

Constitutionalism and Constitutional Morality in India: A Restraint on Criminalisation

Dr. Om Prabha
Assistant Professor, MDU-CPAS, Gurugram, Haryana (India)

Introduction

Constitutionalism

Constitutionalism is the most crucial aspect of any polity governed by the Constitution. In simple words, *Constitutionalism* can be understood as a belief in constitutional government. In other words, it is the doctrine which governs the legitimacy of the actions of the state, and it implies something more crucial than the concept of legality which requires official conduct to be as per with pre-fixed legal rules, i.e., the rule of law as per Constitution. Also, Constitutionalism keeps a check whether the act of a government is as per law or not and whether officials conduct their public duties in accordance with law. The so-called pre-fixed law, i.e., the Constitutionalism has features like Rule of Law, Limitation on the Government, Separation of Powers, Judicial Control, an Independent Judiciary and Respect for Individual and Group Rights.

Constitutional Morality

Constitutional Morality implies the strict following and adherence to the core principles of the Constitution in a polity. However, it is not just limited to following the Constitutional provisions in their literal sense, but it includes a commitment to a democratic political process in which both individual and collective societal interests are satisfied and protected.

Constitutional Morality is not a new concept. It is already present in the text of the Constitution itself, like in the part of Fundamental Rights, Directive Principle of State Policy, Preamble and Fundamental duties. The principle of Constitutional Morality means to bow down to the norms and values of the Constitution and to not to act in a manner which will be contrary to the Rule of Law or reflects an action in an arbitrary manner. Commitment to the Constitution is undoubtedly a facet of Constitutional Morality.

Check on Criminalisation

Both Constitutionalism and Constitutional Morality play a significant role in keeping check on the state's criminalization power. This is evident from the provisions of our Constitution itself as several measures are provided in it which ensures checks and balance on the criminalizing power of the state. For example, Article 13 (1) & 13 (2) holds that the state shall not make any law which is inconsistent or which takes away or abridges the Fundamental Rights. Also, under article 20, three significant protections are given to the accused to keep the criminalizing power of state within limits. These are viz., protection against ex post facto criminal laws [20(1)], double jeopardy [20(2)] and self-incrimination [20(3)].

Our Judiciary has also ensured that the state should not usurp the Constitutional mandates and principles of natural justice while exercising its criminalization power and also to see that the state should follow the principles of Constitutionalism and Constitutional Morality.

This direction can be seen as a step to ensure that in the law-making process, there shall not be such members in the legislature who are themselves criminal, because any polity which is governed by the norms of Constitutional Morality will collapse if law makers of that polity are themselves law violators.

In this context, I will argue that criminalization, keeping in mind the impact of criminal law on the individual and the society, should be used as the last resort while making any rational legislative policy. Even when, criminalization is inevitable, the state shall give due regard to the concepts of Constitutionalism and Constitutional Morality. The use of Constitutional Morality while assessing the wrongness of a conduct would mandatorily requires for testing every act of criminalisation

against the touchstones of the Constitution and to see that if it infringes unnecessarily upon any right or liberty guaranteed by it. The traditional principles of criminalization, like liberty limiting principle, are not flawless. To overcome these flaws, a better option for legislature and the judiciary can be Constitutional Morality and Constitutionalism, which, unlike social morality (that constitutes social norms) and conventions and beliefs endorsed by the majority, instead, requires testing of every criminal law against the touchstones of the Constitution thereby ensuring that the individuals do not face unjust and illegal criminal law sanctions for exercising the rights guaranteed to them by the Constitution.

This view holds good for the both substantive and procedural criminal law. So, I have this view that when the state exercise sanction by use of criminal law, there are number of checks and balancing measures provided in the Constitution and also the Judiciary takes care that these measures are strictly abided with.

However, I am also the believer of equity maxim, "*Look at the intent rather than form*". What I want to say by this is that, although there are many measures to ensure check on criminalizing power of the state, but still, we see in our daily life, that these measures are applicable only in theory and not in practice. For example, Article 21 provides that no person's liberty shall be curtailed except as per procedure established by law. Certain acts as has been enacted by the Parliament were judicially reviewed and their vires has also been challenged before the Hon'ble courts, subject to certain conditions.

