CHAPTER III

PROTECTION IN RESPECT OF CONVICTION OF OFFENCES

A. Genesis of Fundamental Rights

"The human person possesses right because of the very fact it is a person" and accordingly "he has the right to be respected."\(^1\) The idea of basic rights and its incorporation in the Constitution of India is said to be the legacy of the British rule over India.\(^2\) Fundamental rights incorporated in part III of the Constitution of India are the embodiment of aspirations and high ideals of the people for constitutional recognition of civil rights and liberties. It is not that right did not exist before this as has been rightly pointed out by the Supreme Court in *Golakh Nath v. State Of Punjab*\(^3\) that "Fundamental rights are the modern name for what have been traditionally known as "natural rights." But after the enforcement of Constitution they have been guaranteed as inalienable rights for securing which the state machinery could be taken to task.

In the primitive period man lived as an animal. In the process of evolution he formed himself into groups and the idea of possession gained importance. Gradually, authority was recognised and state came into being. Man subjected himself to the authority of state and his possession was protected. As time passed, law was diversified into many branches. With the advancement of knowledge man became more civilized and the laws were shaped accordingly. Man subjected himself to the authority of the State and in turn the State became liable to secure peace and security to an individual and to protect his interests. Hence it became an obligatory duty of the State to ensure basic or natural or fundamental rights of an individual.

The Constitution of India, when placed against the background of the Constitutions of the U.S.A., Australia and Canada, would make a seeming appearance of drawing largely on

---

\(^1\) Jacques Maritain, *The Rights of Man* 37(1944).
\(^3\) AIR 1967 SC 1643, 1656.
the experiences of those Constitutions and is devoid of anything indigenous in it. This would for the most part be attributed to the fact that “federalism in its modern form is of recent growth, since the American Revolution, and America has furnished the example to all the later federations. There is a strong family resemblance between the several federations and that each other Constitution draw upon and profited by the experience and working of the earlier federal Constitutions of the world.⁴

One of the most important aspects of the British Indian common law was that it did not make any distinction between different rights in respect of the extent of their protection. This feature gave to the right to personal liberty a pivotal position and only if person liberty i.e. freedom of the person persisted could he exercise his rights. As Ivor Jennings has summed up the situation by remarking that right to personal liberty is the genus and all the other positive rights are the species.⁵

For our study, dealing with the right of the accused the fundamental rights which are available to a person accused of an offence are of relevance. Article 20 deals with this right which is available for the so called ‘accused’ person. This Article is divided into three clauses dealing with three different safeguards against arbitrary action against an individual, affecting his life and personal liberty. These are:

(A) Right against ex post facto laws
(B) Right against double jeopardy
(C) Right against self-incrimination.

B. Right against Ex post facto Laws

The values and morals of the society keep on changing. When man lived in primitive age law of mighty prevailed. A person who was stronger had an upper hand. Gradually authority was recognized and state come into being. Man subjected himself to the

authority of state and his possession was protected. The state made rules which man was
supposed to adhere to so that there could be a sense of security among fellow citizens.
Hence the most important thing was that a man should know before hand as to which
conduct or action is not permitted or is not criminal in nature, more so when punishment
or penalties are involved. Crime is a social and economic phenomenon and is as old as
human society. It is also known as a ‘living concept’.

The ‘living concept’ of crime is dependent upon the social evolution of the human
beings all over the world. Thus conduct varies from person to person. Conduct which is
accepted in one society may be punishable in the other depending on the socio-religious
and political feelings of that society. Hence a person must know as to whether his actions
are criminal so as to determine mensrea which is an essential element of crime. This is
the basis of the rule against ex post facto laws contained in section 20(s)(1) of the
Constitution of India.

Law is not static but is a flowing stream and there are cases when a conduct may not be
wrong at a particular time but due to change in circumstances as a result of social and
political change a need may be felt to declare that conduct as criminal. Once it becomes
a criminal act the obvious outcome is that it would be meted by a punishment. Now to
punish a person guilty of committing a criminal act is obvious but to punish a person
guilty of an act which was not criminal when he committed it is not only ethically wrong
but is against the principles of natural justice.

Article 20(1) enacts certain fundamental principles in criminal jurisprudence dealing with
right against ex post facto laws which checks this phenomenon. The characteristic of a
law is that it prescribes a rule of conduct by which persons are to govern themselves in
respect of their civil rights, and are warned in advance of the penalties they may incur
under the criminal law. This article is confined to penal legislation and has no
application to legislation which is related to civil action. Article 20(1) states that no

6 V.P.Srivastava, “The Protection of Human Rights in Criminal Proceedings in India” in Crime, Justice and
People of India 147 (1996).
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, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence.

Main ingredients:
(1) Conviction is barred by a law which makes an action done before the passing of the law criminal and which was innocent when done.
(2) A person cannot be convicted under a law that aggravates a crime i.e. makes it greater than it was when committed.
(3) The punishment should be one that was annexed to the crime when committed and not a greater punishment.
(4) Legal rules of evidence to remain the same as were required at the time of the commission of the offence.

