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A Comparative Study of Ex post Facto Laws in India with Special Reference to UK and USA

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ABSTRACT

Article 20 provides protection against ex-post facto laws, double jeopardy and self-incrimination, which are all safeguards intended for persons accused of committing an offence. These are well recognized protections and have been considered to be basic defences in the law relating to crimes in all common law jurisdictions. The Constitutional Advisor had pointed out that these protections had been afforded in many of the other progressive constitutions of the world and that the protection against ex-post facto laws had found a place in the Irish, U.S., and the Weimar Constitutions. This paper seeks to understand the basic concept of Fundamental Rights of the Accused with special reference to Ex post facto laws and also compares with the constitutions of the UK and USA.

Keywords: Article 20, Ex post facto laws, Fundamental rights.

I. INTRODUCTION

The best definition of an ex-post facto law is that by Chief Justice Marshall: “*One which renders an act punishable in a manner in which it was not punishable when it was committed*”.³

An ex post facto law is from the Latin word for “after the fact” or “retroactive law” is a law that retroactively changes the legal consequences of acts committed or the legal status of facts and relationships that existed prior to the enactment of the law. In reference to criminal law, it may criminalize actions that were legal when committed; or it may aggravate a crime by bringing it into a more severe category than it was in at the time it was committed; or it may change or increase the punishment prescribed for a crime, such as by adding new penalties or extending terms; or it may alter the rules of evidence in order to make conviction for a crime more likely than it would have been at the time of the action for which a defendant is prosecuted. Conversely, a form of ex post facto law commonly known as an amnesty law may decriminalize certain acts or alleviate possible punishments (for example by replacing the death sentence with

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³ Fletcher v. Rock, 3 L Ed 162 : 10 US (6 Cranch) 87 (1810).

life-long imprisonment) retroactively.

An ex-post-facto law is a law which imposes penalties retroactively, that is, upon act is already done, or which increases the penalty for the past acts. Suppose a person does an act in 1954 which is not then unlawful. 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 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 offences committed before 1955. These are both examples of ex-post-facto laws. Such laws are regarded as inequitable and abhorrent to the notions of justice and, therefore, there are Constitutional safeguards against such laws.

A law may have an ex post facto effect without being technically ex post facto. For example, when a law repeals a previous law, the repealed legislation no longer applies to the situations it once did, even if such situations arose before the law was repealed. The principle of prohibiting the continued application of these kinds of laws is also known as "*Nullum crimen, nulla poena sine praevia lege poenali*", particularly in European continental systems.

II. PROVISIONS IN OTHER CONSTITUTIONS

(A) US constitution

Section 9 of Article I of the U.S. Constitution states: "No Bill of Attainder or ex-post facto law shall be passed." Section 10 of Article I, inter alia, states: "No State shall pass any Bill of Attainder, ex-post facto law".⁴ The import of this constitutional guarantee was explained two centuries ago by the US Supreme Court in *Calder v. Bull*,⁵ which still holds the field, in the following words:

1. Every law that makes an action done before the passing of the law; and which was innocent when done, criminal; and punishes such action;
2. Every law that aggravates a crime, or makes it greater than it was, when committed;
3. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed;
4. 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 offence, in order

⁴ For text of the U.S. Constitution, see Appendix 31, infra. "Bill of Attainder" means a legislative act that imposes punishment on a particular individual without a hearing or trial.

⁵ *Calder v. Bull*, 1 L ED 648 : 3 US (3 Dall) 386 (1798) - cited with approval in *Transmission Corporation of A.P. v. Ch. Prabhakar*, (2004) 5 SCC 551, 560 : AIR 2004 SC 3368.

to convict the offender.

