Protection in respect of Conviction for offences/Asr

Article 20

- Article 20 of the Indian Constitution provides the following safeguards to the persons accused of crimes: -
- Ex post facto law: Clause (1) of Article 20.
- Double jeopardy: Clause (2) of Article 20.
- Prohibition against self-incrimination: Clause (3) of Article 20.

RETROSPECTIVE CRIMINAL LAWS

Article 20 (1) imposes a limitation on the law-making power of the Legislature. **Ordinarily, a Legislature can make prospective as well as retrospective laws, but clause (1) of Article 20 prohibits the Legislature to make retrospective criminal laws.** However, it **does not prohibit imposition of civil liability retrospectively**, i.e. with effect from a past date. So, a tax can be imposed retrospectively.

An ex post facto criminal law is a law which imposes penalties retrospectively, i.e. on acts already done and increases the penalty for such acts

VIOLATION OF 'LAW IN FORCE'

- ***If an act is not an offence at the date of its commission it cannot be an offence at the date subsequent to its commission.***
- In Pareed Lubha v. Nilambaram(1967 Ker), ***it was held that if the non-payment of the Panchayat Tax was not an offence on the day it fell due, the defaulter could not be convicted for the omission to pay*** under a law passed subsequently even if ***it covered older dues.***

TRIAL UNDER A PROCEDURE DIFFERENT

- The ***prohibition is just for conviction and sentence only and not for trial under a retrospective law. A*** trial ***by a special court constituted after the commission of the offence cannot ipso facto be held unconstitutional***.
- ***Thus, trial procedure can be amended tomorrow and apply to offences committed earlier .***
- ***New trial procedure can be adopted for old cases***

Guarantee in American Constitution is wider

- The protection afforded by clause (1) is available only against conviction or sentence for a criminal offence under *ex post facto* law and not against the trial. ***Under the American law the prohibition applies even in respect of trial. The guarantee in American Constitution is thus wider than that under the Indian Constitution.***

PREVENTIVE DETENTION, OR DEMANDING SECURITY

- The protection of clause (1) of Article 20 ***cannot be claimed in case of preventive detention, or demanding security from a person.***

PENALTY GREATER

- The second part of clause (1) protects a person from 'a penalty greater than that which he might have been subjected to at the time of the commission of the offence.' In *Kedar Nath v. State of West Bengal(1953)*, ***the accused committed an offence in 1947, which under the Act then in force was punishable by imprisonment or fine or both. The Act was amended in 1949 which enhanced the punishment for the same offence by an additional fine equivalent to the amount of money procured by the accused through the offence***. The ***Supreme Court held that the enhanced punishment could not be applicable to the act committed by the accused in 1947 and hence set aside the additional fine imposed by the amended Act.***

TAKE ADVANTAGE OF THE BENEFICIAL PROVISIONS

- ***The accused can take advantage of the beneficial provisions of the ex post facto law.*** The rule of beneficial construction requires that *ex post facto* law should be applied to mitigate the rigorous (reducing the sentence) of the previous law on the same subject. Such a law is not affected by Article 20(1).

T. Baral v. Henry An Hoe(1983)

- In *T. Baral v. Henry An Hoe,* ***a complaint was lodged against the respondent under Section 16(1)(a) on August 16, 1975 for having committed an offence punishable under Section 16(1)(a) read with Section 7 of the Prevention of Food Adulteration Act as amended by the Amending Act of 1973. On the date of the commission of the alleged offence, i.e. on August 16, 1975, the law in force in the State of West Bengal was the Amendment Act which provided that such an offence would be punishable with imprisonment for life***. On April 1, 1976, enacted Prevention of Food Adulteration (Amendment) Act, 1976 which ***reduced the maximum punishment of life imprisonment as provided by the West Bengal Amendment Act to 3 years imprisonment.*** It was held that the accused could take advantage of the beneficial provision of the Central Amendment Act and thus he had the benefit of the reduced punishment.

