EXPLAIN THE CONCEPT OF EX – POST FACTO LAWS, DOUBLE JEOPARDY AND RIGHT AGAINST SELF INCRIMINATION

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Meaning Ex – post facto laws

An ex post facto law, also called a retroactive law, is a law that retroactively changes the legal consequences of actions that were committed, or relationships that existed, before the enactment of the law.

Latin for "after the fact," which refers to laws adopted after an act is committed making it illegal although it was legal when done, or increases the penalty for a crime after it is committed. Such laws are specifically prohibited by the U. S. Constitution, Article I, Section 9. Therefore, if a state legislature or Congress enact new rules of proof or longer sentences, those new rules or sentences do not apply to crimes committed before the new law was adopted.

- **Protection against ex – post facto law**

An ex – post facto law is a law which imposes penalties retroactively, that is, upon acts already done, or which increase penalty for past acts. Suppose a person does an act in 1954 which is not then un- lawful. A law is passed in 1956 making that act a criminal offence and seeking to punish that person for what he did in 1954. Or suppose punishment is prescribed for an offence in 1954 is six months imprisonment, but the punishment for the same offence is increased in 1955 to imprisonment for a year, and is made applicable to the offence committed before 1955. These are both example of ex- post fact laws. Such laws are regarded as in acquirable and abhorrent to the notion of justices and, therefore, there is constitutional safe guard's against such laws.

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Article 20 (1) (First Part)

Article 20(1) provides the necessary a protection against an ex- post facto laws.

Article 20(1) has two parts. Under the first part, no person is to be convicted of an offence except for violating a (law in force) at the time of the commission of the act, charged as offence. A person is to be convicted for violating a law in force, when the act charged is committed. A law enacted later, making an act done earlier(not an offence when done) as an offence, will not make the person liable for being convicted under it an immunity is thus provided to a person from being tried for an act, under a law enacted subsequently, which makes the act un lawful. This means that if an act is not an offence on the date of its commission, a law enacted in future cannot make it so.

- **Illustration**

Section 304-B, IPC was enacted on 19/11/1986.making a dowry death punishable as an offence under the penal code. A new offence as thus been inserted in the IPC, with effect from 19/11/1986. Because of article 20(1), section 304 – B cannot be applied to a dowry death which took place in 1984. That is prior to its enactment. Section 304 – B is a substantive provision creating a new offence subsequent to the commission of the offence attributed to the respondent in the instant case and so he could not be tried under section 304 – B.

- **Article 20 (1) (Second Part)**

The second part of Article 20 (1) immunizes a person from a penalty grater then he might have incurred at the time of his

committing them offence. Thus, a person cannot be made to suffer more by an ex- post facto law then what he would be subjected to at the time he committed the offence. The clause applies to punishment for criminal offences.

Example

X committed an offence in 1947, under the prevention of corruption act which then prescribed a punishment of imprisonment or fine or both. In 1949, by an amendment of the law, the punishment was enacted. The Supreme Court held that the enhanced punishment could not be applicable to the offence committed in 1947 because of the prohibition contained in Article 20 (1).

The scope of Artile 20 (1) has been fully considered by constitutional bench of Supreme Court in K. Satwant Singh V/S state of Punjab.

The appellant, who had been a contractor in Burma, in response to an advertisement issued in August, 1942, by the evacuee Government of Burma, then functioning at Simla, inviting claims from contractors for works of construction and repairs executed by them, submitted claims aggregating to several lackh of rupees. The Government of Burma sent these claims for verification to Major Henderson at Jhansi in March and May, 1943, as he was the officer who had knowledge of these matters. He certified many of these claims to be correct and on his certification the Government of Burma sanctioned the claims and directed the Controller of Military claims at Kolhapur to pay the amounts. On the request of the appellant cheques drawn on the Imperial Bank of India at Lahore were posted to him from Kolhapur and they were encashed at Lahore. The largeness of such claims aroused the suspicions of the Government and it was discovered that the claims made by the appellant were false. He was tried in several trials under S. 420 of the Indian Penal Code along with Henderson, charged under

S. 420/109 of the Code for abetment of those offences, before a special Tribunal at Lahore, functioning under Ordinance No. XXIX of 1943, as amended by ordinance No. XII of 1945. After the partition of India, the trials by the Special Tribunal took place at Simla.