The Supreme Court of India summarized the interpretation placed on this constitutional guarantee by the US Supreme Court as under:

1. Statute which punishes as a crime a previous act which was innocent when committed violates constitutional guarantee.⁶
2. Legislation which aggravates the degree of the crime resulting from an act committed prior to its passage violates the constitutional prohibition.⁷
3. Law which imposes additional punishment to that prescribed when a criminal act was committed is *ex-post facto*.⁸ The key question is whether the new law makes it possible for the accused to receive a greater punishment, even though it is possible for him to receive the same punishment under the new law, as could have been imposed under the prior law.
4. Legislation which is in relation to that offence or its consequences alters the situation of a party to his disadvantage or which eliminates, after the date of a criminal act, a defense available to the accused person at the time the act was committed violates constitutional guarantee.⁹
5. A law which alters the legal rules of evidence so as to require less proof than the law required at the time of the commission of an offence, in order to convict the accused, can amount to an *ex-post facto* law within the constitutional guarantee.
6. Constitutional prohibition does not apply to laws bringing about changes in procedure which do not alter substantial rights, even though they might in some way operate to a person's disadvantage. It does not give defendants a vested right in the remedies and methods of procedure employed in trials for crimes, provided that any statutory procedural change does not deprive the accused of a substantial right or immunity possessed at the time of the Commission of the offences charged.¹⁰
7. A change in law that alters a substantial right can be *ex-post facto* even if the statute takes a seemingly procedural form.¹¹

⁶ *Calder v. Bull*, 1 L Ed 648 : 3 &S (3 Dall) 386 (1798) and *Beazell v. Ohio*, 269 US 167 : 70 L Ed 216 (1925).

⁷ *Fletcher v. Peck*, 3 L Ed 162 : 10 US (6 Cranch) 87 (1810) and *Bouie v. Columbia*, 378 US 347 : 12 L Ed 2d 894 (1964).

⁸ *Cummings v. Missouri*, 71 US (4 Wall) 277 : 18 L Ed 356 (1867).

⁹ *Kring v. Missouri*, 107 US 221: 27 L Ed 506 (1883) and *Beazell v. Ohio*, 269 US 167 : 70 L Ed 216 (1925).

¹⁰ *Hopt v. People of Utah*, 110 US 574 : 28 L Ed 262 (1884) and *Mallett v. North Carolina*, 181 US 589 : 45 L Ed 1015 (1901).

¹¹ *Winston v. State*, 118 ALR 719 and *Miller v. Florida*, 482 US 423 : 96 L Ed 2d 351 (1987).

U.K Constitution: In the United Kingdom, ex post facto laws are strictly frowned upon, but are permitted by virtue of the doctrine of parliamentary sovereignty. Historically, all acts of Parliament before 1793 were ex post facto legislation, inasmuch as their date of effect was the first day of the session in which they were passed. This situation was rectified by the Acts of Parliament (Commencement) Act 1793. Ex post facto criminal laws are prohibited by Article 7 of the European Convention on Human Rights, to which the United Kingdom is a signatory, but parliamentary sovereignty, in theory, takes priority even over this.¹² An ex-post-facto law is one which gives the pre-enactment conduct a different legal effect from that which it would have had without the passage of the enactment. Thus, it reaches back to attach new legal rights and duties to already completed transactions.¹³

In *Phillips v. Eyre*,¹⁴ it was laid down that ex-post-facto laws are laws which violated and punished what had been lawful when done.

Japanese Constitution: Article 39 of the constitution of Japan prohibits the retroactive application of laws.¹⁵

Irish Constitution: The imposition of retroactive criminal sanctions is prohibited by Article 15.5.1° of the constitution of the Republic of Ireland. Retroactive changes of the civil law have also been found to violate the constitution when they would have resulted in the loss in a right to damages before the courts, the Irish Supreme Court having found that such a right is a constitutionally protected property right.¹⁶

III. UNIVERSAL DECLARATION OF HUMAN RIGHTS AND RELATED TREATIES

Article 11, paragraph 2 of the Universal Declaration of Human Rights provides that No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed.¹⁷

Article 15, paragraph 1 of the International Covenant on Civil and Political Rights No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor

¹² <http://www.parliament.uk/archives/> (accessed on 2-8-2018).

