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Protection in Respect of Conviction for Offences: A Comparative Analysis

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The Constitution of India provides for certain rights under art. 20 regarding 'Protection in respect of Conviction for Offences'. These are the rights concerning the right against double jeopardy, the right against self-incrimination, and the right regarding Ex Post Facto laws. The research paper focuses upon critically analyzing the key elements of these provisions and how their scope has been widened, since the adoption of the constitution, through judicial pronouncements. The probable reasons behind the enactment of such clauses under part III of the constitution will also be highlighted. In order to provide a holistic perspective, this paper will analyze the stance of international law with respect to these rights. A comparative analysis would be made regarding the position of law in India with respect to some other countries across the globe. Moreover, within India also there are certain legislations that tend to elaborate on these rights, such statutes will also be discussed to provide a multidisciplinary aspect. In the end, the paper will conclude by providing critical suggestions and pointing out some lacunas in law that are needed to be fixed for better functioning of the society.

Keywords: *protection, conviction, offences.*

INTRODUCTION

In India, rights regarding the 'Protection in respect of Conviction for Offences' have been recognized since the inception of its constitution. The framers were far-sighted enough to enshrine these rights under Part III of the constitution dealing with Fundamental Rights. These were considered significant enough to be made constitutional rights and were not left at the mercy of legislature to be enacted as statutory rights in the future. Through judicial interpretation, these rights are mentioned under art. 20 of the constitution has been deliberated upon extensively, which has eventually led to the widening of its scope to an extent.

The three main rights are mentioned under art. 20 of the constitution are right regarding Ex Post Facto laws¹, right against Double Jeopardy², and right against Self-Incrimination³. These are so fundamental in nature that no statute should be enacted in contravention to these rights because the laws that are violative of such rights are invalid under art. 13(2) of the constitution. As the language of art. 20 suggests it is applicable for both citizens and non-citizens. It is one of the two articles of the constitution under part III that cannot be suspended even during an emergency.

RIGHT REGARDING EX POST FACTO LAWS

Ex Post Facto is a commonly used legal maxim that is used to denote laws that have retrospective application. This would imply that the legal consequence of an act committed before the enactment of an act might change because of the retrospective application of such a law.

UNDER INDIAN JURISDICTION

Indian Constitution recognizes the right of its citizens and non-citizens against the retrospective application of laws enacted by the legislature under art. 20(1). Though the maxim '*ex post facto*' is nowhere used in the article but the implication of the section is such that it

¹ Constitution of India, art 20(1)

² Constitution of India, art 20(2)

³ Constitution of India, art 20(3)

prohibits retrospective application of laws in two ways. **Firstly**, it states that no person should be convicted for an offence that was not considered as an offence at the time when the act was committed. For instance, in a country ‘ABC’ which has a similar provision as this, if a law is passed making ‘hit and run’ a punishable offence then the people who commit such offence thereafter should be punished and not the ones who committed such act before the law was enacted, as it is prohibited. **Secondly**, no person should be awarded a punishment greater than what was prescribed under law for an offence when it was committed. For instance, in the same country ‘ABC’ if the punishment for ‘hit and run’ is an increase from five to ten months then the increased sentence should be awarded to a person who committed the offence only after the coming up of such amendment and not retrospectively. In a case, the apex court held that as the accused committed the offence in 1947 and the punishment for such offence was amended in 1949 so as to include an additional fine was not applicable on the accused by virtue of art. 20(1).⁴

Though, generally, the legislatures have the right to enact both prospective as well as retrospective laws but with the provision of art. 20(1) the power gets restricted. As the sub-clause talks about the conviction for offences thus it is clear that it is dealing with the prohibition of ex post facto laws in criminal legislation. It is to be noted that these rights are with regards to convicting and sentencing. The reason as to why the draftsmen of the world’s largest constitution would have thought it necessary to enshrine such a right under the ambit of the fundamental right itself is because punishing a person for an act that was not an offence at the time of its commission goes against the rules of natural justice and fair play.

This provision has no application on the procedural aspect of law which implies that an amended procedural requirement under the law can have retrospective application. For instance, in a country ‘ABC’, a procedural requirement at trial for a ‘hit and run’ case is amended then it can be applicable on an ongoing trial of such case for an offence committed before the amendment as such amendment is not related to the convicting and sentencing

⁴ *Kedar Nath v State of West Bengal* AIR 1953 SC 404

aspect and thus not hit by art. 20(1). In the case of *Shiv Bahadur Singh Rao v. State of U.P.*⁵, it was held that a retrospective application of a mere procedural law will not lead to an infringement of an accused fundamental right under art. 20(1).

UNDER OTHER JURISDICTIONS AND INTERNATIONAL LAW

The Universal Declaration of Human Rights, under art. 11 para 2, lays down a similar provision that is akin to what has been provided under the Indian constitution. As discussed earlier under Indian jurisdiction, the provision regarding ex post facto laws under UDHR also prohibits the retrospective application of penal laws in similar two ways. Art. 11 para 2 of UDHR and Art. 20(1) of the Indian constitution can be said to be a replica of each other with the use of different terminologies.

