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Rights of Accused in Criminal Trial in India and Abroad: A Comparative study

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Abstract
Principles of Justice which the law enforcement officials have to observe are mainly the principles emanating from the Bill of Rights guaranteed to the individuals under the Constitution of the country, the Code of Criminal Procedure and other Statutes which deal with the system of criminal justice. In the previous chapter the discussion covered the application of the provisions of Municipal Law by which the courts adopted the method of Balancing the rights and duties of the individuals as well as the powers and functions of the law enforcement agencies in the sphere of Criminal Justice.
Above all, there is a cluster of rights coming to the individuals under various instruments of the International Human Rights Law. From these rights grow the principles which the law enforcement officials have to observe whenever they perform the duty of enforcing the law and taking such actions as investigating a crime or prosecuting an offender. The message conveyed to the law enforcement officials through these principles is that in case of a conflict between any provision of law which empowers the law enforcement official in any matter and the individuals in the form of Human Rights and for that matter the Principles of Justice, it is the principle of justice will prevail over a certain provision of law which is sought to be implemented by the law enforcement officials. In this paper, the author has attempted to analyze the rights afforded to the accused in many nations, including the US, UK, and others, and to compare the set of rights with those afforded under Indian Criminal Procedure.

Keywords: Criminal Trial, Principles of Justice, Presumption of Innocence

Introduction

1. The Right to Presumption of Innocence

Presumption in the context of the presumption of innocence, means that the burden of proving the charge is on the State. This guarantees that guilt cannot be declared until the charge has been proven by the State. Burden of proof is entirely on the state and there is no duty on the defendant to assist the state in discharging its burden. This burden of proof applies to each and every element of the crime. The presumption of innocence as a right is contained in the following international and regional instruments:-

The Universal Declaration of Human Rights states, "*Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence* [1]*."*

The Convention for the Protection of Human Rights and Fundamental Freedoms of the Council of Europe says, *"Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law".*

This convention has been adopted by treaty and is binding on all Council of Europe members. Currently (and in any foreseeable expansion of the European Union) every country member of the European Union is also member to the Council of Europe, so this stands for EU members as a matter of course. Nevertheless, this assertion is reiterated verbatim in Article 48 of the Charter of Fundamental Rights of the European Union.

Presumption of innocence and the duty of the prosecution to prove the guilt of the person accused of an offence is the golden thread in criminal law jurisprudence [2]. Every individual charged with a crime has a right to be presumed innocent until proven guilty [3]. The guideline that bail be the general rule and jail an exception is the logical and consistent adaptation of the principle of presumption of innocence to the pre-trial stage. It is also found in the United Nations Standard Minimum Rules for the Treatment of Prisoners (Rule 84 (2). Guilt cannot be presumed before the prosecution proves a charge beyond reasonable doubt, and this principle applies until the judgment is made final. There are a number of ways in which the presumption of innocence can be protected.

First, according to the United Nations Human Rights Committee, the presumption is breached where public officials prejudge the outcome of a trial [4]. Public officials include Judges, Prosecutors, the Police and government officials, all of whom must avoid making public statements of the guilt of an individual prior to a conviction or after an acquittal.

A second element in protecting the presumption of innocence relates to the burden of proof. The burden of proof refers to which party will have the burden of proving a particular fact or set of facts. In order to protect the presumption of innocence, the burden of proof should be on the prosecution to prove the guilt of the accused rather than on the accused

The United States Supreme Court has adopted both restrictive and liberal interpretation of presumption of innocence. In *Stack v. Boyle* [5] the court conclusively held that unless this right to bail before trial is preserved, the presumption of innocence secured after centuries of struggle would lose its meaning.

In re Winship, [6] the Supreme Court held that *"the Due Process clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime charged."* [1]:17It established this burden in all cases in all states (constitutional case). The decision did not specify which facts constitute the charged crime.

However, in Bell v. Wlfish [7] the Supreme Court has stated conversely that the right to be presumed innocent until proven guilty is not operative at the stage of bail. Similarly,

The US Supreme Court in *United States v. Salerno* [8] has clarified the exceptional nature of detention pending trial to be in effect only when it is found that there is an unequivocal threat to the safety of individuals and community. Justice Marshall in Salerno (supra) stated that "presumption of innocence in favour of the accused is the undoubted law, and its enforcement lies at the foundation of the administration of our criminal law". He concludes that such provision in the Bail Reform Act would eviscerate the presumption of innocence and is unconstitutional. The Supreme Court of Canada in R. v. Hall [9] held that the denial of bail has a detrimental effect on the presumption of innocence and liberty rights of the accused. However, in R. v. Pearson [10] the court clarified that this principle must be applied at the stage of trial and not at the stage of bail because during bail, guilt or innocence is not determined and hence, penalty must not be imposed. The stance taken by the Supreme Court of Canada in Pearson is in consonance and conformity with the perspective of the Kerala High Court in State v. P. Sugathan [11] where the Court held that the salutary rule is to balance the defendant's liberty with public justice. Pre-trial detention in itself is not opposed to the basic presumption of innocence. It observed that:

> *"Ensuring security and order is a permissible non-punitive objective, which can be achieved by pre-trial detention. Where overwhelming considerations in the nature aforesaid require denial of bail, it has to be denied"*

Consequently, it may be surmised that pre-trial detention beyond the strictly necessary limits, poses a serious threat to the principle of presumption of innocence of the accused. The revocation of bail is dependent on the presumption being dislodged by strong material pointing towards substantial probability and clear and convincing evidence of the guilty in relation to an offence [12]. The Supreme Court of India has opined that the presumption of innocence would be effective by favouring bail [13].

2. Right to Personal Liberty, Security and Freedom from Arbitrary detention:

Article 3 of the Universal Declaration of Human Rights provides that *"Everyone has the right to life, liberty and security of person…"*. Article 9 of the Declaration says, "*No one shall be subjected to arbitrary arrest, detention or exile*". Article 9 (1) of the International Covenant on Civil and Political Right, 1966 echoes the fundamental rights to liberty, security and protection against arbitrary detention. By virtue of this fundamental right the state is placed under an obligation to protect and preserve the liberty and the security of the citizens against arbitrary arrest and detention. In order for the detention to be lawful and not arbitrary, it must be consistent with the substantive rules of national and international laws as well as the principles and guidelines preserving fundamental rights.

The Human Rights Committee in *Albert Womah Mukang v. Chameroon* [14] held that custody pursuant to lawful arrest must always be lawful, reasonable and non-arnotraru/ Further it must be necessary in all the circumstances, e.g., t prevent flight, interference with the evidence or the recurrence of crime. Pre-trial detention has been found to be arbitrary, inter alia, where no charges has been laid, when the duration of detention is indefinite or becomes excessive, detention is applied automatically or there is no possibility of bail and if the pre-trial detention set according to the length of the potential sentence.

Similarly the European Court of Human Rights uses a balancing test to review the detention or remand or individuals. Continued detention can be justified only if there are specific indications of a genuine requirement of public interest which, notwithstanding the presumption of innocence, outweighs the rule of respect for individual liberty [15].

3. Right to Speedy Trial

The right to a speedy trial can be said to be an extension of right to liberty, security and protection against arbitrary detention and a precursor to be presumed innocent until proven guilty. This right is ubiquitous and is not conditioned on any request or invocation of such right by the accused person. Such accused is entitled to be produced before the Court without undue delay in order to enable the court to determine whether the initial detention is justified and whether the accused must be released on bail. Both the International Covenant on Civil and Political Rights, 1966 and the European Convention on Human Rights provide that, releasing the accused on reasonable bail is the remedy for failure to decide upon charges in an expeditious manner. In addition, Article 9 (3) of the International Covenant on Civil & Political Rights, 1966 states that a detained person shall be brought before the authorities promptly and that the general rule is not detention.. The US Supreme Court has considered right to speedy trial within strict scrutiny, as it has prescribed for the dismissal of the charges without to the prejudice as the ordinary remedy for violation of this right. In Strunk v. United States [16] considered alternative remedies, but concluded that dismissal must remain certain—the only possible remedy).

4. Right to Bail

In the system of criminal justice obtaining in many countries of the world the Police has the authority to arrest a person on receiving a complaint or an information that a certain offence has been committed by him or that he is involved in the commission of a certain crime. The person so arrested is taken before the Magistrate for detaining him in custody until the matter is examined by the court of law. But if a person wants a provisional release from detention then he may ask for Bail form the Police or the Magistrate as the case may be. The system is such that conditional release may be granted at the discretion of the Police or the Magistrate but what is insisted upon is that he should furnish a surety that he will come back to the court whenever he is required for a trial on the charges pending against him. For this purpose a bail bond has to be executed by the detainee for a sum of money, which sum of money in most of the cases is a very high sum which poor persons cannot afford to Pay. It is this problem which the Constitutions of modern democracies have tried to solve by laying down the condition that no excessive bails shall be demanded.

There are certain rights having the status of Human Rights by virtue of which the person detained may be considered for a provisional release. The Universal Declaration of Human Rights, 1948, and the International Covenant on

Civil & Political Rights, 1966 guarantee protection to the life, liberty and safety of the persons. Under the same instruments a person is presumed to be innocent until proved guilty, which means he cannot be deprived of his liberty merely because he is arrested or is charged with an offence. There has to be an order of the court convicting him by a certain kind of punishment. But the rule of detention is such that a person when arrested may be detained for long periods, of a few days, few weeks or few months or few years. This is the unfortunate situation in which an individual is although the Human Rights Law and the Constitutional Law of the country are very much there to protect his interests. As against the rights of an individual under the Human Rights Law and the Constitution there is the claim of the State for maintaining order in society and maintaining the confidence of the people in the administration of justice.

