means ipso facto every event of taking of life or interference with liberty is unconstitutional. But such unconstitutional charge can be rebutted by showing that the taking or interference was after following a legal procedure. Since originally the constitution makers never intended to introduce the idea of the ‘quality’ of the legal procedure in question, the burden of those who were required to take life or interfere with the liberty was lighter. The offending party was only required to show that they have

³ INDIA CONST. art. 372.

⁴ INDIA CONST. art. 13.

⁵ INDIA CONST. art. 13.

⁶ INDIA CONST. art. 13.

⁷ INDIA CONST. art. 21.

acted per a legally established procedure. But the post- emergency interpretation given to ‘legal procedure’ by the Supreme Court in Maneka Gandhi⁸ has even made the issue of quality of legal procedure a constitutional question. Now the procedure has to be a ‘fair’ and ‘just’ procedure and not ‘any procedure. Thus, wherever the ‘taking’ and ‘interference’ is arbitrary, discriminatory, undignified, de-humanizing etc. it shall fall foul of Article 21⁹, thereby making this constitutional provision as the ‘mother of all actions’ or foundations.

Right against diverse modes of accusations

The adversarial system of Justice confers wide powers on the prosecution party to accuse persons of crimes and subject them to the various criminal justice processes such as arrest, charging for offences, trial etc. Article 20¹⁰ that is titled as “Protection in Respect of Conviction for Offences” accords recognition to the three basic postulates of criminal liability, namely (a) Prohibition against ex post facto laws, (b) Prohibition against double jeopardy and (c) Prohibition against self- incrimination. Article 20(1)¹¹ reads: “No person shall be convicted of any offence except for the violation of the law in force at the time of the commission of the act charged as offence...” This provision re-iterates the classic Criminal Law Maxim: Nulla poena sine lege and Nulla Crimin sine lege, that means there cannot be any crime without an existing law that criminalizes behavior. Article 20(2)¹²: “No person shall be prosecuted and prosecuted for the same offence more than once”. The guarantee envisages to prohibit repeat penalization first, at the initial stage of prosecution/framing of charges and later, at the stage of sentencing. The idea is that no criminal ought to suffer for the crime he has committed in perpetuity. Similarly, Article 20(3) lays down: “No person accused of an offence shall be compelled to be a witness against himself”. The guarantee prohibits ‘compelled self- incrimination, but not voluntary confession that is legally permissible as a piece of evidence. Similarly taking of blood sample with the permission of the court is not a violation of clause (3) of Article 20.¹³

Rights against indiscriminate arrest and lack of legal defence

⁸ Maneka Gandhi v. Union of India, (1978) 1 S.C.C. 248.

⁹INDIA CONST. art. 21.

¹⁰INDIA CONST. art. 20.

¹¹ INDIA CONST. art. 20.

¹²INDIA CONST. art. 20.

¹³INDIA CONST. art. 20.

Since every arrest involves interference with the personal liberty, but the constitution makers preferred to create a separate provision for arrest and the conditions under which it can be effected legally by enacting a distinct provision Article 22¹⁴. Clauses (1) and (2) of this Article expressly lay down three vital limitations on the powers of the state to arrest, namely, First, that every arrestee who is detained in custody shall be communicated the grounds of his arrest, second, no arrestee shall be denied the right to consult and be defended by a lawyer of his choice, and third, the person in custody must be produced before a Magistrate within 24 hours of arrest/coming into custody. The foundational provision relating to rights against indiscriminate arrest laid down in 1950 has undergone significant legislative and judicial transformations and the present arrest law is infused with much greater civil liberty orientation.

Right to Equality

A fair and just criminal justice administration shall ensure that the powers to criminalize and the procedures of criminalization are evenly exercised, without any kind of discrimination. This basic principle of egalitarian order assumes much greater significance in a society like ours that suffers from multiple kinds of inequalities. The Constitution begins the Fundamental Rights discourse with

Article 14¹⁵ on “Equality before Law” that reads: “the State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India”. The guarantee ensures that neither equality before the law shall be denied by the State, nor the State will discriminate between persons in matters of administration of laws. This guarantee prohibits discriminatory criminalization, differential administration of criminal justice and different punishment for the same crime. However, does not prohibit reasonable classification based on intelligible differentia test.

