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Paper : **Fundamental of Crime, Criminal Law and Criminal Justice**

Module : **Principle of Legality**

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DESCRIPTION OF MODULE

Items	**Description of Module**
Subject Name	Law
Paper Name	Fundamentals of Crime, Criminal Law and Criminal Justice
Module Name/Title	Principle of Legality
Module Id	02
Objectives	Learning Outcome: • To make the learners understand the basic principles governing criminal law jurisprudence. • To make the learners acquainted with the history and development of the notion of legality. • To make the learners understand the application of the principle of legality in Indian Context.
Prerequisites	Basic fundamental principles of criminal laws.
Key words	Legality, self-incrimination, retroactivity, burden of proof, strict construction.

Introduction. The principle of legality is a core value which governs the criminal justice. It is a guarantee of human liberty, which protects individuals from state abuse and unjust interference as well as ensures the fairness and transparency of the judicial authority (Crisan, Iulia, 2010). In recent years, it has been outlined as a human right, being in consonance with the Universal Declaration of Human Rights (1948), the International Covenant on Civil and Political Rights (1966) and a plethora of other international and regional human rights treaties.

The principle is often expressed by the maxim '*nullum crimen sine lege*, *nullum poena sine lege'*, 'no crime without law, no punishment without law', meaning thereby that an individual may not be criminally punished for an act that was not clearly condemned in a statute prior to the time that the individual committed the act. In other words, all wrongful behaviour must be criminalised and all punishments established before the commencement of any criminal prosecution. Hall treats 'legality' as synonymous with 'rule of law'. He states that it is in some ways the most fundamental of the principles since it 'qualifies the meaning of both crime and punishment and is, thus presupposed in all of criminal theory(J. Hall, 1947). The principle of legality is a phrase which is powerfully righteous and invoked in its minimal sense of 'being governed by rules which are fixed, knowable and certain'- thereby enhancing liberty and reducing arbitrariness by the State's organs. This is a fundamental principle, with both procedural and substantive implications (Ashworth & Horder, 2013).

nullum crimen sine lege

- no crime without law

nullum poena sine lege

- no punishment withour law

History & Development. The origin of this principle can be traced to second century AD politician and jurist Ulpian (Toscano, 2015). Nevertheless, the first ever known formulation of the principle of legality is contained in the second law of Ur-Nammu, from the end of the twenty-first century BC, in the Ancient East. In Roman Law, there were some legal provisions that might relate to the principle of legality but they were not considered to be binding in an absolute manner. Article 39 of the Magna Carta also provided a general formulation of the principle when stating that no person can be arrested, unless it is done according to the law of the land. However, it did not exactly relate to the principle in its modern sense (Hallevy, 2010).

It was only in the second half of the eighteenth century, in the insights of the European Enlightenment, that the principle came to be clearly defined. The industrial revolution created a new socio- economic middle class which pressured the regime to create the legal frames that would protect their economic interests. At the same time there emerged the political philosophy of liberalism which focussed on the fundamental freedoms of the individual as against the power of the sovereign to impose social control. The intervention by the state in individual's life came to be reduced and restricted to the maintenance of social order that requires valid and explicit justification. By the eighteenth century, criminal codes emerged all across Europe partially or fully embracing the principle of legality in its liberal interpretation (Hallevy, 2010).

The connotations of the principle of legality are wide ranging. Hall discusses the three basic elements of the principle which fall under the maxim *nulla poena sine lege.* The maxim demands, first, that no conduct may be held criminal unless it is precisely defined in a penal law. A corollary of this element is the requirement that penal statutes be strictly construed. Finally, the maxim commands that penal laws are not to be given retroactive effect. These requirements are subsumed under the proposition that: "The citizen must be able to ascertain beforehand how he stands with regard to the criminal law."' The three sub-propositions of the principle of legality amount to a requirement of fair notice of what the law is and what will happen if an individual violates the law (Potts, 1982). Hallevy maintains that, in criminal law, the principle may be divided into four distinct principles- a) the principle of non-retroactivity; b) the principle of maximum certainty; c) the principle of strict construction and d) the presumption of innocence.

The principle of non- retroactivity. The essence of the non-retroactivity principle is that a person should never be convicted or punished except in accordance with a previously declared offence governing the conduct in question (Ashworth & Horder, 2013). Laws should operate in prospect, and not retrospect. An ex-post facto law is a law "passed after the fact". As explained by Alexander Hamilton, "because subjecting of men to punishment for things which, when they were done were breaches of no law, and the practice of arbitrary imprisonments, have been, in all ages., the favourite and most formidable instrument of tyranny." (Lippman, 2014). In 1798, in a case (*Calder v. Bull*, 1798), the Supreme Court Justice Samuel Chase listed four categories of ex post facto laws:

- Every law that makes an action, done before the passing of the law, and was innocent when done, criminal; and punishes such action.
- Every law that aggravates a crime, or makes it greater than it was, when committed.
- Every law that changes the punishment, and inflicts a greater punishment, that the law annexed to the crime, when committed.
- Every law that alters the legal rules of evidence, and receives less or different, testimony, than the law required at the time of the commission of the offense, in order to convict the offender.

