Privilege Against Self-Incrimination

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Abstract

This article discusses the concept of Privilege of self-incrimination given to the accused as a fundamental right under Article 20(3) of the Constitution. Who all can avail the benefit of the right under Article 20(3) of the constitution?

The article also scrutinizes how the judicial interpretation is done by the courts in different case laws on the concept of self-incrimination, after that the right of silence decided its path. The article also discusses other laws that take into consideration self-incrimination. Not only the constitutional law, but other laws such as CRPC also protects the right to silence by stating that the accused should not be considered liable for punishment for refusing to answer during interrogation. The Article also reviews the journey of this right, which started with the issue of admissibility of handwriting specimens and went through different changes meanwhile considering the issue of defining the meaning of 'to be a witness against himself' and answering the question of compulsion in police custody. Further, the article also discusses how the final path of the journey is decided by challenging the constitutionality of Narco- analysis, lie-detector test, and BEAP on the basis of violation of privacy and personal liberty under Article 21 of the Constitution. These three tests help in the investigation and are now used by investigating bureaus after the judgments given on them, but it still raises the question of an individual's right to privacy and life.

Introduction

Most of us must have heard the following dialogue infinite times in many movies and TV soaps taken from the Miranda Rights of U. S.[1]-

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[1] 384 US 436 [1966]

> [Y]ou have right to be silent during interrogation. Anything said by you during investigation can be used against you in the court. You have every right to communicate with your attorney and your attorney can be present during interrogation. If you are unable to afford a lawyer, it will be provided by government expense.

In the article by Sujata V Manohar[2] it is stated that the Right of free expression is the fundamental beginning of democracy. The right is essential for one's development and the success of parliamentary democracy.

> [T]he right to silence is a basic code of common law which means that courts should not be encouraged to conclude, by prosecutors or parties, that an accused is guilty merely because they refused to testify against themselves when asked to respond to questions asked by the courts or the police.[3]

The origin of right against self-incrimination finds its incarnation from the medieval law of the Roman church from the Latin maxim 'Nemon tenetur seipsum accusare'[4] which means 'no one is bound to accuse himself'[5]. No court or tribunal should conclude the accused guilty based on their refusal to answer the question in front of law enforcement officers or court officials. India borrowed the provision of the right to silence from the fifth amendment of the American Constitution and introduced it in the Indian Constitution through the Fourty-fourth Amendment Act, 1978[6]. The Article 20 of Indian Constitution was granted a non-derogable status i.e. the state has no legal basis, even in a state of emergency, to refuse to honor this right[7]. The question to be answered in this article is whether the relaxation in Article 20(3) is violative of the privilege given to the accused in self-incrimination due to the advancement of technology.

Principle of Article 20(3)

[2] Trimbak Krishna Tope and Sujata V Manohar, *T.K. Tope's Constitutional Law Of India* (2010).
[3] 180th Report of the Law Commission of India, Article 20(3) the Constitution of India and the Right to Silence, 3, (2002).
[4] '(footnotes omitted)'
[5] '(footnotes omitted)'
[6] Sec. 40 of the Constitution (Forty-fourth Amendment) Act, 1978.
[7] The Indians Oaths Act 1969, 5, 6 and 342

In the Indian context, the fundamental right against self-incrimination is guaranteed under clause (3) of Article 20 of the Constitution of India. The mere questioning by a police officer investigating a crime against a certain individual to do a specific thing is not within the meaning of Article 20(3) of the Constitution.

The foundation of the protection against self-incrimination is best asserted by the Court in *Saunders v. United Kingdom*[8]. This case described that the right lies for the accused protection by improper compulsion of the authorities, which leads to a contribution towards the failure of justice[9]. It may say that two pillars of self-incrimination are ethics and reliability[10].The police use coercion, threats, inducement, or deception on the accused to get the statements against the accused, and to avoid more torture and brutalization, the person gives the involuntary statements that might or might not be true. This is against ethics. The rational of ethics is to protect the accused of torture and brutalization from investigation agencies. Hence, this right is safeguarding the method of third-degree to get the information by investigators and serves check on police behavior.