¹³ *Forbes Pioneer Boat Line v. Board of Comr's* 258 US 338 (1922).

¹⁴ (1170) LR. 6 Q.B.I, at p. 26;

¹⁵ For text of the Japanese Constitution, see Art 39 of Constitution of Japan.

¹⁶ For text of the Irish Constitution, see Article 15.5.1° of the constitution of the Republic of Ireland.

¹⁷ Article 11 of Universal Declaration of Human Rights.

shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby. Paragraph 2 adds In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgment rendered by a competent court.¹⁸

Article 6, paragraph 2 provides In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgment rendered by a competent court.¹⁹

IV. INDIAN CONSTITUTION

Article 20(1) of the Constitution reads, “*No person shall be convicted of any offence except for violation of a law in force at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence*”. The very wording of Article 20 and the words used therein - convicted; commission of the act charged as an offence, be subjected to a penalty, commission of offence, prosecuted and punished, accused of any offence, would indicate that proceedings therein contemplated are in the nature of criminal proceedings before a court of law or a judicial tribunal and the prosecution in this context would mean an initiation or starting of proceedings of a criminal nature before a court of law or judicial tribunal in accordance with the procedure prescribed in the Statute which creates the offence and regulates the procedure.²⁰

Present Article 20 was Article 14 of the Draft Constitution. Mr. Naziruddin Ahmad (West Bengal) moved" that in clause (1) of Article 14, after the words, "greater than" the words, or of a kind other than be inserted". And clause (1) may provide: "No person shall be subjected to a

¹⁸ Article 15 of International Covenant on Civil and Political Rights.

¹⁹ Article 6 of International Covenant on Civil and Political Rights.

²⁰ Maqbool Hussain v. State of Bombay, AIR 1953 SC 325; see also Basu, D.D., Commentary on Constitution of India sixth edition, Calcutta (1978) p. 33 ;There was no prohibition to enact ex-post-faCto laws under the Government of India Act,1935.

penalty greater than that which might have been inflicted under the law at the time of the commission of the offence" This was the first part and the second part of Article 14 which was moved by Pandit Thakur Dass Bhargava, "That in clause (1) of Article 14, for the words, 'under the law at the time of the commission' the words, 'under the law in force at the time of the commission be substituted.²¹ In the jurisprudence of Constitutional law, Article 20(1) incorporates a prohibition against 'ex-post-facto penalty law'.²² Article 20 provides protection in respect of conviction for offences. It constitutes a limitation on the legislative power of the Parliament or the State Legislature under Article 246 read with three Legislative lists contained in the seventh schedule to the Constitution.²³ Because of the word 'person' used in each clause, the article must be regarded as applicable to a corporation which is accused, prosecuted, convicted or punished for an offence.²⁴ The protection contained in Article 20 is available to all peoples citizen or noncitizens. The term "person" in Article 20 includes a corporation which is accused, prosecuted, convicted or punished for an offence.²⁵

The rights guaranteed under Article 20 and the two succeeding Articles namely 21 and 22 can be claimed even by a foreigner, who is of course, not entitled to the rights guaranteed under Article 19.²⁶

An "ex-post facto law" is a law which is enacted subsequent to some occurrence, i.e., the commission of some act or omission.²⁷ Ex-post-facto laws may fall in three categories:

- a) A law which declares some act or omission as an offence for the first time after the completion of that act or omission.²⁸
- b) A law which enhances the punishment or penalty for an offence subsequent to the commission of that offence.²⁹
- c) A law which prescribes a new and different procedure for the prosecution of an offence subsequent to the commission of that offence.³⁰

Clause (1) of Article 20 provides protection only in respect of (a) and (b). It should be noted

²¹ Constituent Assembly Debates, Vol. 7, pp. 789-790.