So, unless and until the intent is strong rather than the form, Constitutionalism and Constitutional Morality principles will remain abstract, rather than reality. For better comprehension of the same, the interaction of the Constitution with the criminal justice system is to be observed and critiqued. The infallible fundamental rights, being the soul of the Constitution, have a very poignant place in the criminal justice system as well. Article 21 of the Constitution of India, prescribed for "Protection of Life and Personal Liberty: No person shall be deprived of his life or personal liberty except according to procedure established by law." The said Fundamental Right is universally applicable to the citizens of the country and foreigners alike. Though the said protection can only be evoked by the person himself and not by some other person on

his or her behalf. The provision in the Constitution imbues a personal right and the same may be exercised in the same capacity. Article 21 of the Constitution of India, is the most important provision which relates to the fair trial and rights of accused. One of the most important facets of Article 21 in lieu of the criminal justice system is the Right to speedy trial. The said principle though envisaged under Sections 309, 311 and 258 of the Criminal Code of Procedure, 1973 but the right to speedy trial has also been recognized and established by way of setting irrevocable precedents namely, **HUSSAINARA KHATOON V Home Secretary , STATE OF BIHAR (CITATION: AIR 1979 SC 1369)**, "the court held and directed that the under-trial prisoners whose name and particulars were filed by Mrs. Hingorani should be released. it had been because imprisonment like false imprisonment were considered to be an illegal and also violative of their Fundamental Rights enshrined under Article 21 of the Indian Constitution. The court also mandated that in the time of charging bailable offences, they need to be produced before the Magistrate on remand dates. The government ought to name a legal advisor at their own expenses for making an application for bail. A quick trial is much required for securing justice. The court also ordered both the government as well as High Court to display the particulars regarding the location of the courts of magistrate and court of sessions in the State of Bihar along with the cases pending in each court on 31st December, 1978. They were also asked to state the rationale of pendency of cases. On next remand dates the under-trial prisoners should be produced before the court in order that the state government must ought to designate a lawyer of its own expense. The state cannot avoid its constitutional obligation to supply speedy trial to the accused by the way of pleading. Free legal service to the poor and therefore the needy people is an essential elementary factor of legal aid. Another direction by the honorable court was to supply the under-trial prisoners charged with bailable offences, free legal aid by the state, on their next remanded dates before the Magistrates. The court further observed that detaining them for any long would be illegal and is clearly against the elemental rights under Article 21 as these prisoners are behind the bars. Although nowadays human rights are being demanded for everyone in this world but are these under-trial prisoners not to be protected from such harm or even torture, in fact they too are human rights hence their rights must not be denied. Equal access to justice must be the

central point which has to be given due recognition.”¹

The Supreme Court in *Kartar Singh Vs. State of Punjab* 1994 SCC (3) 569, JT 1994 (2) 423, “held that, ...81. The procedure prescribed under these Acts does not meet the requirements implicit in Article 21 of the Constitution because the said procedure is the antithesis of a just, fair and reasonable procedure. Under the guise of providing speedy trial not only the procedural safeguards have been completely denied to the accused who are subjected to trial by Special Courts under 1984 Act or by the Designated Courts under the TADA Acts, but also the Acts have been substantially altered to the prejudice of the accused. Therefore, the procedure prescribed by the Acts which falls foul of Article 21 should be held to be arbitrary, unfair, oppressive or unreasonable.”

Another facet of the criminal justice system in which the constitutionality and constitutional morality is inherent is the Right of Bail. To impress upon the same, the said right is to be glanced through the lens of Constitutional provisions and its interaction with the provisions of criminal jurisprudence as has been bestowed upon the legislators and interpreted by the courts. The right to bail directly effects the rights enshrined under the paradigm of Article 21 of the Constitution. It has been held in various judgments that “Bail not Jail, is the rule”. The present circumstances there are around 2,82,000 under trial prisoners awaiting the process of trial to begin.² This problem of clogging jails and keeping the right of speedy trial of the accused in abeyance is a direct attack on the fundamental right of the accused person. The Apex Court in “*Mantoo Majumdar Vs. State of Bihar* AIR 1980 SC 846 has emphasized about the deplorable state of affairs which included delay in the police investigations and mechanical process of ordering remand of the accused persons. The accused persons in this case were enlarged on bail without sureties as they had spent 6 years in prison while waiting for their trial. Further, Justice Bhagwati while perusing the letter to him by the Free legal Aid committee. He thereby, observed in [*Veena Sethi vs. State of Bihar* that “The rule of law does not exist merely for those who have the

means to fight for their rights and very often for perpetuation of status quo... but it exist also for the poor and the downtrodden... and it is solemn duty of the court to protect and uphold the basic human rights of the weaker section of the society. Thus having discussed various hardships of pre-trial detention caused, due to unaffordability of bail and unawareness of their right to bail, to undertrials and as such violation of their right to personal liberty and speedy trial under Article 21 as well as the obligation of the court to ensure such right. It becomes imperative to discuss the right to bail and its nexus to the right of free legal aid to ensure the former under the Constitution- in order to sensitize the rule of law of bail to the demands of the majority of poor and to make human rights of the weaker sections a reality.”[3]

