Subject Name: Constitution Law
Topic Name: Article 20

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Introduction

The intersection of criminal law and constitutional principles encapsulates a timeless discourse within political liberalism: the delineation of boundaries between individual freedom and societal regulation. Criminal law, as wielded by the State, exercises its coercive authority to curtail individual liberties in the pursuit of overarching public interests such as state security or communal harmony.

Concurrently, criminal procedure delineates the mechanisms employed by the State to investigate and prosecute offences, thus furthering the collective welfare. However, within the framework of a liberal constitutional framework, there exists a counterbalancing endeavour to safeguard individual freedoms from undue or arbitrary encroachment by the State, accomplished through the imposition of constitutional constraints on both the scope and methodologies of criminal law.

In the realm of criminal procedure, constitutional deliberations reflect and often magnify the inherent tension between these competing imperatives of safeguarding individual autonomy and advancing the common good. Constitution framers confront at least two fundamental approaches: prioritising individual liberty by circumscribing state authority (the 'liberty perspective'), or prioritising public order by constricting individual freedoms and expanding state prerogatives (the 'public order perspective').

Insights from the Constituent Assembly Debates

The discussions within the Constituent Assembly shed light on the liberty perspective concerning criminal process rights. Assembly members acknowledged the intricate task of drafting safeguards for criminal processes, which necessitated a delicate balance between individual freedom and societal regulation.

The debates surrounding what would eventually become Articles 21 and 22 highlighted the struggle to achieve this equilibrium. As elucidated below, the primary focus of the Constituent Assembly was on curbing State power to prevent arbitrary encroachments on individual liberty.

The Advisory Committee on Minorities, Fundamental Rights, etc., proposed the inclusion of a provision ensuring that no individual would be deprived of life or liberty without due process of law.

However, the Drafting Committee opted for the phrase "procedure established by law" instead of "due process of law" to mitigate concerns about potential interpretations akin to Lochner-style economic due process, which could hinder social welfare initiatives.

This alteration sparked significant dissent both within and outside the assembly, with apprehensions that it would grant the legislature unchecked authority to utilise coercive state powers arbitrarily. Some assembly members even referred to Article 21 as the "crown of our failures" due to this alteration.

Amidst these debates, Dr. Ambedkar recognized the apprehensions regarding the removal of the "due process" clause and introduced draft Article 15A, later becoming Article 22, which contained criminal process rights safeguarded from parliamentary abrogation. Lengthy deliberations ensued within the Constituent Assembly regarding the extent of these compensatory due process guarantees.

Despite disagreements on their adequacy in safeguarding individual liberty against state oppression, members concurred on the necessity of explicit limitations on the criminal process within the Constitution to protect individual freedoms.

Many members drew upon their experiences of British colonial rule, particularly instances of incarceration during the freedom movement, to highlight the perils of a legal system permitting liberty deprivations without fair process.

References were made to laws promulgated by central and provincial governments that were perceived as unwarranted infringements upon life and liberty, reinforcing the imperative of requiring the State to justify every deprivation of liberty through a fair criminal process.

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Ex-Post Facto Laws

Article 20(1) of the Indian Constitution serves as a bulwark against convictions and penalties under ex-post facto laws, viewed as profoundly inequitable and unjust due to their retrospective nature. Such laws fail to provide individuals with fair warning regarding prohibited conduct and penalise them for actions that were previously permissible.

Moreover, ex-post facto laws can be exploited by a coercive state apparatus to target individuals, either by criminalising previously lawful behaviour or by circumventing protective procedural safeguards to secure convictions.

In India, the guarantee against ex-post facto laws comprises two essential components. Firstly, it prevents convictions for acts that were not offences at the time of their commission. Secondly, it prohibits the retrospective enhancement of penalties. Notably, judicial interpretations of Article 20(1) have had significant ramifications, shaping the contours of criminal justice in the country.

The case of Soni Devrajbhai Babubhai v State of Gujarat illustrates the practical application of the first safeguard under Article 20(1). The Court ruled against applying a newly enacted law retroactively to an incident predating its enactment, affirming the principle that laws cannot be applied retrospectively to the detriment of individuals.