Entitlement to Equal Justice and Free Legal Aid

Realizing that the poor and resource-less get a raw deal from the legal system the 42nd Constitutional (Amendment) 1976 incorporated 39A that: directs the State to ensure that the operation of the legal system promotes justice by providing equality of opportunity to all the persons to have equal access to justice. Such equal access is denied when there are limited

¹⁴ INDIA CONST. art. 22.

¹⁵ INDIA CONST. art. 14.

justice forums, or the claimants of justice are located in far- away places like the hills, forests and desert areas, or are totally resource-less and completely lack awareness. The Directive in Article 39-A¹⁶ requires the State to of set the access to justice needs of the resource-less by organizing facilities for free legal aid. The directive for free legal aid has been partly complied by the organization of the National Legal Services regime all over the country in terms the National Legal Services Authorities Act, 1987. As a consequence, at the formal level the legal service need of the resource-less are envisaged to be delivered through the National Legal Services Authority at the Central and State Level Legal Services Authorities.

Constitutional Right to Judicial Remedies

A unique feature of the Fundamental Rights is their enforceability by the superior judicial agencies such as the Supreme Court and the High Courts. Article 32(1)¹⁷ expressly provides that” The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this part is guaranteed”. Such right to constitutional remedies may be exercised by the Supreme Court by the issuance of directions or orders or writs and such right shall not be suspended except as provided by the Constitution itself. The State High Courts, also enjoy similar powers within their jurisdiction to, issue directions, orders or writs for the enforcement of rights conferred by Part Iii or for any other purpose under Article 226. Both the Articles 32 and 226¹⁸ confer the right to seek remedies through appropriate proceedings in the constitutional Courts.

Statutory Laws Framework Relating to Criminal Justice

The statutory law framework that constitutes the legal basis for the CJA mainly comprises of the substantive laws and the procedural laws. The substantive law is largely composed of the Indian Penal Code, 1860¹⁹ and hoard of other penal statutes on diverse subjects, while as the procedural law is mainly drawn from the Code of Criminal Procedure, 1973²⁰ and the Indian Evidence Act, 1872.²¹

- (i) The substantive law plank mainly inspired by the mid nineteenth century criminal justice philosophy enshrined in the Penal Code, as interpreted by the High ‘Courts and

¹⁶ INDIA CONST. art. 39-A.

¹⁷ INDIA CONST. art. 32.

¹⁸ INDIA CONST. art. 226.

¹⁹ Indian Penal Code, 1860, No. 45, Acts of Parliament, 1860 (India).

²⁰ Code of Criminal Procedure, 1973, No. 2, Acts of Parliament, 1974 (India).

²¹ Indian Evidence Act, 1872, No. 1, Acts of Parliament, 1872 (India).

the Supreme Court from time to time, has certain inherent features that can be described as hall-mark of the Indian Criminal Justice. Lord Babington Macaulay, whose Benthamite thinking profoundly influenced the basic features of the Penal Code, had this to say: “We know that India cannot have a free government. But she must have the next best thing – a firm and imperial despotism, the worst state in which she can possibly be placed is that in which the memorialists would place her. They call on us to recognize them as a privileged order of freemen in the midst of slaves. It was for the purpose of averting this great evil the Parliament, at the same time at which it suffered English men to settle in India, armed us with those large powers which, in my opinion, we will deserve to possess if we have not the spirit to use them now”, (lord Macaulay’s Legislative Minutes, Geoffrey Cumberlege, OUP (1946) selected by C.D. Dharkar, The Black Act, No. 10 (no date) p.180). Macaulay’s strong desire to enact a strong and uniform criminal law for all the Indians, rich and poor, privileged or unprivileged is again epitomized in this observation: “A privilege enjoyed by a few individuals in the midst of vast population is not freedom, it is tyranny”. (Macaulay’s Legislative Minutes p.133). Macaulay’s such obsession with the principle of uniformity and the outright rejection of caste and class privilege in matters of codification of the criminal law makes equality foundation as the bed rock of the Indian Criminal Justice idea, though in reality the things may be far more in-egalitarian than normatively provided for.