²² M.P Sharma v. Satish, (1954) SCR 1077; There was no prohibition in Govt. of India Act, 1935 or any other law prior to commencement of the Constitution, against ex-post-facto laws. The Legislature was competent to pass such laws. The courts, however, used to lean against a retrospective interpretation. See also Basu, D.D., op. cit. VI ed. vol. D (1978), pp. 3-40.

²³ AK Gopalan v. State of Madras, AIR 1950 SC 300. 133.

²⁴ AIR 1986 SC 424.

²⁵ MP Sharma v. Satish Chandra, AIR 1954 SC 300.

²⁶ Chaudhary and Chaturvedi's, Law of Fundamental Rights ,ed.III, Law Book Company(1985), pp. 502-503.

²⁷ Kumar, Narender, *Constitutional Law of India*, op.cit, p. 183.

²⁸ Kanaihalal v. Indumati, AIR 1958 SC 444.

²⁹ Kedar Nath v. State of West Bengal, AIR 1953 SC 404.

³⁰ Shiv Bahadur v. State of Vidtiya Pradesti, AIR 1953 SC 394.

that while substantive law imposing liability or penalty cannot be altered to the prejudice of the person supposed to be guilty with retrospective effect, there is no vested right in procedure. Besides this, the thrust of Article 20(1) is in the field of criminal law only, since the word offence as defined in Article 367 read with the General Clauses Act can only denote an act or omission punishable by law.³¹

Section 26 of the General Clauses Act, 1897 defines the term "offence" as an act or omission made punishable by any law for the time being in force.³² This is a limitation upon the law making power of the legislatures in India. A law is said prospective, when it affects acts done or omission made after the law comes into effect. The majority of laws are prospective in their operation. But sometimes the legislature may give retrospective effect to a law, that is to say to bring within the operation of the law, not only future acts and omissions but also acts or omissions committed even prior to the enactment of the law in question. Though ordinarily a legislature can enact prospective as well as retrospective laws, according to the present clause a legislature shall not be competent to make a criminal law retrospective so as to provide that a person may be convicted for an act which was not an offence under the law in force at the time of commission of that act or to subject an accused to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence. In other words, when the legislature declares an act to be an offence or provides a penalty for an offence, it cannot make the law retrospective so as to prejudicially affect the persons who have committed such acts prior to the enactment of that law.³³ The first limitation is in respect of conviction and punishment of a person for an offence which, when committed was not an offence by the law of the land. The second is in regard to the imposition of a greater penalty than that which ought to have been imposed under the existing law on the date of the commission of the offence.³⁴

(A) Article 20 (1) - first part

The first part of clause(1) of Article 20 relates to the first category of ex post- facto laws. It says that "*no person shall be convicted of any offence except for violation of a law in force at the time of the commission of the act charged as an offence*". It explains that a person can only be convicted of an offence if the charge against him is an offence under the law in force at the time

³¹ Article 367 of the Constitution deals with interpretation of the General Clauses Act, 1897 subject to adaptations made under Article 372; See also *Shiv Bahadur v. State of UP* (1953) SCR 118; *Kedar Nath v. State of WB*, AIR 1953 SC 404; *Jawala Ram v. State of Pepsu*, AIR 1962 SC 1246; *State of West Bengal v. SK Ghose*, AIR 1963SC255.

³² *Maqbool Hussain v. State of Bombay*, AIR 1953 SC 325.

³³ *Kedar Nath v. State of Bengal* (1954) SCR 1150.