However the prohibition against ex post facto laws: (1) does not apply against retrospective laws which are advantageous to the accused e.g. deduction of punishment (2) does not apply against laws which without affecting the substantial procedure merely alters the practice or procedure (3) does not invalidate a statute permitting punishment to be enhanced on proof of a previous conviction even though the previous conviction took place before the passing of the statute (4) does not apply to deportation or extradition proceedings since it is not a criminal punishment, (5) does not invalidate a statute declaring that no person after conviction of a felony shall carry on a business, even though the person was convicted before the passage of the law (6) does not apply to detention of the insane or to forfeiture for non-payment of taxes or barring a person from public employment or canceling his naturalization.

Prohibition against retrospective laws

---

Human rights must essentially be directed for mass good and welfare. Hence legislative process has become an important full time assignment in all democracies including India. Law is being extensively used not only for regulating social change but also for eradication of socio economic evil and the after effects of industrial changes. A sovereign legislature has the power to enact prospective as well as retrospective laws. But article 20 sets two limitations upon the law making power of every legislative authority in India as regards retrospective criminal legislation. It prohibits:

(1) the making of *ex post facto* law, *i.e.* making an act a crime for the first time and then making that law retrospective.

(2) The infliction of a penalty greater than that which might have been inflicted under the law which was in force when the act was committed.

(3) The prohibition of this law clause is not merely against the passing of such retroactive law but also against conviction under that law.

a) Position in other Constitutions

Article 20(1) of the Indian Constitution deals with *ex post facto* laws though unlike the American Constitution this expression has not been used. A sovereign legislature has power to legislate retrospectively, though philosophical writers have denied that any legislative ought to have such a power. As retrospective law would ordinarily work great injustice, English Judges have leaned against a construction which would make the law *ex post facto*. But British Parliament can legislate an *ex post facto* law. On the contrary, art. 1 s.9, cl. 3 and s. 10 of the U.S. Constitution provides that “No bill of attainder or *ex post facto* law shall be passed” and “No State shall ..... pass any bill of attainder, *ex post facto* law...” When the American Constitution was adopted it was thought that *ex post facto* law includes all retrospective laws, or laws governing

---

9 See, Sedgwick, Statutory and Constitutional Law 160(1874).
or controlling past transactions of a civil and criminal nature. However, in *Calder v. Bull* 10 Chase, J., said:

Every *ex post facto* law must necessarily be retrospective; but every retrospective law is not an *ex post facto* law. The former only are prohibited. Every law that takes away or impairs rights vested agreeably to existing laws is retrospective and is generally unjust and may be oppressive, it is a good general rule that a law should have no retrospect; but there are cases in which the laws may justly and for the benefit of community, and also of individuals, relate to a time antecedent to their commencement; as statutes of oblivion or of pardon. They are certainly retrospective, and literally both concerning and after the facts committed. But I do not consider any law *ex post facto* within the prohibition (of Art. I, S. 9, cl 3), that mollifies the rigour of the criminal law, but only those that create and aggravate the crime or increase the punishment or change the rules of evidence for the purpose of conviction... There is a great and apparent difference between making an unlawful act lawful and the making an innocent action criminal and punishing it as a crime.

**b) Application of article 20 (1)**

The principle enunciated in *Calder v. Bull* has been adopted by the Supreme Court of India as it said in *Ratan Lal v. Punjab*: 11

---

10 (1798) 3 Dall. 386, 391, 1 L. ed. 648, 650.
11 (1964) 7 SCR 676.
Every law that takes away or impairs a vested right is retrospective. Every *ex post facto* which only mollifies the rigour of a criminal law does not fall within the said prohibition (of Article 20).

In the leading case of *Shiv Bahadur Singh v. State of U.P.*,\(^{12}\) it was clarified that what was prohibited under article 20(1) is a conviction or sentence under an *ex post facto* law, and that to the substantive law. A change of procedure is not guaranteed against. Therefore, a trial can be held under procedure which is different from that which existed at the time of the commission of the offence provided the substantive law remains the same.

**i) Meaning of 'law in force':** Article 372 (3) expl. 1, shows that “a law in force” means an enacted law even if it, or parts of it, are not in operation either at all or in particular areas. It is clear that such a law is not a law in force within the meaning of article 20 for, if the law is not in operation it cannot constitute any act a crime during the time it is not in force. In *Shiv Bahadur Singh’s* case it was held that “a law in force’ must be taken to relate not to a law “deemed to be in force’ and thus brought into force, but the law factually in operation at the time or, what may be called the existing law. These observations, taken by themselves, may be interpreted to mean that wherever a law is “deemed to be in force” it is not actually in force.

But such a reading of the judgment would be incorrect for it says that the phrase ‘law in force’ as used in article 20 must be understood in its natural sense as being the law in fact in existence and in operation at the time of the commission of the offence as distinct from the law ‘deemed’ to have become operative by virtue of the power of the legislature to pass retrospective laws. This is clearly right, for to allow retrospective laws to be treated as laws in force at the time the offence was committed

\(^{12}\) AIR 1953 SC 394.
would nullify article 20(1). However all deeming provisions are not retrospective because section 24 of the General Clauses Act provides that:

Where any Central Act or Regulation is after the commencement of this Act repeated and re-enacted with or without modification, then unless it is otherwise expressly provided,...any rule, form or bye law issued under the repealed Act or Regulation, shall, so far as it is not inconsistent with the provisions re-enacted, continue in force and be deemed to have been made or issued under the provisions so re-enacted until and unless it is superseded by any... rule formed or by law made or issued under the provisions so re-enacted.