In the light of the above it may be asserted that an important aspect of the of criminal justice in the present day world is the rule regarding Bail. With regard to a large number of matters of criminal justice there are provisions in the Human Rights Law as a necessary implication of which a person detained feels entitled to the remedy of Bail.

The significance of the matter lies in the fact that in dealing with the question of granting or refusing Bail the courts have to honour the commitment of the State to the international instruments which provide for Human Rights in order to protect the life, liberty and property of the individuals and they have as well a duty to show regard to the task of the Public Prosecutor who has laboured hard to gather evidence for the purpose of getting the accused punished for the crime. The specific issue involved is that the court has to balance the interests of the individuals and the interests of the state; it has to strike a balance between its responsibility of dealing with the crime problem and the responsibility of protecting the rights of the individuals to life liberty and safety. While dealing with this problem the courts have to remember their obligation to help the State maintain order in society and take care at the same time of respecting the Human Rights of the Individuals. Such an approach deserves to be given due consideration in view of the fact that denial of Bail without a justifiable cause may be considered as a violation of Human Rights.

From the perspective of the Constitutional Rights and the message of Human Rights the concept of Bail is quite significant in the system of Criminal Justice. The reason why we have to look to the provisions of Human Rights law is the detention of a suspect has its serious impact on various other rights of the person detained. From the point of view of the condition of the suspect is that an immediate problem which a person detained has to face is to offer a bail bond for a sum of money stipulated by the Court, which in most of the cases is for a high sum of money which a poor person cannot afford to pay. The condition of money for provisional release is such a difficult thing for a poor person that he cannot afford to agree upon the condition immediately, but the circumstances force him to abide by the condition and execute a bond. Thus, the he direct effect of detention of a person before trial is on his economy. The person detained stands to lose his economic resources because of which he faces innumerable problems concerning his family life and individual well-being. The only remedy available to him is to agree upon a conditional order for his release which a Magistrate is empowered under the law to impose while considering his provisional release. But in this conditional order also the Magistrate may impose arbitrary conditions including the condition of executing a monetary bond of a high value. In order to deal with a situation like this arising from [17] excessive bail, the Constitution of United States provided that "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted [27]."

5. The Right to Fair Trial

In civilized societies of the present day, it has been universally accepted that persons accused of any wrongful act shall be entitled to certain rights before they are punished. In the system of administration of justice these rights together represent the human rights of the accused persons. By virtue of the rights guaranteed by the system a person charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has all guarantees necessary for his defence. By virtue of the same principle, everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal for the determination of the criminal charge against him. The underlying principle of the right to be tried by a impartial tribunal is traceable to the Western jurisprudence of the ancient days which in a very short period of time assumed the significance of the concept of Due Process of Law. In the modern age the concept of Due Process has been incorporated in the legal instruments adopted by the legislative institutions at the international and regional levels. By virtue of these instruments the Right to be Tried by an impartial tribunal is of the status of a Human Right. In the system of criminal justice the concept of Fair Trials has intrinsic value for many reasons. Such trials are essential to the sane application of criminal law; in the administration of criminal justice at the national or international levels the same rationale holds good in administering justice through fair trial. The outcome of a fair trial has credibility and enhances respect for the rule of law. A fair process serves the truth finding function of a trial and offers greater assurance that the final judgment will be accurate. Justice is done and seems to have been done. For the reasons stated above criminal courts are established to help "put an end to impunity" for serious crimes" through an effective system of prosecution. This objective may be sought to be achieved through a process that is fair. In a society disturbed by crimes of various kinds and criminal of various tendencies the concept of independent judiciary offers the promise of an impartial and fair administration of justice. As a value fundamental to any system of criminal justice, the concept of Fair Trial has been recognized as essential to the successful functioning of the democratic government.

While the Fair Trial rights have their base in the national constitution and the bare laws of the state, a major repository of these guarantees is the international legislation and the jurisprudence of the courts. These rights are a reflection of the protection for fair trial rights that international law provides through international human rights instruments, for instance, the provisions of the Universal Declaration of Human Rights, 1948, and International Covenant on Civil and Political Rights, 1966.