All four of the categories are "mirror images of one another. In each of the instances, the government refuses, after the fact, to play by its own rules, altering them in a way that is advantageous only to the State, to facilitate an easier conviction." The prohibition on ex post facto laws prevents the legislation being applied to acts

committed before the statute went into effect. The Legislature is free to declare that in the future a previously innocent act will be a crime (Lippman, 2014).

Ashworth questions the entire development of English criminal law which has progressed untrammelled by the non-retroactivity principle (Ashworth & Horder, 2013). The conflict between the non-retroactivity principle and the functioning of the criminal law as a means of social defense reached its modern apotheosis in Shaw's case (*Shaw v. DPP*, 1962). The prosecution had indicted Shaw with conspiracy to corrupt public morals, in addition to two other charges. The House of Lords upheld the validity of the indictment, despite the absence of any clear precedents, on the broad ground that the conduct intended and calculated to corrupt public morals is indictable at common law. What happened in Shaw was that a majority of the House of Lords felt a strong pull towards criminalization because they were convinced of the immoral and antisocial nature of the conduct- thus regarding their particular conceptions of social defense as more powerful than the liberty of citizens to plan their lives under the rule of law.

The English courts (*R. v. R.*, 1991) abolished the husband's immunity from liability for rape of his wife. The question whether the judicial decision operated retrospectively on the defendant was taken to Strasbourg where the court held that the removal of the marital rape exemption by the House of Lords did not amount to a retrospective change in the elements of the offense. As explained by the European Commission (*SW & CR v. United Kingdom*, 1995):.

> "Article 7(1) excludes that any acts not previously punishable should be held by the courts to entail criminal liability or that existing offenses should be extended to cover facts which previously did not clearly constitute a criminal offense. It is, however, compatible with the requirements of article 7(1) for the existing elements of an offense to be clarified or adapted to new circumstances or developments in society in so far as this can reasonably be brought under the original concept of the offense. The constituent elements of an offense may not however be essentially changed to the detriment of an accused and any progressive development by way of interpretation must be reasonably foreseeable to him within the assistance of appropriate legal advice if necessary."

A counterpoint to the non-retroactivity principle is provided by the 'thin ice' principle which provides that, 'those who skate on thin ice, can hardly expect to find a sign which will denote the precise spot where he fall in.' The essence of this principle seems to be that citizens who know that their conduct is on the borderline of illegality take the risk that their behavior will be held to be criminal. On occasions, the courts have applied this principle both to the creation of new offense and to the extension of an existing offense. However, it may be mentioned that the principle neglects the role

of the criminal law as a censuring institution whose conviction may result in both punishment and considerable stigma and social disadvantage and overlooks the violation of the principle of autonomy caused when a citizen is convicted on the basis of a law that did not clearly cover the conduct at the time it took place (Ashworth & Horder, 2013).

The Principle of Maximum Certainty- This principle embodies what are termed as 'fair warning' and 'void for vagueness' principles in the United States law. Due process requires that criminal statutes should be drafted in a clear and understandable language. To be precise, it means two things (Lippman, 2014):

- Due process requires that individuals receive notice of criminal conduct. Statutes are required to define criminal offences with sufficient clarity so that ordinary individuals are able to understand what conduct is prohibited.
- Due process requires that police, prosecutors, judges are provided with a reasonably clear statement of prohibited behaviour which ensures uniform and non-discriminatory enforcement of the law.

The emphasis on predictability, certainty and fair warning guarantees respect for a citizen as a rational and autonomous individual. He is not caught unawares, but is warned of the criminal law provisions. Certainty also ensures that the police and other agencies involved in criminal justice administration do not misuse the powers bestowed on them but are clearly and unambiguously limited within the confines of the criminal law provisions. When criminal offences are drafted in vague and ambiguous ways, citizens are not only faced with unpredictable behaviour by enforcement officials, they are also denied a fair opportunity to avoid punishment. Such a denial flouts, in the words of Ashworth, "an incontrovertible minimum of respect for the principle of autonomy" (Claes & Krolikowski, 2009)

The word 'certainty' is preceded by the term 'maximum' meaning thereby, that the clarity has to be to the maximum extent possible, but definitely not absolute. The latter is somewhat impossible to achieve in the drafting of a statute. Unless the criminal law occasionally resorts to such open- ended terms as 'reasonable' and 'dishonest', it would have to rely on immensely detailed and lengthy definitions which might be extremely complicated and which might still fail to cover the ground. It is also asserted that some vagueness in criminal laws is socially beneficial because it enables the police and the courts to deal flexibly with new variations in conduct without having to await the lumbering response of the legislature (Ashworth & Horder, 2013).

