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Right to Counsel: Limited or Unfettered?

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I. Abstract

In India, the right to counsel has always been neglected, with only limited applicability in the pre-trial stage. Such limited access to an integral right is detrimental to the accused, who is unaware of his legal rights. The lack in legal knowledge possessed by the common man opens the possibility to a plethora of mistreatment, abuse and exploitation by the police who take undue advantage of the prevalent illiteracy in the society. Corrupt practices shame the fair justice and trial system promised to the citizens of the democracy, as their fundamental rights are violated by state authorities themselves. In light of these violations the court imposes guidelines on the police regarding the presence of the lawyer in a pre-trial stage. However, these guidelines fall a step too short, as the presence is merely limited, and need not be for the entirety of the interrogation and other pre-trial procedures. This limited nature doesn't prevent exploitation, but merely postpones it to times wherein the lawyer is not present. Thereby these provisions do not reduce the absolute nature of the power possessed by the police during investigation. This paper explores the need for concrete legislative action and establishment of punitive measures regarding enforcement of the right to counsel in the pre-trial stage.

II. Key Words

Right to counsel; Police exploitation; Rights of accused; Pre-trial procedures; Interrogation and investigation.

III. Introduction

The right to legal assistance has been reiterated and reinforced repeatedly in both domestic and foreign jurisdictions due to the importance it holds in preventing exploitation and mistreatment of accused personnel. It is of paramount importance to recognize the fundamental principle of law wherein the accused is 'innocent until found guilty'. Providing the right to legal assistance to the accused at the pre-trial stage, thus aids in upholding the principle by giving way to people such that they become aware of the rights they can avail to be found innocent. This principle allows for many humanitarian and statutory rights to be granted to the accused. Unfortunately, these rights are often blurred and neglected in the administration of justice, such that the justice delivered is a gross miscarriage of the intended judicial and legislative system. In a country with such prevalent rates of illiteracy, especially legal illiteracy, it is important to have the "guiding hands of the counsel at every step in the proceedings against him".²²⁸⁴ This guidance is vital in order to preserve the sanctity of the justice system and ensure fair justice for all. The absence of such guidance grants the police with utmost power and authority. While the pre-trial proceedings are extremely confidential and delicate it is important to ensure that they are carried out with proper caution and procedure as dictated by the Constitution and Criminal Procedure Code. This is also worsened by the lack of awareness and the legislative silence on the topic of the right to counsel. Hence, the right to legal assistance even during detention is "one of the most important fundamental rights of a citizen".²²⁸⁵

IV. Analysis

A. Legal Unawareness Amongst the Masses

The discourse on the rights of an accused person has been one of the longest-running

²²⁸⁴ Powell v. Alabama, 1932, 287 U.S. 45.

²²⁸⁵ R v. Samuel, 1988, QB 615.

discussions in the Criminal Procedure Code, with new rights and liberties granted to the accused being added. While the plethora of rights is being increased, the knowledge and awareness of the same remain dangerously low. In a country like India wherein the majority of the population continues to live in rural areas, it is extremely difficult to spread legal literacy into these areas. A majority of the Indian population is unaware of the very fundamental rights that are guaranteed in the Constitution, like the right to not self-incriminate. This, coupled with ignorance and unfamiliarity of the population with the judicial system due to lack of transparency and other corruption issues proves to be a large hindrance in ensuring justice for the citizens of the nation. Therefore, this unawareness with respect to their rights is the very fact that urges the right to a lawyer during interrogation to be established as a fundamental and essential right rather than a limited right.

It has been observed on numerous occasions where accused individuals belonging to discriminated groups and rural areas are exploited as they are not informed of their rights and due to this, end up in situations where they self-incriminate, etc.²²⁸⁶ In light of the exploitation which occurs due to the lack of intimation by the police, the court in the case of *D.K. Basu*,²²⁸⁷ laid out guidelines that must be followed upon arrest and during an investigation by the police, these include informing relatives, etc. While these guidelines are in place through precedent, there is a lack of legislation governing these guidelines and rights which must be conveyed to the accused when the arrest is made. In light of this lack of knowledge, Justice Iyer in the case of *Nandini Satpathy*,²²⁸⁸ also opined that the right to an attorney should “extend the embargo to the police investigation stage.” This was done so that the rights of the accused are protected and the intimidation at the hands of the police

is not extreme and irrational. Such thinking has also been propagated in later judgements and reports, such as the D.K Basu guidelines giving the importance of the accused being allowed to meet his lawyer.