Ratanlal v. State of Punjab(1965)

- . In Ratanlal v. State of Punjab, ***a boy of 16 years was convicted for committing an offence of house-trespass and outraging the modesty of a girl aged 7 years. The Magistrate sentenced him for 6 months' rigorous imprisonment and also imposed fine. After the judgment of Magistrate, the Probation of Offenders Act, 1958 came into force. It provided that a person below 21 years of age should not ordinarily be sentenced to imprisonment.*** The Supreme Court by a majority of 2 to 1 held that the rule of beneficial interpretation required that *ex post facto* law could be applied to reduce the punishment. ***So an ex post facto law which is beneficial to the accused is not prohibited by clause (1) of Article 20.***

5 points

1. **Civil laws can be retrospective but not criminal**
2. **If an act is not an offence today ,it cannot become later with retrospective effect.**
3. **If today for an offence if the punishment is 3 years imprisonment, it cannot be enhanced with retrospective effect.**
4. **The prohibition(just for conviction and sentence only)does not apply in respect of trial (Trial can be by a special court constituted after the commission of the offence)**
5. **The accused can take advantage of the beneficial provisions**

Protection against Double Jeopardy – Clause (2)

- Article 20(2) of our Constitution says that "***no person shall be prosecuted and punished for the same offence more than once***". This clause embodies the common law rule of *nemo debet vis vexari* which means that ***no man should be put twice in peril for the same offence***.
- ***Under the American and the British Constitution the protection against double jeopardy is given for the second prosecution for the same offence irrespective of whether an accused was acquitted or convicted in the first trial.***

Section 300 CrPC, 1973

- **S.300 CrPC:-** However, according to the principle of ***autrefois convict or autrefois acquit embodied in S.300 CrPC, an accused cannot be tried again whether punished or acquitted and thus entitled to the same protection available in USA or England.***

BOTH PROCEEDINGS TO BE JUDICIAL PROCEEDINGS

- ***If either the 1st Proceeding or the 2nd Proceeding is not a judicial proceeding then the protection of Art.20(20) does not apply***

ESSENTIALS FOR THE APPLICATION OF DOUBLE JEOPARDY RULE (Art.20(2)

- ***The person must be accused of an 'offence'.*** The word 'offence' as defined in General Clauses Act means 'any act or omission made punishable by law for the time being in force.'
- The proceeding or the prosecution must have taken place before a ***"court" or "judicial tribunal" (Proceeding/decision/Judgement must be of judicial character)***
- The '**offence' must be the same for which he was prosecuted** in the previous proceedings.

Maqbool Husain v. State of Bombay(1953)

- In *Maqbool Husain v. State of Bombay,* ***the appellant brought some gold into India. He did not declare that he had brought gold with him to the customs authorities at the airport. The customs authorities confiscated the gold under the Sea Customs Act. He was later on charged for having committed an offence under the Foreign Exchange Regulations Act.*** The appellant contended that second prosecution was in violation of Article 20(2) as it was for the same offence, i.e., for importing gold in contravention of Government notification for which he had already been prosecuted and punished as his gold had been confiscated by the customs authorities. ***The Court held that the Sea Custom Authorities were not a court or judicial tribunal and the adjudging of confiscation under the Sea Customs Act did not constitute a judgement of judicial character necessary to take the plea of the double jeopardy. Hence the prosecution under the Foreign Exchange Regulation Act is not barred***.

DUTYFREE GOLD/CUSTOMS DUTY (12.5%/10%)

- A male passenger can carry up to 20 grams gold jewelry duty-free into the country, provided that it has a maximum value of Rs. 50,000 (App $735). On the other hand, if you are a female passenger, your duty-free gold limit is 40 grams, with a maximum worth of Rs. 100,000 (App $1470). These rules also apply to children, as long as they have been living abroad for longer than a year.
- Gold ornaments that are brought into India which exceed these limits will be subject to a 12.5% customs duty(7.5%+2.5% cess).
- The duty-free allowance in India is ONLY for gold jewelry and NOT for gold coins, bars or biscuits.
- **If you are carrying any gold while travelling abroad=Get an export certificate from the customs department**

Venkataraman v. Union of India(1954)

- In *Venkataraman v. Union of India*, ***the appellant was dismissed from service as a result of an inquiry under the Public Service Enquiry Act, 1960, after the proceedings were held before the Enquiry Commissioner. Later on, he was prosecuted for having committed the offence under Indian Penal Code and the Prevention of Corruption Act.*** The Court held that the ***proceedings taken against the appellant before the Enquiry Commissioner did not amount to a prosecution for an offence. The enquiry held by the Commissioner was in the nature of fact finding to advise the Government for disciplinary action against the appellant. It cannot be said that the person has been prosecuted.*** Hence, the second prosecution of the appellant was held not to attract the application of the double jeopardy protection guaranteed by Article 20(2).

