
RIGHT AGAINST SELF INCRIMINATION

Charu Trivedi, Assistant Professor of Law, NRI Group of Institutions, Bhopal (M.P)

ABSTRACT

The term ‘Self-incrimination’ means making statements or producing evidence by a person against himself which tends to prove that he is guilty of crime. The Constitution, the procedural laws and the International Covenants provide protection in this respect to the accused under different provisions. The development in the field of technology has benefitted crime detection in India but adversely affected the basic right against self-incrimination of the accused. This paper discusses the position of right against self –incrimination in India in comparison to its International position. It also includes the development of the technology in this field and the relevant cases.

INTRODUCTION

The right against self incrimination is one of the fundamental canons of common law criminal jurisprudence which has been incorporated in the Constitution of the United States under the Fifth Amendment¹ and thereafter in the Indian Constitution under article 20(3)². This right is contained in article 14³ of the ICCPR as well as article 11(1) of UDHR provides for the presumption of innocence until proved guilty which is genesis of the rule of immunity from self incrimination.

The right against self incrimination is often referred as a right to remain silent. In *Miranda v. Arizona*⁴, the Supreme Court extended the right to remain silent to pre-trial custodial interrogations. The landmark case on self incrimination in India is *Nandini Sathpathy v. P.L. Dani*.⁵, in which the Supreme Court held that an essential element of a fair trial is that the accused cannot be forced to give evidence against herself/himself. Forcing suspects to admit their guilt violates the constitutional guarantee against self incrimination and breaches provisions of the Code of Criminal Procedure, 1973 (Cr.P.C) and is also inadmissible as evidence in a court of law.

Section 161 of Cr.P.C provides that during interrogation the person shall not be compelled to answer questions which tend to criminate him. Similarly the Indian evidence act under sections 24 and 25 provides-‘When a confession is relevant and admissible?’ The confession made to the police officer cannot be used in evidence against the accused this is to prevent the use of coercive methods to obtain information/confession. Even if the confession is made before the magistrate, it is mandatory for him to confirm whether it is voluntary or compulsive and to inform the accused that the confession can be used against him in the further proceedings.

Thus, the provisions under Indian legislations and International agreements provide protection to the accused against self- incrimination but the recent development in crime detection technologies has effected this right of suspects.

ORIGIN OF RIGHT AGAINST SELF- INCRIMINATION:

¹No person shall be compelled in a criminal case to be a witness against himself.

²20 (3) No person accused of any offence shall be compelled to be a witness against himself.

³ 14(3) (g) Not to be compelled to testify against himself or to confess guilt.

⁴ 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966)

⁵ AIR 1978 SC 1025.

The concept of self incrimination has its legal sources laid down in the American and English jurisprudence that no one shall be compelled to give testimony which may expose him to prosecution for crime. Historically, the legal protection against self incrimination is directly related to the question of torture for extracting information and confession. The Fifth Amendment⁶ of U.S. Constitution applies to witness as well as parties in proceeding-civil and criminal. It covers documentary evidence and oral evidence, and extends to all disclosures including answers which by themselves support a criminal conviction or furnish a link in chain of evidence needed for conviction.

As per the English laws, it is a fundamental principle of the common law that an accused shall not be compelled to discover documents or objects which incriminate him. Even the theory of, Right to Silence which is considered to be the mode towards self – incrimination has embarked in Britain. The origins of this right may not be exactly clear but the right goes back to the middle Ages in England. During the 16th century, the English Courts of Star Chamber and High Commission developed the practice of compelling suspects to take an oath known as the “ex-officio oath” and, the accused had to answer questions, without even a formal charge, put by the judge and the prosecutor. If a person refused to take oath, he could be tortured.⁷

These Star Chambers and Commissions were later abolished. The right is based on the principle ‘nemo debet prodere ipsum’⁸, the privilege against self-incrimination. This principle has crept into the English common law criminal procedure in the middle ages. The privilege originated in Roman Common Law, applying first to witnesses and to allegations of crime in civil proceedings and then was extended to the accused in criminal law.

In India the fundamental right against self incrimination relates to the Fifth Amendment of United States and contains, more or less, the same language. Right against self –incrimination includes right to remain silent and extends even to interrogation during the investigation and also both to the accused and suspect equally.