Innocent people might give the wrong statements under stress and pressure resulting in suspicion on them. Wrongdoers get the privilege of self-incrimination and hide important information resulting in their freedom. This question the reliability of the statement. The privilege of article 20(3) provides the guarantee of reliable statements as any person's statement which is made from sheer pressure and stress will not count and will not lead to wrong judgment.

The Statutory Provision- Article 20(3)

The provision to self-incrimination is contained under Article 20(3) of the Indian Constitution which reads as 'No person accused of any offence shall be compelled to be a witness against himself.'

The right to silence has various ingredients:

[8] [1997] 23 EHRR 313.
[9] Ibid.
[10] Albert Alschuler, 'A Peculiar Privilege in Historical Perspective: The Right to remain silent'[1995] <https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1998&context=journal_articles>

i. A person accused of offence

The privilege of the right to silence is only available to accused i.e., against whom formal accusation for the commission of offence is made. The privilege can be availed at the time of trial as well as investigation. In the case of *Raja Narayan Lal Bansi Lal v. Maneck Phiroz Mistry* [11] believed that to invoke the constitutional right of Article 20(3) there is a need for formal accusation against the person who is claiming the protection. Simply because appellant figures that he is the accused in complaint case, blanket protection cannot be granted to him.

Even if the name of the person is not mentioned in the FIR, he can claim the right. This right was extended after the case *Nandini Satpathey v. P. L. Dani*[12]. It said that the extends to witnesses in the same manner as it was given to the accused. The person who is accused at the present may not be accused in the future. In *Balasaheb v. State of Maharashtra*[13] the court held that an accused in a complaint case who is also a witness in police case of the same incident, that person cannot claim the immunity of right to silence from testifying in the police case based on Article 20(3). The person has the leverage to refuse to answer only those questions which might incriminate him.

ii. The compulsion to be a witness

In the landmark judgement of *State of Bombay v. Kathi Kalu Oghad*[14], the court defined the meaning of 'to be witness' as 'to furnish evidence' and said compulsion includes threatening, beating, etc. It was also said, it must be shown that the accused was compelled to make statements that would incriminate him.

Likewise, in the case of *State (Delhi Administration) v. Jagjit Singh*[15] the court held that if once an accused is approved pardon under section 306 of Cr.P.C. then he ceases as an accused and becomes a witness for the prosecution and the evidence by him as approver cannot be used against him in other cases as he is protected according to the proviso to Section 132 of Indian Evidence

[11] AIR 1961 SC 29 : (1961)1 SCR 417.
[12] AIR 1978 SC 1025
[13] (2011) 1 SCC 364.
[14] AIR 1961 SC 1808.
[15] AIR 1989 SC 598.

Act. The proviso of section 132 protects the witness directly or indirectly to incriminate himself and being prosecuted for not giving answers in criminal proceedings.

iii. Accused cannot be compelled to give evidence "against himself"

An accused can be compelled to submit during investigation his photographs, voice recorded, his tested blood sample, his hair, or any other body material used for DNA testing, etc. There are some exceptions to the right.

In case *State of Bombay v. Kathi Kalu Oghad*[16] it was stated that compulsion is duress; it must be physical objective act and not the state of mind of the person who is making the statement, except in the situation where the mind of the person has been conditioned by some extraneous process as to render the making of the statement involuntary and, therefore, extorted.

In *Amrit Singh v. State of Punjab*[17] the Supreme Court observed that even though the accused has the protection under self-incrimination to not give his hair but if court started to consider these kinds of situations under self-incrimination then the right might be misused by many accused. In *Ritesh Kumar v. State of U. P.*[18] it was held that voice samples asked to person during the investigation does not violate article 20(3). Court gave us the phrase of 'privacy is not absolute and must bow down to compelling public interest.'[19]

Similarly, In *V.S. Kuttan Pillai v. Ramakrishnan & Others*[20], the court held that a search warrant may be issued to procure the documents and they can be recovered from any person who is found in possession of it and such a search is not violative of the constitutional right guaranteed under Article 20(3). This Article is also not violated when the accused is asked to show up his face for identification and can be ordered to disclose any scar or mark on his body for identification.

