ADVANCED CONSTITUTIONAL LAW

Module PROTECTION IN RESPECT OF CONVICTION FOR OFFENCES (ARTICLE 20)
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1. Introduction

Article 20 of the Constitution appears in the chapter on 'Fundamental Rights' and deals only with the constitutional protections to a person accused and convicted of an offence. These safeguards have been elevated to the pedestal of constitutional rights and replicate the natural justice principles of fair trial in the administration of criminal justice. The protections embodied in Article 20 of the Constitution guarantee protection in certain respects against conviction to a person who is an accused of a criminal offence, by prohibiting-

1. Retrospective criminal legislation, commonly known as ex post facto legislation.
2. Punishment for the same offence more than once or double jeopardy.
3. Compulsion to give self-incriminating evidence.

Realising the significance of these constitutional safeguards, the Constitution of India was amended by the Constitution Forty-fourth Amendment Act, 1978 to the effect that Article 20 cannot be suspended even during a national emergency.

2. Learning Outcome

It is a fundamental right of any person accused of an offence to be entitled to the constitutional protections against application of retrospective criminal legislation,
double jeopardy and compulsion to give self-incriminating evidence. No person can be tried and convicted in violation of these provisions.

3. Protection Against Ex Post Facto Laws: International Scenario

The essence of non-retroactivity principle is that a person should never be convicted or punished except in accordance with previously declared offence governing the conduct in question. This principle is to be found in Article 11(2) of the Universal Declaration of Human Rights etc. There is universal acceptance of the legality principle as a result of the international human rights movement after 1945. Article 15 Constitution of Maryland (1776) contained the first explicit prohibition against ex post facto laws, which later found its way into Article 1 (90)(3) of the Constitution of the United States of America. The British Parliament occasionally enacted ex post facto criminal laws well into the 19th century. It was only in 1973 the House of Lords abolished the doctrine of residual judicial discretion to create common law crimes. However, the Scottish judiciary still claims this power, as a part of dynamic system of common law which must be adapted to deal with changing social circumstances.

3.1 Historical Development: Article 20 (1)

In the Draft Constitution this protection against ex post facto laws was provided in Article 14(1) that originally provided protection only against imposition of greater penalty retrospectively. At this stage, during the Constituent Assembly Debates an amendment to clause (1) was suggested and finally adopted so as substitute the words ‘under the law in force at the time of the commission’ in place of ‘under the law at the time of the commission’. Another amendment suggested was to insert after the words ‘greater than’, the words ‘or of a kind other than’ was however, negative. The provision against ex post facto legislation is contained in Cl. (1) of Article 20 of our Constitution.

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1 Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR) art 11(2)
Article 20 (1)- No person shall be convicted for any offence except for violation of law in force at the time of the commission of the act charged as an offence, nor be subject 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.

It may be noted that the Government of India Act, 1935, did not provide for such prohibition against ex post facto laws.8

4. Constitutional Protection Against Ex Post Facto Laws:

To give retrospective effect to a law by bringing within its operation, acts committed prior to the enactment of the law in question would be prejudicial to the interests of any person, if the act when done was innocent and attracts penal liability by virtue of a subsequent law. Hence, Art. 20(1) limits the right of the sovereign legislature in a limited manner. Such laws are regarded as inequitable and abhorrent to the notions of justice and, therefore, there are constitutional safeguards against such laws.9

5. Scope and Effect of Prohibition Against Ex Post Facto Laws

This Article in broad import, prohibits conviction and sentence under ex post facto laws. No one should be punished for something, which was lawful when it was done. This would be highly inequitable, unjust and contrary to the universal notion of fairness and justice.10

6. Immunity Restricted To Criminal Offences/Liability

This immunity does not extend to a civil liability11 and is restricted only to conviction or sentence. The latter half of Art. 20 applies only to cases of retrospective increase of penalty for an offence. In Art.20(1) the expression ‘penalty’ is used in narrow sense as meaning a payment which has to be made or a deprivation of liberty which has to be suffered as a consequence of a finding that the person accused of a crime is guilty of the charge. However, a penalty imposed by the sales tax authorities is only a civil liability, though penal in character.12