The Indian Mines Act vouchsafes for the above rule. Since the Indian Mines Act of 1923 was repealed and re-enacted in 1952, but the rules and regulations framed thereunder in 1926 remained in force, then, for the time being: this gave rise to a confusion that the prosecutions under the new Act read with old rules and regulations were not sustainable without contravening article 20(1). It was held that such rules are actually in force, and the deeming provision is designed to prevent their ceasing to be in force by reason of the repeal of the law under which they were made. Thus it was held that the Multifarious Mines Regulation, 1926, were laws in force within the meaning of article 20(1) since they were kept alive after the repeal of the Mines Act, 1923, by section 24 of the General Clauses Act.  

The Supreme Court decisions in Sajjan Singh v. State of Punjab, C.D.S Swami v. State and Surajpal Singh v. State of U.P have held that section 5(3) of the

---

13 H.M Seervai, supra note 7 at 756-757.
15 AIR 1964 SC 464.
16 AIR 1960 SC 7.
17 AIR 1961 SC 583.
Prevention of Corruption Act, 1948, did not create a new offence. What it did was to prescribe rule of evidence for proving an offence of criminal misconduct as defined in section 5(1) for which an accused person was already under trial.

In Ganendra Kumar v. Narayan Chander, it was held that once a person has been prosecuted under the Calcutta Municipal Act, 1923, a greater penalty under the new Calcutta Municipal Act was not justified having regard to article 20(1).

In Kalpnath Rai v. State (Through CBI) certain persons were convicted under section 3(5) of TADA in addition to other offences. Section 3(5) provided that any person who is a member of a terrorist's gang or a terrorist's organisation, which is involved in terrorist act, shall be punishable with specified imprisonment and shall also be liable to fine. The said sub-section 3(5) was inserted in TADA by Act 43 of 1993, which came into force on 25.5. 1993. K.T. Thomas, J., speaking for the court, held that for using section 3(5) against any person two conditions must be satisfied. First that the accused should have been a member of a “terrorist gang” or “terrorist organisation” after 23.5.1993. Secondly, the said gang or organization should have involved in terrorist acts subsequent to 23. 5. 1993. Unless both postulates exist together, section 3(5) cannot be used against any person. The protection against ex-post facto law was reiterated in State v. Gian Singh, the appellant was convicted under section 3(2)(1) of the Terrorist and Disruptive Activities (Prevention) Act, 1985 (TADA Act. 1985) for causing death of Sant Longowal and was awarded death penalty because that was the only sentence which could be awarded under the said provision. The TADA Act of 1985 remained in force for two years but the prosecution under section 3 (2) (I) continued by virtue of section 1(3). Meanwhile, Terrorist and Disruptive Activities (Prevention) Act, 1987 (TADA Act, 1987) covering the same area and prescribing punishment for identical offences came into force, section 3(2)(I) of the TADA Act, 1987 reduced the harshness of the

18 AIR 1953 Cal. 562.
corresponding provision of the previous TADA Act of 1985 by providing an alternative punishment for life in place of death sentence. Section 25 of the TADA Act of 1987 gave an over-riding effect to the provisions of this Act. On facts of the case and the facts that the accused had already undergone imprisonment for 14 years, the Supreme Court speaking through Thomas, J., affirmed the conviction for offence under section 3 (1) of the TADA Act of 1985 but the sentence under section 3 (2) there of was altered to imprisonment for life. The Supreme Court also clarified that article 20 (1) of the Constitution was no bar in extending the benefit of the TADA Act of 1987.22

C. Right against Double Jeopardy

Article 20(2) of the Indian Constitution embodies the fundamental principle that no person shall be prosecuted and punished for the same offence more than once. The common law rule of nemo debit vis vexari meaning no man should be put twice in peril for the same offence is embodied in this clause. The clause that originally stood in the Draft Constitution was “no person shall be punished for the same offence more than once” – Mr. T.T.Krishnamachari moved an amendment for the addition of the words ‘prosecuted and punishment’ preceding the word ‘punished’ in the draft clause. As stated by him this amendment was for the reason that “… this (i.e. draft clause) might probably affect cases, whereas in the case of an official of Government who has been dealt with departmentally and punishment has been inflicted, he cannot again be prosecuted and punished if he had committed a criminal offence or per contra, if a Government official had been prosecuted and sentenced to imprisonment or fine by a court, it might preclude the Government from taking disciplinary action against him.” Hence the word ‘prosecuted and punishment’.23

Article 20(2) states that:

23 For more details see CAD VII at 795.
No person shall be prosecuted and punished for the same offence more than once.

The object of this clause is to protect an individual from being subjected to prosecution and conviction more than once for the same offence.

a) Autrefois convict & autrefois acquit

It is settled by the Supreme Court that there should be not only a 'prosecution' but also a 'punishment' in the first instance in order to operate as a bar to a second prosecution and punishment for the same offence. In other words, the constitutional guarantee embodies the principle only of _autrefois convict_ and does not include the principle of _autrefois acquit_. According to the Supreme Court 'and' in the clause is used in the conjunctive and not in disjunctive sense.  

