

RIGHT AGAINST SELF-INCRIMINATION: AN ANALYSIS & DETAILED STUDY OF LAWS PREVAILING IN INDIA

by

Subhajit Samanta

&

Somasree Bakshi

ABSTRACT

The right to self-incrimination first appears in medieval Roman church law in the Latin maxim 'Nemo tenetur seipsum accusare' which means 'no person accused of any offence shall be compelled to be a witness against himself.' This provision is contained in Part III of the Constitution of India under article 20 (3). It embodies the general principles of American and Britain jurisprudence that no one shall be compelled to confer the testimony which may expose him to prosecution for crime. However, the cardinal principle of criminal law which is really the bed rock of UK jurisprudence is that an accused must be presumed to be innocent till the contrary is proved and it would be the duty of the prosecution to prove the offence. The accused has not required to make any admission or statement against his own free will. The 5th amendment of the American Constitution declares that "no person shall be compelled in any criminal case to be a witness against himself." The fundamental rule of criminal jurisprudence against self-incrimination which has been taken up to a rule of the constitutional law in article 20 (3) and a confessional statement of the accused found to be involuntary is hit by article 20 (3) of the Constitution of India. This guarantee supplements to any person who is accused of an offence and prohibits all kinds of compulsions to construct him a witness against himself.

INTRODUCTION

“Justice is the sum of all moral duty”

William Godwin.

The concept of self-incrimination is difficult to understand of its clear apply on the matters. In various cases the Court laid down the aspect of its implications and many times the questions were raised for the concern such as the plea-bargaining is violating the self-incrimination which is a fundamental right conferred by article 20 (3) in the Constitution of India. However, the protection of article 20 (3) is confined to an accused in a criminal proceeding and does not apply to witnesses or civil proceedings or proceeding other than criminal.¹ In America, the privilege against self-incrimination is not confined to accused merely but it extends to witness also. Same is the position in the English Law. Though, this protection is not available to an accused who tried for his involvement in bomb blast when he has made confession of his culpability in other case involving bomb blasts.²

CONSTITUTIONAL PROVISIONS OF SELF-INCRIMINATION UNDER ARTICLE 20 (3)

The protection contained in article 20 (3) is available to every person and the term "person" includes not merely natural individuals also companies and unincorporated bodies. The essential ingredients of the protection is available –

I. PERSON ACCUSED OF AN OFFENCE

A person "accused of an offence" means a person against whom a formal accusation relating to the commission of an offence has been levelled which may result in a prosecution.³ The "formal accusation" is ordinarily brought into existence by lodging of an F.I.R. or a formal complaint to the appropriate authority or court against the specific individual accusing him of the commission of a crime.⁴ However, it is not necessary, to avail the privilege contained in article 20 (3), that actual trial or inquiry should have commenced before a Court or a judicial tribunal.⁵ The words "accused of an offence" indicate an accusation made in a criminal

¹ *Dushyant Somal v. Sushma Somal*, AIR 1981, SC 1027.

² *State of Maharashtra v. Kamal Ahmed Mohd. Vakil Ansari*, AIR 2013, SC 1441.

³ *M.P. Sharma v. Satish Chandra*, AIR 1954, SC 300.

⁴ *Balkrishnan v. State of Maharashtra*, AIR 1981, SC 379.

⁵ *Supra Note 3.*

prosecution before the Court or a judicial tribunal where a person is charged with having committed an act which is punishable under the Indian Penal Code, 1860 or any special or local law.⁶ It is merely on the making of such formal accusation that of article 20 (3) becomes operative covering that person with its protective umbrella against testimonial compulsion.⁷ It follows that a person cannot claim the protection if at the time he made the statement, he was not an accused but becomes an accused thereafter.⁸ The mere fact that at the relevant time the person was arrested on suspicion of having committed an offence that would be immaterial when neither the case is registered nor an FIR is recorded.⁹