The Principle of Strict Construction- This is the third principle under the umbrella of legality. This principle relates to the courts' task of interpreting legislation. The general rule is that a penal statute should be strictly interpreted, that is, if two possible

and reasonable constructions can be put upon a penal provision, the court must lean towards a construction which exempts the subject from penalty rather than the one which imposes a penalty. It is not competent for the court to stretch the meaning of an expression used by the legislature in order to carry out the intention of the legislature. It is for the legislature and not for the court to define a crime and provide for its punishment (Vepa, 2010).

The name "strict construction" is really misleading. Under the rule, an ambiguous statutory determinable imposing or enlarging criminal liability will be construed narrowly, while such a determinable relieving from or diminishing liability will be construed broadly, so that the particular determinate will be placed with reference to the statutory determinable where it is of most advantage to the accused (L. Hall, 1935). Prior to the 17th century, this rule was rarely applied. The doctrine of strict construction emerged as a general rule of conscious application with the growth of humanitarianism, to guard against the unmitigated severity in serious crimes. Ashworth mentions that the principle seems to have originated either through the notion of construction *in favorem vitae* or as a response to statutory incursions into the common law- which in turn led Parliament to enact more detailed, subdivided offences (Ashworth & Horder, 2013).

The rule as stated is as under (*The Gauntlet*, 1872):

> "No doubt all penal statutes are to be construed strictly- that is to say, the court must see that the thing charged as an offence is within the plain meaning of the words used; must not strain the words on any notion that there has been a slip, that there has been a *casus omissus*; that the thing is so clearly within the mischief that it must have been intended to be included, and would have been included if thought of. On the other hand, the person charged has a right to say that the thing charged, though within the words is not within the spirit of the enactment. But where the thing is brought within the words and within the spirit, there a penal enactment is to be construed, like any other instrument, according to the fair common-sense meaning of the language used; and the court is not to find or make any doubt or ambiguity in the language of a penal statute where such doubt or ambiguity would clearly not be found or made in the same language in any other instrument."

Thereby, the principle attempts to preclude the law from being construed to the detriment of the accused. Observance of this canon is chiefly invoked to prevent the creation of offences by construction, that is, to restrain the courts from usurping the functions of the legislature by extending the words of a statute to acts or omissions not within its plain terms or manifest intention (Russell & Turner, 1958).As stated by Chief Justice Marshall, "…though penal laws are to be construed strictly, they are not to be construed so strictly as to defeat the obvious intention of the legislature… the intention of the legislature is to be collected from the words they employ. Where there

is no ambiguity in the words, there is no room for construction." (*United States v. Wiltberger*, 1820). The proper approach is not to be bound by any particular dictionary definition of a crucial word in a statute, but rather to construe a legislative provision in accordance with the perceived purpose of that statute. In order to assist in ascertaining that purpose, a court may consult Parliamentary proceedings, reports, etc. so as to ascertain the gap in the law which the legislation was intended to remedy. (Ashworth & Horder, 2013)

Presumption of Innocence- The presumption of Innocence is a fundamental principle of criminal jurisprudence which asserts that a person should be presumed innocent unless and until proved guilty. It is derived from the Latin maxim, *ei incumbit probation qui dicit, non qui negat*- the burden of proof is on he who declares, not on he who denies. The sixth century Digest of Justinian provides as a general rule that the burden of proof is on him who asserts and not on one who denies. As stated by Sankey LC(*Woolmington v. DPP*, 1935), throughout the web of English criminal law, one golden thread is always to be seen- that it is the duty of the prosecution to prove the prisoner's guilt. It is a principle of procedural fairness in criminal law, whose justifications may be found in the social and legal consequences of being convicted of a crime, in which context the principle constitutes a measure of protection against error in the process and a counterweight to the immense power and resources of the State compared to the position of the defendant. Justice Dickson laid down that the presumption of innocence is a hallowed principle lying at the very heart of criminal law. The presumption of innocence protects the fundamental liberty and human dignity of any and every person accused by the State of criminal conduct. An individual charged with a criminal offence faces grave social and personal consequences, including potential loss of physical liberty, subjection to social stigma and ostracism from the community, as well as other social, psychological and economic harms. In light of the gravity of these consequences, the presumption of innocence is crucial. It ensures that until the State proves an accused's guilt beyond all reasonable doubt, he or she is innocent. This is essential in a society committed to fairness and social justice. The presumption of innocence confirms our faith in humankind; it reflects our belief that individuals are decent and law-abiding members of the community until proven otherwise.(*R. v. Oakes*, 1986)