³⁴ Chaturvedi, A.N, *Right of accused under Indian Constitution*, op.cit.,p. 336.

of commission of that act. It seems to the Constitutional recognition to the principle that no one can be convicted except for the violation of a law in force. Although clause (1) is mainly concerned with retroactive penal legislation, it also seems to give Constitutional recognition to the principle that there cannot be a conviction except for violation of a law in force. It would seem, therefore, that in India, there can be no 'common law' offences; and the judiciary cannot, in India, create an offence not created by statute.³⁵

How far the word violation would require that the violation should be personal, is a matter not specifically provided for in the article.³⁶ The expression "law in force" in Article 20(1) postulates the actual factual existence of law at the relevant time and it excludes the retrospective operation of any subsequent law³⁷The expression "law in force", refers to the law factually in operation at the time when the offence was committed and does not relate to the law "deemed to be in force" but the retrospective operation of law subsequently made. The law for the violation of which a person is sought to be convicted must 'have been', in fact in force at the time when the act with which he is charged was committed.³⁸ But rules and regulations made under Statute which is repealed but continued in force under Section 24 of the General Clauses Act are 'law in force' within the meaning of Article 20 (1), even though they are kept alive by a legal fiction.³⁹ Article 372 (3), Expl. 1, shows that 'a law in force' means an enacted law even if it, or parts of it, are not in operation either at all or in particular areas. It is clear that such a law is not a law in force within the meaning of Article 20, for, if the law is not in operation it cannot constitute any act a crime during the time it is not in force.⁴⁰

In *Pareed Lubha v. Nilambaram*⁴¹, the non-payment of panchayat tax was not an offence on the day it fell due, the defaulter could not be convicted for the omission to pay under a law passed subsequently even if it covered older dues. As a result, large number of persons committed defaults in the payment of the tax. The Act was subsequently amended and nonpayment of tax was made punishable retrospectively. The court held that defaulters, prior to the amendment of the law, could not be convicted for the omission to pay the tax under the amended law.

It was held in *Soni Devrajbhai Babu bhai v State of Gujarat*⁴² that Section 304-B inserted in the Indian Penal Code, 1860 on November 19,1986, creating a distinct offence of dowry death and

³⁵ Kumar Narender, *Constitutional Law of India*, op.cit., p183.

³⁶ Bakshi, P.M., *The Constitution of India*, op.cit., p. 35.

³⁷ M/s W.R.E.D Co., Ltd., v. State of Madras, AIR 1962 SC 1753; Shiv Bahadur v. State of Vindhya Pradesh, AIR 1953 SC 394.

³⁸ Pulin V. Satyaranjan, AIR 1953 Cal. 599.

³⁹ Basu, D.D., *Commentry on the Constitution of India*, 11th ed., Vol. D, (1978), pp. 11-12.

⁴⁰ Seerval, H.M., *Constitutional law of India*, Vol. 1, (1983), p. 757.

⁴¹ AIR 1967 Ker 155.

⁴² AIR 1991 SC 2173.

providing a minimum sentence of seven years imprisonment, could not be applied to such death caused before the insertion of the section, because of the prohibition contained in Article 20 (1).

In *Om Prakash v State of UttarPradesh*⁴³, it was held the accused could not be punished under Section 165-A of Indian Penal Code for offering bribe in 1948 as Section 3 of the Criminal Law (Amendment) Act, 1952 inserted Section 165-A in the Indian Penal Code, 1860 declaring offer of bribe as punishable offence.

In *Securities & Exchange Board Of india v Ajay Agarwal*⁴⁴ here the question of protection against ex-post facto laws fall for consideration.

In this case it is noticed that Section 11-B of the Act was invoked even at the show cause stage. Therefore, it cannot be said that any provision has been invoked in the midst of any pending proceeding initiated by the Board. The respondent was, thus, put on notice that the Board is invoking its power under Section 11-B which was available to it under the law on the date of issuance of show cause notice.

Court also finds that there is no challenge to the amended provision of the law. Even if the law applies prospectively, the Board cannot be prevented from acting in terms of the law which exists on the day the Board passed its order.

It was urged on behalf of the respondent that on the date when the violations were alleged against him, the Board did not have the power either under Section 11-B or under Section 11 (4)(b) as those provisions came subsequently by way of amendment. This contention weighed with the appellate forum and the respondent was given the protection against ex post facto law even though it was not clearly mentioned in the order of the Appellate Forum.