In *Nandini Satpathy v. P. L. Dani*¹⁰ - The Hon'ble Supreme Court laid down that section 160 (1) of Cr. P.C. which barred the calling of a woman to a police station was violated in the case. Further, the question related to the scope of the protection contained in article 20 (3) and it was ruled that article 20 (3) extended back to the stage of police investigation not commencing in court merely since such inquiry was of an accusatory nature and could end in prosecution. The ban on self accusation and the right to silence while an investigation or trial was underway the Court viewed, extended beyond that case and protected the accused in regard to other offences pending or imminent which may deter him from voluntary disclosure of criminatory matter. It follows that the protection contained in article 20 (3) is also available at the stage of police investigation. Further that the right of silence guaranteed by article 20 (3) is not limited to the case for which the person is examined but extends to other offences pending or imminent, which may deter him from voluntary disclosure of criminatory matter. It was also held that the protection could be claimed by a suspect also.

II. PROTECTION AGAINST COMPULSION TO BE A WITNESS

The protection contained in article 20 (3) is against compulsion "to be a witness". In *M.P. Sharma v. Satish Chandra*¹¹ the Supreme Court gave a wide connotation to the expression "to be a witness" which includes oral, documentary and testimonial evidence. The protection contained in article 20 (3) which not covered merely testimonial compulsion in the court room but also compelled testimony previously obtained from him. It would extend to any compulsory

⁶ *Amin v. State*, AIR 1958, All 293.

⁷ *Supra* Note 3.

⁸ *State of Bombay v. Kathi Kalu Oghad*, AIR 1961, SC 1808.

⁹ *Supra* Note 4.

¹⁰ AIR 1978, SC 1025.

¹¹ AIR 1954, SC 300.

process for production of evidentiary documents which were reasonably likely to support a prosecution against the accused.

In *State v. M. Krishna Mohan*¹² the Supreme Court laid down that taking of specimen finger print and handwriting from accused is not prohibited by article 20 (3) as being 'witness against himself'. The appellant who was not an accused in the Police case but in fact a witness whose statement was recorded in section 161 of Cr.P.C. although his name figured as an accused in the complaint filed later on in the same case which was held not to be entitled to a blanket protection under article 20 (3) for invoking the constitutional right under article 20 (3). A formal accusation against the person claiming the protection must exist. In case of trial in the police case if answer to certain questions tends to incriminate or otherwise then it has to be considered at that time. It held that the information conferred by an accused person after his arrest to a police officer which leads to the discovery of a fact in section 27 of the Indian Evidence Act is admissible in evidence in article 20 (3) of the Constitution of India.

III. COMPULSION TO CONFER EVIDENCE AGAINST HIMSELF

The protection under article 20 (3) is available merely against compulsion of the accused to confer evidence against himself. Though, if the accused voluntarily makes an oral statement or voluntarily produces documentary evidence, incriminatory in nature then article 20 (3) would not be attracted.¹³ The term "compulsion" in the context of article 20 (3) which means "duress". However, compulsion may take many forms and the person accused of an offence may be subjected to physical or mental torture. He may be starved or beaten and a confession may be extracted from him by deceitful means he may be induced to belief that his son is being tortured in an adjoining room and by such inducement he may be compelled to make an incriminating statement.¹⁴ However, the article 20 (3) would have no application where the accused is not any manner compelled to confer evidence against himself.

In *V. S. Kuttan Pillai v. Ram Krishnan*¹⁵ the Court held that search of the premises occupied or in possession of person accused of an offence or seizure of anything from there was not violative of article 20 (3) of the Constitution. If any document is recovered as a result of search and seizure it can be produced in the courts as an evidence against the accused as he

¹² AIR 2008, SC 368.

¹³ *Dastagir v. State of Madras*, AIR 1960, SC 756.

¹⁴ *Yusufalli v. State of Maharashtra*, AIR 1968, SC 147.