6.1 Offence Should Be Committed According To ‘Law In Force’

If an act when committed is not an offence as per the law in force, no future law can make it an offence.13 An immunity is provided to a person from being tried for an act, under a law enacted subsequently, which makes the act unlawful.14

6.2 Applicable To Law Enhancing The Criminal Liability

8 R.C. Nigam, Law of Crimes in India (Asia Publishing House, 1965) 477
9 M.P. Jain, Indian Constitutional Law (Fifth edn., X Wadhwa and company, Nagpur, 2006) 1055
10 Rao Shiv Bahadur Singh and Another v State of Vindhya Pradesh AIR 1953 SC 394, 398
11 See SaraswathiBabu 2014 (1) RCR (Criminal)167 and Lt. Col. V. D. Bhanot v SavitaBhanot 2012 (1) R.C.R. (Criminal) 834
12 Shiv DuttaRaiFateh Chand v Union of India (1983) 3 SCC 529
14 See State of Maharashtra v KaliarKoilSubramaniumRamawamy (1977) 3 SCC 524
Every law that takes away or impairs a vested right is retrospective. But an *ex post facto* law that only mollifies the rigour of a criminal law or reduces the penalty, does not fall within the prohibition under Art. 20 (1). If under a law no minimum sentence of fine has been provided and an unlimited fine can be imposed thereby, subsequent change in law laying down the minimum fine which the court must compulsorily inflict on a person, does not infringe Art. 20 (1).

6.3 Prohibition Not Applicable To Trial/Court/Procedure

There is no fundamental right available to a person accused of the commission of an offence, to be tried by a particular court or by a particular procedure, unless there is involvement of any constitutional objection by way of discrimination or the violation of any other fundamental right. Retrospective change in the venue of trial does not attract the application of Art. 20 (1). A statute cannot be said to be retrospective because a part of the requisites for its actions is drawn from a time antecedent to its passing.

7. Protection Against Double Jeopardy: International Scenario

In common law if a person is charged again for the same offence in an English court, he can plead, as a complete defence, his former acquittal or conviction, i.e. the plea of *autrefois acquit* or *autrefois convict*. The corresponding provision in the American Constitution is embodied in the Fifth Amendment. The expression ‘double jeopardy’ is one of American law and is not used in our Constitution.

7.1 Historical Development: Article 20 (2)

The principle of ‘double jeopardy’ has been embodied in the existing law in India and finds place in Section 26 of the General Clauses Act, 1897 and also in Section 300 of the Criminal Procedure Code, 1973 (Section 403 of the Code of Criminal Procedure, 1898). In the Draft Constitution Article 14(2) ran as under:

“No person shall be punished for the same offence more than once.”

An amendment for the addition of words ‘prosecuted and’ was suggested before the word ‘punished’ and was accepted. The suggestions to extend the immunity also to

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15 T. Barai v Henry AH HOE (1983) 1 SCC 177
16 Maya Rani Punj v I.T. Commr. Delhi 1986 (1) SCC 445
17 Rao Shiv Bahadur(n10) 398
18 Union of India v SukumarPye AIR 1966 SC 1206, 1208
19 Sajjan Singh v State of Punjab AIR 1964 SC 464, 468
acquittal and to add the words ‘otherwise than as permitted by the Code of Criminal Procedure, 1898’ at the end of clause (e) were negatived.