*Kalp Nath Rai v. State (Through CBI)*⁴⁵ certain persons were convicted under section 3(5) of TAD A in addition to other offences. Section 3(5) provided that any person, who is a member of a terrorist's gang or a terrorist's organization, which is involved in terrorist act, shall be punishable with specified imprisonment and shall also be liable to fine. The said sub-section 3(5) was inserted in TADA by Act 43 of 1993, which came into force on 25.5.1993. K.T. Thomas J, speaking for the court, held that for using section 3(5) against any person two conditions must be satisfied. First, that the accused should have been a member of a terrorist gang or terrorist organization after 23.5.1993. Secondly, the said gang or organization should

⁴³ AIR 1957 SC 388.

⁴⁴ (2010) 96 CLA 72 (SC).

⁴⁵ 1997 (2) ALD Cri 805, 1998 CriLJ 369, JT 1997 (9) SC 18, 1997 (6) SCALE 689, (1997) 8 SCC 732

have involved *in* terrorist acts subsequent to 23.5.1993. Unless both postulates exist together, section 3(5) cannot be used against any person. Thus, the protection against ex-post facto law was reiterated.

*Gautam kundu v. Manoj kumar Assistant Director, Eastern Region, Directorate of Enforcement (prevention of money laundering act)*⁴⁶ It was alternatively submitted by the learned senior counsel appearing for the appellant that assuming if Section 24 simplicitor is treated as a scheduled offence, it was introduced vide PMLA (Amendment) Act, 2012, w.e.f. 15.02.2013 i.e. much after the offences were alleged to have been committed and bar against ex-post facto laws under Article 20 (1) would be attracted. Section 2 (u) of PMLA defines “proceeds of crime” and states that it must be as a result of criminal activity relating to a scheduled offence. Under Section 3 of the PMLA, in order for the offence of money laundering to be triggered, it must be established at the threshold that the “proceeds of crime” was as a result of criminal activity relating to a scheduled offence on the date such crime was committed. He submitted that the offences are alleged to have been committed between the years 2001 and 2007. The offence under Section 12A r/w Section 24 of SEBI Act became scheduled offence only by way of the Prevention of Money Laundering (Amendment) Act, 2009 w.e.f. 01.06.2009, much after the alleged commission of crime and the appellant is admittedly not accused of violation of Section 12 and Section 24 of the SEBI Act.

V. CIVIL LIABILITY DOES NOT APPLY & CIVIL LAWS

The term ‘penalty’ in Article 20 (1) indicates that the prohibition provided therein applies to punishment imposed for offences and it does not prohibit imposition of civil liability retrospectively. In *Hathsingh Manufacturing Co. v Union of India*,⁴⁷ an Act passed in June, 1957 imposed on the employers closing their undertaking, a liability to pay compensation to their employees with effect from November 28, 1956. Failure to discharge the liability was made punishable. It was pleaded that the Act enacted in 1957 infringed Article 20 (1) because it imposed a liability to pay compensation. Since Nov 28, 1956 and non payment was made punishable retrospectively. The Supreme Court upheld the constitutionality of impugned Act and held that liability imposed was a civil liability and its failure was not an offence and Article 20(1) would have no application.⁴⁸ Likewise, a penalty levied under a tax law has been held to be only a civil liability not hit by Article 20 (1).⁴⁹ Article 20 (1) has no application in cases of

⁴⁶ AIR 2016 SC 106.

⁴⁷ AIR 1960 SC 923.

⁴⁸ Jai Singh v. State of Haryana, AIR 1995 P&H 243.