The appellant was convicted at these trials and sentenced to imprisonment ranging from Punjab one year to three years, and payment of fines of various amounts.The Tribunal divided the fines into 'ordinary' and 'compulsory', the latter by virtue of s, 10 of the Ordinance, which prescribed a minimum fine equal to the amount procured by the offence. In default of payment of the 'ordinary' fines it directed the appellant to undergo further imprisonment for certain periods, but there was no such direction with respect to the 'compulsory' fines. The High Court, on appeal, affirmed the convictions but varied the sentences by reducing the term of imprisonment and setting aside the 'compulsory' fines. The appellant as also the State of Punjab appealed to this Court. It was contended on behalf of the appellant that (1) the offences having been committed at Kolhapur, then outside British India, the trial at Simla, in the absence of any certificate or sanction given under S. 188 of the Code of Criminal Procedure, was illegal ; (2) the joint trial of the appellant and Henderson at Simla was also illegal : (3) SS. 234(1) and 239(b) of the Code could not be combined to try a person charged with three offences of cheating with another charged with abetment in respect thereof in a single trial and (4) sanction under S. 197 of the Code was necessary for the prosecution of Henderson and the absence of such sanction vitiated the joint trial. The contention of the State in the appeals preferred by it was that the imposition of the 'compulsory' fines by the Tribunal was perfectly valid in law and the High Court was in error in setting aside the same.

Held, that before the provisions of S. 188 of the Code of Criminal Procedure could apply to a case, it was necessary to establish that the crime was committed outside British India In the instant case the misrepresentation by the appellant, the false

certification by Henderson and the resulting payment having been made respectively at Simla, Jhansi and Lahore, then in British India, no part of the offence could be said to have taken place outside British India. The contention that the posting of the cheques at Kolhapur was tantamount to delivery of them to the appellant at Kolhapur, the Post Office being the agent of the appellant, was wholly misconceived in the facts and circumstances of the case. Moreover, what might be a relevant consideration as to the place of payment for the purpose of the Income-tax Act would not necessarily be relevant for the purposes of a criminal case.

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P.B. Gajendragadkar – Law, Liberty & Social Justice
http://en.wikipedia.org/wiki/constitution

DOUBLE JEOPARDY

The act of putting a person through a second trial for an offense for which he or she has already been prosecuted or convicted.

The act of prosecuting a defendant a second time for an offence for which he has already been tried.

- **Principle of double jeopardy**

The roots of the doctrine against double jeopardy are to be found in the well established maxim of the English common law, Namo debt bis vxari, mans that a man must not be put twice in peril for the same offence.

When a person has been convicted for an offence by a competent court, the convection serves as a bar to any further criminal proceedings against him for the same offence. The idea is that no one ought to be punished twice for one and the same offence. If a person is indicted again for the same offence in a court, he can plead, as a complete defense, his formal acquittal or conviction or, as it is technically expressed, he can take the plea of autrefois acquit or autrefois convict.

The fifth amendment of U.S. constitution does not provide inter alia“Nor shall any person be”subject for the same offence to be put twice in jeopardy of life or limb”. In the USA the protection is not only against a second punishment but even against the peril in which a person is placed by second trial for the same offence.

- **Scope of Article 20(2)**

Article 20(2) runs as “No person shall be prosecuted and punished for the same offence more than once” contains the rule against double jeopardy.

The principle was in existence in India even prior to the commencement of the constitution, But the same has now been given the status of the constitutional, rather than a mere statuary, guarantee.