8. Constitutional Protection Against Double Jeopardy Under Article 20(2)

This Article incorporates the common law plea of autrefois convict. Article 20 (2) bars the retrial of a person, when he has been convicted and sentenced for the same offence.

| Article 20 (2) - (2) No person shall be prosecuted and punished for the same offence more than once |

It is based upon the principle of ‘double jeopardy’ clause and lays down that no person should be put in jeopardy of his life or liberty more than once. Article 20 (2) uses the word ‘and’ in conjunctive sense and it is only where the accused has been both prosecuted and punished for the same offence, a second trial is barred. Article 20 (2) can be invoked, if the following two requisites are fulfilled -

(i) The person must be accused of an “offence”
(ii) The person must have been prosecuted and convicted before a court or a judicial tribunal.

9. Extent and Scope of Article 20 (2)

The Article applies when the second trial is for the same offence for which the accused was previously tried and convicted. Section 300 is more comprehensive in its scope than Art. 20(2). Under Section 300(1), even a person who has been acquitted in a previous trial by a competent court, cannot be tried for the same offence.

9.1 Narrow in Scope

The scope of Art. 20 (2) is even narrower than the English or the American rule against double jeopardy. Second trial is barred even when the accused has been acquitted at the first trial for that offence. Art.20(2) has not incorporated the rule of autrefois acquit and may be invoked only when there has been co-existence of prosecution and punishment in the first instance. That means, if a person has been prosecuted for an offence but acquitted, then he can be prosecuted for the same offence again and punished. The scope of Art.20 (2) has thus been very much narrowed down by judicial interpretation.

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24Ibid. pp. 791 & 96
28M.P. Jain (n 9) 1060
29ibid 1064
9.2 Prosecution and Punishment Before a Competent Court
The Article does not give immunity from proceedings other than proceedings before a court of law or a judicial tribunal. Hence, a government servant who has been punished for an offence in a court of law may yet be subjected to departmental proceedings for the same offence or vice-versa. The proceedings before the sea customs authorities or the adjudicatory authorities functioning under the Foreign Exchange Regulation Act are of “adjudicatory” nature and character and are not “criminal proceedings”.

9.3 Cannot be Invoked Against Previous Acquittal/Previous Trial Becoming Abortive for Inherent Defects

A trial under Article 20(2) is not barred when the previous trial has become abortive either by virtue of some inherent defect or illegality affecting the validity of the trial itself, like lack of jurisdiction etc. An appeal against an acquittal is in substance a continuation of the prosecution, hence the protection under Art. 20 (2) cannot be pleaded against the appeal.

9.4 Bar Operates Only Against Prosecution and Punishment for Identical Offence Tried Previously

Article 20(2) to be operative, both prosecution and punishment must co-exist when the second prosecution and punishment is for the identical offence for which the person concerned had already been prosecuted and punished earlier. The same offence would essentially mean the offence whose ingredients are same. Double punishment is not barred if there are two distinct and separate offences with different ingredients under two different enactments, notwithstanding that some of the ingredients of the two offences may be common.

9.5 Effect of Prosecution and Conviction in Foreign Country

A person liable by any Indian law to be tried for any offence committed beyond India is to be dealt with under the provisions of the Cr.P.C., having regard to the fact that the provisions of the Code would also apply to any offence committed by any citizen of India in any place within and beyond India. If the offences for which a person had

30 D.D. Basu (n 20) 91
31 Director of Enforcement v MCTM Corpn, Pvt. Ltd. (1996) 2 SCC 471
been tried and convicted in the USA and for which he is now being tried in India, are
distinct and separate will not attract Art 20 (2) of the Constitution.36

10. Protection Against Self Incrimination: International Scenario

Right to Silence is implicit in protection against self incrimination. Some of the
aspects relating to right to silence have been embodied in Art. 11.1, the Universal
Declaration of Human Rights, 1948; Art. 14(3)(g), the International Covenant on
Civil and Political Rights, 1966 and Art. 6(1) & 6(2), and the European Convention
for the Protection of Human Rights and Fundamental Freedoms.