The Rome statute fair trial guarantee embraces the rights of the accused, but also the interests of victims and witnesses

and the right of the Prosecutor to fairness. ICC Pre Trial Chamber I has defined "fairness" in broad terms:
"The term 'fairness' (*equite*) from the Latin '*equus*" means equilibrium, or balance. As a legal
Concept, equity or fairness "is a direct emanation of the idea of justice". Equity of the proceedings entails equilibrium m between the parties, which assumes both respect for the principle of equality an the principle of adversarial proceedings. In the view of the Chamber, fairness of the proceedings includes respect for the procedural rights of the Prosecutor, the defence, and the Victims as guaranteed by the relevant statutes in systems which provide for victim participation in criminal proceedings).
The guarantee of a fair trial attracts, in turn, a cluster of supporting rights inuring to the benefit of the accused, a complex of duties mean to secure the well being of victims and witnesses and the protection of the ability of the Prosecutor to fulfil his mandate under the Rome Statute.
The Rome Statute requires the Prosecutor and Deputy Prosecutor to have certain attributes relating to independence, separate nationalities, character, competence and experience, fluency in French or English and impartiality. Article 6 of the European Convention on Human Rights says, "Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law." In one of the leading cases decided by the European Court it was observed: "*While impartiality normally denotes absence of prejudice or bias, its existence or otherwise can, notably under Article 6 (1) of the Convention be tested in various ways. A distinction can be drawn in this context between a subjective approach, that is endeavouring to ascertain the personal conviction of a given Jude in a given case, and an objective approach that is determining whether the offered guarantees are sufficient to exclude any legitimate doubt in this respect."* [18]
The Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms, 1950 provides for the Right to fair Trial in the following terms:

> *"In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances were publicity would prejudice the interests of justice* [19]."

The American Convention on Human Rights, 1969 providing for the Right to an impartial tribunal along the right to a Fair Trial declares as follows:-
"Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labour, fiscal or any other nature. Criminal Proceedings shall be public, except in so far as mnay be necessary to protect the interests of justice." [20]

The African Charter on Human and Peoples' Rights, 1981 dealing with the Right to Fair Trial including the right to be tried by an impartial court says,

1. "Every individual shall have the right to have his cause heard. This comprises:
2. The right to be tried within a reasonable time by an impartial court or tribunal.
3. States Parties to the present Charter shall have the duty to guarantee the independence of the Courts [21].

6. Right to be tried by an Impartial Tribunal

During the 13th century a Court called the Court of Star Chamber was established in England which in every matter obeyed the orders of the King and in their anxiety to enforce the commandments of the King the Judges of the Star Chamber followed peculiar procedures in conducting the trials of cases. Some such methods followed by the Star Chamber were Torture, Self-Accusation, Testimonial Compulsion, Double Jeopardy etc. But in the subsequent era when the Courts of Common Law became independent from the Crown and evolved a new system called the Writ System they introduced rules of evidence and rules of procedure making a departure from the rigid and arbitrary rules of the Star Chamber and its absolutism.
By the instrument of Magna Carta the King had agreed not to proceed arbitrarily but to give notice and hearing in accordance with the law of the land. As early as 1215, the English Magna Carta declared: "We will sell to no man, we will not deny or defer to any man either justice or right", and 'No sheriff, constable, coroners or others of our bailiffs, that is, Royal officers shall hold pleas of our Crown that is criminal trials. Sir Edward Coke has described these procedural safeguards of the Common Law Courts as the Due Process of Common Law From that beginning, through Coke, Madison, and many others there grew the great modern edifice of 'Due Process of law' now enshrined in many national constitutions [22].
When the Procedural rules underwent a further refinement, the term 'Natural Justice' was used interchangeably with Natural Law, Equity, Summum Jus and other theories related to the theory of Natural Law. All these terms generally denoted the general principles and minimum standards of fairness in adjudicating upon a dispute.
In the present day system of government, administrative agencies exercise three different kinds of governmental powers, namely, the power of law making, the power of law enforcing and the power of adjudicating upon the disputes arising between the individuals and the authorities of the State. In exercising these powers particularly the powers with regard to adjudication, the administrative agencies follow certain principles and procedures which in some cases are the same as those which are followed by the conventional agencies and in some cases they are different from the conventional rules. Among the principles followed by the administrative agencies those of far reaching significance are the principles of natural justice, principles of fairness, principles of impartiality and the principle of securing the accountability of officials. The institutions which have become very popular because of these procedures are the institutions of administrative tribunals, the institution of ombudsman and the institutions operating the system of alternative dispute resolution.
Out of so many institutions which are involved in the administration of justice, the one particular set of

institutions are the administrative tribunals, and on the analogy of administrative tribunals the international organizations have adopted the policy of establishing tribunals for dealing with the criminal cases; in other words the international tribunals have criminal jurisdiction and among the procedures which have made this institution very popular is the procedure of being fair and impartial in administering justice.

The principle of fairness manifested the specific requirements that no man shall be a Judge in his own cause (*Nemo Judex in Causa Sua*) and that each side shall be heard and no man shall be condemned unheard (*Audi Alteram Partem*). The first principle required a Judge to decline jurisdiction if he has any legal or pecuniary interest in the outcome of the dispute or if there is any real likelihood or appearance of bias such as arising from relationship with a party or membership of a body concerned.