The ambit of Article 20 (2) is, however narrower then the English or the American rule against double jeopardy the Indian provision enunciates only the principle of autrefois convicts But not that of autrefois acquit in Britain and USA, both this rules operate and second trial is barred even when the accused has been acquitted at the first trial for that offence. In India, on other hand the rule of autrefois acquit is not incorporated in article 20 (2). Article 20 (2) may be invoked only when there has been prosecution and punishment in the first instance. Both prosecution and punishment should co- exist for article 20 (2) to be operative. A prosecution without punishment would not bring the case with in article 20 (2). If a person has been prosecuted for an offence but acquitted, then he can be prosecuted for the same offence again and punished.

A person accused for committing a Murder was tried and acquitted. The state preferred an appeal against an acquittal. The accused cannot plead Article 20 (2) against the sate preferring an appeal against the acquittal. Article 20 (2) could not apply as there was no punishment for the offence at the earlier prosecution and an appeal against an acquittal was in substance a continuation of the prosecution.

- **Case Law**

V.K. Agarwal v/s VasantRaj Air 1988 SC 1106

The accused was convicted under the customs act. He was later sought to be prosecuted under the Gold (Control) Act. The Supreme Court ruled that the ingredient required to be established under the customs act are different from the ones required to be established for an offence under the gold (control) act and therefore article 20 (2) does not come into the picture. If the ingredients of both the offences are satisfied the same act of possession of gold would constitute offences under both the acts. The petitioner in the instant case was not been prosecuted for the same offence twice but for two distinct offences constituted of different ingredients, and the Bar of Article 20 (2) does not apply in such a situation.

- Mohinder singh V/s State of Punjab.

The appellant had been tried earlier under the sections 399, 402 of IPC and section 3 of TADA for having a fire arms in possession and preparing and assembling for committing a dacoity later he was tried under section 5 of TADA essentially for unauthorized possession of a stein gun. In the earlier case, the question of possession of stain gun was considered but the prosecution evidence was not believed then. The Supreme Court in Mohinder singh case rejected the contention that the accused was being tried twice for the same offence.

- **Prosecution**

A limitation read in to Article 20 (2) is that the former "prosecution" (which indicates that the proceeding are of criminal nature) must be before court of law, or a judicial tribunal required by law to decided matters in controversy Judicially on evidence and on oth and which is must be authorized by a law to administer, and not before e a tribunal which entertain a departmental or administrative enquiry even though set up by a statute but not required to proceed on legal evidence given on oath.

The words "before a court of law or judicial tribunal" do not found specifically in the Article have never the less been read there in. when a civil servant is dismissed from government service on ground of miss behavior after a department enquiry, his later prosecution on the same charges which had been earlier enquired into and for which he was punished by dismissal would not be barred by article 20 (2). The earlier enquiry could not be regarded as prosecution for a criminal offence so Article 20 (2) would not apply thus a departmental enquiry dose not bare a later prosecution and punishment in a court.

The court has explained the legal position under Article 20(2) as follows.

To invoke the protection of article 20(2), there must have been both prosecution and punishment in respect of same offence.

The words “prosecuted and punished” are to be taken not distributively so as to mean ‘Prosecuted’ or “punished’. Both the factors must co – exist in order that the operation of Article 20(2) may be attracted. When a department enquiry is held against a civil servant under the public servants (Enquires) Act 0f 1850, is not “prosecuted’ and ‘punished’ for an offence as contemplated by Article 20 (2).

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Privileges against self incrimination

U.S.A.

The fifth amendment of the U.S. constitution provides inter alia.

"No person ... shall be compelled in any criminal case to be a witness against himself"

By Judicial interoperation, the above provision has been given a very wide connotation. The privilege against self incrimination has been held to apply to witnesses as well as parties in the proceeding civil/ criminal. It covers the documentary evidence and oral evidence, and extends to all disclosure including answers which by themselves support a criminal conviction or a furnish a link with the chain of evidence needed for conviction.