Unfortunately, this line of thought is not continued or clarified by the court, as the right to an attorney is not ratified to be throughout the investigation rather, only until the police officer in charge of the case permits. Limiting the right to an attorney opposes the efforts and attempts made towards ensuring fairness in investigation, as the lawyer’s presence is essential to protecting the accused’s fundamental rights. Moreover, the right to counsel is further compromised by the onus being on the accused to ask for legal assistance.²²⁸⁹ This can be seen in the Constitution wherein Article 22 which enshrines the right to an attorney does not create a positive right, but merely a restriction on the ability to deny a lawyer.²²⁹⁰ This burden on the suspect to ask for assistance circles back to the absence of knowledge they might have about their ability to ask for a lawyer and hence, will hamper justice. The absence of creating the right to an attorney as a positive obligation upon the state and authorities highlights the ignorance that drafters and legislation have expressed towards the accused and the aforementioned rights granted.²²⁹¹

It is troublesome for the system to assume the legal knowledge that is possessed by different classes and categories of citizens in the country when drafting laws and legislature to protect their right to a lawyer. As clearly stated by Mathivanan J. “It would be a mockery of the criminal justice system if it is left upon the poor and illiterate to know and ask for a lawyer”.²²⁹² Although there have been attempts by the judiciary to create a positive right these attempts fall short of success due to the

²²⁸⁹ The Constitution of India, 1950.

²²⁹⁰ Prejal Shah, *Suspect’s rights in India: A comparative law and the right to legal assistance as drivers for reform* (DPhil in Law, Brunel University 2016).

²²⁹¹ H M Seervai, *Constitutional Law of India*, Third Edition, Vol. I, 857.

²²⁹² Justice T. Mathivanan, *Legal Aid: Issues, Challenges, and Solutions- An Empirical Study*, Madras High Court.

²²⁸⁶ Law Commission, *Report on Article 20 (3) of the Constitution of India and the Right to Silence* (Law Com No 180, 2002).

²²⁸⁷ *D.K. Basu v. State of West Bengal* AIR 1996 SC 610.

²²⁸⁸ *Nandini Satpathy v. PL Dani* 1978 AIR 1025.

ambiguity and vagueness present in the judgements. For instance, while Nandini Satpathy's case is a landmark for the presence of a lawyer in order to protect the right to remain silent, the court failed to describe and elaborate upon the ambit of the "near custodial stage" wherein the right to an attorney was said to begin by the aforementioned court.²²⁹³ This lack of clarity is further exacerbated wherein D.K Basu guidelines do not distinguish between non-warrant arrests and arrests with warrants.

B. Legislative Inconsistency and Varied Thinking

To eradicate the ambiguity regarding the right to an attorney in a "pre-trial" stage, there must thus be statutory or legislative enactments. Such enactments would simultaneously add to the awareness within the nation with respect to legal rights and more specifically, the right to an attorney that is awarded and granted to every individual. The disparity between judicial interpretation and legislative action is vast, giving rise to obscure administration of justice as the authorities themselves remain uncertain about the rights that they are expected to inform the accused. This puzzlement can be seen in the Constitution and the Criminal Procedure Code, both of which acknowledge the right to an attorney being present to the accused but neither of them defines when or how such a right shall be granted to the accused.²²⁹⁴ Furthermore, legislative interference in the right to legal assistance should amount to the creation of a positive duty for the police to inform the accused of his rights. Currently, owing to merely jurisprudence, the information of the right to counsel remains a mere suggestion by the Apex Court to the police and authorities. However, this suggestion is rarely implemented as the police themselves repeatedly fail to inform the accused of the same.²²⁹⁵

The shocking findings and the consequent recommendations made by the 180th law

commission have been neglected and haven't been given effect to till date. The blatant ignorance towards the report's recommendations has paved the way to malpractice and a manifest violation of the rights granted to the accused, as legislation and other acts fail to specify the police station, wherein a majority of the exploitation takes place.²²⁹⁶ The aforesaid exploitation is also a consequence of the lack of punitive measures or actions taken upon non-implementation of the right to legal assistance. This is merely an extension of the lack of statutory requirements obliging police to grant the right to legal assistance, and such critical failure in procedure must be rectified and addressed by the legislature.

