CHAPTER - III

CONSTITUTIONAL IMPERATIVES OF PUNISHMENT

This chapter discusses the principles laid down in the constitution which are relevant to the subject of punishment, such as, the principles embodied in article 20 (Principles relating to Criminal Justice) and the principles embodied in some other provisions of the constitution. These principles are imperatives in the sense that the authorities of the state are supposed to observe them in all that they do, whether it is law making or law enforcing. constitution (article 13) prohibits making of any law that abridges citizens’ rights enumerated in part III.

The term ‘state’ has been defined as including the law making institution, laws and policies implementing and enforcing institution and the adjudicating machinery founded by the state. The major repository of the constitutional principles is Part III of the constitution which has the heading ‘fundamental rights’. But apart from the citizens’ rights mentioned in part III of the constitution there are certain other principles embodied in various other provisions of the constitution like the principle of federalism, the principle of independence of judiciary, the principle of procedure established by law, the principle of fairness etc. Which are binding on all those who exercise the authority of state in making the laws or in enforcing the provisions of law?

Then there are certain principles which are the result of judicial decisions and which according to the legal traditions of our country are binding on the authorities of the state. These principles which are the result of judicial activism are also of an imperative character and they are discussed in this chapter.

In presenting the discussion on the constitutional principles which are of imperative character, priority is given to article 20 and they are discussed first then the other principles connected to other elements of the constitution and the court judgments. have been discussed. The methodology followed in presenting the discussion is to present in Section A the principles embodied in the constitution and in Section B the principles as evolved by the supreme court through its decision have been discussed :

SECTION A – PRINCIPLES EMBODIED IN THE CONSTITUTION

The following are the principles proclaimed in article 20 of the constitution which are mentioned as certain protection to convicts in certain circumstances and conditions.
1) There can be no ex post facto punishment. That means the law prohibiting certain acts must be on the statute book on the day of commission of offence.

2) Courts are not supposed to try any person doubly for one offence and punish doubly for the same offence.

3) No one can be punished taking into account his/her self incriminating statements obtained involuntarily (by force.)

**i) The Principle of Protection against ex post facto law**

The constitution of India has adopted the Doctrine of Nullum crimen Sine Lege, and Nullum Poena Sine Lege in article 20 of the constitution, which says,

> law prohibiting an act must precede the commission offence and the trial is the basic tenet of penology. ex post facto leniency given by legislature available on the day of judgement must be given. This provision puts the Criminal Jurisprudence at par with the international standards in criminal justice. However, the difference in the provisions of international covenant and the constitution of India is that the constitution does not guarantee a safeguard as to the lighter punishment provided by subsequent legislation.

The right against ex-post-facto law has been recognized at international level under the two international covenants viz., an international declaration of human rights and the important covenant on civil and political rights.

art.11, clause (2) of the universal declaration of human rights proclaims also says that there can be no ex post facto trial and punishment. law must exist in regard to the offence on the day the offence is alleged.

art.15 of the international covenant on civil and political rights, 1966 proclaims that no one can be held guilty by any courts situated in the countries signatory and party to the covenant for any omission of duty not mentioned on the day such omission is criminalized by a valid law

The constitution of India, by its article 20(1) guarantees its people against the ex-post-facto, in the following way broadly speaking, ex-post-facto laws are which voided and punished what had been lawful when done. In Rao Shiva Bahadur v state of Vindhya Pradesh, Jagannathadas, J. said: that the principle of barring ex post fact trail and punishment is paramount. the judgment also said that creating offences retrospectively is bad in law and not in line with tenets of justice.
art. 20 (1) bans the law making authority of the Legislature. Ordinarily, a Legislature can make prospective as well as retrospective laws, but clause (1) of art.20 prohibits the Legislature from making retrospective (back dated) criminal laws.

In India, a legislature ordinarily can make a prospective as well as retrospective law, but the constitution prohibits it from making retrospective laws with regard to crimes and the attached punishments. Clause 1 of article 20 of the constitution says that people shall not be punished for any offence except for violation of an existing law on the day of committing the act. People cannot be subjected to any higher penalty than that which existed on a statute book on the day of the happening of the misdemeanour or felony.

By an ex-post-factolaw what is understood in India is a law which imposes penalties retrospectively, i.e., on acts which at the time they were committed were not punishable, and with greater punishment than what the punishment was at the time the offence was committed. Thus, an ex post factolaw is a law which is promulgated and criminalizes the act after the act has been done. Further, a person cannot be given a bigger penalty than which already existed before the alleged wrong behaviour.

Meaning of ex-post-factolaw: An ex-post-factolaw is a law which impose penalties retroactively, that is, act criminalized after the the act takes place. Also bigger quantum of punishment cannot be given which did not exist already. As, for example, suppose in 1964, a person does an act which is not then unlawful. In 1965, a law is passed making that act a criminal offence and seeking to punish that person for what he did in 1964 or, suppose, punishment prescribed for an offence in 1964 is six months, but in 1965, the punishment is increased to a year and is made applicable to the offences committed before 1965. These are examples of ex-post-factolaws.

Law making authority of the state entrust give permission prohibit and give punishment. It can declare new offence and for that new offences law making authority prescribe rules of conduct for every person who is the citizens in present or in up coming cases. It can ordered what is correct and forbidden and what is not right. But it may not be changed innocent into quite or punishment innocence as a crime by enacting an 'ex-post-factolaw'. In many civilized countries such laws are regarded as inequitable and abhorrent to notions of justice and, therefore, there are constitutional safeguards against such laws. The U.S. constitution contains a restriction against ex-post-factolaw both the Centre and the states under art.1 Sections 9 and 10.