The doctrine regarding the presumption of innocence has generally come to embody the following procedural element s (Ingraham, 1996):

1) The prosecution (the state) has the burden of proving all the essential elements, or ultimate facts, of the crime charged. These include proof of the criminal act, the defendant's *mens rea* that the harm, if any, mentioned in the definition of the crime was proximately caused by defendant's criminal act, and the harm itself, by the standard of proof "beyond a reasonable doubt".

2) The defendant, on the other hand, generally has no burden of proof except perhaps the burden of creating reasonable doubt in the minds of the factfinder as to the strength of the state's case. The defendant may remain silent and offer no defence, relying wholly on the presumption of innocence to carry him to a verdict of acquittal if he is confident that the state has failed to meet its burden. There is no duty on his part to take the witness stand in order to explain ambiguous or apparently incriminating circumstances involving him. Of course, he may testify in his own behalf if so inclined, but if he fails to do so, the factfinder should not draw from that failure any adverse inference of guilt, and neither the judge nor the prosecutor may comment upon the fact.

3) The factfinder should withhold his judgement at trial until all the evidence has been presented, and unless the state has proved it beyond reasonable doubt. The judge may direct a verdict of acquittal or dismiss the charges whenever the judge believes the prosecutor has failed to present a prima facie case or when, at the conclusion of the prosecution argument or at the end of the trial, he believes that the state has not proved all essential elements of the crime beyond reasonable doubt.

The rule, as it stands, thus enumerates that a person who is charged must be proved guilty, the accused stands innocent until he is proved guilty and his proof of guilt must displace all reasonable doubt. In saying that the accused person shall be proved guilty, it says also that he shall not be presumed guilty; that he shall be convicted only upon legal evidence, not tried upon prejudice; that he shall not be made the victim of the circumstances of suspicion which surround him, the effect of which it is always so difficult to shake off, circumstances which, if there were no emphatic rule of law upon the subject would be sure to operate heavily against him; the circumstances, e. g., that after an investigation he has been indicted, imprisoned, seated in the prisoner's dock, carried away hand- cuffed, isolated, watched, made an object of distrust to all that behold him. He shall be convicted, this rule says, not upon any mere presumption, any taking matters for granted on the strength of these circumstances of suspicion; but he shall be proved guilty by legal evidence, and by legal evidence which is peculiarly clear and strong-clear beyond a reasonable doubt. The whole matter is summed up and neatly put by Chief-Justice Shaw in Webster's case "The burden of proof is upon the prosecutor. All the presumptions of law independent of evidence are in favor of innocence, and every person is presumed to be innocent until he is proved guilty. If upon such proof there is reasonable doubt remaining, the accused is entitled to the benefit of it by an acquittal."(Thayer, 1897)

An ancillary to the presumption of innocence is the right of silence. The right to silence is a principle of common law which means that normally courts or tribunals of fact

should not be invited or encouraged to conclude, by parties or prosecutors, that a suspect or an accused is guilty merely because he has refused to respond to questions put to him by the police or the court. It is based on the principle "nemo debet, prodere ipsum", the privilege against self-incrimination. The privilege against self-incrimination confers immunity from an obligation to provide information tending to prove one's own guilt. A person is not bound to answer any question or produce any document or thing if that material would have the tendency to expose the person to conviction for a crime. A number of rationales justify the existence of the privilege. It is intended to maintain a "proper balance between the powers of the state and the rights and interests of citizens".(McDougall, 2008) Historically, in societies where freedom from self-incrimination is not available, coercive means have been used to compel a person to speak. The privilege is also intended to protect the adversarial system of criminal justice. The presumption of innocence until proven guilty underpins the privilege against self-incrimination. Those who allege an individual's guilt should not be able to compel them to give evidence against themselves. Further individuals are to be protected from being confronted by the "cruel trilemma' of punishment which refers to witness having to choose between refusing to answer questions (thereby risking punishment for contempt), answering honestly (thereby providing evidence of guilt), or lying (thereby risking punishment for perjury). The modern rationale frames the privilege in terms of human rights: specifically, the right to dignity, privacy and freedom. As stated by Murphy J.(*Rochfort v. Trade Practices Commission*, 1982) "[T]he privilege against self-incrimination is a human right, based on the desire to protect personal freedom and human dignity".