⁴⁹ Shiv Dutt Rai Fateh Chand v. Union of India, AIR 1984 SC 1194; Jawala Ram v. Pepsu, AIR 1962 SC 1246; MP V Sunderamier & Co. V. State of AP, AIR 1958 SC 468.

preventive detention and disciplinary proceedings.⁵⁰

A law punishing continuing offence is outside the prohibition of Article 20(1). Thus, non-payment of provident fund contribution and establishment charges on due date is a continuing offence and become punishable as soon as the scheme comes into force. Likewise, authorizing imposition of penal damages for use and occupation of village common land, has been held not a provision making an offence. It is only providing a civil liability for unauthorized possession and is, therefore, not violative of Article 20.⁵¹

VI. ENHANCED PUNISHMENT PROHIBITED

The second part of clause (1) of Article 20 prohibits the enhancement of punishment or penalty after the commission of the offence. It provides that “*no person shall be subjected to a penalty greater than that which might be inflicted under the law in force at the of commission of the offence.*”⁵²

The Prevention of Corruption Act, 1947 provided for punishment of imprisonment and fine for offence committed under the Act. In *Kedar Nath V. State of West Bengal*⁵³ the accused, managing agent of a company committed an offence in 1947. Subsequently, the criminal law (Special Courts) Amendment Act, 1949 amended the said Act. The amended law enhanced the penalty for the offences committed under the Act by an additional fine to be equivalent to the amount of money found to have been procured by the offender through the offence. It was held that penalty enhanced by amended laws, which came into force in 1949, could not be imposed on the accused for the offence committed in 1947, because of the prohibition contained in second part of clause (1) of Article 20.

In *State of West Bengal V. S.K. Ghosh*⁵⁴ the accused, a government, servant was placed under suspension for commission of embezzlement before August, 1944. Subsequently on August 23, 1944, an ordinance was issued providing for confiscation of the property of a person convicted for embezzlement of government money, to set off the embezzled money Therefore, property of the accused was forfeited under the ordinance and the ordinance was held valid as it did not impose a penalty but merely provided a speedier remedy for the recovery of the embezzled money. In *Satwant Singh v. State of Punjab*,⁵⁵ Section 420 of the Indian Penal Code, 1860, had prescribed an unlimited fine for an offence. The accused committed an offence under this

⁵⁰ Pandurang Swamy v. State of AP, AIR 1971 AP 234.

⁵¹ Jai singh v. State of Haryana, AIR 1995 P&H 243.

⁵² Kumar, Narender, *Constitutional Law of India*, op. cit., p. 184

⁵³ AIR 1953 SC 404.

⁵⁴ AIR 1963 SC 255; see also AIR 1953 Mad.337

⁵⁵ AIR 1960 SC 266.

section prior to 1947. In 1949, an ordinance was issued prescribing minimum fine for the person convicted under this section. This minimum fine was imposed on the accused for an offence committed by him in 1947 i.e. prior to the issuance of the ordinance. The court held that the imposition of fine was not violation of Article 20(1). The Supreme Court observed that Article 20(1) was not infringed by the ordinance, because the minimum fine prescribed by it could not be said to be greater than what could be imposed on the accused under Section 420 at the time at which he committed the offence. The court explained that under Article 20(1), all that had to be considered was, whether the ex-post facto law imposed a penalty greater than that which might be inflicted under the law in force at the time of commission of the offence. It could not, therefore, be said that the ordinance imposed any such penalty.

In *Rattan Lal v. State of Punjab*⁵⁶, the accused, a boy of 16 years was convicted for the offence of house trespass and outraging the modesty of a girl aged seven years. The Magistrate sentenced the boy for rigorous imprisonment for six months and also the fine. While the accused was undergoing imprisonment, the Probation of Offenders' Act, 1958 came into force, which provided that a person below the age of 21 years should not ordinarily be sentenced to imprisonment. The accused claimed benefit under the Act, a reformation measure. The State contended that the Act in question being an ex-post-facto could not be pleaded by the accused. The Supreme Court held that ex-post facto law which was beneficial to the accused did not fall within the prohibition of Article 20 (1) and further held that the rule of beneficial construction required that ex-post facto law could be applied to reduce the punishment.