Interpretation of India’s constitution by scholars states that what is banned in India is only ex post facto law. That is law must exist criminalizing an act before commission of that act.
Scholars say that courts can be changed ex post facto. The offence triable by JMFC court can be made as triable by Sessions court and accused person has no remedy about that. The accused person cannot press for a particular court as trial court.

There is another debate currently going on in the country as to whether special courts like TADA court POTA court MCOCA court UAPA court are regular courts within the meaning on article 21. According to one argument of legal scholars the special courts are not regular courts and therefore trial by special courts is not “due process of law.” Special courts judges have mind set that they are specially created to punish and not to acquit. Such mind set is bad as it spoils impartiality.

Even in Holy Quran which came on earth between 645-690 CE that is before 1400 years there is “due process clause” In surah Al Anam chapter No.6 Verse No. 151 the Quran says “no one can be put to death except by bringing him /her before court / judge.

It is wrong to argue that Indian constitution does not have “due process clause” equivalent to American due process. Such argument is not tenable since there can be no law on earth without “due process clause” The interpretation of constitution is done in India by agents of totalitarianism Their interest in indicating that procedure established by law is not due process. The interest is to hang the minority people like Sikhs, Muslims and Christians by using self incriminating evidence Okayed by special courts.

The first part of clause (1) of art.20 lays down that no person shall be convicted of any offence except for violation of a law in force at the time of the commission of the act charged as an offence. This means that a person can only be convicted of an offence if the act charged against him was an offence under the law in force at the doing of the act when any act is committed on a particular day if that act is not forbidden by any law in force or any present law. Means when any act is committed any particular day if that act is no offence in on a particular day. But if that same act which is not prohibited particularly in future same act become offence that is never possible means no any person is liable for his/her every act which is done in a part can not be a subject matter of punishment in future time. The same consept i.e. ex-post-fato-laws. It clearly means that the penal laws. It clearly means and until it is expressly provided by the legislature. Thus, in GovindPillai v. PadmanabhaPillai, the Kerala highcourt held that, where the rule made applicable from 1.7.1961 was published in the Gazette of 7.7.1961, the rule could not be applicable in respect of acts committed before 7.7.1961. Similarly, in Pareed Lubha v. Neelambaram the Kerala highcourt gave judgement that not remitting panchayat dues on the date payment was due did not constitute, the person having dues against his name cannot has not done any wrong by paying after due date.
The immunity under art.20 (1) extends only against punishment by courts for a criminal offence under an ex-post-facto law, but it does not cover the imposition of civil liability retrospectively. In Hathi Singh Manufacturing Co. v. union of India, an Act passed in June, 1957, imposed on the employees closing their undertaking, the liability to pay compensation to their employees since Nov. 28. 1956. For failure to discharge the liability to pay compensation, a person could hold that the liability was a civil liability and since the failure to discharge a civil liability is not an offence, art.20 (1) would not apply.

According to article 11 of the international covenant on civil and political rights no one in the member countries which are signatories and parties to the covenant can be imprisoned for inability to perform contractual obligation. India is a signatory and party (ratified treaty) to the covenant yet India has not changed its laws to gain compatibility with ICCPR 1966.

In Satwant Singh v. Punjab, arose the following fact-situation. According to Sec. 420 indian penal code, an unlimited fine can be imposed on committed an offence punishable under this provision. Later, an ordinance laid down the minimum fine which a court must inflict on a person convicted u/s 420 indian penal code. The supreme court held that art. 20(1) was not infringed by the ordinance because the minimum penalty fixed by it could not be said to be greater than what could be inflicted. Under the law in force at the time he committed the offence. Under art. 20, all that has to be considered is whether the ex-post-facto law imposes a penalty greater than that, which might be inflicted under the law in force at the time commission of the offence.

In RatanLal v. state of Punjab, the accused, a boy of 16 years was found guilty of having committed house trespass and having tried to outrage the modesty of a girl aged 7 years. The magistrate awarded him rigorous imprisonment for six months and also imposed fine. The accused appealed to the Addl. Sessions judge, then to the highcourt in revision, without taking the plea that he might be given the benefit of the probation of offenders Act, 1958, which came into force after the magistrate has given his judgment.

This Act was a reformative measure in the field of penalty and provided that a person below 21 years of age should not ordinarily be sentenced to imprisonment. It was only after the highcourt had dismissed the revision, that the appellant. In a petition, urged the court to apply the Act to his case which the highcourt refused. The appellant approached the supreme court through Special Leave. The question for determination was whether an appellate court could apply the Act in respect of an accused who was convicted by the trial court before the Act had come into force. The supreme court, by a majority of two to one, answered the question in the affirmative. Subba Rao J., who delivered the majority opinion, concluded that in considering such petitions, the rule of
beneficial construction required that even an ex-post-facto law of the type involved in that case be applied to reduce the punishment.