INTERNATIONAL RECOGNITION OF RIGHT AGAINST SELF-INCRIMINATION:

The right against self incrimination is a basic human right of the accused. This protection is granted to the accused not only in India but also at the International level.

⁶ No person shall be compelled in any criminal case, to be witness against himself.

⁷ 180th Law Commission Report.

⁸ No man is obliged to accuse himself.

Some international instruments having provision of this right are as follows:

Universal Declaration of Human Rights, 1948.

Article -11 (1): “Everyone charged with a penal offence has a right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.”

The International Covenant on Civil and Political Rights, 1966 to which India is a party provides in Article. 14 (3) (g)⁹ a person’s right not to confess guilt or testify against himself. General Comment No. 13 of ICCPR is related to Article 14.

General Comment No. 13¹⁰: Article 14 (Administration of Justice) - Equality before the Courts and the Right to a Fair and Public Hearing by an Independent Court Established by Law.

It was contended in the second paragraph that the state parties fail to recognize that article 14 applies not only to procedures for the determination of criminal charges against individuals but also to procedures to determine their rights and obligations in a suit at law. Laws and practices dealing with these matters vary widely from State to State. This diversity makes it all the more necessary for States parties to provide all relevant information and to explain in greater detail how the concepts of “criminal charge” and “rights and obligations in a suit at law” are interpreted in relation to their respective legal systems.

The 14th paragraph of the document provides specifically in the context of the right against self-incrimination. Subparagraph 3 (g) of article 14 of ICCPR provides that the accused may not be compelled to testify against himself or to confess guilt. In considering this safeguard the provisions of article 7¹¹ and article 10(1)¹², should be borne in mind. In order to compel the accused to confess or to testify against himself, methods which violate these provisions are frequently used. The law should require that evidence provided by means of such methods or any other form of compulsion is wholly unacceptable.

European Convention for the Protection of Human Rights and Fundamental Freedoms

⁹ Not to be compelled to testify against himself or to confess guilt.

¹⁰Adopted at the Twenty-first Session of the Human Rights Committee, on 13 April 1984

¹¹ No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

¹²All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.

states in Art. 6 (1) that every person charged has a right to fair trial and Article 6(2) thereof states:

“Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to the law.” Thus article 6 of this convention also indirectly protects the right of an accused person not to testify against himself as the burden is on the prosecution to prove his guilt. This is the basic tenet of right to fair trial.

Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment - General Assembly Resolution 43/173 (9 December 1988)

These Principles were laid down by a resolution of General Assembly in 1988. Principle 21 states that it shall be prohibited to take undue advantage of the situation of a detained or imprisoned person for the purpose of compelling him to confess, to incriminate himself otherwise or to testify against any other person. And that no detained person while being interrogated shall be subject to violence, threats or methods of interrogation which impair his capacity of decision or judgement

RELEVANT CASES:

Miranda V. Arizona¹³ was a landmark decision of the United States Supreme Court. In a 5–4 majority, the Court held that both inculpatory and exculpatory statements made in response to interrogation by a defendant in police custody will be admissible at trial only if the prosecution can show that the defendant was informed of the right to consult with an attorney before and during questioning and of the right against self-incrimination before police questioning, and that the defendant not only understood these rights, but voluntarily waived them.

This has a significant impact on law enforcement in the United States, by making what became known as the Miranda rights part of routine police procedure to ensure that suspects were informed of their rights.

Saunders V The United Kingdom¹⁴: The subsequent use against a defendant in a prosecution, of evidence which had been obtained under compulsion in company insolvency

¹³ 384 U.S. 436 (1966)

¹⁴ (1997) 23 ECHR 313.

procedures was a convention breach of Art 6. Although not specifically mentioned in Article 6 of the Convention the right to silence and the right not to incriminate oneself are generally recognised international standards which lie at the heart of the notion of a fair procedure under Article 6. The right not to incriminate oneself is primarily concerned, however, with respecting the will of an accused person to remain silent. As commonly understood in the legal systems of the contracting parties to the Convention and elsewhere, it does not extend to the use in criminal proceedings of material which may be obtained from the accused through the use of compulsory powers but which has an existence independent of the will of the suspect such as, inter alia, documents acquired pursuant to a warrant, breath, blood and urine samples and bodily tissue for the purpose of DNA testing.