The meaning of *Nemo Judex in Causa Sua* is that a Judge should not adjudicate upon a cause in which he has a bias or interest. According to Dictionary meaning 'bias' means anything which tends or may be regarded as tending to cause a person to decide a case otherwise than on evidence. Bias is of three types: Pecuniary Bias, Personal Bias, and Bias as to subject matter. A pecuniary interest however slight disqualifies as adjudicator. Personal bias may be the result of hostility or favouritism towards one party or the other. Bias as to subject matter arises when the Judge has an interest in the subject matter. Bias as to subject matter is classified into various categories, such as, departmental bias, official bias, policy bias, partiality bias, etc.

When these theoretical ideas received the approval of the people, there was recognition given to them by the legislatures. At various times, at various places legal instruments have been formulated providing for the procedures in the administration of justice to be fair and impartial.

Apart from the national constitutions the international instruments have declared the idea of Due Process as part of Human Rights and urged upon the Member States to incorporate the principle in their systems of Justice. These instruments have set a certain standard in the matter of Human Rights in general, and the Right to Fair Trial in particular. The right to be tried by an impartial tribunal as part of the rights of the accused persons has been incorporated in the international and regional instruments on Human Rights thus:

The Universal Declaration of Human Rights, 1948 provides that "*Everyone is entitled to full equality to a fair and public hearing by an independent and impartial tribunal in the full determination of his rights and obligations of any criminal charge against him."* [23]

Another provision of the Universal Declaration contains a right to be presumed innocent as part of the rights of the accused persons. [24] The right to a fair trial (including the right to be presumed innocent and to be tried by an impartial tribunal) is contained in the following provision of the International Covenant on Civil & Political Rights, 1966:-

> *"… In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The Press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice, but any judgment rendered in a criminal case or in a suit at law shall be made public except where the interests of juvenile persons otherwise requires, or the proceedings concern matrimonial disputes or the guardianship of children*." [25]

In the interpretation of the rule of bias the question that arises is whether the test to be followed in determining the element of bias should be one of actual or real bias, or a real likelihood of bias or a reasonable apprehension of bias. A review of the relevant literature shows that there is variation in the standard relevant to the question of determining the element of bias. In some countries of the common law system, for example in the United Kingdom, the courts look to see if there is a real danger of bias rather than a real likelihood [26], However, other common law jurisdictions have rejected this test as being too strict and cases such as South African Rigby Football Union case [27] have used the test of relevant reasonable person as the arbiter of bias, investing him with the requisite knowledge of the circumstances before an assessment as to impartiality can be made.

In United States disqualification on grounds of bias is governed by Section 455 of the US Code which provides that a Judge shall disqualify himself "in any proceeding in which his impartiality might reasonably be questioned." The Supreme Court has stated that "the goal of section 455 (a) is to avoid even the appearance of impartiality". [28] a federal Judge is disqualified for lack of impartiality where "a reasonable man cognisant of the relevant circumstances surrounding a Judge's failure to recuse himself would harbour legitimate doubts about the Judge's impartiality [29].

7. Rights in the case of Reverse Burden of Proof

In Attorney General's Reference [30] the Court preferred the approach in Johnstone over Lambert and held that the former was the last word on the subject and the citation of other authorities should be discouraged. This conclusion was helped by the fact that the comments in Lambert on this subject were essentially obiter, as the Court in that case had held that the Human Rights Act 1998 did not act retrospectively. However, in the case of Sheldrake v DPP the Court held that Lambert should not be ignored and that it was perfectly compatible with Johnstone. Lord Bingham suggested that the differences in emphasis in the case 'are explicable by the difference in subject matter of the two cases'. However, in practice it may be difficult for counsel not to prefer one authority over the other when justifying when a legal burden is justified or otherwise. Lord Bingham in Sheldrake outlined the general philosophy in reverse burden cases, concluding that the overriding concern should be that the trial is fair and the presumption of innocence maintained. He further concluded that the imposition of any reverse burden should be fair and proportionate, taking into account various factors including the seriousness of the offence and the maximum sentence, the ease of proof by one party over the other and the danger of convicting the innocent. In an attempt to provide clarity in this area, Dennis has helpfully sought to draw the

authorities together and sketch out the law as it currently stands:

A reverse burden of proof is held to be justified as pursuing a legitimate aim, the Court must then consider whether such an interference is proportionate. To be proportionate, the law 'requires a balance to be struck between the general interest of the community and the fundamental protection of The rights of the individual'**.** The court will balance a number of factors in assessing this question, including

1. Appropriate deference to the will of Parliament
2. Whether the crime is truly criminal or regulatory
3. The nature of the penalty
4. The ease with which the defendant can discharge the legal burden The desirability of the prosecution proving the essential elements of the offence and
5. The significance of the presumption of innocence as a general procedural safeguard. Finally, if the provision is not proportionate, then the court will assess whether it can be 'read down' as imposing an evidential burden. If it cannot be read down, then a declaration of incompatibility will be made under s. 4 of the Human Rights Act 1998.