The privilege against self-incrimination of an accused has come a long way over the centuries. While the 15th and 16th centuries witnessed the practice of compelling suspects to take oath and answer questions, the collapse of the political courts of Star Chamber and Commissions witnessed the establishment of the right(Langbein, 1994). Wood and Crawford maintained that the right emerged in England as a basic democratic right established by public agitation. Levy and Maguire traced the privilege against self-incrimination to the English common law criminal procedure in the immediate ages. Mc Nair, on the other hand, forwarded the view that the privilege originated in Roman common law, applying first to witnesses and allegations of crime made in civil proceedings before being extended to the accused in criminal law. Whatever may be the origins of the right, it has come to gain a strong foothold in criminal jurisprudence over the years. The Universal Declaration of Human Rights, 1948, includes the right to silence in Article 11.1 which reads as: Everyone charged with the penal offense has the right to be presumed innocent until proved guilty according to law in a public trial. The International Covenant on Civil and Political Rights, 1966, states that none shall be compelled to testify against himself or to confess guilt. As explained, the privilege is a prerogative of a defendant not to take the stand in his own prosecution; it is also an option of a witness not to disclose self-

incriminating knowledge in a criminal case. It may also be a privilege to suppress substances removed from the body or admissions made in prior judicial proceedings or to the police.(McNaughton, 1960). It thereby prevents " the employment of the legal process to extract from the person's own lips an admission of his guilt; which will thus take the place of other evidence…it exists mainly in order to stimulate the prosecution to a full and fair search for evidence procurable by their own exertions, and to deter them from a lazy and pernicious reliance upon the accused's testimony extracted by the force of law."(Kreitzberg, 1994)

Indian Position: The principle of legality is embedded in the criminal law jurisprudence of most nations in varying degrees, especially the common law jurisdictions. In India, also, the principles discussed above are to be found in the Constitutional framework as well as other statutory codes governing the criminal law jurisdiction of the land.

Ex-post facto laws. Art 20 of the Indian Constitution guarantees the fundamental right to a person with regard to ex post facto laws, double jeopardy and prohibition against self-incrimination. The first part of clause (1) lays down that no person shall be convicted of any offence except for violation of a law in force at the time of 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 date of commission of the act. If at the date of commission of an act, such commission was not prohibited by a law then in force, no future legislation prohibiting that act with retrospective effect will justify a conviction for such commission. In other words, if an act is not an offence at the date of commission; no future law can make it an offence. The second part of the clause guarantees that no person shall be subjected to a penalty greater than that which could be inflicted under the law in force at the time of the commission of the offence(Singh, 2013). "There can be no doubt", said Jagannathadas J., "as to the paramount importance of the principle that such ex post facto laws which retrospectively create offences and punish them are bad as being highly inequitable and unjust." (*Rao Shiva Bahadur Singh v. State of Vindhya Pradesh*, 1955).

Section 304B Indian Penal Code 1860 which was inserted on 19th November 1986 creating a distinct offence of dowry death and providing a minimum sentence of seven years imprisonment was held not to apply to such deaths caused before the insertion of the section (*Soni Devrajbhai Babubhai v. State of Gujrat*, 1991). It is only retrospective criminal legislation that is prohibited and not the imposition of civil liability. Thus, restriction on dealing in securities under the Securities and Exchange Board of India Act 1992 does not amount to creation of offence (*SEBI v. Ajay Agarwal*, 2010). Even a penalty under a tax law imposed retrospectively does not

violate Art 20(1) because the penalty is simple a civil liability to be enforced by the tax authorities(*Shiv Dutt Rai Fateh Chand v. Union of*, 1984).

In *Maru Ram v. Union of India* (1980) the vires of Section 433A of the Code of Criminal Procedure was challenged which compelled two classes of prisoners to undergo at least for fourteen years of imprisonment, regardless of remissions and concessions sanctioned by prison rules. These two categories included prisoners for serious offences where death has been prescribed as an alternative punishment. Prior to 1978, the rules of remission and release were common for all prisoners. It was argued that Section 433A was bad based on Art 20(1) of the Constitution. The court held that fourteen years duration is always less than life imprisonment, the sentence for which they have been punished and secondly, a remission, in the case of life imprisonment, ripens into a reduction of sentence of the entire balance only when a final release order is made. On the point whether those who have been convicted prior to the coming into force of Section 433A are bound by the mandatory limit, the court held that "civilised criminal jurisprudence interdicts retroactive impost of heavier suffering by a later law… It inevitably follows that every person who has been convicted by the sentencing court before December 18, 1978, shall be entitled to the benefits accruing to him from the Remission Scheme or short-sentencing project as if Section 433A did not stand in his way. The section uses the word 'conviction' of a person and, in the context, it must mean 'conviction' by the sentencing court; for that first quantified his deprivation of personal liberty."