The Supreme Court of India appears to have adopted the language of *Calder V. Bull* in the matter of *Rattan Lai v. State of Punjab*⁵⁷ when it observed "every law that takes away or impairs a vested right is retrospective. Every ex-post-facto law is necessarily retrospective. But an ex-post-facto law which only mollifies the rigors of a criminal law does not fall within the said prohibition Article 20 (1)⁵⁸ (emphasis added).

Clause (1) of Article 20 does not prohibit the trial of offences under the ex-post facto laws. Therefore, a law enacted subsequent to the commission of the offence, prescribing a new procedure different from the ordinary procedure for prosecution or trial, is not hit by Article 20 (1).⁵⁹ What is prohibited under Article 20 is only conviction or sentence under an ex-post-facto

⁵⁶ AIR 1965 SC 444; In *T Barai v. Henry All. Hoe*, AIR 1983 SC 150; Held that an accused should have the benefit of a retrospective or retroactive criminal legislation reducing punishment for an offence; see also *Public Prosecutor v. K. C Ayyappan Pillai*, AIR 1953 Mad 337.

⁵⁷ AIR 1965 SC 444.

⁵⁸ Chaturvedi, A.N, *Right of accused under Indian Constitution*, op. cit., p. 106.

⁵⁹ *Shiv Bahadur v. State of Vindhya Pradesh*, AIR 1953 SC 394.

law and not the trial thereof. Such trial under a procedure different from what obtained at the time of the commission of the offence.... cannot ipso facto be held to be unconstitutional. A person accused of the commission of an offence has no fundamental right to trial... by a particular procedure, except in so far as any Constitutional objection by way of discrimination or the violation of any other fundamental right may be involved" ⁶⁰ (emphasis added). What this article prohibits is only conviction and sentence under ex-post-facto law and not the trial thereof.⁶¹ A law which retrospectively changes the venue of trial of an offence from a criminal court to an administrative tribunal, has been held not falling within the prohibition of Article 20 (1).⁶² Hence, an accused cannot contend on the strength of Article 20 (1) that he cannot be tried under a procedure different from what obtained at the time of the commission of the offence.⁶³

In *State v. Gian Singh*⁶⁴, appellant was convicted under section 3 (2) (i) of the Terrorist and Disruptive Activities (Prevention) Act, 1985 (TADA Act, 1985) for causing death of Sant Longowal and was awarded death penalty because that was the only sentence which could be awarded under the said provision. The TADA Act of 1985 remained in force for two years but the prosecution under section 3 (2) (i) continued by virtue of section 1 (3). Meanwhile, Terrorist and Disruptive Activities (Prevention) Act, 1987 (TADA Act, 1987) covering the same area and prescribing punishment for identical offences came into force. Section 3 (2) (i) of the TADA Act, 1987 reduced the harshness of the corresponding provision of the previous TADA Act of 1985 by providing an alternative punishment for life in place of death sentence. Section 25 of the TADA Act of 1987 gave an over-riding effect to the provisions of this Act. On facts of the case and the fact that the accused had already undergone imprisonment for 14 years, the Supreme Court speaking through Thomas J, affirmed the conviction for offence under section 3 (1) of the TADA Act of 1985 but the sentence under section 3 (2) thereof was altered to imprisonment for life. The Supreme Court also clarified that article 20 (1) of the Constitution was no bar in extending the benefit of the TADA Act of 1987.

⁶⁰ Shiv Bahadur v. State of V.R (1953) SCR 1188.

⁶¹ Chaudhary and Chaturvedi, op. cit. ,pp. 502-503.

⁶² Union of India v. Srikumar, AIR 1966 SC 1206; see also G.P. Nayyarv. State (Delhi Admn.) AIR 1979 SC 602.

⁶³ Nayyar v. State AIR 1979 SC 602 (Para 7); The Constitution of USA provides for protection even against ex-post-facto procedural laws and trial under ex post facto law is banned under US Constitution.

⁶⁴ (1999) 9 SCC 312 This case was a death reference case which was disposed of along with criminal appeal No 931 of 1998 of Gum Singh v State of Punjab, (1999) 9 SCC 312