- (ii) The 1898 Criminal Procedure Code constituted the basic procedural law till the enactment of the new Code in 1973. In the two post-constitutional decades of 1950’s and 60’s the constitutional guarantees had started making impact on the CJA and its constituents. This is clearly evidenced by the first phase of criminal law reforms undertaken in the late 1960’s, in which the first in the line of reform was the criminal procedure law that needed to be brought in tune with the current liberal, constitutional ethos. That is the Code of Criminal Procedure Bill, 1971 did not impart amendments to the existing law, but envisaged to come out with a new procedure law itself. The Bill was moved in the Parliament with the three basic consideration in, mind, namely:
- Speedy disposal consideration
 - Due process consideration, and
 - Fair deal to poorer sections consideration

The aforesaid three considerations were duly reflected in the provisions of the Code of Criminal Procedure, 1973²² that aims at providing expeditions, fair and just and nondiscriminatory criminal proceedings. These aims are particularly reflected in the following salient features of the new Code of Criminal procedure:

a) **Clearer demarcations of the stages of criminal proceedings and functions of the agencies assigned the procedural tasks**

Chapter XII begins with providing information about the crime to the police under Sections 154 & 155,²³ can also be described as the pre-investigation stage that serves as the prelude to Investigation Stage. The stage commences with Section 156 and concludes in Section 173(2).²⁴ The eighteen Sections confer powers on the Executive multifaceted functions that may be Code assigns the investigation function mainly to the Police agency, no other agency such as Prosecution or the Judiciary may ordinarily assume the functions of investigation of offence. However, a significant feature of the new Code is that it has tried to clearly demarcate the Stage and Functions of the agencies, particularly in respect to Police and prosecution, by incorporating introducing new Sections 24 & 25 that expressly require a distinct cadre for the prosecution. The idea enshrined in the original sections has been lent support by the later Amendments that envisage a distinct Directorate of Prosecution in every State. The idea is that a clear demarcation of functions would ultimately improve the quality of criminal justice.

b) **Measures for expeditions criminal proceedings**

Section 57²⁵ prohibits police custody for more than 24 hours and requires the Police Officer to obtain remand order from a Magistrate in cases of longer detention. Similarly under Section 167²⁶ that gives powers to the Magistrate to pass orders regarding Police Custody remand (maximum for 15 days) or judicial custody remand (15 days at a time), but even judicial custody remand shall not be given for a period beyond 90 days in case of investigation for offences punishable with imprisonment above 10 years to death and not more than 60 days if the investigation relates to any other offence. Thus, the arrestee shall have a right to be released on bail the moment the time period fixed for investigation about the concerned offence is over. Similar the provisions relating to

²² Code of Criminal Procedure, 1973, No. 2, Acts of Parliament, 1974 (India).

²³ Sections 154 & 155, Code of Criminal Procedure, 1973, No. 2, Acts of Parliament, 1974 (India).

²⁴ Sections 173, Code of Criminal Procedure, 1973, No. 2, Acts of Parliament, 1974 (India).

²⁵ Sections 57, Code of Criminal Procedure, 1973, No. 2, Acts of Parliament, 1974 (India).

²⁶ Sections 167, Code of Criminal Procedure, 1973, No. 2, Acts of Parliament, 1974 (India).

discharge proceedings under Section 227, 239, 245 and 258²⁷ of the Cr.P.C. are also aimed at expedition in criminal proceedings.

c) **Better safeguards pre-trial stage rights of the accused**

Power conferred on the Police to arrest, whether without warrant or with warrant, constitutes the most important means of regulation and control over the deviant population. Often this power is put to abusive use against political dissenters and other undesirable sections of the society at the behest of the political masters. As a consequence, hoard of unemployed youths, minorities and dalits are regularly subjected to arrest proceedings in most of the States today.

²⁷ Sections 227, 239, 245 and 258, Code of Criminal Procedure, 1973, No. 2, Acts of Parliament, 1974 (India).