Similarly, in Kedar Nath Bajoria v State of West Bengal, the Court rejected the retrospective imposition of enhanced penalties, emphasising the constitutional prohibition against such actions.

However, despite these paradigmatic cases, the judiciary's interpretation of Article 20(1) has often been characterised by a restrictive approach. Problematic distinctions between procedural and substantive provisions, as well as between criminal and civil liabilities, have shaped judicial discourse.

The courts have upheld the retrospective application of provisions introducing new evidentiary presumptions or reversing the burden of proof, disregarding concerns about the historical misuse of ex-post facto laws.

Moreover, the judiciary's formalistic approach has led to a narrow interpretation of Article 20(1), excluding certain civil liabilities from its purview. The distinction between criminal and civil liabilities fails to address the underlying issue of state abuse and the erosion of individual liberty resulting from retrospective burdens imposed on individuals. Even in cases where civil liabilities are retrospectively imposed based on prior criminal penalties, the courts have upheld such actions, emphasising public order considerations over individual rights.

Double Jeopardy

Article 20(2) of the Indian Constitution stipulates that "No person shall be prosecuted and punished for the same offence more than once." However, the judiciary's approach to interpreting this guarantee against double jeopardy reflects a public order perspective, characterised by a restrictive reading of the right.

The rationale behind the prohibition against double jeopardy, as elucidated by the US Supreme Court in Green v United States, indicates the principle that individuals should not be subjected to repeated attempts at conviction by the state. This safeguard aims to prevent individuals from enduring the emotional and financial toll of multiple trials, as well as the uncertainty and anxiety associated with the possibility of being found guilty despite innocence.

While courts in the UK and US have construed double jeopardy protections to preclude a second trial regardless of the outcome of the first trial—whether conviction or acquittal—the Indian Supreme Court has adopted a more narrow interpretation. It has declined to construe the phrase "prosecuted and punished" disjunctively, meaning that an acquittal in the initial prosecution does not bar subsequent prosecution.

Furthermore, the Court has clarified that Article 20(2) only prohibits multiple criminal prosecutions and punishments for the same offence. It does not preclude civil trials, administrative proceedings, or other non-criminal proceedings arising from the same transaction. Quasi-judicial proceedings are similarly unaffected by, and do not impede, criminal prosecutions.

Similarly, the Court's interpretation of the phrase "for the same offence" is limited to cases where both the prosecution and punishment in successive instances relate to offences with identical ingredients. If the elements of two offences differ, even if based on the same allegations, an individual can be prosecuted and punished for both offences.



Right Against Self-Incrimination: Balancing Liberty and Public Order

The right against self-incrimination presents a direct clash between the liberty interest in preventing coercion by state authorities and the public order interest in ascertaining the truth. This right

shields individuals accused of offences from being compelled to incriminate themselves, aiming to ensure the reliability and voluntariness of statements made by the accused.

Interpretations of this right by the Supreme Court have delved into its nuances, particularly concerning who qualifies as "accused of an offence," what constitutes "being compelled," and the meaning of "to be a witness."

The Court has ruled that an individual is considered accused of an offence during both investigation and trial stages. However, the term "to be a witness" has been construed narrowly to encompass only oral and written statements, termed "personal testimony," excluding the production of physical objects or bodily substances.

This distinction arises from the concern that compelled personal testimonies may result in non-voluntary statements, impairing the truth-seeking function of the criminal process. Conversely, the production of physical evidence aids in truth-seeking without raising the same concerns about voluntariness.

Recent cases have further showed the Court's commitment to the reliability rationale of the right against self-incrimination. For instance, in Selvi v State of Karnataka, the Court emphasised that coerced or induced statements are inherently unreliable and thus inadmissible. Similarly, the Court's interpretation of Section 313 of the Criminal Procedure Code, requiring the accused to respond to prosecution evidence, reflects a focus on eliciting truthful information rather than curbing coercion.

However, the Court's approach has also drawn criticism for its departure from a strict liberty perspective, particularly regarding the drawing of adverse inferences from the accused's silence or false denial. While a liberty-focused approach prioritises curbing police misconduct, the Indian narrative has largely revolved around the reliability of evidence obtained through compulsion.

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