POSITION IN INDIA:

The Cr.P.C¹⁵ contains provision which correspond with the spirit of Article 20(3) of the Constitution. Section 161(2)¹⁶ of Criminal Procedure Code, 1973 grants a right to silence and right against self- incrimination during interrogation by police.

The Supreme Court in *Nandini Satpathy vs P.L. Dani*¹⁷ held the accused person may remain silent or refuse to answer when confronted with incriminating questions. Similarly, Section 313(3) of Criminal Procedure Code protects right to silence at the time of trial and states that the accused shall not be liable to punishment for reason of refusal to answer any question put to him. Similar protection is available to a person accused under Sections 25¹⁸ of Indian Evidence Act.

From the very first years of our Constitution, a certain ambiguity on the question of what evidence was accorded protection, and apparent conflicts between Article 20(3) and provisions of the Indian Evidence Act, 1872 have prevailed.¹⁹ *M.P. Sharma v. Satish Chandra*²⁰ was the significant ruling on the interpretation of Article 20 (3) of the Constitution. This resulted in judgements with apparent imbalance between the right against self-incrimination in Article

¹⁵ The Criminal Procedure Code, 1973.

¹⁶ Section 161(2)- Such person shall be bound to answer truly all questions relating to such case put to him by such officer, other than questions the answers to which would have a tendency to expose him to a criminal charge or to a penalty or forfeiture.

¹⁷ AIR1978SC1025, 1978crilj968, (1978)2SCC424, Decided on:07.04.1978.

¹⁸ Section 25- Confession to police officer not to be proved.—No confession made to a police officer, shall be proved as against a person accused of any offence.—No confession made to a police officer1, shall be proved as against a person accused of any offence."

¹⁹ *State of Uttar Pradesh v. Deomen Upadhyaya*, AIR 1960 SC 1125(Supreme Court of India).

²⁰*M.P. Sharma v. Satish Chandra*, AIR 1954 SC 300 (Supreme Court of India).["M.P Sharma"]

20(3) and the necessity to facilitate collection of evidence by investigating trial agencies. These judgements were referred to the Apex Court, which clubbed them and referred them to an eleven-judge bench. The resultant judgement is the landmark judgment of *State of Bombay v. Kathi Kalu Oghad*²¹ which has made a defining contribution to the case law on the matter as it stands today.

In this case a murder accused was identified by the Trial Court and convicted based upon handwriting samples taken at three different times, under police custody. The convict appealed to the High Court which held that the evidence of specimen handwriting was tantamount to compulsion, as it was obtained under police custody, thereby making the evidence inadmissible. Holding that the identity of the respondent was not established beyond a reasonable doubt under other available evidence, the accused was acquitted. The State of Bombay then appealed to the Apex Court which led to the judgement under review. The two issues contended were that of the admissibility of handwriting specimens as evidence in the light of Article 20(3) and whether compulsion was imputed in the taking of such specimens in police custody.

The Apex Court held that handwriting exemplars, fingerprints, thumbprints, palm prints, footprints or signatures were considered to be outside the scope of Article 20(3). It was also held that the giving of a statement by an accused in police custody gave the Court no reason to believe that coercion had been used in the procurement of the same.

In *Selvi vs. State of Karnataka*²², (2010) 7 SCC 263, a three-Judge Bench of this Court while considering testimonial character of scientific techniques like Narco-analysis, Polygraph examination and the Brain- Electric activation profile held that the issue is whether the results gathered from the impugned tests amount to ‘testimonial compulsion’, thereby attracting the prohibition of Article 20(3). Apart from the apparent distinction between evidence of a testimonial and physical nature, some forms of testimonial acts lie outside the scope of Article 20(3). For instance, even though acts such as compulsorily obtaining specimen signatures and handwriting samples are testimonial in nature, they are not incriminating by themselves if they are used for the purpose of identification or corroboration with facts or materials that the investigators are already acquainted with. The relevant consideration for extending the protection of Article 20(3) is whether the materials are likely to lead to

²¹ *State of Bombay v. Kathi Kalu Oghad*, AIR 1961 SC 1808 (Supreme Court of India). [“Oghad”]
²⁰(2010) 7 SCC 263

incrimination by themselves or ‘furnish a link in the chain of evidence’ which could lead to the same result. Hence, reliance on the contents of compelled testimony comes within the prohibition of Article 20(3) but its use for the purpose of identification or corroboration with facts already known to the investigators is not barred.