Furthermore, the Constitution makers relied immensely on foreign jurisprudence which includes the cases of *Miranda v. Arizona*,²²⁹⁷ *Ajmal Amir Kasab v. State of Maharashtra*,²²⁹⁸ *Salduz v. Turkey*,²²⁹⁹ wherein the rights and liberties granted to an accused are laid out and the importance of the same is also emphasized giving rise to landmark reforms in their respective legal systems. The international importance given to the right to counsel can be seen in the International Covenant on Civil and Political Rights, which affirms the same.²³⁰⁰ Therefore, the legislature's approach of not codifying and highlighting the ambit of the right to counsel being granted to an accused in India contradicts the intention of the Constitution makers who being inspired by such foreign jurisprudence included the right to counsel as a fundamental right. Additionally, foreign legislation continues to be proactive in remedying the lacunae caused by the absence of a lawyer.

The British legislation has implemented the PACE act which aims to rectify the miscarriage of justice that occurs in the absence of a lawyer;

²²⁹³ Nandini Satpathy v. PL Dani 1978 AIR 1025

²²⁹⁴ *Supra* note 7.

²²⁹⁵ *Supra* note 7.

²²⁹⁶ Aurora E. Bewicke, *Asian Developments in Access to Counsel: A Comparative Study* 11 Northwestern Journal of International Human Rights (2011).

²²⁹⁷ *Miranda v. Arizona*, 382 U.S. 436.

²²⁹⁸ *Ajmal Amir Kasab v. State of Maharashtra*, 2012, 9 SCC 1.

²²⁹⁹ *Salduz v. Turkey* [2008] ECHR 1542.

²³⁰⁰ International Covenant on Civil and Political Rights, 1966.

however, these efforts have not been reflected or attempted by the Indian legislation leading to the continuing difficulties that are faced by the accused.²³⁰¹ India also lacks a procedure of warning or cautioning the accused about the rights available to him which is a system pioneered by the U.S justice system through the landmark judgement of *Powell v. Alabama*,²³⁰² wherein it was opined that “even the intelligent and educated layman has small, and sometimes no skill in the science of law”. Keeping in mind the lack of awareness and the depth of the law, the importance of caution and a statutory requirement to warn the accused is necessary to ensure the protection of one’s rights. These rights can only be protected once they are acknowledged by the legislature, however, the lack of incorporating obligations and duties to ensure the availing of the right to counsel in the Criminal Procedure Code or other regulations governing police highlights the lack of importance given to this right. Therefore, this ignorant attitude towards this right causes a huge disparity between the rights available and the rights availed by the accused.

In the lack of such legislative or statutory enactments, it is evident that in the absence of a lawyer and any explicit statutory provisions, police officers have the ability and the power to carry out an investigation however they choose to, leading to arbitrariness and exploitation at a systemic level.²³⁰³ Such systemic arbitrariness of power can be understood in the case of *Maneka Gandhi*, wherein the authorities did not inform her of the reason for confiscating her passport, such lack of reasoning-backed power was held to be arbitrary. Similar parallels can be drawn to the power at the hands of the police when investigating and interrogating the accused in the absence of a lawyer.

C. On-ground Perceptions of Legal Assistance

Any enactment towards increasing the ambit of the right to counsel has been met with restraint and contentions owing to the immense backlog

suffered by the country’s legal system. Many argue, that how can steps be taken to make the justice system more intricate to avoid a miscarriage of justice while the subsequent delay of justice would in itself be a miscarriage of not just one accused but mismanagement of the justice system at large. These views are laid out by courts in Andhra Pradesh, Gangtok, and Jammu & Kashmir (Law Commission Report No. 152),²³⁰⁴ who reiterate the delay in an investigation if a lawyer is asked to be present. Furthermore, the delay in investigation followed by the pre-existing delay in the trial stage would lead to a doubling of the pre-existent problems within the system. Furthermore, it is also contended that in numerous cases that do not amount to serious offences, halting or conducting the interrogation and investigation as per the lawyer’s presence and availability would be counter-productive and would open the process to the whims and fancies of a lawyer (Law Commission Report No. 152).²³⁰⁵ However, in serious offences the presence of a lawyer is required and understood thoroughly. Another contention frequently raised is the lack of clarity in the judicial positions of the same, for instance, the Supreme court has ruled that “if an accused has wished for a lawyer during the examination, this facility shall not be denied” (Ho, 2014)²³⁰⁶ while soon contrasting it with the *D.K Basu* judgement, wherein the “arrestee may be permitted to meet his lawyer during interrogation, though not throughout the interrogation.” (Ho, 2014).²³⁰⁷ This disparity is futile and often benefits the police in situations of mistreatment of the accused and other atrocities which may be committed in the absence of a lawyer. The efficiency of the criminal system is contingent on achieving a balance between controlling crime and ensuring due process upon committing the crime (Packer, 1964).²³⁰⁸ However, there lies a

²³⁰¹ *Supra* note 7.

²³⁰² *Powell v. Alabama*, 1932, 287 U.S. 45.