The majority opinion obviously reiterated the rule of the laws of punishment did not fall with the prohibition of art. 20 (1) Thus, the accused can take advantage of the beneficial provisions of the ex-post-facto law. When Central law Amendment Act (Food Adulteration) creates new offences or enhances punishment for a particular type of offence, no person can be convicted by such ex-post facto law nor can the punishment be enhanced taking support of y amendment ; but when ex post fact law reduces the punishment for an offence punishable under s. 16(1)(a) of the Act, there is no impediment for getting the reduction of punishment proclaimed by amended law which is also ex post facto. The rule of beneficial construction requires that even ex post facto law of such a type should be applied to mitigate the rigour of the harsh law. It is rule of interpretation that if any punishment is prescribed for a particular act and subsequently the punishment prescribe for the act is altered or amended either by enhancing punishment, or reducing the quantum of punishment, it clearly means that the previous provision is repealed on the same ground if any act is describe any offence and if it repealed subsequently then also it will mean that now that particular act is no offence ( Michell v. Brown 1959)

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 reduced punishment.

The Doctrine of ex-post-facto legislation however operates subject to certain limitations, which may be explained, thus:

(1) The courts do not review the validity of Pre-constitution laws, under article 13(1) of the constitution because the constitution itself does not have retrospective operation. In Keshava Madhava Menon v. state of Bombay the supreme court held that article 13 (1) has no retrospective effect but is wholly prospective in operation and that if the behaviour which was legally wrong at that moment, was done before the commencement of the constitution, in contravention of the provision of any law, which after the constitution became void with respect to the exercise of fundamental rights, the inconsistent law is not upheld out retroactively so as to make the act not an offence. There is not fundamental right that an accused cannot be dealt with in court if the offence has taken place before the commencement of the constitution.

(2) In Srinivas Ayyer v. Saraswati Ammal the petitioners who were to be prosecuted for the offence of Bigamy had raised the question of the validity of the Madras Hindu (Bigamy prevention and Divorce) Act, 1949 as offending articles 14, 15, and 25 of the Act. The Madras highcourt held that article 13(1) has no retrospective effect to wholly prospective in operation. If the act which was an offence on the day it was done before the commencement of the constitution
in contravention of any provision of any law, which after the constitution became void with respect to the exercise of the Fundamental right, the inconsistent law is not wiped out retrospectively so as to make the act net an offence.

The reason for this ruling is that if such a fiction were accepted, and a law passed later were to be treated as a law in existence earlier, then the whole purpose of the protection against ex-post-facto law would be frustrated, for a Legislature could then give a retrospective operation to any law.

(ii) The Rule Against Double Jeopardy

article 20 (2) of our constitution says that nobody can be prosecuted and punished for the same offence twice or more times. This clause embodies the common law rule of nemodebetvisvexari which means that no man should be put twice in period for the same offence. If he is prosecuted again for the same offence for which he has already been prosecuted he can take complete defence of his former acquittal or conviction. No person shall be vexed twice is a rule guaranteed under Article 20(2) of Indian constitution and also sec. 300 of cr.p.c. it is a procedural defence under both of the above provisions. That is no person shall be punished or tried for a single act more than once. If after following due process of law and by a competent forum.

The word ‘prosecution’ as used with the word ‘punishment’ embodies the following essentials for the application of double jeopardy rule. They are:

1. The person should have been charged with culpability The word ‘offence’ as defined in General Clauses Act means ‘any commission or avoidance labeled as crime would invite punishment’.

2. The proceeding or the prosecution must have taken place before a ‘court’ or ‘judicial tribunal’.

3. The person must have been prosecuted and punished in the previous proceeding;

4. The offence must be the same for which he was prosecuted and punished in the previous proceedings.
In Maqbool Hussain v. state of Bombay the appellant had brought some gold into India. He did not declare that he had brought gold with him to the customs authorities on 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 the 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 Customs Authorities were not a court or a judicial tribunal and the adjudging of confiscation under the Sea Customs Act did not constitute a judgment of judicial character necessary to take the plea of the double jeopardy. Hence the prosecution under the Foreign Exchange Regulation Act is not barred.

Similarly proceedings before departmental and administrative authorities cannot be a proceeding of judicial nature. 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 the 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).

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 the second prosecution was not barred since it was not for the same offence.

Likewise, clause 2 of article 20 does not apply where the person is prosecuted and punished for the second time and subsequent proceeding is mere continuation of the previous proceeding, e.g., in the case of an appeal against acquittal. Thus, where a number of persons were punished for smuggling currency notes, arms and ammunitions and were later on prosecuted for criminal conspiracy for carrying out their trade, it was held that the second prosecution was not forbidden although it related to the same offence, i.e., smuggling currency notes, etc. for which they had already been prosecuted and punished.
In A. A. Mulla v. state of Maharashtra the appellants were charged under Section 409, IPC and Section 5 of the prevention of corruption Act for making false penchnama disclosing of recovery of 90 gold biscuits although according to prosecution case the appellant had recovered 99 gold biscuits. They were tried for retaining 9 gold biscuits before the Special judge but appellants were acquitted. On the ground that the prosecution had failed to prove misappropriate the appellants were again tried under the Customs Act and the Foreign Exchange Regulation Act (FERA). The appellant challenged the validity of their second trial on the ground that it was violate of article 20 (2) of the constitution. It was held that the second trial was not barred as not only the ingredients of the offence of two trials were different but the factual situation of offences in the first and second trial was also different.

(iii) The Rule against Self Incrimination

Self-incrimination is the act of exposing oneself (generally, by making a statement) "to an accusation or charge of crime; to involve oneself or another [person] in a criminal prosecution or the danger thereof." Self-incrimination can occur either directly or indirectly: directly, by means of interrogation where information of a self-incriminatory nature is disclosed; indirectly, when information of a self-incriminatory nature is disclosed voluntarily without pressure from another person.