The conditions for the application of the clause are:

1. A previous proceeding must be there before a court of law or a judicial tribunal of competent jurisdiction.
2. The previous proceeding should have resulted in 'prosecution' of the accused.
3. The conviction (or acquittal) in the previous proceeding must be in force at the time of the second trial.
4. It follows that the prosecution must be valid and not null and void or abortive.
5. The 'offence' which is the subject matter of the second proceeding must be the same as that of the first proceeding, for which he was 'prosecuted and punished'.

---

27 See, supra note 25.
28 See supra note 26.
The ‘offence’ of the accused must be an offence as defined in S. 3(38) of the
General Clause Act, that is to say ‘an act or omission made punishable by any law
for the time being in force.’

The subsequent proceeding must be a fresh proceeding where the accused is, for
the second time, sought to be ‘prosecuted and punished’ for the same offence.
Hence, the clause has no application where the subsequent proceeding is a mere
continuation of the previous proceeding, e.g. in the case of an appeal against
acquittal, or against conviction. Nor does it bar a retrial, on appeal, with a
direction to reframe the charges, provided the retrial is confined to the same
offence or offences for which he had been tried at the original trial.

For the same reason, the clause does not prohibit a provision for two penalties for
the same offence in the same proceeding, without involving a double prosecution
and conviction or conviction of one charge after acquittal of another, at the same
trial.

b) Prosecution and punishment
The word “punishment” is not defined in the General Clauses Act. But punishment
follows prosecution and therefore the word “punishment” must be restricted to the sense
of a sentence which could be imposed after the accused is convicted at the end of
prosecution. The penalty imposed after a disciplinary proceeding on a government
servant would not be a punishment, in as much as it does not follow a prosecution. The
word “prosecution” is well known in criminal procedure as meaning prosecution in a
criminal court. It would follow that the proceedings under the Customs Act for the
imposition of penalty or fine and for the confiscation of goods would not be a
prosecution, and therefore criminal prosecution after these proceedings, would not be
barred by article. 20(2). Punishment under the Contempt of Courts Act by the High
Court under inherent jurisdiction is also not ‘punishment’ for the purposes of article 20(2)

---

of Bombay, AIR 1953 SC 325.
35 Ibid.
as was settled in *Sukhdev Singh v. Teja Singh*\(^38\) Hence, punishment means a judicial penalty and would not include other penalties, such as –

i) disciplinary action in the case of public servant\(^39\) including penalty imposed under section 22 of the Public Servants (Inquiries) Act, 1850;\(^40\) or

ii) action against a lawyer under the Legal Practitioners Act;\(^41\) or

iii) penalties for jail offence under disciplinary rules of jails or under the Prisons Act;\(^42\) or

iv) penalties under section III of the Customs Act, 1962;\(^43\)

v) penalties prescribed by Rules of a Legislative for breach of privileges;\(^44\) or

vi) binding down for good behaviour under section 110\(^45\) or taking security under section 107 of the Criminal Procedure Code.\(^46\)

vii) Penalty under section 23(1)(a) of the Foreign Exchange Regulation Act, 1947.\(^47\)

c) Same offence

Article 20(2) bars double punishment for the same offence. But where the same act constitutes offences under different laws or different sections of the same Act. In *Directorate of Enforcement v. M.C.T.M. Corp. Pvt. Ltd.*\(^48\) the Supreme Court came to the conclusion that the proceedings under section 23(1) (a) of Foreign Exchange Regulation Act, 1947 (FERA) are ‘adjudicatory’ in nature and character and not “criminal proceedings”. The officers of the Enforcement Directorate and other administrative authorities are expressly empowered by the Act to “adjudicate” only. They perform quasi-judicial functions and do not act as ‘courts’ but only as ‘administrators’ and ‘adjudicators’. They impose ‘penalty’ for the breach of the “civil obligation” laid down under the Act and do not impose any ‘sentence’ for the

---


\(^38\) AIR 1954 SC 186, paras 2 and 3.


\(^41\) *Re. Devagraha*, AIR 1952 Mad. 725.

\(^42\) *Bapraiah, in re*, AIR 1970 A.P. 47.


\(^44\) *Raj Narain v. Atmaram* AIR 1954 All. 319.


\(^46\) *Subeg v. Emp.*, AIR 1942 Lah. 84.


\(^48\) Ibid.
commission of an offence. Therefore, even after an adjudication by the authorities and
levy of penalty under section 23(1) (a) of FERA the defaulter can still be tried and
punished for the commission of an offence under the penal law, where the act of the
defaulter also amounts to an offence under the penal law and the bar under article 20(2)
of the Constitution would not be attracted.