Judicial approach to article 20(3)

[16] *Kathi Kalu Ogadh* (n 14)
[17] AIR 2007 SC 132.
[18] AIR 2013 SC 1132.
[19] *Ritesh Kumar* (n 18)
[20] AIR 1980 SC 185.

The case laws of Article 20(3) went through an interesting journey by taking a landmark judgment of case *State of Bombay v. Kathi Kalu Oghad*[21], the court defined the meaning of 'to be witness' as 'to furnish evidence' and included only oral and written testimony based on personal knowledge which can provide evidence. Whereas fingerprints, impressions of palm or fingers, exposing any body part of the accused or signature or handwriting samples were given protection under Article 20(3). It made a significant contribution in evolving the journey of self-incrimination and refined the meaning of 'being a witness against himself' by taking the precedent case of *M. P. Sharma v. Satish Chandra*[22]. The question brought before the court was whether search and seizure under Section 94 and 96 of Cr.P.C violated Article 20(3) of the Indian Constitution. The court looked upon the meaning of witness as per section 139 of the Indian Evidence Act and held that a person furnishing a document is to be taken as a witness. The eight-judge bench recognizing a search and seizure process held that the protection applied primarily to 'testimonial compulsion'. Justice Jagannadhadas held that 'to be a witness' was equivalent to furnishing evidence which constituted production of documents from accused possession, oral testimony or documentary evidence from any person who may become accused from future proceedings are treated as constitutional and legal under article 20(3).

The M.P. Sharma case failed to include the non-verbal evidence which was, later on, include by the Kathi Kalu Oghad case which said the protection was generalised from oral evidence to the written statement as well so as not 'to limit Article 20(3) and rob it of its substantial purpose or to miss the substance for the sound'. M.P. Sharma laid down propositions too widely whereas they were re-interpreted and narrowed down in Oghad case. M.P. Sharma established the distinction between testimonial and physical evidence. Self-incrimination was said to be the communication of information by a person giving information based on personal knowledge. It ruled that 'personal testimony' depends upon the will of the person as accused a choice of refusing or making the statement. So, Oghad limited this scope of 'to be witness' by bringing a much clear interpretation of Article 20(3). It included handwriting samples, fingerprints, thumbprints, palm-prints, footprints, or signatures not under 'personal testimony' under section 73 of Indian Evidence Act, 1872 and were declared to be not incriminating and outside scope of Article 20(3). This judgment altered the interpretation given by its precedent.

[21] *Kathi Kalu Oghad* (n 14).
[22] *M. P. Sharma* (n 11).

Several subsequent cases after Oghad helped to solve the conflict among different statutes and interpretations. In *Selvi v. State of Karnataka*[23] constitutionality of Narco Analysis Test, Polygraphy Test, and Brain Mapping Test were challenged. The court ruled that such tests involved the use of advanced scientific methods are a forcible intrusion in mind of accused and should be banned as they not only violated Article 20(3) but invaded the privacy and liberty of individuals under Article 21 of the Indian constitution. This case re-interpreted the meaning of self-incrimination according to the situations which lead to social change and technology.

In *Ritesh Kumar v. State of U. P.*[24] it was held that voice samples asked person during the investigation does not violate article 20(3). Court gave us the phrase of 'privacy is not absolute and must bow down to compelling public interest.'[25] The voice sample given by the accused is merely an identification data for the investigation.

Narco-Analysis re Self-Incrimination

Emphasizing today's era, we all very well know about developing technology and growing crimes in India. Nowadays as criminals take all the possible precautions and leaves no evidence behind their crime, it has become necessary to adopt technology and scientific methods. The admissibility of scientific techniques for enhancing investigation has been a matter of debate about whether these tests violate the constitutional right under Article 20(3) or not.

'The admissibility of science in a court demands that three major conditions be met: validity, reliability, and legality.'[26] The same must help to analyze the narco-analysis test. On one hand, validity demands a scientifically validated method and a reasonable amount of accuracy whereas reliability demands consistency in the accuracy of test results and success rate of conducted tests.