Art. 15 para 1 of the International Covenant on Civil and Political Rights is almost a verbatim replica of art. 11 para 2 of UDHR with the only difference of using 'criminal offence' in place of 'penal offence'. Not just this it also says that an accused shall be given the benefit of a lighter punishment even if the amendment in the quantum of punishment was done after the commission of the offence.

In the United States, the application of an ex post facto law has been prohibited both by federal⁶ and state governments⁷. In a landmark judgment of *Calder v. Bull*⁸, the US Supreme court defined ex post facto laws. Though in the UK, ex post facto laws are not really welcomed it is possible to pass such laws due to parliamentary supremacy and even though the UK is a signatory to the European Convention of Human Rights which prohibits such laws from being applied under art. 7 but in theory, the UK can still pass such laws as they follow parliamentary sovereignty.

RIGHTS AGAINST DOUBLE JEOPARDY

⁵ *Shiv Bahadur Singh Rao v State of UP* AIR 1953 SC 394

⁶ Constitution of United States, art 1, s 9, cl 3

⁷ Constitution of United States, art 1, s 10

⁸ *Calder v Bull* 1 L Ed 648

The concept of double jeopardy is convenient to understand as it is based on a commonsense logic that a person should not be punished for the same offence twice. It is no brainer as to why such a provision would have found its way to part III of the constitution. This principle is significant as it follows the principles of natural justice. It shall be unfair to punish a person for an offence for which one has already undergone punishment. The legal maxim attached to the concept of double jeopardy is *autrefois convict*. It can be said that a person who is being again prosecuted for the same offence can raise double jeopardy as a defense.

UNDER INDIAN JURISDICTION

Again, art. 20(2) nowhere uses the term double jeopardy by itself. Moreover, it is a very famous criminal law principle that has been followed in India even prior to the enactment and adoption of the constitution. What the constitution did was that it simply made it a fundamental right by adding it to part III. As the language of the article suggests, this concept is specifically provided for criminal law cases, but this does not mean that such a principle is not to be found in civil jurisprudence. The principle of *res judicata* is very much applicable for civil cases and has a similar application. The General Clauses Act of 1897 also provides for a provision against double jeopardy under s. 26.

As mentioned above, the concept of double jeopardy was being adhered to in India even prior to the coming of the constitution as it was provided for under the Criminal Procedure Code. Currently, s. 300 of CrPC deals with the concept of double jeopardy and it is to be noted that it acknowledges both the pleas of *autrefois acquit* and *autrefois convict*. The requirements under CrPC so as to raise the defense of double jeopardy are that **firstly**; the person should have been either acquitted/convicted for the offence, **secondly**; the acquittal/conviction should have been by a competent court, or **thirdly**; the subsequent proceeding should be against the same offence based on the same set of facts.

It is important to note that under art. 20(2), the subsequent proceeding should be for the same offence. For instance, if a person was prosecuted for an offence 'X' based on some set of facts and in the future is being prosecuted for offence 'Y' based on a similar set of facts, then it will

not be termed as being prosecuted twice as the offences are different. Also, in the case of *Institute of Chartered Accountants of India v. Vimal Kumar Surana*⁹, the court held that if a person is being prosecuted and convicted under different laws then it will not be hit by double jeopardy. What is important to be noted here is that if the elements of an offence for which a person is being prosecuted subsequently is not the same with respect to the elements of the offence for which the accused for prosecuted at the first time, then it will not attract the defense of double jeopardy.¹⁰

UNDER OTHER JURISDICTION AND INTERNATIONAL LAW

The International Covenant on Civil and Political Rights provided for protection against double jeopardy under art. 14(7). It states that a person who has been convicted or acquitted after a trial in accordance with the law of a country should not be tried again. The Optional Protocol No. 7 of the European Convention of Human Rights also provides for protection against double jeopardy under art. 4 which is like what ICCPR has to say about double jeopardy with the use of different terminologies.

In the United States, Fifth Amendment brought the double jeopardy clause to its constitution. It protects an individual from being prosecuted again for the same offence for which he had been already convicted or acquitted. In America, as states have the power to enact their own laws and are considered independent sovereigns, thus the doctrine of dual sovereignty applies.¹¹

Criminal law in England and Wales acknowledges the concept of double jeopardy. If a person is once acquitted for an offence by a court, then even if later the person confesses the offence, still cannot be punished for the same and can only be prosecuted for perjury. Though in 2003, few exceptions were created and now the concept of double jeopardy has been diluted so as to bring guilty people to the justice system and providing closure to the victim's family.