The protection of article 20(2) of the Constitution is also not available in those cases
where the ingredients of offences in the previous and subsequent trial are distinct. Thus,
where the appellants were tried but acquitted for offences under section 409 of IPC and
section 5 of the Prevention of Corruption Act, 1948, the subsequent trial under section
135 of the Customs Act, 1962 (after obtaining the requisite sanction) and section 85 of
the Gold Control Act, 1968 ending in conviction was held valid and the protection of
double jeopardy under section 403 of Cr.PC of 1898 and article 20(3) of the Constitution
was not available.49

In State v. Nalini50 Rajiv Gandhi, the former Prime Minister, was assassinated by a
‘human bomb’. Twenty six persons were charge-sheeted as members of the conspiracy.
The special judge found the 26 appellants guilty of various offences the main ones being
section 302r/w section 120-B IPC. All of them were convicted of the offences and
sentenced to death, which was confirmed by the High Court. Hence the appeal against
the High Court order. Dealing with the case against A-16 and A-17 by counsel for the
appellants, it was stated that they were tried in another criminal case for offences under
section 3(3) 3(4) and 5 of TADA, section 5 of the Explosive Substances Act and section
3(1) of Arms Act. They were convicted, sentenced to imprisonment and underwent the
punishment period as a consequence of that trial. It was contended by counsel that they
were not liable to be tried again for the said offences since the facts were the same. The
Court, as regards this contention, held as follows:

When an offence has already been the subject of judicial adjudication, whether it ended in an acquittal or conviction, it is a negation of criminal justice to allow repetition of the adjudication in a separate trial on the same set of facts.

The principle which is sought to be incorporated into section 300 of Cr.P.C. is that no man should be vexed with more than one trial for offences arising out of identical acts committed by him.

Though article 20(2) of the Constitution of India embodies a protection against a second trial after a trial and conviction of the same offence, the ambit of the clause is narrower than the protection afforded by section 300 of the Cr.P.C. While the clause embodies the principle of *autrefois convict*, section 300 of the Cr.P.C. combines both *autrefois convict* and *autrefois acquit*.

Section 300 has widened its protective wings by debarring a second trial against the same accused on the same facts even for a different offence, if a different charge against him for such offence could have been made under Section 221(1) of the Code or he could have been convicted for such other offence under section 221(2) of the Code.

The Court held that it had no doubt that the offence indicated above were covered by the first trial and therefore the prosecution was debarred from proceeding against A-16 and A-17 for the aforesaid offences and the conviction and sentence for the above offences were thus set aside.

In *State of Bihar v. Murad Ali Khan*, an SLP was filed by the appellants against the order of the High Court that quashed on order of the judicial magistrate who took cognizance of an offence under section 9(1) read with section 51 of the Wildlife (Protection) Act 1972 against the respondent. The counsel for the respondent contended that the offence of killing an elephant falls within the overlapping areas between section 419 IPC on one hand and section 9(1) read with section 50(1) of the Act on the other and therefore constitute the same offence. The Court held as follows:

---

A protection against a second or multiple punishment for the same offence, technical complexities aside, includes a protection against re-prosecution after acquittal, a protection against re-prosecution after conviction and a protection against double or multiple punishment for the same offence. This protection receives constitutional guarantee under article 20(2).

In order that the prohibition is attracted the same act must constitute an offence under more than one Act. If there are two distinct and separate offences with different ingredients under two different enactments a double punishment is not barred.

The same set of facts, in conceivable cases can constitute offences under two different laws. An act or omission can amount to and constitute an offence under the IPC and at the same time constitute an offence under any other law.

The Court held that in the present case there had been no prior conviction and sentence for offences under section 429 IPC, even assuming that the two offences, one under section 9(1) read with section 50 of the Act and the other under section 429 IPC are substantially the same offence. Hence it was held that the bar of double jeopardy will not operate.

d) More than once

As has been pointed out already, there is no double punishment to attract the operation of the present clause unless there is a fresh judicial proceeding for the same offence or where the consequences following from one act constitutes a separate offence, there is nothing under the Constitution to bar separate trial and punishment. This clause does not bar subsequent trial if the ingredients of the offences in the previous and the subsequent trials are distinct and also where the question of possession of a stain gun was considered but the evidence in that regard was not believed.


In every trial the Court shall:

1. Ensure that no person is prosecuted or punished for the same offence, more than once.

2. Ensure that the accused is not prosecuted and punished for the same offence and for the same set of facts more than once irrespective of whether the accused was acquitted or convicted.

3. Ensure that the same act constitutes an offence under more than one Act. If there are two distinct and separate offences with different ingredients under two different enactments a double punishment is not barred.

e) Position in other Constitutions

The protection provided by article 20(2) to an accused is narrower than that given in American and British laws. The Fifth Amendment of the U.S. Constitution provides that “No person ... shall ... be subject for the same offence to be twice put in jeopardy of life or limb”. This clause protects an individual against more than being subject to double punishments; it is a guarantee against being put to second trial, which commences when a man is charged before a competent tribunal. Hence it protects a defendant in a criminal proceeding both against multiple punishments and repeated prosecution for the same offence.