- **Britain**

It is a fundamental principle of the common law that a person accused of an offence shall not be compelled to discover documents or objects which incriminate himself. No witness, whether party or stranger is, except in few cases, compellable to answer any question or to produce any documents the tendency of which is to expose the witness, to any criminal charge, penalty.

The privilege is based on the policy of encouraging person to come forward with evidence in court of Justices, by protecting them as far as possible, from injury or needless annoyance, in consequence of so doing.

- **India**

The privilege against the self incrimination is fundamental cannon of common law criminal jurisprudence. The characteristic principle features of this principle are –

1. That the accused is presume to be innocent,
2. That it is for the prosecution to establish his guilt.
3. That the accused need not make any statement against his will.

These propositions emanate from an apprehension that if compulsory examination of an accused were to be permitted then the force and torture may be used against him to entrap him into fatal contradiction. The privilege against self incrimination thus enables maintenance of human privacy and observance of civilized standard in enforcement f criminal justices.

Article 20 (3) which embodies these privilege – "No person accused of any offence shall be compelled to be a witness against himself". On analysis, this provision will be found to contain the following components.

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

All the three ingredients must necessarily co- exist before the protection of Article 20(3). Can be claimed. If any of these ingredients is missing, Article 20 (3) cannot be invoked. Each of this ingredients is discussed as below.

Indian Constitutional Law – M.P. Jain
Phipson on Evidence, X Ed. 264

Types of Incriminating evidence covered by Article 20(3)

The privilege applies to "testimonial compulsion'. It no doubt covers oral testimony by an accused. But judicial opinion has fluctuated on the question whether Article 20(3) covers something more besides oral evidence.

- M.P. Sharma v/s Satish Chandra case.

Supreme Court taking a broad view of Article 20(3) stated that to limit Art. 20 (3) to the oral evidence of a person standing trial for an offence is "to confine the content of the constitutional guarantee to its barely literal import". And so to limit Art 20(3) would be to rob then guarantee of its substantial purpose and to miss the substance.

A person can be a witness not merely by giving oral evidence but also by producing documents or making intelligible gesture as in the case of dumb witness. The phrase 'to be a witness' in Article 20(3), the court ruled, meant nothing more than 'to furnish evidence" as and this could be done through lips, or by production of a things or a document, or in any other mode. Every positive volitional act which furnishes evidence is testimony and testimonial compulsion connotes coercion which procures the positive volitional evidentiary acts of the person as opposed to the negative attitude of silence or submission on his part.

The Supreme Court ruling in SHARMA v/s SATISH, thus gave a broad important to Article 20(3) as it was held to cover not only oral testimony or statement in writing of the accused but also production of things or of evidence by other modes.

The Supreme Court reconsidered the matter in state of Bombay v/s kathi Kalu Oghad. A bench of eleven judges was constituted to consider the issue involved.

The main question involved was whether Article 20(3) is violated when the accused is directed to give his specimen hand writing, or signature or the impression of his palms and figures.

The answer to this question depends on the interpretation of the words “to be a witness” found in article 20(3). Is not violated in any of the above situation. The court stated that “self – incrimination must mean conveying information based upon the personal knowledge of the person giving information” and covers only “personal testimony which must depend upon his violation” he court stated in oghad.

“To be a witness” may be equivalent to ‘furnish evidence’ in the sense of making oral or written statement, but not in larger sense of the expression so as to include giving of thumb impression or impression of palms or foot or figures or specimen writing or exposing a part of the body by an accused person for purpose of identification”.

The court emphasized that it is as much necessary to protect an accused person against becoming compelled to incriminate himself, as to arms the agent of law and the law courts with legitimate powers of bringing offenders to justices. The court stated regarding production of documents in the possession of the accused, that ‘if it is a document which is not his statement conveying his personal knowledge relating to the change against him, he may be called upon by the court to product that document”.

