PRESUMPTIONS : IRREVERENCE AND IRRELEVANCE

AN EMINENT authority while commenting on the policy of legislation observes that it should not, (*i*) shock elementary reason or justice; and (*ii*) be against common sense.[1] It should, in the words of Cardozo, be infused with the "glow of principle".[2] This aspect seems absent in some amendments to the Indian law of evidence which provide for certain presumptions of fact. Their constitutionality seems suspect.

The Indian Evidence Act 1872 enacts a number of presumptions which are normally rebuttable, relating to a given fact only. Of late, Parliament when faced with situations of terrorism has responded with certain novel presumptions, which through proof of *one* fact enable inference of the existence of *another* fact.

The thread of commonality which runs through section 111-*A* of the Indian Evidence Act 1872 and section 21(1)(*b*) of the Terrorist and Disruptive Activities (Prevention) Act 1987 is that mere proof of presence of an accused at the site of the offence is sufficient to warrant an inference of its commission by him. It must be carefully noted that punishments for such offences can extend to death.

The inference of one fact from the proof of another should be capable of being held reasonable only if possible in the light of common human experiences. The USA experience *vis-a-vis* 'due process' in this regard is worth looking into. The arguments against referral to this doctrine to draw parallels in the Indian context can be met by Justice Krishna Iyer's observation that, "True our Constitution has no due process clause but after *Cooper*... and *Maneka Gandhi*... the consequence is the same".[3] In India it therefore becomes clear that "no person shall be deprived of his life or personal liberty except according to fair, just and reasonable procedure established by valid law".[4] Hence 'law' in article 21 "is reasonable law, not any enacted piece".[5]

Applying these judicial standards to these new kinds of presumptions, they are clearly unconstitutional. The argument justifying them as 'terrorist contingency' legislations fails to take note of the fact that the Indian Evidence Act is a general law applicable even to ordinary citizens. The Supreme Court of USA while striking down such presumptions had held:

> [Where] there is no rational connection between fact proved and ultimate fact presumed, ... where the inference is so strained as not to have a reasonable relation to the circumstances of life as we know them... inference of the one from the proof of the other is arbitrary... .[6]

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1. P.M.Bakshi, *An Introduction to Legislative Drafting* 63 (4th ed. 1992).
2. *Id.* at 62.
3. *Sunil Batra* v. *Delhi Administration*, (1978)4 S.C.C. 494 at 518.
4. *Bachan Singh* v. *State of Punjab*, (1980)2 S.C.C. 684 at 730 (per Sarkaria J.).
5. *Maneka Gandhi* v. *Union of India*, (1978)1 S.C.C. 248 at 338 (per Krishna Iyer J.).
6. *Tot* v. *United States*, 87 L Ed. 1519 at 1524.

In a case of presumption similar to those enumerated in Indian law, the defendant's 'presence at an illicit liquor stall was deemed sufficient to authorise conviction unless the defendant explains such presence to the satisfaction of the jury'. The punishment provided was actually for possessions, custody and control of the illegal stall, not for mere presence at the site. The Supreme Court of USA held:

> Presence is relevant and admissible evidence in a trial for possession charge, *but absent some showing of defendant's function at the stall* its connection with possession is too tenuous to permit a reasonable inference of guilt - the inference of the one from proof of the other is arbitrary.[7]

Thus, where the *one* fact proved is merely presence at the site of the offence, the inference of *another* fact of its commission and consequent punishment for it without showing of any connection through any attempt or active steps taken by the accused is unreasonable and casts too high a burden on the accused. It would fail the test of article 13(2), being hit by article 14 for arbitrariness, unreasonableness and by article 21 of the Constitution of India as well. The degree of difficulty involved in proof of terrorist offences provides no excuse for the prosecution to resort to unconstitutional 'means' justifying the 'ends'.

Such presumptions should not have been drafted into the Indian law of evidence in the first place. But then, as Roscoe Pound puts it, "There is little in legislation that is original. Legislatures imitate one another".[8] While legislating, pronouncements by apex courts on provisions of the 'inspiring' law seem hardly to receive any notice.

The final say on the matter lies with the Supreme Court of India under article 141 of the Constitution of India when these questions are answered by it after due consideration.

But that is a long wait[9] and meantime executive action proceeds apace because of the presumption in favour of constitutionality. Consistent with the oath of office by the President under article 60 of the Constitution of India, no Bill shall be signed into law if any of its provisions are *prima facie* constitutionally suspect. However this has not been the style of exercise of power till date.

*Vikramjit Reen**

7. *United States* v. *Romano*, 15 L Ed. 2d 210 at 214. (Emphasis added).

8. *Supra* note 1 at 19.

9. The Supreme Court has upheld the validity of the Terrorist and Disruptive Activities (Prevention) Act 1987, after a gap of 6 1/2 years after the Act was enacted. However, the larger questions raised here still remain relevant for the evidence law and Indian legal system generally.

* III Year, B.A.LL.B(Hons.), National Law School of India University, Bangalore.