The protections afforded by double jeopardy clause are implicated only when the accused has actually been placed in jeopardy. Jeopardy connotes risk. A defendant is placed in jeopardy once he is put to trial before the trier of facts, whether the trial be jury or a judge jeopardy normally attaches when the trial commences.
The above provision of the American Constitution is indeed founded on the English Common Law rule nemo debet vis vexari.\(^{59}\) Blackstone referred to “this universal maxim of the common law of England, that no man is to be brought into jeopardy of his life more than once for the same offence.”\(^{60}\) It enables an accused person to enable a plea not only of autrefois convict but also of autrefois acquit:\(^{61}\)

The plea of autrefois convict or autrefois acquit avers that the defendant has been previously convicted or acquitted on a charge for the same offence as that in respect of which he is arraigned … The question for the jury on the issue is whether the defendant has previously been in jeopardy in respect of the charge on which he is arraigned, for the rule of law is that a person must not be put in peril twice for the same offence. The test is whether the former offence and the offence now charged have the same ingredients in the sense that the facts constituting the one are sufficient to justify a conviction of the other not that the facts relief on by the crown are the same in the two trials.

**D. Rights against Self Incrimination**

Magna Carta is the Bible of basic human rights. Clause 39 of the Magna Carta says:

No freeman shall be taken or imprisoned or outlawed or banished or in any way destroyed, nor will be go upon him, nor send upon him, except by legal judgment of his peers or by the law of land

\(^{59}\) R. v. Barron (1914) 2 K.B. 570.  
\(^{60}\) IV B. Comm., 335  
\(^{61}\) R v Miles (1890) 24 O.B.D. 423.
The concept of presumption of innocence of the accused seems to be derivative of the above clause of the Magna Carta and from that doctrine of the presumption of innocence of evidentiary rights of the accused originated. Keeping up with this trend the Indian Constitution embodies the right against self-incrimination in article 20(3). It states:

No person accused of any offence shall be compelled to be a witness against himself.

The expression “accused of any offence” used in article 20(3) has to be understood in the context of the preceding articles 20(1) and 20(2). It has to be understood that the accusation must be the criminal offence against which the guarantee against self-incrimination given by this article is available.

a) Accused of any offence

When does a person become an accused? The decision in Nandini Satpathy v. Dan has now established that even at the stage of the police interrogation by way of an investigation into an offence a person can be an accused. Such a person is entitled to the protection of article 20(3). Hence, the guarantee is available to a person ‘accused of any offence’ and is not necessarily confined to a person against whom prosecution is commenced. Jagannadhadas, J., (for the Court of 8 Judges) in Sharma v. Satishchandra after analyzing the historical background of the guarantee emphasized the words ‘accused of any offence’. As the accusation under the Code of Criminal Procedure is made on filing the First Information Report by the police, the learned Justice held that there is no “...reason to think that the protection in respect of the evidence so procured is confined to what transpires at the trial in the court room. The phrase used in Art. 20(3) is ‘to be a witness’ and not to ‘appear as a witness.... It is available, therefore, to a person against whom a formal accusation relating to the commission of an offence has been levelled.

64 AIR 1978 SC 1025.
65 AIR 1954 SC 380 (304).
which in the normal course may result in prosecution...."66 Thus the protection was extended to a stage prior to the actual prosecution.

b) Compelled
Compulsion is an essential ingredient of this clause.67 The clause has been designed to protect the accused from being compelled by hope or fear to admit facts or deny them. The immunity from self-incrimination is based on the 'presumption of innocence' and so long as the presumption remains as one of the fundamental canons of criminal jurisprudence, evidence against the accused should come from sources other than the accused. The rule casts burden on the prosecution to prove a person guilty and allows the accused to stand by and watch prosecution failing in establishing the charge conclusively and beyond all reasonable doubts.68

The protection against self-incrimination has its origin in the protection against inquisitorial and manifestly unjust methods of interrogating accused person. While the admissions or confessions of the prisoners, when voluntarily made, have always ranked high in the scale of incriminating evidence, if an accused person be asked to explain his apparent connection with a crime under investigation, the case with which the questions put to him may assume an inquisitorial character, the temptation to press the witness unduly to brow-beat him if he be timid or reluctant, to push him to a corner, and to entrap him into fatal contradictions, which is so painfully evident in many of the earlier state trials, ... made the system so odious as to give rise to demand for its total abolition.69

Compulsion may be physical or mental but mental compulsion takes place only "when the mind has been so conditioned by some extraneous process as to render the making of the statement involuntary and thereby extorted.70

---

68 Supra note 2 at 161-162.
70
i) Testimonial Compulsion and the doctrine

In order to avail himself of the protection it is necessary that the person accused must have stood in the character of an accused at the time when he made the statement. It is not enough that he should become an accused, anytime after the statement has been made.\textsuperscript{71} An involuntary statement not extorted by using third degree methods would not be characterized as a testimony by compulsion. Thus:\textsuperscript{72}

An accused person cannot be said to have been compelled to be witness against himself simply because he made a statement while in police custody without anything more...
The mere questioning of an accused person by a police officer, resulting in a voluntary statement, which may ultimately turn out to be incriminatory, is not ‘compulsion’.

Search and seizure and the protection against self-incrimination. In order to give full effect to clause (3) of article 20 the protection may be extended to any compulsory process for production of evidentiary documents reasonably and likely to support the prosecution against an accused person.\textsuperscript{73} Now the moot point is whether the production of documents through the legal process of search and seizure from the custody of an accused hit the constitutional procedure. The Supreme Court had the occasion to discuss this issue in \textit{M.P. Sharma v. Satish Chandra}.\textsuperscript{74} It was held that a search and seizure of documents from the possession of the accused made in pursuance of warrants issued under section 96 (now section 93 of the new Code) of the Code of Criminal Procedure, 1898, was legal and constitutional. It was further held that there was no invasion of the fundamental right of the petitioner guaranteed by article 20(3) of the Constitution consequent upon a legal research and seizure made under section 96 of that Code.