The right to refusal to answer questions that may incriminate a person is a procedural
safeguard which has gradually evolved in common law and bears a close relation to
the “right to fair trial”. Under the English Law, a witness is protected from answering
questions which may lead to criminal prosecution or any other penalty or forfeiture.37
The Fifth Amendment of the United States Constitution provides that no person shall
be compelled in any criminal case, to be a witness against himself. This privilege is
also available to the witnesses besides the accused.38

10.1 Historical Development

The Drafting Committee considered clause 26 of the Constitutional Adviser’s Draft
Constitution on November 1, 1947, and held that the intention of the second part of
sub-clause (2) was only to prohibit compulsion of an accused to be a witness against
himself. The Committee split up sub-clause (2)39 into two independent clauses. The
amended provision appeared in the Draft Constitution as Article 14 (3):
“(3) No person accused of any offence shall be compelled to be witness against
himself.”

11. Constitutional Protection Against Self Incrimination

This constitutional privilege has been given to the accused in order to safeguard his right to
privacy and to ensure the civilized standards in the enforcement of criminal justice. In the
absence of such protection there is likelihood of the accused being subjected to the third
degree treatment so as to ‘entrap him into fatal contradictions’40 “The right against self-
incrimination” is viewed as an essential safeguard in criminal procedure. The “rule against
involuntary confessions” is to ensure that the testimony considered during trial is reliable and
ruling out the chances of miscarriage of justice.41

Art. 20 (3) has exalted status in our Constitution.

Article 20 (3)- No person accused of any offence shall be compelled to be a witness against
himself.

36 Jitendra Panchal v Narcotics Control Bureau (2009) 3 SCC 57
37 See Phipson on Evidence:IX Ed., 215&474 as cited in V.N.Shukla (n 21) 160
38 See Willis, Constitutional Law, 419 (1936) as referred in ibid 160
39 As per Munshi’s Draft sub-clause (2) provided-“(2) No person shall be tried for the same offence
more than once nor be compelled in any criminal case to be a witness against himself.”
40 As cited in Vandini Satpathy v P.L. Dhani (1978) 2 SCC 424 referring Brown v Walker 40 L Ed 819
41 Selvi v State of Karnataka (2010) 7 SCC 263, 320
The right is protected by Articles 20(3) and 21 of the Constitution and Sections 161 (2), 313 (3) and 315 of the Cr.P.C., 1973. The Constitution and the Code are coterminous in the protective area.\textsuperscript{42}

Art. 20 (3) embodies in its import the right to silence and has various facets which emanate from canons of criminal justice as follows:

(i) Burden is on the State/the prosecution to prove the guilt of the accused.
(ii) Accused is presumed to be innocent until proved to be guilty beyond any reasonable doubt.
(iii) Right of the accused against self incrimination, namely, the right to be silent and that he cannot be compelled to incriminate himself.

12. Extent and Scope of Article 20 (3)

Article 20(3) confers guarantee against "testimonial compulsion". The judicial interpretation of ‘immunity against self incrimination/right to silence’ has been widened keeping up with the exigencies and the dynamism of law and the trends in criminal jurisprudence.

An analysis of Art. 20 (3) brings out three essential components of the immunity contained in our Constitution, namely:\textsuperscript{43}

(i) it is a right pertaining to a person accused of an offence;
(ii) it is a protection against compulsion to be a witness; and
(iii) it is a protection against such compulsion resulting in his giving evidence against himself.

If any of these ingredients do not exist, Article 20(3) cannot be invoked.\textsuperscript{44}

12.1 Accused of an offence

For the invocation of Art. 20 (3), the first requisite is that the person claiming the protection should be “accused of an offence” at the time he makes the statements but can not avail the privilege if he becomes accused after making such statement.\textsuperscript{45} It does not refer to a hypothetical person who may in future be discovered to have been guilty of some offence.\textsuperscript{46} There should be formal accusation levelled, in the form of First Information Report or complaint relating to the commission of an offence before a magistrate competent to try the offence.\textsuperscript{47} The privilege under this Article is available not only to an individual, but even to an incorporated body, if “accused of an offence”.\textsuperscript{48}