Clause 3 of article 20 vociferously ordains that no accused individual shall be forced to criminalize self by giving statement against self. Thus, article 20 (3) is equivalent to the general tenets of understanding that self incrimination is bad and immorality is attached to it. Self incrimination is totally unjust, unethical politically most oppressive thing. article 20(3) is against self incrimination but still continues as a mode of criminal justice. Afzal Guru was awarded death sentence on the basis of his confession taken in custody and hypocritically the confessional statement was declared as voluntary confession by the police agency which agency itself obtained confession. Another point is application of Section 10 of the evidence act in which one of the conspirators if makes some admission leading to confession about conspiracy then his confession would entangle the remaining two or three automatically. The evidence act 1872 was drafted and promulgated by the British Crown.

The British Crown was interested in subduing native Indian population and therefore legitimacy was given to section 10 setting co-conspirators against each other by way of confessional statements. The investigating and interrogating police has the skill and kinky wisdom
of giving allurement, promise, threat to co-conspirators by separately talking to them and setting them against each other. India’s police do not have modern scientific tools and equipment nor are there well equipped forensic laboratories in India therefore reliance is always placed on admissions and confessions for convicting persons. John Von Neumann who founded Game Theory which is a mathematical interactive decision making theory has structured a Game called Prisoner’s Dilemma in which allurement and outcome are strategically structured to make a puzzle.

English and American jurisprudence have doctrine that no one shall be compelled to give testimony which may expose him to prosecution for crime. The cardinal principle of criminal law which is really the bed rock of English jurisprudence is that an accused must be treated and innocent. It is the job of prosecuting agency to substantiate the offence. 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 fundamental rule of criminal jurisprudence against self-incrimination has been raised to a rule of constitutional law in article 20 (3). The guarantee extends to any person accused of an offence and prohibits all kinds of compulsions to make him a witness against himself. 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 charged with a crime

2. It is a protection against ‘compulsion to be a witness’.

It is a protection against such compulsion relating to his giving evidence against himself. The constitution of India provides that no person shall be compelled to be a witness against himself this is called rule against self incrimination. Most of the civilized country is following this rule but in India in number of judicial pronouncement the apex court and high court of different state time and again given verdict that obtaining finger friend of accused of blood sample, nail clipping and also taking sample for DNA profiling is not against the rule of self incrimination.

there are also provisions in substantive and procedural law that every person is bound to answer the question put to him during investigation, inquiry or trial but, subject to defense that no person shall be compiled to answers such question which will criminate a person on for feature or penalty. There are also certain non compellable witness provided under law of evidence such as, no spouses are compiled to discloses any communication mad during marriage by each other and also no person whether husband and wife harbors any of them. Giving evidence against self must
mean giving confessional statement against self by the main accused of certain crime during interrogation to the police and prosecutor by which the accused person himself will erase his innocence and accept crime in part or in full. His admissions will be converted into confessional statement and produced before the court. Such statement of admission and conversion of admissions in to confession can occur due to duress and torture by police. Voluntariness of the statement is crucial.

When an accused person is not released on bail and is continuously in police custody or magisterial custody from where police can pick him up any time for interrogation then such person divulging that he himself did the crime amounts to forcible extraction of admission from the accused. In India forcible extraction of self incriminating admission is a routine procedure. In 2007 bombing of Samjhouta Express in Haryana one Swami Assemanand had been charged. National Investigation Agency claimed that Asseemanand gave confessional statement the he did the crime.

Surprisingly the statement of confession was obtained from him at Chanchalguda central jail Hyderabad Andhra Pradesh for a crime which ocured in Harayana. Aseemanand later retracted and denied that he ever gave any confessional statement ata all. The police play Game Theory. Police is in the habit of giving the mixed package threat and allurement to the accused

The privilege against self-incrimination contemplated under clause (3) of art.20 is confined only to an accused i.e. an individual who is formally charged with an offence or offences, Afzal Guru’s confessional statement in parliament attack case upon which he was convicted and was hanged also came under attack by human rights organizations including Amnesty international..

However, it is not necessary to avail the privilege, actual trial or inquiry should have commenced before the court or Tribunal. In M.P.Sharma v. Satish Chandra it was laid down that a person against whom the First Information report has been recorded by the Police and investigation ordered by the magistrate, can claim the benefit of the protection.

The guarantee in art. 20(3) is against the compulsion ‘to be a witness’. ‘To be a witness’ means making of oral or written statements in a court or out of court by a person accused of an offence. What is an incriminatory statement in relation to art.20 (3) or Sec. 161(2) criminal procedure code, the supreme court in Nandini Sathpathy v. P.L.Dani case in which Nandini Satpathy former chief Minister of Odisha was being forced by Police to answer a questionnaire which aimed at implicating her in charges of corruption. Nadini Satpathy knocked the doors of the supreme court.
In Nadini Satpathy case supreme court accepted that the rivalry existed between the societal interest in crime detection and the constitutional right of the accused citizen against self incrimination under article 20(3).

It is shocking that we still have section 179 of the Indian Penal Code on statute book which forces the accused person to answer the question asked by police and at the same time also have constitutional right not to answer the question asked by police.

In Nadini Satpathy case The supreme court was caught in a dilemma whether to uphold the right of police to interrogate given under Section 179 of Indian Penal Code or to uphold the guarantee against self incrimination given under article 20(3) by the constitution of India.

The supreme court gave following directives in the Nadini Satpathy case.