However, the authorities have been criticised as not providing clear enough guidance on how to interpret statues that impose a reverse burden. The factors identified in Sheldrake above are indicative at best, but do not provide conclusive guidance. It is therefore wholly understandable that the proportionality exercise has been described as an 'imprecise science' that involves balancing the egregiousness of the evil posed against society and the rights of the accused. Dennis concedes that it is difficult to discern any pattern within the case law on the relative importance of each factor, with the author indicating that 'the justifiability of particular reverse onuses will resemble a forensic lottery'. For example, in Johnstone a potential ten year maximum penalty did not prevent a legal burden being upheld in this case. The criminal/regulatory distinction is also ripe for challenge. Legal reverse burdens for 'quasi-criminal' offences tend to be upheld as compliant with Art 6(2). These offences do not tend to involve custodial sentences or involve any social stigma. However, it is submitted that this regulatory category is not particularly robust and is likely to be challenged, as some quasi-criminal offences increasingly carry moral disapproval and the real possibility of a custodial sentence.

8. Right to remain silent

The right to remain silent, sometimes referred to as the privilege against self-incrimination, is looked upon differently in various traditions of criminal law. It is most likely derived from the common law tradition, and even though it does not appear explicitly in the text of the European Convention on Human Rights it is present in the modern codes of criminal procedure throughout continental Europe. The right to remain silent has various facets. One is that the burden is on the State or rather the Prosecution to prove that the accused is guilty. Another is that an accused is presumed to be innocent till he is proved to be guilty. A third is the right of the accused against self-incrimination, namely, the right to be silent and that he cannot be compelled to incriminate himself. There are also exceptions to the rule. An accused can be compelled to submit to investigation by allowing his photographs taken, voice recorded, his blood sample tested, is hair or other bodily material used for DNA testing etc.

Some of the aspects relating to right to silence came to be included in the Universal Declaration of Human Rights, 1948, Article 11.5 thereof reads as follows:

> *"11. Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence."*

The International Covenant on Civil and Political Rights, 1966 to which India is a party states in Article 9.1 that none shall be deprived of his liberty except on such grounds and in accordance with procedure as are established by law; Article 9.2 states that any one who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him. Article 11.3 refers to the right to be produced in a court promptly and for a trial In the words of Article 14 (3) (g) of the International Covenant on Civil & Political Rights the accused has the right *"not to be compelled to testify against himself or to confess guilt" This protection, however, relates only to the accused and does not involve either a suspect nor a witness.*

> The European Convention for the Protection of Human Rights and Fundamental Freedoms states in Article 6(1) that every person charged has a right to a fair trial and Article 6(2) thereof states: *"Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law".*

Initially in England, the law makers were confronted with problems of terrorism in Northern Ireland. In order to combat the said problem, the Criminal Evidence (Northern Ireland) Order, 1988 was amended permitting inferences to be drawn from the silence of an accused where the accused had a duty to speak. Later on, similar changes were carried out in the English law by enacting sections 34 to 37 in the Criminal Justice and Public Order Act, 1994. These provisions permit 'proper inferences' too be drawn from the silence of the suspect during interrogation or of the accused at the trial. The Court can comment on the silence in its summing up to the jury. The jury can take the silence into consideration. In a case arising from Northern Ireland under the Criminal Evidence (Northern Ireland) Order 1988 the matter initially came up before the House of Lords in Murray v. Director of Public Prosecutor [31] There the statute enabled the Judge to take silence into account. In Northern Ireland the matters would go before the jury unlike the provisions in the English Act of 1994. Lord Mustill observed that though the statute in Ireland enabled 'proper inference' to be drawn in case of silence of the accused, it was first necessary that a prima facie case is made out against the accused. Only then the new provisions could be resorted to for the purpose of drawing conclusions about the guilt of the accused. The Court has to make a 'common sense approach'. He made it clear that no finding of guilt could be arrived at merely based on the silence of the accused.