\textsuperscript{42}NandiniSatpathy v P.L. Dhani (1978) 2 SCC 424, 435
\textsuperscript{43}Delhi Judicial Service Assn. v State of Gujarat (1991) 4 SCC 406
\textsuperscript{44}Ibid 431; see also BalkishanDevidayal v State of Maharashtra(1980) 4 SCC 600
\textsuperscript{46}Senior Intelligence Officer, Directorate of Revenue Intelligence v Jugal Kishore Samra (2011) 12 SCC 362; Poolpandi v Suprintendent, Central Excise (1992) 3 SCC 259; Romesh Chandra Mehta v State of West Bengal (1969) 2 SCR 461
\textsuperscript{47}M.P.Sharma v Satish Chandra AIR 1954 SC 300
\textsuperscript{48}Ibid.
Mere issue of notice or pendency of contempt proceedings do not attract Article 20(3) of the Constitution. The contemners do no stand in the position of a "person accused of an offence" merely on account of issue of notice of contempt by this Court.\(^{49}\)

### 12.2 Interpreting ‘to be a witness’

The word ‘witness’, by virtue of extensive interpretation by the Supreme Court in *M. P. Sharma v. Satish Chandra*\(^{50}\), now comprises both oral and documentary evidence. As per the Hon’ble Supreme Court the words "to be a witness" tantamount to "to furnish evidence". A person can be a witness not merely by giving oral evidence but also by producing a thing or documents or making intelligible gestures as in the case of a dumb witness. No person can be compelled to furnish any kind of evidence which is reasonably likely to support a prosecution against him or may have a bearing on the controversy with reference to the charges against him.\(^{51}\)

An eleven Judges bench of the Supreme Court in the *State of Bombay v. KathiKaluOghad*\(^{52}\) while reconsidering the issue as to whether directing the accused to give his specimen signature, or hand writing, or the impression of his palm and fingers is violative of Art. 20(3), ruled in the negative and observed that though it may amount to ‘furnishing evidence’ in the larger sense, is not included within the expression ‘to be a witness’.\(^{53}\)

### 12.3 ‘To be a witness’ – Protection against Testimonial Compulsion not confined to the Courts

The accused person has a constitutional right not to be subjected to “testimonial compulsion” and the right to protection from being compelled to be a witness against himself as provided by Art.20 (3). The confession should appear to have been made voluntarily and the police officer recording the confession should satisfy himself that the same was being made voluntarily by the maker of the statement.\(^{54}\)

The protection afforded to an accused in respect of ‘testimonial compulsion’ is not limited to the stage of trial in the court room but may well extend to compelled testimony previously obtained from him outside the court.\(^{55}\) Forcible administration of scientific techniques/tests like narco analysis, Brain Electrical Activation Profile (BEAP) test and Polygraph test, during the course of investigation would be an unjustified intrusion into mental privacy and would be violative of the “right against self-incrimination”.\(^{56}\) However, mere asking by a police officer investigating a crime against a certain individual to do a certain thing is not compulsion\(^{57}\) and the right

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\(^{49}\)Delhi Judicial Service Assn.(n 43) 431  
\(^{50}\)M.P.Sharma(n47)  
\(^{51}\)Ibid.  
\(^{52}\)AIR 1961 SC 1808  
\(^{53}\)KathiKalu (n 45) [18]  
\(^{54}\)Ayub v State of Uttar Pradesh (2002) 3 SCC 510  
\(^{55}\)KathiKalu (n 45) [18]  
\(^{56}\)Selvi (n 41) 369  
\(^{57}\)See also Mohd. Dastgir v State of Madras AIR 1960 SC 756
under Article 20(3) is not violated when an accused is compelled to stand up and show his face for the purpose of identification, or to merely make a statement while in police custody.