1) the individual charged with crime cannot be compelled by using force in to giving a statement admitting his involvement in offence.

2) The individual charged with crime must be told of his/her right to remain silent and his/her right against forced confession.

3) The individual being questioned has the right to have a lawyer by his/her side if he/she so desires while police is questioning.

4) the individual charged with an offence must be informed of the right to talk to a lawyer at the time of questioning even if he/she under detention

5) Women cannot be detained in custody interrogation in breach of section 160(1) Criminal Procedure Code.

The supreme court also gave directive that causing hurt to extract admission would invite seven years imprisonment.

According to the court, the rule against self-incrimination contemplated by art 20(3) or Sec. 161(2) Criminal Procedure Code is not limited to a specific offence regarding which the questioning is planned but extends to other offences in respect of which the accused might have apprehension of use of force by police.

In the leading case of State of Bombay v. Kathi Kalu Oghod, a bench of the supreme court consisting of eleven judges, disagreed with the interpretation in M.P Sharma v. Satish Chandra and defined the scope of protection thus: In criminal cases if any person use information to the concerned authorities it cannot include proceeding the documented mere technically in the court which highlight any of the points in dispute but which can not contain any statement of the offenders based on personal knowledge for example- if an offender is in possession of some document which is written by his own human handwriting, signature, thumb impression. If such an document is reduce for comparison of handwriting, signature, finger impression. According to
law is not deemed to be a statement of an offender which can be said to the nature of a personal testimony

Hence, giving thumb-impression or impressions of foot or palm or fingers or specimen writings or showing parts of the body by way of identification are not included in the expression ‘to be a witness’.

The protection under article 20(3) also does not extend to searches made in pursuance of a warrant issued under Sec. 96 of the code of criminal Procedure, 1973. Also taking of signature of accused during investigation does not amount to giving a statement under Section 162 of the criminal procedure code nor art.20 (3) as laid down in state of U.P. v. Boota Singh.

The prohibition is only against the compulsion of the accused to give evidence against him. There is no constitutional disability against the accused being a witness on his own behalf. The code of criminal procedure Act, 1955, has added Sec.342. A to the code (now Sec. 315(1) of the new code of 1973) according to which amendment, the accused is a competent witness in his trial though he shall not be compelled to be a witness against himself.

To bring the evidence within the inhibition of article 20(3) it must be shown that the accused was compelled to make the statement having a material bearing on the criminality of the maker. In state of Bombay v. Kathikalu, the supreme court explained the meaning of ‘compulsion’ as what in law called ‘duress’ which is elucidated as infra:

‘Duress’ is a state of intimidated mind that exists when a person is compelled to do an act by threat of future injury, beating, any other physical or mental torture by holding in custody the person or threat of future unlawful imprisonment. Duress can suddenly arise by the threat of being killed, threat of grievous bodily harm, or threat of being unlawfully detained called menace. Duress also includes torturing or threat of torturing close relative or family member of an accused individual.”

In Nandini Sathpathy’s case, the supreme court further laid down some practical points for the due observance of the principles laid down in art. 20(3) and Sec. 161(2) criminal procedure code as follows:

The Police should permit the accused to consult an advocate of his choice at the time the accused is examined. However, the Police need not wait for more than reasonable time for the advocate’s arrival.
Where a lawyer of the accused arrestee’s choice is not available immediately, after examination of the accused, the Police Officer must produce the accused before a judge or any other impartial authority and allow the accused person secluded audience where he/she can tell whether he/she has suffered any torture at the hands of police or mental duress during the course of examination in that case; in which case he should be transferred to such lodging where the accused cannot be reached by police.

The investigatory Personnel must be separated from the general mass and given in-service specialization of many hues on a scientific basis. The Policeman must be released from addiction to coercion and sensitized to constitutional values.

In Poolpandi v. Superintendent, Central excise, it was held by the supreme court that a person for questioning during investigation by authorities under the provisions of the Customs Act or the Foreign Exchange Regulation Act is not an accused. He cannot, therefore, claim that in view of the possibility of his being made an accused in future he is entitled to the presence of his lawyer when he is questioned. Refusal to allow presence of lawyer in such case would not be violative for protection under article 20(3). Nor can it be said that when a person is called away from his own house and questioned in the atmosphere of the customs office without the assistance of his lawyer or his friends, his constitutional right under article 21 would be violated. It could not be said that if the person who is used to certain comforts and convenience is asked to come by himself to the Department for answering questions it amounts to mental torture. Thus, even on applying the ‘Just, fair and reasonable test’ the refusal to allow presence of lawyer would not violate article 21.

In Ilias v. Collector of Customs the questions whether Customs Officials are polite officers and whether the statements recorded by the customs authorities under Sec.107 and 108 of the Customs Act were inadmissible in evidence and answered in the negative.

In the state of Bombay v KathiKaluOghad, an eleven judge Bench of the supreme court defined the scope of protection under article 20(3) as follows:

In criminal cases if any person use information to the concerned authorities it cannot include proceeding the documented mere technically in the court which highlight any of the points in dispute but which can not contain any statement of the offenders based on personal knowledge for example- if a offender is in possession of some document which is written by his own human hand writing , signature, thumb impression. If such an document is reduce for comparison of hand
writing, signature, finger impression. According to law is not deemed to be a statement of an offender which can be said to the nature of a personal testimony

Hence, giving thumb-impression or impression of foot or palm or fingers or specimen writing or showing parts of the body by way of identification are not included in the expression ‘to be a witness’.