RIGHT AGAINST SELF-INCRIMINATION

⁹ *Institute of Chartered Accountants of India v Vimal Kumar Surana* (2011) 1 SCC 534

¹⁰ *Leo Roy v Superintendent District Jail* AIR 1958 SC 119

¹¹ *Gamble v United States* 139 S Ct 1960 (2019)

The understanding of a provision regarding the right against self-incrimination can be reached through the application of simple criminal law principles like the burden of proof of proving an accused guilty in a trial should be on the prosecution with the help of evidence. It should not be by way of compelling the accused to provide self-incriminating statements. This holds value as in an adversarial type of system that is followed in India it would be absurd to allow the prosecution to compel the accused to provide self-incriminating witness in his own case.

UNDER INDIAN JURISDICTION

The Indian Constitution while providing for such right under art. 20(3) has certain elements that are to be fulfilled in order to exercise such rights. **Firstly**, a person should be formally accused of an offence that has great implications as a person cannot exercise such right until and unless a formal F.I.R. or complaint has been lodged against it. Though, it is not necessary for a trial to have commenced for such right to come into application. Also, departmental inquiries against an employee will not entitle him/her to enjoy this right as it is a mere inquiry, and no formal accusation has been laid. **Secondly**, the accused should have been compelled to give self-incriminating statements for art. 20(3) to apply but if the accused voluntarily gives a self-incriminating statement, then that cannot be challenged.¹²

The intention behind the enactment of such a right under part III of the constitution would have been to protect people from unnecessary harassment at the hands of the authorities. Also, this right is available for both accused and witness in a case which can be exercised even during the pre-trial period when information is being extracted by police as held in a Supreme Court case of *Nandini Satpathy v. P.L. Dani*¹³

Other statutes too provide provisions that can be said to be some sub-sets of the right against self-incrimination enshrined under the constitution of India. For instance, s. 24 of the Indian Evidence Act makes a confession irrelevant if it is provided under a threat, inducement, etc. by a person in authority. Also, ss. 161(2) of CrPC makes an exception by allowing the witnesses not to answer questions that might expose them to some criminal liability.

¹² *State of Bombay v Kathi Kalu Oghad* AIR 1961 SC 1808

¹³ *Nandini Satpathy v PL Dani* AIR 1978 SC 1025

UNDER OTHER JURISDICTIONS AND INTERNATIONAL LAW

In the United States, through the inclusion of the Fifth Amendment right against self-incrimination was added. Through judicial interpretation, this right is applicable in both civil and criminal cases. This right can be exercised with respect to both oral as well as documentary evidence. This right has been interpreted to become so wide that even a disclosure with regards to the furnishing of evidence required for conviction can be avoided with the help of this right.

In the UK, though the accused cannot be compelled to produce anything that is self-incriminating the same is not true in all cases with respect to witnesses as they can be compelled in exceptional cases to produce evidence or answer questions that are self-incriminating, and which can lead to criminal liability.

The International Covenant on Civil and Political Rights under art. 14(3)(g) states that no person can be compelled to confess guilt or even testify against himself. Though the European Convention on Human Rights does not specifically mention this privilege against self-incrimination, it is read into art. 6 of this convention talks about the right to a fair trial.¹⁴

CONCLUSION

The rights provided under art. 20 of the constitution have been widened through judicial interpretation. For instance, the right against self-incrimination has been widened so much so that it also includes the right to remain silent. With the change in time and advancement of technology, new tests are being developed which can help in the process of investigation, but the problem arises when the constitutionality of such tests is put into question. Some examples of such tests are the narco-analysis test, polygraph test, DNA test, etc.

The different courts in India have time and again given judgments that have presented diverse views with respect to the constitutionality of such tests. Some have expressed the view that such tests are ultra vires the constitution as they compel the accused to give statements that

¹⁴ *Funke v France* (1993) 16 EHRR 297

can be self-incriminating. Also, the fact that the accused is not conscious and thus cannot choose whether to answer the question or not makes it involuntary.¹⁵ On the other hand, courts have also expressed the view that such technological advances can be used keeping in view the public interest.

The concept of double jeopardy though has been enshrined under the constitution is also a part of the criminal procedure code and a lot of Supreme Court judgments have held that the concept under CrPC has a wider application as compared to the Indian Constitution. Criminal law jurisprudence is vast and can be considered as an ocean in itself but what the Constitution of India has provided for are few basic rights to all persons under the head of fundamental rights so that subsequent laws can be enacted based on these elementary yet significant principles.

Art. 20 is a part of fundamental rights that have been borrowed from the US constitution and thus both countries have similar provisions with regards to protection in respect of conviction for offences. All the rights enshrined under art. 20 within different sub-clauses are in a way the constitutional acknowledgment of some key principles of a fair trial. These rights are also internationally recognized under different conventions as mentioned throughout the analysis. All the rights are mentioned within art. 20 are keeping in consonance with the principles of equity, natural justice, and good conscience.

¹⁵ *Selvi v State of Karnataka* AIR 2010 SC 1974