DEVELOPMENT IN TECHNOLOGY AND ITS EFFECT ON THIS RIGHT

With the growth of technology in every field the emergence of different techniques for investigation has also taken place. In India, the use of Deception Detecting Tests has been questioned in courts. The main argument against it is the infringement of the fundamental right under Article 20(3) and under Article 21 of the Constitution, which provides for a privilege against self incrimination and right to health and privacy, respectively. In most of these cases, the revelations made have led to the discovery of information’s favouring probative truth and consequently recoveries have been made in large number of cases under section 27²³ of Indian Evidence Act. Thus, it is right to say that DDT is proving to be a useful tool in the field of criminal investigation. Legal questions are raised about their validity with some upholding its validity in the light of legal principles and others rejecting it as a blatant violation of constitutional provisions. There is a tension between efficient or successful investigation and preservation of individual rights, which is discussed in the following manner:

If a person is not willing to consent, it is being assumed by the people that he is not cooperating with investigation and might have committed or involved in the offence. But, DDT has certain outcomes which are unethical as well as unconstitutional.

It is well established that the Right to Silence has been granted to the accused by virtue of the pronouncement in the case of Nandini Sathpathy vs P.L.Dani, Supreme Court held that “ no one can forcibly extract statements from the accused, who has the right to keep silent during the course of interrogation (investigation). By the administration of these tests, forcible intrusion into one’s mind is being restored to, thereby nullifying the validity and legitimacy of the Right to Silence. Moreover, under the influence of the drug, the accused has garbled speech and tends to talk about fantasies, and labours under delusions. For example, a person may talk about a crime s/he fantasized about committing, even if they actually have not done it. Their

²³Section - 27. How much of information received from accused may be proved.—Provided that, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved.

state resembles that of a person in delirium. So, it ultimately constitutes self incrimination of a person because it is difficult to distinguish reality from fantasy.

180th report of Law Commission of India on Article 20(3): (2002)

A survey of the current law in various countries reveals that in USA, Canada and India in view of the constitutional provisions against self incrimination the Courts have required the prosecution to prove guilt beyond reasonable doubt and there has been no encroachment whether at the stage of interrogation or trial, into the right to silence vested in the suspect or accused. It is only in UK that certain deviations have been made recently. Court has laid down some conditions which must be satisfied before the Court or jury could take into consideration the silence of the accused. Firstly, a prima facie case as to guilt has to be made out by the prosecution. Secondly, the suspect or the accused must have been given an opportunity to call an attorney when he was questioned. This has led to the further amendment in the UK law in 1999 permitting the suspect or accused to call for an attorney's assistance. But then fresh problems have arisen where the accused has relied upon the lawyer's advice to remain silent. In such cases the Courts are resorting to the cross-examination of the accused as well as his lawyers. A lawyer's wrong advice can lead to serious prejudice to the accused and this cannot be permitted.

In the light of the above complications, criminal trials have become more complicated and the accused is having more grounds to question a verdict of guilt. In the view of the commission, it may not therefore be wise to introduce similar changes in our system.

In view of the provisions of clause (3) of Art.20 and the requirement of a fair procedure under Art. 21, and the provisions of ICCPR to which India is a party and taking into account the problems faced by the Courts in UK, the law commission recommended that it will not only be impractical to introduce the changes which have been made in UK but any such changes will be contrary to the constitutional protections referred to above. Thus this report is a very important document that relates to the right of self- incrimination.

CONCLUSION

The right against self incrimination is a basic fair trial right of the accused. It is protected by incorporating it as a fundamental right in the part 3 of the Constitution. The right is protected under Cr.P.C as well as Indian Evidence Act. The cases mentioned in this paper and the 180th

report of law commission makes it clear that in present time this right of the accused is protected under the criminal justice system. The decisions of the Supreme Court in several cases related to testimonial compulsions have further proved this contention.

Therefore in the era of technology and legal development the basic right against self incrimination is protected.

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