²³⁰³ *Maneka Gandhi v. Union of India*, 1978 AIR 597.

²³⁰⁴ Law Commission, *Custodial Crimes* (Law Com No. 152, 1994).

²³⁰⁵ Law Commission, *Custodial Crimes* (Law Com No. 152, 1994).

²³⁰⁶ Hock Lai Ho, *Recent (Non-) Developments in an Arrested Person’s Right to Counsel*, Singapore Journal of Legal Studies 267, 267-284 (2014).

²³⁰⁷ *Id.*

²³⁰⁸ Herbert L. Packer, *Two Models of the Criminal Process*, 113 U. Penn. L. Rev. (1964)

world of a difference between the jurisprudence upon the matter and the procedure implemented in practice.

The malpractice that occurs due to the absence of this provision to have a legal counsel present at all times, is a classic example of the gap between the intentions on paper versus the reality of the practice. This disparity has often been exploited by police and other officials to justify or neglect the rights that accused personnel has. This absolute power bestowed upon the police through the provisions of the Criminal Procedure Code and the Constitution leads to excessive miscarriage of justice and hinders the promise of equal protection of the law given in Article 14 of the Constitution.²³⁰⁹ This gives rise to a situation wherein the police can act as per their whims and fancies, as opined in the Maneka Gandhi Judgement, arbitrariness is the “whim and caprice of an absolute monarch”.²³¹⁰ Hence, licensing of such freedom to the police leads to inherent arbitrariness thereby causing a collapse of the institution of fair trial and just treatment. Instances of such failure in the justice system can be seen when interviewing or talking to police officers, who claimed to not have informed the accused of their right to counsel, as they were “habitual criminals and have their own lawyers”.²³¹¹ Such assumptions act as justifications to exercise arbitrary power by the police and act as a method of absolving them of repercussions.

Similar justifications can also be found in the Police’s ability to manipulate the ambiguities within the law in order to achieve their point and their goal, for instance, someone picked up for routine questioning on the street, is not protected by counsel as such questioning doesn’t amount to interrogation so long as the information provided is not relevant. Thus, it can be observed that the dismissive attitude that is portrayed by the police towards this entire practice, only adds to the injustice faced by those being interrogated. Moreover, it is frequently observed that the accused or

anybody in the police station is intimidated by the authority that the police hold within that vicinity hence, leading to more misuse of that power. Such misuse can also be understood in the Mathura case.²³¹² Wherein the court held Mathura to have passively submitted due to the undue authority that police had within the station. Hence, preventing such atrocities is critical and steps taken to reduce the fear of the police amongst the dis-advantaged is necessary and should be undertaken without ado.

V. Conclusion

The paper demarcates the importance and the need for the presence of a lawyer, while also shining light on the neglect shown to this right by the police and other authorities. This ignorance of the accused’s right results in forgoing of a fair investigation and administration of justice as a whole. Upholding justice is the principal goal of democracy, and in order to ensure the delivery of fair justice one must eradicate sources of exploitation, corruption, and other ill-treatments which lead to a miscarriage of the proceedings. Therefore, the guidance of a lawyer is required to reinforce the accused during the investigation, by ensuring proper procedure and preventing any abuse or mistreatment which may come to the accused.

Furthermore, a lawyer’s presence will also ensure proper police treatment, which is extremely necessary for a country like India, wherein arbitrary power in the hands of authority has yielded extremely unfortunate results. This importance has been repeatedly emphasized yet not translated into anything concrete, as highlighted in the paper and has thereby restricted the ambit of the right to counsel. With increasingly frequent discourses on the topic it is crucial that the required steps are taken and the right to counsel is increased from just the trial to even pre-trial stages as an absolute right and an extension of the right enshrined under Article 22 of the Indian

²³⁰⁹ India Const. art. 14.

²³¹⁰ Maneka Gandhi v. Union of India, 1978 AIR 597.

²³¹¹ *Supra* note 7.

²³¹² Tukaram v. State of Maharashtra 1979 AIR 185.

Constitution.²³¹³ Additionally, such steps are also required to be backed by legislative action which creates a positive obligation upon the police to wait for the lawyer's presence before questioning or to create any punitive measures for not following or granting the accused the right to counsel. The lack of the aforementioned legislative action has been tainting attempts by the judiciary to increase the ambit of the right to counsel. Therefore, in order to uphold the promise of a fair trial and just punishment, it is integral to give way to an attorney at every stage of the investigation to protect the accused and preserve the inviolability of the Indian justice system.

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²³¹³ India Const. art. 22.