PUNISHMENT IS NOT FOR THE SAME OFFENCE

- Article 20(2) ***will have no application where punishment is not for the same offence. Thus if the offences are distinct the rule of double jeopardy will not apply.*** Thus, where a person was prosecuted and punished under Sea Customs Act; and was later on prosecuted under the Indian Penal Code for criminal conspiracy, it was held that second prosecution was not barred since it was not for the same offence.

Jitendra Panchal v. Intel Officer N.C.B.(2009)

- In *Jitendra Panchal v. Intelligence Officer N.C.B.,* the offence for which the ***accused was tried and convicted in a foreign country, USA was in respect of a charge of conspiracy to possess a controlled substance (Hashish) with the intention of distributing the same punishable under USA law. The offence for which he was being tried in India was relating to the importation of the contraband article from foreign country from Nepal to India and exporting the same for sale in the USA and for which he is now being tried in India.*** The offences are distinct and separate and do not, therefore, attract the provisions of Article 20(2) of the Constitution.

PROHIBITION AGAINST SELF-INCRIMINATION----Article 20(3)

- **C. Prohibition against self-incrimination – Clause (3)**. – Clause (3) of Article 20 provides that no person accused of any offence shall be compelled to be a witness against himself. ***Thus Article 20(3) embodies the general principles of English and American jurisprudence that no one shall be compelled to give testimony which may expose him to prosecution for crime.***
- The accused need not make any admission or statement against his own free will. The Fifth Amendment of the American Constitution declares that "no person shall be compelled in any criminal case to be a witness against himself."

The characteristic features of the principle against self-incrimination are

- that the accused is presumed to be innocent,
- that it is for the prosecution to establish his guilt, and
- that the accused need not make any statement against his will.

M.P. Sharma v. Satish Chandra(1954)

- Explaining the scope of this clause in *M.P. Sharma v. Satish Chandra*, the Supreme Court observed that this right embodies the following essentials:

1. ***It is a right pertaining to a person who is "accused of an offence***."
2. ***It is a protection against "compulsion to be a witness".***
3. It is a protection against such compulsion relating to his giving evidence "against himself."

Accused of an offence

- The words ‘accused of an offence’ make it clear that this right is only available to a person accused of an offence. ***A person is said to be an accused person against whom a formal accusation relating to the commission of an offence has been levelled which is normal course may result in his prosecution and conviction. It is not necessary that the actual trial or inquiry should have started before the Court.*** Thus in *M.P. Sharma v. Satish Chandra*, it was held that a person, whose name was mentioned as an accused in the first information report by the police and investigation was ordered by the Magistrate, could claim the protection of this guarantee.

Modh. Dastgir v. State of Madras(1960)

In *Modh. Dastgir v. State of Madras*, ***the appellant went to the bungalow of Deputy Superintendent of Police to offer him bribe in a closed envelope. The police officer on opening it found the envelope containing currency notes. He threw it at the face of the appellant who took it.*** Thereafter, the police officer asked the appellant to handover the envelope containing the currency notes. ***The appellant took out some currency notes from his pocket and placed it on the table which was seized by the police officer.*** The appellant contended in appeal before the Supreme Court that the currency notes should not be produced in evidence as he was compelled by the police officer to give to him. The Supreme Court held that the accused was not compelled to produce the notes as no duress was applied on him to produce the notes. ***Moreover, the appellant was not an 'accused' at the time the currency notes were seized from him.***

Delhi Judicial Service Association v. State of Gujarat(1991)

- In *Delhi Judicial Service Association v. State of Gujarat,* it has been held that ***mere issue of notice or pendency of contempt proceedings do not attract Article 20(3) as the contemners were not "accused of any offence". A criminal contempt is different from an ordinary offence. Since the CONTEMPT PROCEEDINGS are not in the nature of CRIMINAL PROCEEDINGS for an offence, the pendency of contempt proceedings cannot be regarded as criminal proceedings merely because it may end in imposing punishment on the contemner.*** A contemner is not in the position of an accused.
- ***Even if the contemner is found to be guilty of contempt, the court, may accept apology and discharge the notice of contempt, whereas tendering of apology is no defence to the trial of a criminal offence.***

PROTECTION NOT AVAILABLE TO A WITNESS

- This shows that the guarantee in our Constitution is narrower than that in the American Constitution. ***In America the protection of self-incrimination is not confined to the accused only. It is also available to a witness. The position is the same in English law. But the protection under clause (3) of Article 20 is only available to the accused.***
- **ACCUSED AS ACCUSED /ACCUSED AS WITNESS**