\textsuperscript{71} \textit{State of Bombay v. Kathi Kala Oghad}, id. at 1816-17.
\textsuperscript{72} \textit{Ibid.}
\textsuperscript{73} \textit{Swarnalingam v. Asst. Labour Inspector}, AIR 1956 Mad. 165.
\textsuperscript{74} AIR 1954 SC 300.
c) Witness against himself

An accused cannot ever give evidence on behalf of the prosecution. It is now settled\textsuperscript{75} that the words 'to be a witness' includes oral as well as written testimony. In \textit{Sharma's}\textsuperscript{76} case it was held that a compulsory process for the production of evidentiary documents against a person who has been accused of any offence contravenes article 20(3) of the Constitution, if the documents are reasonably likely to support the prosecution against such person.\textsuperscript{77} But, subsequently by majority in \textit{State of Bombay v. Kathi Kalu}\textsuperscript{78} the proposition has been narrowed down to written statements "conveying his (the accused's) personal knowledge relating to the charge against him." The accused cannot be compelled to produce such a document. However, this protection does not extend to the production of any other document, e.g., a document containing the statements of 'other' persons in his custody\textsuperscript{79} or even a document written by the accused himself which shows his handwriting or states facts which does not convey his personal knowledge relating to the charge against him, or a document which may incriminate some other person.

Similarly, giving of thump impressions, or impressions of palm or foot or fingers or specimen writing or exposing a part of the body by an accused for the purpose of identification may be 'furnishing evidence' in a wider sense but that "could not have been within the contemplation of the Constitution makers for the simple reason that though they have intended to protect an accused person from the hazards of self-incrimination, they could not have intended to put obstacles in the way of efficient and effective investigation into crime and bringing criminals to justice. In other words thereby, a person is not compelled to testify but to make an exhibition of facts. It is identification.. In \textit{Sukhwinder Singh v. Punjab},\textsuperscript{80} the Supreme Court held that directions to the accused to give specimen writings in order to compare the disputed writings with the admitted or

\textsuperscript{75} Ibid.
\textsuperscript{76} Ibid.
\textsuperscript{77} Ibid.
\textsuperscript{78} Supra note 71.
\textsuperscript{79} Many existing laws, e.g., s. 73 of the Evidence Act, ss. 5 and 6 of the Identification of Prisoners Act, 1920, provide for taking of finger prints, specimen writing, signature, measurements and photographs for the purpose of comparison, and it could not be said that the framers of the Constitution were unaware of these laws.
\textsuperscript{80} (1994) 5 SCC 152.
proved writing could only be issued by the court holding enquiry under the Code of Criminal Procedure or the court holding trial of the accused. Failure of the accused to raise objection when called upon to give specimen writing was immaterial if the competent authority did not requisition such specimen writings.81

d) Constitutionality of sections 91 and 93 of Criminal Procedure Code, 1973

Section 91 empowers a court or an officer-in-charge of a police station to issue a summons or written order requiring any ‘person’ to produce a document or thing in his possession. If this is literally interpreted it would offend article 20(3). Hence, the Supreme Court narrowly interpreted the word ‘person’ to exclude the accused, in order to be consistent with the guarantee in article 20(3). While section 91 empowers a court to issue a summons against a person to produce a document or thing, section 93 empowers the Court to issue a warrant for the search or to inspect a place where a document or thing may be found. So that its provisions do not offend article 20(3) it has been held that this section would exclude the ‘accused’ so that this section is constitutionally valid.82 Secondly the warrant under this section does not specify any person whose place may be searched, but empowers the police officer to search any place where the document thing is not known to be in the possession of any person. Hence the section empowers the court to issue a ‘general’ search warrant without specifying the document or thing to be recovered, i.e., for the document or thing to be recovered, i.e., for the purpose of discovering objects, which might involve criminal liability. It is not directed against any person.

e) Positions in other Constitutions

Article 20(3) of the Indian Constitution is fashioned around the similar guarantee in the Vth Amendment of the U.S. Constitution i.e., “No person ... shall be compelled in any criminal case, to be a witness against himself.” The Supreme Court of America has not confined itself to a literal reading of the relevant language but has adopted a broad

construction of its provisions. The Fifth Amendment, by its terms, protects one from being a witness 'against himself'. But the cases hold that the privilege is not limited to the literal language.