¹⁵ AIR 1980, SC 185.

is not compelled to confer witness against himself. In *Amrit Singh v State of Punjab*¹⁶ the Court held that asking an accused of his hair for purpose of identification amounts to testimonial compulsion. The accused has right to refuse to give specimen of his hair for purpose of identification. He cannot be made witness against himself in view of article 20 (3) of the Constitution.

NARCO-ANALYSIS TEST AND SELF-INCRIMINATION

The admissibility of scientific techniques such as brain mapping test, narco-analysis tests, etc for enhancing the investigation which has been a matter of debate concern whether these tests are violating the right against self-incrimination under article 20 (3) or not? In *Gobind Singh v. State of Madhya Pradesh*¹⁷ the Court laid down that the mental state of a person comes in the ambit of 'Right to Privacy'. Thereafter, developments of the area observed that the authority of the State to compel an individual to expose the parts of his life which he desires to retain to himself is ultra vires of the Constitution as it is in infringement of the rights guaranteed under article 20 (3) and 21.

This issue was derived before the Supreme Court in the case of *Selvi vs State of Karnataka*¹⁸ the court prohibited High Court's for dependency on the reliability, validity and utility of Narcoanalysis test, Polygraphy and Brain Finger Printing as methods of criminal investigation. The Court was set up that it is a requisite compulsion to force an individual to undergo narco-analysis test, brain-mapping and polygraph tests. The answers conferred during these tests are not consciously and voluntarily given, so that an individual is not able to decide whether or not to answer a question, hence it amounts to attracts protection and testimonial compulsion under article 20 (3). The Court held that narco-analysis test is an inhuman treatment and cruel which infringed the right to privacy of an individual. That courts could not allow the administration of narco-analysis test against the will of an individual except in order to where it is necessary for public interest.

DNA TEST AND SELF-INCRIMINATION

The courts are disinclined in accepting evidence which based on DNA Test due to it challenges on the Right to Privacy and Right Against Self-Incrimination of a citizen and Right to privacy is a fundamental right which inherent under article 21 of the Constitution of India. However,

¹⁶ AIR 2007, SC 132.

¹⁷ AIR 1975, SC 1378.

¹⁸ AIR 2010, SC 1974.

the Hon'ble Supreme Court held that the Right to Life and Personal Liberty is not absolute and imposed certain restrictions on it. In *Kharak Singh v. State of Uttar Pradesh*¹⁹ the Supreme court propound that Right to Privacy is not guaranteed under the Constitution. The courts have allowed DNA tests on certain exceptional cases to be used in an investigation for production of evidence.

In the case of *Kanchan Bedi v. Gurpreet Singh Bedi*²⁰ where the parentage of the infant is in question, and the mother filed an application for conducting DNA test, for which the father opposed by arguing that his right to privacy would be violated. The Court held that where the parentage of a child is in question, directing a person to undergo a DNA Test does not amount to a violation of fundamental rights. The Court upheld the judgment given in *Geeta Saha v. NCT of Delhi*²¹ where the Division Bench ordered a DNA Test to be conducted on the foetus of the rape victim.

CONCLUSION

The Right as enshrined in article 20 (3) prima facie preserves the interests of the individual who accused of an offence. However, as a fundamental concept it also preserves the interests of the State so that law and order would maintain in our society. Moreover, it is a very broad principle itself and for its effective utilize the judiciary shall be understood the ethical, technological and scientific aspects which are balancing them with the legal umbrella. The rights available for an accused and the interests of victims or state who are very much necessary for the assurance of justice. There is no settled principle of law which may be established to denote that what would be confined such balance and it could be agreed that the restrictions are necessary for the benefit of public policies. However, when the restrictions are reasonably depends upon the facts of each the cases. Hence, it constitutes the role of the judiciary more crucial as it would be the duty to elaborate in the detail circumstances and facts of each cases.

¹⁹ AIR 1964, SCR 332.

²⁰ AIR 2003, DEL 446.

²¹ AIR 1999, JCC 101.