In *Ratan Lal v. State of Punjab*(1965)**,** the question that fell for consideration was whether an appellate court can extend the benefit of Probation of Offenders Act, 1958 which had come into force after the accused had been convicted of a criminal offence, it was unequivocally declared by this Court that an ex post facto criminal law, which only mollifies the rigour of law is not hit by Article 20(1) of the Constitution and that if a particular law makes provision to that effect, though retrospective in operation, it would still be valid. In T. Barai (*T. Barai v. Henry Ah Hoe and Anr.,* 1983), this view was reiterated and it was emphasized that if an amending Act reduces the punishment for an offence, there is no reason why the accused should not have the benefit of such reduced punishment. In a case where the Narcotic Drugs and Psychotropic Substances Act 1985 underwent an Amendment by virtue of the Act of 2001, the apex court held that in all cases where the trials have concluded and appeals were pending when the Amending Act 9 of 2001 came into force, the amendments introduced would not be applicable and they would have to be disposed in accordance with the NDPS Act 1985 as it stood before 2001 (*Basheer v. State of Kerala*, 2004).

Right of Self Incrimination. In India, the right against self-incrimination is incorporated in clause (3) of Article 20. It is found to contain the following components:

1. It is a right available to a person 'accused of an offence';
2. It is a protection against 'compulsion' 'to be a witness';
3. It is a protection against such 'compulsion' resulting in his giving evidence 'against himself'.

In *Govind Puri* v. *Laxmi Narayan* (2013), the court clarified that the right against self-incrimination as guaranteed under Article 20(3) of the Constitution cannot be curtailed by any provision of law. It is a fundamental right available to the accused which is of the nature of a non-defeasible right which cannot be suspended even during the course of emergency. The right, however, does not proscribe voluntary statements made in exercise of free will and volition (*Mohd. Ajmal Mohd. Amir Kasab@ Abu Majahid v. State of Maharashtra*, 2012) Only compelled testimony by accused person, extracted under duress, physical or mental, comes within the fold of the protection. The term 'accused' has been taken to include "persons then or ultimately accused" (*Nandini Satpathy v. P.L. Dani*, 1978). "Accused of an offence" in Article 20(3) has been interpreted as a person normally characterized as such when the first information report was lodged against him in respect of an offence before an officer competent to investigate it or when complaint was made before a competent Magistrate to try or send to another Magistrate for trial of the offence. The right against self-incrimination under Article 20(3) has been statutorily incorporated in the provisions of Code of Criminal Procedure, 1973 (Sections 161, 162, 163 and 164) and the Indian Evidence Act, 1872 (Section 24, 25, 27 etc.), as manifestations of enforceable due process, and thus compliance with statutory provisions is also compliance with the Constitutional requirements.

In *M.P. Sharma* v. *Satish Chandra* (1954),a seven judge bench of the Supreme Court did not accept the contention that the guarantee against testimonial compulsion is to be confined to oral testimony while facing trial in court. The guarantee was held to include not only oral testimony given in court or out of court, but also the statements in writing which incriminated the maker when figuring as an accused person. In *Kathi Kalu Ogha*d (*State of Bombay v. Kathi Kalu Oghad*, 1961) the court agreed with the above conclusion drawn in *M.P. Sharma*, though it did not agree that "to be a witness" may be equivalent to "furnishing evidence" in larger sense of the expression so as to include giving of thumb impression or impression of palm or foot or fingers or specimen handwriting etc. In response to the fact that the investigation agencies cannot be denied their legitimate power to investigate a case properly, the court gave a restricted meaning to the term 'to be a witness'. In the words of the court: "to be a witness may be equivalent to furnishing evidence in the sense of making oral or written statements, but not in the larger sense of the expression so as to include giving of thumb impression or impression of palm or foot or fingers or specimen writings or exposing a part of the body… Furnishing evidence in the latter sense could not have been within the contemplation of the Constitution makers for the simple reason that-

though they may have intended to protect an accused person from the hazards of self-incrimination,… They would not have intended to put obstacles in the way of efficient and effective investigation into crime and of bringing criminals to Justice… It is as much necessary to protect an accused person against being compelled to incriminate himself, as to arm the agents of law and the law courts with legitimate powers to bring offenders to justice." The court further observed that the term 'self-incrimination' must be taken to mean conveying information based upon personal knowledge of the person giving the information. "When an accused person is called upon by the court or any other authority holding any investigation to give his finger impression or signature or a specimen of his handwriting, he is not to giving any testimony of the nature of a 'personal testimony'. The giving of a personal testimony must depend upon his volition. He can make any kind of statement or may refuse to make any statement. But his finger impressions or his handwriting, in spite of efforts of concealing the true nature of it by dissimulation cannot change their intrinsic character."