_Counselman v. Hitchcock_83 ruled that the provision applies to a witness as well as accused. The right of a witness not to give incriminating answers and the comparable right of an accused both come within Fifth Amendment protection.84

The privilege is not confined to the courtroom. Instead, it should apply in every governmental proceeding, even when it does not involve a case in court or some ancillary judicial agency, such as a grand jury.85 In accord with this view, the Fifth Amendment privilege is applicable in legislative proceedings, such as Congressional committee hearings,86 and in administrative proceedings, such as an investigation by the Interstate Commerce Commission87 or the Office of Price Administration88 or a tax89 or immigration proceeding.90 As summed up by the Supreme Court, the privilege may be asserted in any proceeding, civil or criminal administrative or judicial, investigatory or adjudicatory.91 It not only protects the individual against being called as a witness against himself in a criminal prosecution but also privileges him not to answer official questions put to him in any other proceeding.92 Thus:

(1) The privilege has been held to include not only oral evidence but also documentary evidence which is self-incriminatory.93

82 142 U.S. 547 (1892).
83 See, _United States v. Housing Foundation of America_ 176 F.2d 665, 666 (3d Cir. 1949).
The privilege has been extended to any disclosure, including the production of chattels, sought by legal process against a witness.

The privilege has been used to protect a witness as fully as it does apply to protect a party defendant to a cause of the person accused.\(^4\)

It would be available to all persons including a lawyer,\(^5\) or a police officer.\(^6\)

The privilege extends not only to answers which by themselves support a criminal conviction but also to answers which might furnish a link in the chain of evidence needed to convict the witness for an offence.\(^7\)

Above all, though the Fifth Amendment refers to a ‘criminal case’, it has been held to extend to any proceeding, civil or criminal, ‘wherever the answer might tend to subject to criminal responsibility’. The immunity extends to pre-trial investigation and interrogation.

Unlike Indian law where meaning of documentary evidence has been narrowed down to mean a document “conveying his (accused’s) personal knowledge relating to the charge against him. American guarantee extends to all compelled production save public documents.

The maxim that “no man is bound to accuse himself” was brought forward in England in the 16th century “in the protests of people against the inquisitorial methods of interrogating accused persons adopted by the ecclesiastical courts.”\(^8\) The maxim is now embodied in a statute – the Criminal Evidence Act, 1898, which says that though the accused is competent to be a witness on his own behalf, he cannot be compelled to give evidence against himself. The protection is extended also to witnesses other than the accused on the principle that a witness in any proceeding, civil or criminal, has the privilege of not answering a question on the ground that the answer might make him liable to criminal charge.\(^9\)

\(^4\) McCarthy v. Arndstein (1924) 266 U.S. 34(40).
\(^9\) Ex parte Reynolds, 20 Ch.D. 294; Blunt v. Park Lane Hotel (1942) 2 All. ER 187 (190).
E. Conclusion

The idea of basic rights and its incorporation in the Constitution of India is said to be the legacy of the British rule over India. Fundamental rights incorporated in part III of the Constitution of India, 1950, are the embodiment of aspirations and lofty high ideals of the people for constitutional recognition of civil rights and liberties. Moreover, the adoption of fundamental rights in the Constitution of India was done after studying deeply the constitutional text of America in respect of their Bill of Rights. The awareness regarding human rights has gained considerable importance and the highest judiciary in its various pronouncements has made it clear that an accused is not a rogue to be treated as an outcast merely because a FIR is lodged against him but he has a number of legal and constitutional rights guaranteed to him for his protection.

The Indian Constitution is not prohibitive of legislative competence of its legislatures to pass a retrospective law, but it is, certainly, prohibitive of ex post facto law as stated in article 20(1) of the Constitution. Article 20(1) is double edged as it imposes two restrictions on the retrospective legislative competence of its legislatures. The first restriction is in respect of conviction and punishment of a person for an offence which when committed was not an offence by the law of the state. The second restriction is on the imposition of a greater punishment than that which ought to have been imposed under the existing law on the date of the commission of an offence. However, the provisions of the article do not hit an ameliorative procedural law. Only substantive law comes within the purview of ex post facto laws.

The concept of double jeopardy has been recognized in India by section 26 of the General Clauses Act, 1897, secondly by section 403 of the Code of Criminal Procedure, 1898, now section 300 of the Code of Criminal Procedure, 1973. In addition this right has been guaranteed by clause (2) of article 20 of the Indian Constitution. But this clause is given a very literal and restrictive interpretation in India as opposite to common law countries and United States of America. One explanation to it may be because of the abolition of
The phrase “prosecuted and punished” has been interpreted by the Indian courts to be suffixed by the words courts of law and judicial tribunal only, and not by administrative tribunal functioning judicially. In criminal trials all these precautions of double jeopardy and *ex-post facto* laws are very essential since criminal trials involves conviction and consequently the person is stigmatized and his freedom is threatened.

A person is presumed to be innocent till contrary is proved in the court of law is the general practice on this doctrine is based the principle of immunity from self-incrimination. In the beginning of the Constitution the application of the doctrine was limited to only orally compelled testimony tendered in the court but in *Sharma’s* case its application was extended to the testimonial compulsion obtained not only in court, but also outside the court. It has now been enlarged to cover documentary evidence as well. It is, however, submitted that the rule be made available to a witness in a court or judicial tribunal as it is available in England and America.

It has been rightly said that in India a layman goes to the Court for justice but he gets law but seldom justice. In the realization of this problem the contribution of the Supreme Court and the High Courts has, though been realistic and of a very high order, nevertheless article 20 of the Constitution needs more liberal and more realistic approach in its application (as the American Law on the issue) so that justice is done in the adjudication of law.100

---

100 *Supra* note 2 at 97.