Several types of evidences are excluded from the preview of Article 20(3). This is done with a view to draw a balance

between the exigencies of investigation of crimes and the need to safeguard the individual from being subjected to third degree methods.

The court has reiterated that the prohibition in Article 20(3) covers oral testimony given by a person accused of an offence both in and out of the court, as well as the written statements by him having a bearing on the controversy with reference to the charges against him.

But Article 20 (3) would not include signature, thumb impression, impression of the palm or foot or fingers or specimen of handwriting or exposing parts of his body by an accused for purpose of identification. Although “it may amount to furnishing evidence in the large sense, is not included within the expression to be witness”.

Thus, Article 20 (3) is not violated by compelling a witness to stand up and show his face for the purpose of identification. He can also be ordered to disclose any tell/ tale scare on his body for purpose of identification.

The accused may have documentary evidence in his possession which may throw some light on controversy. If it is a document which is not his statement conveying his personal knowledge relating to the charge against him, he may be called upon by the court to produce the same. On this point, the court stated in oghad the accuse person may be in possession of document which is in his hand writing or which contains his signature or his thumb impression. The production of such a documents with a view to comparison of the writing or the signature or the impression, “is not the statement of accused person, it can be said to be of the nature of the personal testimony”.

Article 20(3) is directed against self incrimination by an accused. Self incrimination must mean conveying information based upon personal knowledge of a person giving the information and cannot include merely the mechanical process of producing document in court which may throw light on any point in controversy but which do not contain any statement of the accused based on his personal knowledge.

- **What is compulsion**

In order to bring the evidence within the inhabitation of Article 20(3), it must be shown that not only the person making the statement was an accused at the time of making the statement and that it had a material bearing on the criminality of the maker of statement, but also that he was a compiled to make the statement.

'Compulsion' is duress, compulsion as to b a physical objective act and not the state of mind of a person making the statement, except where the mind as been so conditioned by some extraneous process as to render the making of the statement involuntary and therefore, extorted .The mere asking by a police officer investigating a crime against a certain individual to do a certain thing is not compulsion within the meaning of Art. 20(3).

The mere fact that the accused was in police custody at the time he made the statement would not, by itself, be the foundation for the inference of law that the accused was compiled to make the statement. An accused person is not regarded as having been compiled to be a witness against himself merely because he made a statement while in police custody without anything more. As a proposition of law , the mere fact of being in police custody at tyh time of making the statement does not by itself lead to the inference that the

accused as been compiled to make a statement. However if the police obtains a statement by employing a third degree method, the statement would be barred under Art 20(3).

The accused may however shows that while he was in police custody at the revelent time he was subjected to treatment which amounted to compulsion. In other words it will be question of facts in each case to be determined by the court on weighing the facts and circumstances disclosed in the evidence before it.

Compulsion may take many forms, an accused may be subjected to physical or mental torture he may be starved or beaten and a confession extorted from him.

- **Case Law**

  Mohd. Dastgir V/S State Of Madras. AIR 1960 SC 756,3SCR116

In this case accused went to the house of police officer and offered him some currency notes as a bribe which he threw at the face of the accused. Shortly, thereafter, the officer asked the accused to produce the currency notes which he did. The accused was then tried for the offence of offering a bribe. It was argued on behalf of the accused that he was compiled to produce the envelope containing the currency notes and there was thus violation of Art20 (3).

The Supreme Court rejected the c contention. the court argued that before Art 20(3) could come into play two facts must be established ,

1. That the individual concerned was a person accused of an offence and
2. That he was compiled to be a witness against himself.

The requirement of Art20 (3) would not be fulfilled if only one of this fact and not the other is established. The Supreme Court held that the accused could not claim the benefit of Art20 (3) as he was not compiled by the officer to produce the currency notes, although the accused was asked to produce the money, it was within his power to refuse to comply with the officer's request.