In the case of *Selvi,* the Supreme Court referring to *Kathi Kalu* opined that Article 20(3) aims to prevent the forcible conveyance of personal knowledge that is relevant to the facts in issue. The results obtained from Polygraph, Narco-analysis and Brain Electrical Activation Profile bear a testimonial character and they cannot be categorized as material evidence such as bodily substances and other physical objects. The entire scheme of the criminal procedure, the court explained, has given due regard to this right, since the Code of Criminal Procedure itself acknowledges the hierarchy of the constitutional protection vis-à-vis the powers of investigation. Sections 156, 161, 164, 313, 315 Cr.P.C., 1973 etc. limit the powers of the police officer of questioning and conducting investigation, while recognizing the right of an accused to remain silent. The latter is an essential safeguard in criminal procedure which ensures the reliability of statements made by an accused, the voluntariness of the statements made and the absence of coercive methods during investigation. In the words of the court, "the right against self-incrimination is a vital safeguard against torture and other third degree methods that could be used to elicit information. It serves as a check on police behavior during the course of investigation." The compulsory administration of the three tests, lie detector narcoanalysis and brain fingerprinting, the court said amounts to "testimonial compulsion" and thereby triggers the protection of Article 20 (3). (*Selvi & Ors.v. State of Karnataka*, 2010)

Specificity of offences. An act or omission is a crime if it is clearly prescribed as such by the criminal code of the country. Administration of criminal justice requires clear definitions of crimes and punishments for the wrongdoer. The Indian Penal Code, 1860 is the general criminal law of the land. It defines offences and prescribes punishments for the offences so created. Every section is defined with its complete ingredients that must be proved by the prosecution. The result of the physical act as

well as the state of mind accompanying the act has been specified in the various offences under the code.

Section 40 IPC 1860 defines the term "offence" to mean, *inter alia*, a thing made punishable under the Penal Code or any local or special laws in force. Thus, acts or omissions which have been included in local or special Acts and punishment prescribed therefor are to be regarded as offences only. Section 6 further mandates a court to read every definition of an offence or penal provision including the illustrations appended thereto subject to the General Exceptions incorporated under Chapter IV of the Penal Code. In order to understand or construe any provision of the Code, it is, therefore, not sufficient to read the concerned section alone. Every provision under the IPC has to be read along with the chapter on General Exceptions before coming to any conclusion on the liability or culpability of a person accused of a crime (Vibhute, 2014). Section 53 IPC provides for punishment for the defined offences. It enumerates various kinds of punishment that may be inflicted on perpetrators of the offences mentioned in the IPC. They are: death; imprisonment for life; rigorous imprisonment; simple imprisonment; forfeiture of property; fine, and solitary confinement. The section itself indicates that the discretion of the judge is severely limited by the various options enumerated in the section. Imposition of proper and appropriate sentence is bounded obligation and duty of the court. The endeavour of the court must be to ensure that the accused receives appropriate sentence according to the gravity of the offense, within the confines of section 53 of the IPC (*Gurmukh Singh v. State of Haryana*, 2009).

Construction of Penal Statutes. With regard to construction of penal statutes, the Supreme Court has explained that when it is said that all penal statutes are to be construed strictly, it only means that the court must see that the thing charged as an offence within the plain meaning of the words used and must not strain the words. To put it in other words, the rule of strict construction requires that the language of a statute should be so construed that no case shall be held to fall within it which does not come within the reasonable interpretation of the statute (*M.V. Joshi v. M.U. Shimpi*, 1961). In *P.K. Arjunan*, while convicting the appellant for being in possession of spirit contrary to the provisions of the Kerala Abkari Act, the court observed that a) a penal provision should be strictly construed and b) when the statutory provision is clear and unambiguous, it should be given due effect without recourse to any technical plea(*P.K. Arjunan v. State of Kerala*, 2007). Some of the reasons attributed to strict construction of penal statutes are(Friedman, 1960) :

i) The power of punishment is vested in the legislature rather than the judiciary; this legislative power guards against creation of crimes not contemplated by the legislature by judicial construction
ii) Since the state males the laws, these laws should be construed against the stte in case of any ambiguity or doubt

iii) In order that people of ordinary understanding may be given notice of what conduct is prescribed as criminal, penal statutes will not be construed to include anything beyond the clear meaning of the words employed.