On appeal, the European Court in Murray v. United Kingdom [32] held that the encroachments into the right to silence made in Ireland by the Irish law of 1988 did not

violate the right to a fair trial nor the presumption of innocence mentioned in Article 6 of the European Convention. It was further held that the trial judge could not draw an adverse inference merely on account of the silence of the accused and that the guilt of the accused must be prima facie established by the prosecution. An additional condition was laid down that the new provisions could not be resorted to unless it was proved that the accused was given an opportunity to call for an attorney at the time when he was interrogated by the Police or at the time of trial. This was a mandatory rule. After the judgment above referred to, which arose from the Irish law, the English Parliament, which had in the meantime introduced similar provisions in the Criminal Justice and Public Order act, 1994 as applicable to England and Wales amended the said Act by the Youth Justice and Criminal Evidence Act, 199 by introducing provisions requiring the suspect or accused to be informed of his right to call an attorney. Sub-section 2 (A) was introduced in 1999 in Section 34 and that section deal with pre-trial silence. Sub-Section 2-A provides an opportunity to call a lawyer and reads as follows**:**

> "Section 34 (2A) *Where the accused was at an authorised place of detention at the time of the failure, sub-sections (1) and (2) above do not reply if he had not been allowed an opportunity to consult a solicitor prior to be questioned charged or informed as mentioned in sub-section (1) above."*

A similar provision was introduced in Sec. 36 by way of sub-section (4A). Section 36 deals with failure of the accused to account for objects, substances, and marks. Sub-Section (3A) was introduced in Sec.35. That section deals with right to silence at the trial. Similarly in Section 37 which deals with the presence of the accused at the scene of offence, sub-section (3-A) was introduced. All these new sub-sections require that the accused must be informed that he has a right to the presence of an attorney whenever he is questioned. If he had not been so informed, the fact that he remained silent, could not be taken into consideration. As already stated, initially the encroachment into the right to silence started with the Criminal Law Evidence (Northern Ireland) Order, 1988 during times when terrorist activities started on a big scale in Ireland. The Law Revision Committee had earlier felt in 1972 that such encroachment was necessary in the law relating to silence, in the case of suspected terrorists, serious crimes of armed robbery and in regard to businessmen suspected of sophisticated offences of serious fraud. A law which was proposed to tackle terrorism in Ireland came to be accepted in England in 1994 and applied to al cases of crimes where an accused would choose to remain silent.

In England, the Government had brought the 1994 changes on the basis of the 11th report of 1972 of the criminal Law Review Committee even though two other Royal Commissions had recommended that the right to silence could not be encroached upon.

In a great number of detailed provisions the ad hoc tribunals grant to the suspect and the accused protection against self-incrimination. Article 21 (4) (g) of the International Criminal Tribunal for former Yugoslavia and Article 20 (4) of the International Criminal Tribunal for Rwanda Statute broaden the scope presented in the International Convention on Civil & Political Rights by providing that the accused has the right not to be compelled to testify or to confess guilt and to remain silent, without such silence being a consideration in the determination of guilt and innocence. Procedural rules expand the protection further. As the International Criminal Tribunal for former Yugoslavia Trial Chamber noticed no negative inference may be drawn from the silence of the accused, declaring:

> *"It is the right of the accused not to give evidence at trial and no adverse inference can be drawn form the fact he did not testify. The Trial Chamber refers to Article 21 (3) that guarantees the right to presumption of evidence and Article 21 (4) (g which provides that the accused cannot be compelled to testify against himself."*

This approach remains in compliance with the understanding of what the right to remain silent means in civilized systems of law. The International Criminal Court refers to the right to remain silent differentiating between the rights of persons during an investigation and the rights of the accused. In the latter, the International Criminal Court derives this right from the presumption of innocence and the fact that the burden of lies on the Prosecutor in accordance with this principle [33]

In the United States, the Fifth Amendment relates to the fundamental right against self-incrimination and contains, more or less the same language as in Article 20 (3) of our Constitution. In fact, there is a federal statute of 1878 which declared that it would be competent for an accused to give evidence on his own behalf but that his failure to do shall not be subject to an unfavourable inference against him. Initially, in Adamson v. California [34] the question relating to the right to silence came to be considered. The majority did not refer to the Fifth Amendment. But the minority laid down, while referring to the Fifth Amendment, that the right to silence was absolute in United States. Subsequently in Griffin v. California [35] the Supreme Court of United States refused to permit prosecutorial or judicial comment to the Jury upon a defendant's refusal to take the stand in his own behalf, because such comment was a penalty imposed by courts for exercising a constitutional privilege and it cuts down on the privilege by making its assertion costly". The penalty "needlessly encouraged" a waiver of the defendant's Fifth Amendment right to plead not guilty. The Court has stated that the defendant has an absolute right not to take the 'stand' and that no adverse inference of guilt can be drawn if the defendant exercises his right to silence. An innocent defendant may want to avoid taking the 'stand' because he feels that he is likely to perform badly, being uninformed about the law as compared to an experienced prosecutor who is skilled in the artificial rules governing court rooms and that the prosecutor may be able to trip him up. However, American courts have laid down a different principle, namely, that at a later stage the silence of the accused can be taken into consideration by the court while deciding about the quantum of punishment. Such questions arise during plea bargaining. The Court said that the pressure to take the 'stand' in response to the 'sentencing issue' was not so great as to impair the policies underling the self-incrimination clause. Similarly, a notice by defendant regarding a plea of alibi does not offend the right against self-incrimination.