The protection under article 20(3) also does not extend to searches made in pursuance of a warrant issued under Section 96 of the code of Criminal Procedure.

**Other constitutional Provisions applicable to the system of punishments in India:**

**Independence of union Judiciary:**

*Independence of Judiciary* means:

“That every judge is free to decide matters before him in accordance with his assessment of the facts and his understanding of the law without any improper influence, inducement, or pressure.

That the Judiciary is independent of the Executive and Legislative and has jurisdiction directly or by way of review over all issues of judicial nature.”

The constitution of India has already adopted the aforesaid principle in several of its Provisions pertaining to the system of courts. The main purpose of adopting this Principle has been to secure the performance of a sacred duty which the constitution has entrusted to the Judiciary. For example, Part III of the constitution guarantees certain Fundamental rights to the people of India. It empowers the courts to declare a law enacted by the Legislature as void, or an action of the Administrative Agency as invalid. The court sits as an arbiter in regard to distribution of legislative, administrative and financial powers between the union and the states.

Independence of Judiciary has two aspects; one regarding independence of the individual judges in regard to their nature of office and the other in regard to the independence of judges in the exercise of their powers and performance of their functions. The constitution of India has adopted a system of impartial Judiciary in which both these aspects are duly incorporated.
The Provisions of the constitution dealing with the independence of the three strata of courts may be discussed as follows:

(a) constitutional Provisions designed to secure independence of union Judiciary:

One of the Principles of independence of Judiciary is that the applicants for judicial post must have ability and integrity. They should be well trained in law and well versed in various aspects of its applications. The selection of judges is made without considering factors such as race of the candidate, colour of his/her skin, language or religion of the candidate, political affiliation of the candidate or his/her genealogy, wealth status, or parentage. Under article 124 of the constitution, a person to be eligible for appointment as a judge of the supreme court, must be one who is a citizen of India and has been for at least ten years a judge of the highcourt or has been for at least ten years an advocate of a highcourt.

By prescribing the requisite qualifications in the constitution itself all other considerations which are anathema to the concept of judicial independence have been brushed aside. More particularly political leanings are sought to be eliminated in the matter of judicial appointments.

Under article 124 of the constitution a judge of the supreme court is appointed by the President of India after consultation with such of the judges of the supreme court and of the highcourts in the states as the President may deem necessary for the purpose. Selection. Although the power of appointment is an Executive power, the President is not free to exercise the same by himself, at his discretion. Consultation by him with the authorities specified in the constitution is mandatory and this is designed to protect the institution form political influence had save it from elements which are subversive to the concept of independence.

A judge of the supreme court does not hold office during the pleasure of the President, nor is he a servant of the government... Once appointed he holds office until he completes the age of 65 years which is present limit sanctioned. Removing a supreme courtjudge, is cumbersome and is designed to protect the institution from the grudge or caprice of the politicians.

A retired judge of the supreme court is prohibited, according to clause 7 of article 126 of the constitution form practicing law before any court or authority within the territory of India. It is but natural that the appearance of a supreme courtjudge before the highcourt or any other authority on behalf of any party may affect the freedom of the judge in dealing with the case. Out of regard or out of considerations for the calibre of the retire judge, the highcourtjudgement may feel some kind of influence acting upon his mind in deciding the case. The constitution takes care to prevent this kind of influence being operated on the minds of the judges.
Under article 125 of the constitution the privileges, perquisites and the allowances of a judge once granted cannot be changed to his/her disadvantage. His/her rights in respect of leave or absence or pension cannot be changed to his/her disadvantage after his appointment. The salary fixed by the constitution can be increased but cannot be reduced after the appointment except when there is acute financial crisis and when a similar measure is adopted in respect of other persons employed in the service of the state.

The salaries of the supreme court judges are charged upon the Consolidated Fund of India which means that they are not subject to debate and vote in Lok Sabha.

Further, under article 146 of the constitution of India appointment of officers and servants of the supreme court are made by the Chief Justice of India he exercises control over such appointments. The supreme court can have its own establishment to carry on its internal affairs. The salaries and allowances of the officers and servants of the court are charged on the Consolidated Fund of India directly and the sanction of the house is not necessary.

SECTION B – PRINCIPLES FORMULATED BY THE COURTS THROUGH IT’S INTERPRETATION OF RELEVANT LAWS:

I. Protection to life and personal Liberty

In India, the scope of the important right in relation to life and liberty has received a wider interpretation by the courts.

In Maneka Gandhi v. union of India, the supreme court had appointed a constitution Bench comprising seven judges. Viz. M.Hamidullah Beg, Chandrachud Y.V., Bhagwati P.N., Krishna Ayer V.R., Untwalia N.L., Fazal Ali S.M., Kailasam P.S.

While interpreting the concept of “Liberty” in article 21 the majority judges widened the ambit of liberty enshrined in article 21 saying that liberty includes freedom of locomotion and travel within the country as well travel abroad. The Majority judges said the liberty in article 21 comprises of freedoms given in article 19 plus the myriad remaining freedoms not mentioned in article 19.

right to life and right to liberty mentioned in article are not restrict to mere body of the human being but, it include within its condition that is right to live with human dignity. Expressing the some view in detail the court in Francis coralline V/S unian tertiary Delhi, set that right to life is not restricted just like animal in existence. It is desired that it is something more than just physical
existence as human being. The right to life is not restricted to the faculty or limb through which human life is enjoyed or inner soul communicate with the outside world but also includes the right to live with human dignity and all attributes going along with it, namely, the necessities of reading, writing and expressing ourselves in diverse forms, freely moving about and mixing and mingling with fellow human beings.