Free legal Aid as enshrined under the Constitution of India under Article 39A, also is a very vital part of the criminal justice system. The principle governing the same is that, no person must be left devoid of legal aid due to poverty or any other social or economical aspect. The Supreme Court held in [*M.H. Hoskot v. State of Maharashtra*³ and *Hussainara Khatoon’s* 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. It is essential ingredient of reasonable, fair and just procedure guaranteed under Article 21 that a prisoner who is to seek his liberation through the court process should have legal services made available to him⁴.”]

Conclusion

Due to the above mentioned precedents and statutory provisions and further interpretations, the law that has been laid down must be sieved through the “Golden Triangle” as has been laid down in the *Maneka Gandhi Case*. The checks and balances that have come across the criminal justice system are motivated by Constitutionalism and Constitutional Morality. The upholding of the fundamental rights as prescribed under the constitution cannot be turned down by the severity of the criminal jurisprudence. Though there are reasonable restrictions that are to be taken into account while exercising the same. “The quality of

¹ <https://articles.manupatra.com/article-details/HUSSAINARA-KHATOON-V-Home-Secretary-STATE-OF-BIHAR>

² https://ncrb.gov.in/sites/default/files/PSI-2015-%2018-11-2016_0.pdf

³ AIR 1978 SC 1548

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http://www.goforthelaw.com/articles/fromlawstu/article10.htm#_ftn10

criminal justice system in a country, to a large extent depends upon the working of police force (Prakash Singh & others v. Union of India and others, 2006 (8) SCC 1)”

Recently the Supreme Court has issued certain guidelines, in terms of arrest of the accused in [“**Arnesh Kumar Vs. State of Bihar SLP (Criminal) 9127 of 2014** . Our endeavour in this judgment is to ensure that police officers do not arrest accused unnecessarily and Magistrate do not authorise detention casually and mechanically. In order to ensure what we have observed above, we give the following direction:

- (1) All the State Governments to instruct its police officers not to automatically arrest when a case under Section 498-A of the IPC is registered but to satisfy themselves about the necessity for arrest under the 17 Page 18 parameters laid down above flowing from Section 41, Cr.PC;
- (2) All police officers be provided with a check list containing specified sub-clauses under Section 41(1)(b)(ii);
- (3) The police officer shall forward the check list duly filed and furnish the reasons and materials which necessitated the arrest, while forwarding/producing the accused before the Magistrate for further detention;
- (4) The Magistrate while authorising detention of the accused shall peruse the report furnished by the police officer in terms aforesaid and only after recording its satisfaction, the Magistrate will authorise detention;
- (5) The decision not to arrest an accused, be forwarded to the Magistrate within two weeks from

the date of the institution of 18 Page 19 the case with a copy to the Magistrate which may be extended by the Superintendent of police of the district for the reasons to be recorded in writing;

(6) Notice of appearance in terms of Section 41A of Cr.PC be served on the accused within two weeks from the date of institution of the case, which may be extended by the Superintendent of Police of the District for the reasons to be recorded in writing;

(7) Failure to comply with the directions aforesaid shall apart from rendering the police officers concerned liable for departmental action, they shall also be liable to be punished for contempt of court to be instituted before High Court having territorial jurisdiction.

(8) Authorising detention without recording reasons as aforesaid by the judicial 19 Page 20 Magistrate concerned shall be liable for departmental action by the appropriate High Court.”]

It is pertinent to mention here that apart from constitutional remedies under Article 32, 226 and 227, the Judiciary has enlarged the scope of checks and balances by way of giving a direct right in original jurisdiction, to the High Court having territorial jurisdiction, to act upon and issue contempt against the delinquent police officer.

Thus, it is the endeavor of both the state and the Judiciary to encompass such checks and balances by way of enlarging the scope of law pertaining to upholding the Constitutionalism and Constitutional Morality especially in criminal jurisprudence.