Section 132 Evidence Act

- **Witness not excused from answering on ground that answer will criminate**:- A witness shall not be excused from answering any question as to any matter relevant to the matter in issue in any suit or in a civil or criminal proceeding, upon the ground that the answer to such question ***will criminate, or may tend directly or indirectly to criminate, such witness, or that it will expose, or tend directly or indirectly to expose, such witness to a penalty or forfeiture of any kind.***

Proviso to section 132 Evidence Act

- ***Provided that no such answer, which a witness shall be compelled to give, shall subject him to any arrest or prosecution, or be proved against him in any criminal proceeding.***

State of Bombay v. Kathi Kalu(1961)

- The Supreme Court held that ***self-incrimination can only mean conveying information based upon personal knowledge of the person giving information and cannot include merely the mechanical process of producing documents in court*** which may throw light on any point in controversy, but which do not contain any statement of the accused based on ***his personal knowledge***. ***Thus when a person gives his finger impression or specimen writing or signature, though, it may amount to furnishing evidence in the large sense is not included within the expression*** "to be a witness". In these cases, his is not giving any ***personal testimony.***

State of Bombay v. Kathi Kalu

- Hence, ***neither seizures made under search-warrant, nor the compulsory taking of photographs, finger-print or specimen writing of an accused would come within the prohibition of Article 20(2).*** What is forbidden under Article 20(3) is to compel a person to ***say something from his personal knowledge relating*** to the charge against him.

Compulsion to give evidence “against himself” –

- The protection under Article 20(3) is available only against the compulsion of accused to give evidence “against himself”. ***But left to himself he may voluntarily wave his privilege by entering into the witness-box or by giving evidence voluntarily on request***. Request implies no compulsion; therefore, evidence ***given on request is admissible against the person giving it***.

Compulsion means duress

- To attract the protection of Article 20(3) it must be shown that the accused was compelled to make the statement likely to be incriminative of himself***. Compulsion means duress which includes threatening, beating or imprisoning of the wife, parent or child or a person. Thus where the accused makes a confession without any inducement, threat or promise Article 20(3) does not apply.***

Nandini Satpathy v. P. L. Dani(contd.)

- ***In that case, the appellant was a former Chief Minister of Orissa. Certain charges of corruption were levelled against her and in the course of inquiry she was called upon to attend at a police station and to answer certain written questions. The appellant refused to answer questions and claimed the protection of Article 20(3). She was prosecuted under Section 179, I.P.C., for refusing to answer questions put by a lawful authority.***

Nandini Satpathy v. P. L. Dani(1977)

- In *Nandini Satpathy v. P. L. Dani,* the Supreme Court has considerably widened the scope of clause (3) of Article 20. The Court has held that the ***prohibitive scope of Article 20(3) goes back to the stage of police interrogation not commencing in court only.*** It extends to, and protects the accused in regard to other offences – ***pending or imminent – which may deter him from voluntary disclosure.*** The phrase 'compelled testimony' must be read as evidence procured ***not merely by physical threats or violence but by psychic (mental) torture***. Thus ***compelled testimony is not limited to physical torture or coercion***, but extends also to techniques of psychological interrogation which cause mental torture in a person subject to such interrogation.

Yusufali v. State of Maharasthra(1968)

- In *Yusufali v. State of Maharasthra,* a ***tape-recorded statement made by the accused though made without knowledge of the accused but without force or oppression was held to be admissible in evidence.***
- In ***Sate v. M. Krishna Mohan(2008)***, the Supreme Court has held that taking of specimen finger print and handwriting from accused is not prohibited by Article 20(3) as being 'witness against himself.'

Selve v. State of Karnataka(2010)

- The accused have challenged the validity of certain scientific techniques namely, ***Narcoanalysis, Polygraphy and Brain Finger Printing (BEAP) tests without their consent as violative of Article 20(3) of the Constitution***, they argued that these scientific techniques are softer alternatives to the regrettable use of third degree methods by investigators and violates right against self incrimination in Article 20(3) of the Constitution. **The State argued that it is desirable that crime should be efficiently investigated particularly sex crimes as ordinary methods are not helpful in these cases. So the issue was between 'efficient investigation' and 'preservation of individual liberty'**. A three judge bench of the Supreme Court unanimously held that ***these tests are testimonial compulsions and are prohibited by Article 20(3) of the Constitution.***