In Miranda v. Arizona [36] it was held that the police have to give a warning to the suspect and that the suspect has right to remain silent. He haws a further right to the presence of an attorney during questioning. It is also important to note that the US Supreme Court has nowhere laid down that on account of the silence of the accused, an adverse inference can be drawn or that the silence can be treated as a piece of corroboration for inferring of guilt.

9. Legal Principles relating to Right to Due Process

Due process developed from clause 39 of the Magna Carta in England. At its core, the right to due process of the law is the right to be treated fairly and have a fighting chance when facing legal action. The concept that defendants shall be presumed innocent until proven guilty is the basic underlying tenant of due process as applied to criminal cases. The finer details have always been a subject of debate. In clause 39 of the Magna Carta, John of England promised as follows:

> *"No free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any other way, nor will we proceed with force against him, or send others to do so, except by the lawful judgment of his equals or by the law of the land."* [37]

Magna Carta itself immediately became part of the "law of the land", and Clause 61 of that charter authorized an elected body of twenty-five barons to determine by majority vote what redress the King must provide when the King offends "in any respect against any man." [38] Thus, Magna Carta established the rule of law in England by not only requiring the monarchy to obey the law of the land, but also limiting how the monarchy could change the law of the land. It should be noted, however, that in the thirteenth century these provisions may have been referring only to the rights of landowners, and not to ordinary peasantry or villagers [39].

Shorter versions of Magna Carta were subsequently issued by British monarchs, and Clause 39 of Magna Carta was renumbered "29." [40] The phrase *due process of law* first appeared in a statutory rendition of Magna Carta in A.D. 1354 during the reign of Edward III of England, as follows: "No man of what state or condition he be, shall be put out of his lands or tenements nor taken, nor disinherited, nor put to death, without he be brought to answer by due process of law." In 1608, the English jurist Edward Coke wrote a treatise in which he discussed the meaning of Magna Carta. Coke explained that no man shall be deprived but by *legem terrae*, the law of the land, "that is, by the common law, statute law, or custom of England.... (that is, to speak it once and for all) by the due course, and process of law. Both the clause in Magna Carta and the later statute of 1354 were again explained in 1704 (during the reign of Queen Anne) by the Queen's Bench, in the case of *Regina v. Paty* [41]. In that case, the House of Commons had deprived John Paty and certain other citizens of the right to vote in an election, and had committed them to Newgate Prison merely for the offense of pursuing a legal action in the courts. The Queen's Bench, in an opinion by Justice Powys, explained the meaning of "due process of law" as follows:

> *[I]t is objected, that by Mag. Chart. c. 29, no man ought to be taken or imprisoned, but by the law of the land. But to this I answer, that lex terrae is not confined to the common law, but takes in all the other laws, which are in force in this realm; as the civil and canon law.... By the 28 Ed. 3, c. 3, there the words lex terrae, which are used in Mag. Char. are explained by the words, due process of law; and the meaning of the statute is, that all commitments must be by a legal authority* [42].

Chief Justice Holt dissented in this case, because he believed that the commitment had not in fact been by a legal authority. The House of Commons had purported to legislate unilaterally, without approval of the House of Lords, ostensibly to regulate the election of its members.[10] Although the Queen's Bench held that the House of4 Commons had not infringed or overturned due process, John Paty was ultimately freed by Queen Anne when she prorogued Parliament. Due process is not used in contemporary English law, though two similar concepts are natural justice (which generally applies only to decisions of administrative agencies and some types of private bodies like trade unions) and the British constitutional concept of the rule of law as articulated by A. V. Dicey and others.[1] However, neither concept lines up perfectly with the American theory of due process, which, as explained below, presently contains many implied rights not found in the ancient or modern concepts of due process in England.[2]

Conclusion

In India, the system of trial as envisaged in the Code of Criminal Procedure 1973, is the adversarial or accusatorial model of criminal justice. In Indian criminal jurisprudence, the accused is placed in a somewhat advantageous position than the victim. The criminal justice administration system in India places human rights and dignity for human life on a much higher pedestal. An accused is presumed to be innocent till he is proved guilty. Before the verdict, every accused should be protected by the presumption of innocence. A fair trial also requires suspects to benefit from the right to remain silent and to be present at their trial in open court before an impartial tribunal. The suspected is entitled to full fairness and fair trial and the prosecution is expected to play a typically balanced role in the trial of a crime. With the advent of interstate relations, the states came into interaction commonly and certain rules were become indispensable and obvious to follow in criminal trials, essentially due to the law of nations or international law in existence. But it is also significant that the reliability of the state can be protected by crime prevention by sentencing the guilty and freeing the innocent. Crime prevention is conceivable only when the offenders are punished.

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