In the recent case of the brutal rape of a young lady in the capital city of Delhi, one of the accused persons being below the age of 18 years on the date of commission of the crime was referred to the Juvenile Justice Board in accordance with the provisions of the Juvenile Justice Act, 2000. However, applications were filed contending that a proper interpretation of the Act may be made with regard to Sections 2(i) and 2 (k) of the Act and that the juvenile was not entitled to the benefits under the Act but was liable to be tried under the penal law of the land in a regular criminal court along with the other accused. Rejecting the contentions the Court held that "In the present case there is no difficulty in understanding the clear and unambiguous meaning of the different provisions of the Act. There is no ambiguity, much less any uncertainty, in the language used to convey what the legislature had intended. All persons below the age of 18 are put in one class/group by the Act to provide a separate scheme of investigation, trial and punishment for offences committed by them. A class of persons is sought to be created who are treated differently. This is being done to further/effectuate the views of the international community which India has shared by being a signatory to the several conventions and treaties already referred to… If the provisions of the Act clearly indicate the legislative intent in the light of the country's international commitments and the same is in conformity with the constitutional requirements, it is not necessary for the Court to understand the legislation in any other manner." (*Subramanian Swamy v. Raju Thr. Member Juvenile Justice Board & anr.*, 2014)

With regard to construction, it may further be asserted that if the words used in a criminal statute are reasonably capable of two constructions, the construction which is favourable to the accused should be preferred, but in construing the relevant words, it is obviously necessary to have due regard to the context in which they have been used (*Alamgir v. State of Bihar*, 1959). In *Ishwar Das v. State of Punjab* (1973), it was observed that the provisions of the Probation of Offenders Act, 1958 are not excluded in the cases of persons found guilty of offences under the Prevention of Food Adulteration Act, 1954. Assuming that there was a reasonable doubt or ambiguity, the principle to be applied in construing a penal Act is that such doubt or ambiguity should be resolved in favour of the person who would be liable to the penalty. In *State of Rajasthan v. Raja Ram* (2003), the court observed that the golden thread which runs through the web of administration of justice in criminal cases if that is two views are possible, one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted. The paramount consideration of the court is to ensure that miscarriage of justice is prevented. On the same principle, the Court in *Upendra Pradhan* acquitted the accused and discarded

the opposite view which indicated his guilt (*Upendra Pradhan v. State of Orissa*, 2015).

Burden of Proof and Presumption of Innocence. Section 101 of the Indian Evidence Act 1872 places the burden of proof on the party who substantially asserts the affirmative of the issue and not upon the party who denies it. In a criminal trial, the burden of proof squarely rests upon the prosecution. The burden of proving the guilt of the accused beyond all reasonable doubt always rests on the prosecution and on its failure it cannot fall back upon the evidence adduced by the accused in support of his defence to rest its case solely thereon (*Jarnail Singh v. State of Punjab*, 1996). It is not correct to say that when the prosecution has and used such evidence as the circumstances and nature of the case require, it is for the accused to establish his innocence for the reason that there is no burden laid on the prisoner to prove his innocence and it is sufficient if he succeeds in raising a doubt as to his guilt. In *Ahibaran Singh v. State* (1953), Kaul J. has held that in a case under section 411 IPC, it is not upon the accused to prove how he came to possess the property which is said to be stolen property. The elementary principle of criminal law, that in all cases the burden of proof lies upon the prosecution to bring the guilt home to the accused, does not admit of any exception. The possession of a small quantity of psychotropic substance for personal use requires the prosecution to prove its allegation of commercial position beyond reasonable doubt. It is enough for the accused in his defence to satisfy the judicial mind on a preponderance of probability (*Ouseph v. State of Kerala*, 2004).

In a criminal trial, the presumption of innocence is a principle of cardinal importance and so, the guilt of the accused must in every case be proved beyond all reasonable doubt. Probabilities, however strong, and suspicion however grave, can never take the place of proof (*Babu Singh v. State of Punjab*, 1964). Suspicion that the mother of the illegitimate child might have caused her child's death cannot be substituted for proof. Similarly, clandestine carrying of a liquid in a rubber tube however suspicious is not sufficient to conclude that the liquid contains alcohol, for even a grave suspicion cannot take the place of proof(*State v. Madhukar Gopinath*, 1967). In this regard, the Supreme Court has recognised presumption of innocence as a human right. It has emphasized that "It is now well settled that benefit of doubt belonged to the accused. It is further trite that suspicion, however grave may be, suspicion cannot take place of a proof. It is equally well settled that there is a long distance between 'may be' and 'must be'…. Presumption of innocence is a human right. Such presumption gets stronger when a judgment of acquittal is passed."(*Nagendra Singh v. State of M.P.*, 2004)

Thus, the principle of legality is writ large in the entire criminal law jurisprudence of the country. The enactment of any penal law by the legislature as well as the interpretation of the same by the judiciary is subject to the fairly established principles of legality. A departure or violation of the same is likely to be struck down as being bad and against the fundamental canons of criminal law.

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