2. The right to in relation of the information of being arrested:

article 3 of the declaration of human rights has provided that every human being has the right of survival and right to personal freedoms. Every human being has right to humandignity and while he is taken in to custody by any government agency his family members must be informed of his /her whereabouts. The human being taken in to custody of the government agency must explain the reason of his custody and allow him to engage a lawyer of his choice.

In Madhu Limaye’s case the supreme court held that the requirements of clause 1 of article 22 are meant to afford the earliest opportunity to the arrested person to remove any mistake, misapprehension or misunderstanding in the minds of the arresting authority and also to know exactly what the accusation against him is so that he can exercise the second right, namely of consulting a legal practitioner of his choice and to be defended by him.

The right to be produced before the nearest magistrate:

article 21(2) of the constitution of India says an individual held in detention by agency of the government must be taken to a magistrate for sanction of custody within one full day of such detention plus any time of journey to a magistrate’s office or residence.

Right against Illegal Arrest and Detention:

In Public Interest Litigation writ petition D.K. Basu and Ashok K. Johari v. state of West Bengal 1996 the supreme court laid down certain basic ‘requirements’ to be followed in all cases of arrest or detention till legal provisions are made in that behalf as a measure to prevent custodial deaths and custodial violence.

D.K. Basu Executive Chairman, legal aidservices West Bengal wrote a letter to the Chief Justice of supreme court pointing to the newspaper articles in Daily Telegraph dated 20,21
and 22 July 1986 and 17 August 1986 in Indian Express upon the socio-political evil of high number of deaths in police custody in India and demanded to declare “custody jurisprudence” as a guideline to prevent deaths in police custody. The Bench of Justice Kuldip Singh and Justice Dr. A.S. Anand admitted both the letters as a single writ petition. In its counter the state of West Bengal branded the letters as misconceived. The Bench took a serious view of lock up deaths and declared the law (made by court) as follows

1. “The agents of government taking in to detention for questioning any individual must display his/her name and his official post. The particulars of agents of the government with details of post and department must be recorded so as to reveal or retrieve such record on demand.

2. That the agents of government detaining any person must make a memorandum stating time of taking in to detention such individual with minimum one witness signing such memorandum. The witness must be necessarily a family member of detainee or any respectable person of the community to the act of taking in to detention. The memorandum of detention must bear signature of the detainee and the witness with the date and time.

3. A individual taken as detainee by government agency which may be police, CBI or any authority must see that at least one relative or person interested in the welfare of the detainee is being informed of detention place and time as a safeguard against torture etc.

4. If the detainee lives far off from the place of detention then the government agency taking in to detention such detainee must take names and addresses from detainee of any friend or relative who must be communicated of detainee’s detention within 8-12 hours by any mode available.

5. The detainee must be given knowledge that he has right to have communicated to his family members or one of the friends interested in his /her welfare about his /her confinement immediately after such confinement.

6. The fact of detention must be immediately entered in a register which must be kept for record. The record must contain the names of family members or any friend who have been communicated about such confinement of the individual.

7. The person detained must be examined by a competent doctor about his
condition and any injuries on the body at the time of taking that person in to custody must be recorded in the memorandum of inspection. This memorandum must bear the signature of agent of government who gives effect to detention. The memorandum of medical examination must be signed by the detainee also. Copy of inspection memorandum must be given to detainee.

8. The detainee must be taken to any government doctor or any other qualified doctor who is on the list of government after expiry of each period of full two days (48 hours) and such record has to be kept by officer detaining the person.

9. Memoranda described in 1 to 8 above must copied and sent to the magistrate.

10. The detainee must be allowed to meet consult his lawyer during questioning at any place where the agency of government wants to do questioning.

11. A centralized control room must be there which all arrestig detaining agencies could connect to. Any fresh arrest or detention of any person must be communicated to that centralized control room. The detention of any person or persons must also be displayed on notice board conspicuously.

3. Right against Detention beyond Twenty Four Hours:

According to the provisions of article 22 of the constitution a person arrested or detained in custody by police would have to be taken to magistrate within full two days (24 hours) to validate detention by a judicial authority. This is not a proper and enough safeguard and it does not insulate police from doing excesses. Malegaon Bomb Blast accused Pragya Singh Thakur who has been in jail as under-trial for last five years has been telling the press that she was arrested much before the actual entry made in station diary but entry was made much later. Ms.Pragya Thakur was kept in custody and also interrogated in unauthorized manner for several days. The judicialmagistrates generally do not ask the arrestee whether his relatives and dependants have been informed, whether lawyer has been given, whether he/she has been told by police that right to remain silent is one of his/her right. Miranda rights (Miranda v. Arizona U.S. 1966) of the accused remain on paper and have never become a reality for thousands of accused who face arrest everyday in India. This means that if there is necessity of detention beyond twenty-four hours it is only possible on the authority of a judicial officer.
The expression ‘arrest and detention’ does not apply to a person arrested under a warrant issued by a court on a criminal or a quasi-criminal complaint or under security proceedings.

article 22 is designed to give protection against the act of the Executive or an order of non-judicial authorities and applies to a person who has been accused of a crime or an offence of criminal or quasi-criminal nature or some act prejudicial to the state or public authorities.