12.4 Protection does not extend to search or seizure

This prohibition is not attracted where any object or document is searched or seized from the possession of the accused as per the provisions of the Cr. P. C. Compulsion in the context of Art. 20 (3) must proceed from other person or authority. If a person voluntarily gives evidence in his defence, he cannot be said to be compelled to be a witness. A passive submission to search cannot be regarded as a compulsion on the accused and if anything is recovered during such search which may provide incriminating evidence against the accused it cannot be styled as compelled testimony.

12.5 Not Applicable to Civil Proceedings/ Administrative Proceedings

The protective sweep of Art.20(3) does not extend to the parties and witnesses in civil or any other proceedings.

13. Conclusion

Art. 20 is a compendium of protective rights provided by the Constitution to a person who is accused of an offence and is going to or is facing a criminal trial. Due to the serious ramifications of the criminal proceedings against a person, the protection against ex post facto laws, double jeopardy and self-incrimination have been provided as constitutional safeguards in the administration of criminal justice. These protections flow from the presumption of innocence of the accused until the guilt is proved.

14. Summary

The three important safeguards enshrined under Article 20 of the Constitution of India provide constitutional protection against application of any criminal law retrospectively, against a person being convicted again for the same offence and also against being compelled to give evidence that is self-incriminating. For the protection against retroactive legislation, the act in question should be innocent when done, as per the law in force at the time of commission of the act. The second protection under Article 20 is confined only to the previous conviction. If the person has been previously tried and acquitted, the protection against double jeopardy is not available. The third and the last protection provided under this Article is against testimonial compulsion. No person can be compelled to give evidence adversely affecting his own interest. The ambit of these protections has been widened by judicial

59 KathiKalu (n 45) [18]
60 V.S.KuttanPillai v Ramakrishnan (1980) 1 SCC 264
interpretation to ensure fair trial. These fundamental rights of the accused cannot be suspended even during emergency. These immunities reflect the natural justice principles in the administration of criminal justice.

15. Interesting Facts

1. Use of scientific techniques like Narco analysis, brain finger printing and lie-detector tests were not considered to be violative of Article 20 (3) prior to the Supreme Court’s judgement in Selvi v State of Karnataka (2010) 7 SCC 263.

16. Glossary

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<td>A</td>
<td>autrefois acquit</td>
<td>Refers to a person who has been formerly acquitted</td>
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<tr>
<td>A</td>
<td>Autrefois convict</td>
<td>Refers to a person who has been formerly convicted</td>
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<td>D</td>
<td>Double jeopardy</td>
<td>This is with reference to the constitutional protection provided under Art.20 (2) that no man shall be punished or put in jeopardy twice</td>
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<td>E</td>
<td>Ex post facto laws</td>
<td>Laws with retrospective operation</td>
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<td>S</td>
<td>Self incrimination</td>
<td>Something that goes against a person</td>
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17. Points To Ponder

1. Article 20 cannot be suspended even during a national emergency.

2. The immunity under Article 20 is available only to a person accused of a criminal offence.

3. Article 20 (1) is not attracted against imposition of penalty by the sales tax authorities, as it is a civil liability, though penal in character.

4. Art. 20(1) limits the right of the sovereign legislature by restricting it to enact law with retrospective effect.

5. The scope of ‘double jeopardy’ clause under Art. 20 (2) is narrower than the English or the American rule and incorporates the common law plea of autrefois convict only.
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<td>6.</td>
<td>Under Section 300(1) of the Cr.P.C., even a person who has been acquitted in a previous trial by a competent court, cannot be tried for the same offence.</td>
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<td>7.</td>
<td>A 'crime' and 'misconduct’ might have arisen out of the same act, two separate proceedings can operate in two different fields without attracting Art. 20 (2).</td>
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<td>8.</td>
<td>The privilege under Article 20(3) is available to an incorporated body also, if “accused of an offence”.</td>
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<td>9.</td>
<td>A passive submission to search cannot be said to be compulsion on the accused even if some incriminating evidence is recovered against the accused.</td>
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