Privilege against self incrimination as not been applied in India to searches and seizures, or seizures of document under a search warrant. A seizure of the premises in possession of a person accused of an offence, under a search warrant , and seizure of documents, under the provision of section 94 and 95 crpc is not a compiled production within the meaning of Art20(3) and would not offend the constitutional provision

- **Person accused of an offence**

The privilege under article 20 (3) is available not only to an individual, but even to an incorporated body, if "accused of an offence"

In order to avail protection of article 20(3) against self incrimination, a condition to be fulfilled is that the person calming the protection should be one "accused of an offence" at the time he makes the statement. Article 20(3) doesnot applies if the person is not an accused at the time makes the statement. But becomes an accused by the time when the later the statement made by him is sought to be proved. This means a person against whom a formal acquisition relating to the commission of an offence has been leveled and all though the actual trial may not have commenced as yet, but which in normal course may result in his prosecution.

- Case Law

Raja Narayanlal Bansilal V/S Maneck Firoz Mistry. 1961 SC 29 (1961) 1. SCR 417.

The Supreme Court has stated in Raja Narayanlal " for invoking the constitutional rights against testimonial compulsion guaranteed under article 20(3), it must appear that a formal acquisition has been made against the party with in the guarantee and that relates to the commission of an offence which in the normal course may result in prosecution". When, therefore a person claims the benefit of privilege, a question has to be asked whether he has been accused of any offence. A person cannot claim the privilege if at the time he make the statement he was not an accuse but become an accused thereafter.

- **Civil Proceeding**

The protection against article 20(3) is available only in criminal proceeding or proceeding of criminal nature before a court of law or other tribunal before which a person may be accused of an offence and defined in section3 (38) of the general clauses act, that is, an act punishable under the penal code or a special or local law.

The Protection of article 20(3) does not therefore extend to parties and witnesses in civil proceedings or preceding other then criminal.

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Mohd. Dastgir V/S State Of Madras. AIR 1960 SC 756,3SCR116

Raja Narayanlal Bansilal V/S Maneck Firoz Mistry. 1961 SC 29 (1961) 1. SCR 417

- **Administrative Proceedings**

Article 20(3) is not applicable to administrative investigation even though primary aim of proceeding may be to find out whether the individual has committed an offence or not.

Under section 45G of the Banking companies act, after an order for the winding up of a banking company has been made, the official liquidator has to submit a report whether in his opinion any loss has been cause to the company by any act or omission of the directors. Amounting to fraud. After considering the report, the High court may publically examine the directors, promoters, auditors, etc, of the company regarding the conduct and dealing in relation to the affairs of the company.

- **Case Law**

Ramesh Chandra Mehta V/S state of West Bengal Air 1970 SC 940.

In Ramesh Chandra case the appellant was searched at Calcutta Air Port. As a consequence, currency, pearls and Jewellery were found on his person and his baggage. He was charged under the sea customs act. During his trial, reliance was placed on his confessional statement made by him before the custom authorities. it was argued that it was in admissible in evidence because of article 20(3).

Rejecting the objection, the court ruled that the guarantee against testimonial compulsion contained in Article 20(3) can be claimed by a person only if he was accused f an offence at the time he made the statement under the sea customs act, a custom officers does not accuse a person any offence when calls upon a

person smuggling goods to make a statement. The officers hold the enquiry with a view to adjudge confiscation of goods dutiable. Or prohibited and imposing penalties. His primary duty is to prevent smuggling, is not accusing any person of any offence trial able before magistrate.

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Conclusion

The law does not make any difference in a rich and poor, the law is not meant for a specific group or individual, law protects all the people. In India it is seen that still police are in stronger position and seen dictating on public and many time the injustices are caused to the general people by using third degree and other means, the double jeopardy leads to non ending litigation, and burdening the courts, the protection to each and every person, it is seen the law without such provision can lead to exploitation of poor people and leading to safe guard of rich people such help to protect innocent.

The protection against self incrimination, double jeopardy help to control on non ending litigation and protection of innocent person from being punished by the wrong means used by police and politician.

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