The leading case which guided precedent with respect to narco-analysis in our country is the *U.S. v. Solomon*[27], it was held narco-analysis as unreliable, but they were accepted as a technique for investigation was upheld. The court used expert witnesses to establish their point that acceptable

[23] AIR 2010 SC 1974.
[24] *Ritesh Kumar* (n 18)
[25] *Ritesh Kumar* (n 18)
[26] A. Jesani, 'Narco Analysis, Torture and Democratic Rights' [2008] peoples Union of Democratic Rights, 22nd Dr. Ramanadham Memorial Meeting.
[27] 753 F.2d.1522 (9th Cir. 1985).

safeguarding is possible against the unreliability of narco-analysis. The compulsion was answered by the supreme court in the case of *Dinesh Dalmia v. State* [28] where they said consent plays no role in the narco-analysis test and even though a person is put in narco-analysis under compulsion, the disclosures made by him are done voluntarily. While in one of the case in stay order by supreme court being carried on K.Venkateshwar Rao involving Krushi Cooperative Urban Bank[29], it was said that consent means 'informed consent'. A person who is giving consent much have knowledge of the procedure which is to be carried on him. These two conflicting judgements left us in the hazy situation regarding the role of consent in conducting such tests.

According to the drafting committee on 'National Criminal Justice System Policy'[30] it has been recommended that the government should take various steps to amend the parts of the Code of criminal procedure for effective implementation of science and technology in the criminal justice system[31]. Section 53 of the Cr.P.C was amended to permit medical examination of an accused in the interests of justice, 'as maybe reasonably necessary'. Narco-analysis tests must also be considered as reasonable tests under circumstances such as terrorist attacks and other grave cases.

The question of admissibility of scientific techniques for enhancing investigation has been a matter of debate about whether these tests violate the constitutional right under Article 20(3) or not. This issue was brought up in the court in *Selvi v. State of Karnataka*[32], the supreme court rejected the high court's dependence on utility, reliability, and validity of narco-analysis and other tests in the criminal investigation. Court found out that forcing any person to undergo such tests, regardless of physical harm amounts to compulsion and affects the answers given during the test. Answers given during these tests are under compulsion and are not consciously or voluntarily given, so the results from these tests amounts to a violation of Article 20(3). Supreme court held all these three tests to be 'cruel, inhuman and degrading treatment.'[33]

Conclusion

[28] Cri LJ (2006) 2401.
[29] A. Jesani (n 26) 5
[30] Ministry of Home Affairs, Government of India, National Criminal Justice System Policy, <https://www.mha.gov.in/sites/default/files/DraftPolicyPaperAug.pdf> accessed 30 March 2020
[31] Ibid [7.2.4], [7.2.5]
[32] *Selvi* (n 22)
[33] *Selvi* (n 22)

Given the constitutional right against self-incrimination, courts require the prosecution to prove guilt beyond reasonable doubt and there has been no infringement into the right of silence at the stage of interrogation or trial. This right is a protective umbrella against testimonial compulsion.

Law is a living process, which must change with change in society, ethics, etc. The development in the legal system should take place till the time they do not violate the fundamental rights and are good for society. Proper analysis of this protection and its implication on the criminal justice system gives us certain exceptions to this right. The State must ensure that right of citizens is protected, and all the individuals get an opportunity to a fair trial.

It must be realized that the intent of the legislature behind this provision was to ensure that any person who is accused of any offence are to be protected until and unless proven guilty. The reality remains the same as even today after the right being enshrined has not got its glory in true sense. There are various instances where police officers apply third degree tortures on accused just to scare them to the extent that even the innocent person agrees to confess for the crime to which they have never committed. The three tests are now used by investigating bureaus, it still raises the question of individual's right to privacy and life. Even though the process is safe, it must be used as per the limitations and must be conducted with the voluntary consent of the person and court order. These methods do not give cent percent results but are helpful in furtherance of the investigation. If the prescribed limitations are followed without violating any constitutional right of the person, the test can be practiced when it is highly required in specific cases.

With the advancement in the technology, they can be considered viable and support the investigation as they can be an effective tool for providing evidence for the speedy discarding of the cases. By balancing the coherence between protective rights and the need for speedy disposal, techniques like these can be carried out by following the limitations provided. Hence, right against self –incrimination plays a crucial role in protecting the accused from communicating any incriminatory statement under pressure.