4. The right to Consult a lawyer:

article 22(1) of the constitution says, “No person who is arrested shall be detained in custody without being informed as soon as may not be of the grounds of such arrest, nor shall he be denied the right to consult and to be defended by a legal practitioner of his choice.

5. The right to legal aid:

article 14 of the universal convention 1966 tells about presumption of innocence until completion of trial. No one can be presumed guilty as soon as accused and charged of a crime. Before adjudication and conviction nobody can be presumed guilty. The covenant further tells that legal assistance has to be provided to any person who does not have or cannot appoint his own lawyer to defend him.

In Sheela Barse v. state of Maharashtra the Supreme Court said, “It is the constitution has given right to every persons who is accused, who because of poverty cannot hire an advocate and obtain legal service. The state is under a duty to provide a free legal aid and assistance if the circumstances of the case so require…”

7. Right to Speedy Trial:

article 9, Clause 3 of the international covenant on civil & political rights, 1966 says, The person detained has to be taken to magistrate and the trial has to be started immediately. In spite of such law made by courts the adjudication sloths. Thousands are languishing in hundreds of jails
in India as under-trials and their trial for one reason or another has come to a standstill. The law about speedy trial made by the supreme court and the treaties regarding speedy trial based on humanitarian grounds are ignored by trial judges and there is no actual monitoring.

In A.R. Antulay v. R.S. Nayak the supreme court, upon a review of several decisions of the supreme court of the United states of America and full Bench of the supreme court of India, expressly affirmed the principles of speedy trial enunciated earlier in different cases.

In Hussinara Khatoon v. state of Bihar the supreme court held that a procedure which does not make available legal services to an accused person who is too poor to afford a lawyer and who would therefore have to go through the trial without legal assistance, cannot possibly be regarded as ‘just, fair and reasonable’. It is an essential ingredient of just, fair and reasonable procedure to a prisoner who is to seek his liberation through the court’s process that he should have legal services available to him.

The state cannot avoid its constitutional obligation to provide speedy trial to the accused by pleading financial or administrative inability. It is the constitutional right of every accused person who is unable to engage a lawyer and secure legal services on account of reasons such as poverty, indigence or in communicate do situation to have free legal services provided to him by the state.

In the case: Sheela Barse v. state of Maharashtra, one Mrs. Sheela Barse, a journalism of repute complained of custodial violence to women prisoners while confined in police lock up in the city of Bombay. The petitioner took interview of 15 women prisoners in Bombay Central Jail with the permission of the Inspector General of Prisons and five of them told to have been assaulted in police lock up. The supreme court gave the following guidelines to be observed for protection of constitutional rights of women prisoners:

i) Women suspects and men suspects should not be kept in a single room or single enclosure but they have to be locked up separately. The entrance the toilet facility must be separate for female detainees. Women suspects should invariably be guarded by female constables;

ii) Questioning of female suspects must be done exclusively by female officers or at least one female officer/ constable must be present during such questioning.

iii) If any individual accused of any offence is detained and confined then as soon as he/she is confined, the legal aid committee must be informed so that if detained person is poor and
wants legal assistance then such legal assistance should be available to him/her.

iv) The District & Sessions judge must visit without notice all the lock ups in the city and the district to ascertain what conditions prevail in lock ups and if any detainee in the lock has any complaint about inhuman treatment meted out to him/her then cognizance must be taken by the district judge. Detained persons thus have a chance to complain about the bad conditions in custody and take up the matter through the district judge with the commissioner of Police or Home Department or Chief Justice of the high court;

v) The judge who hears the bail application or grants custody must ask the accused if he was tortured in lock up and if he has any complaint and if the accused wants medical examination by a competent doctor as provided under Section 54 of the code of Criminal Procedure.

vi) right to Compensation for Violation of Fundamental rights:

When the constitutional right of personal liberty is invaded, the invasion is not washed away by his being set free. In appropriate cases the supreme court has jurisdiction to award monetary compensation by way of exemplary costs or otherwise. In a judgment of far reaching importance, in Rudul Shah v. state of Bihar, the supreme court has laid down the above ruling and directed the Bihar government to pay ‘compensation’ of Rs. 30,000/ to Rudul Shah who has to remain in Jail 14 years even after his acquittal because of the irresponsible behaviour of the state government Officers.

The principles evolved by the supreme court in RudulSah’s case was followed in Sebastian M. Hongray v. union of Indian, Bhim Singh v. state of J. & K. and Saheli, a Women’s Resources Centre v. commissioner of Police, Delhi, Police Headquarters. Yet another case of great significance was the one decided by the supreme court in 1993 in which there was a reference to the emerging principle in international law and recognition to the need for enforcing the remedy of compensation in writ jurisdiction under the principles of public law.

In People’s union for Democratic rights v. Police commissioner, Delhi Police Headquarter, a labourer was taken to the Police Station. He was severely beaten and ultimately succumbed to the injuries. It was held that state was liable to pay compensation and accordingly directed the government to pay Rs. 75,000/ as compensation to the family of the deceased. In state of Maharashtra v. Ravikant S. Patil, many atrocities were. Committed on the prisoner. He was suspected to be involved in a murder case. The Bombay high court held that handcuffing and parading of the petitioner was unwarranted and violative of art. 21 and directed the Inspector of Police who was responsible for this to pay Rs. 10,000/ by way of compensation. It also directed that this fact of violation of art.21 should also be entered in his service record. The supreme court
upheld the decision of the highcourt directing payment of compensation but held that the Police Officer was not personally liable as he acted as an Official.