

PROTECTION AGAINST SELF-INCRIMINATION AS A FUNDAMENTAL RIGHT: A CRITICAL APPRAISAL

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ABSTRACT

The rationale behind the study of this research is solely to aid the society and its people about this Right against self-incrimination. The rationale is to find out the intent of the legislature in this very provision and how far the judiciary is carrying out such intent through its pronouncements and thereby administering justice to its people. The research work has mainly dealt with the very provision and its interpretation and to understand how far the provision enshrined in our constitution is executed.

The Research work is purely a Doctrinal Study. The work done is descriptive in nature. Research is based on various reports, debates, views & opinions of the jurists and experts. Judgments of various courts and legislations have aided to the work done. Library resources have been exhausted to understand the aspects of the research work. Secondary and Electronic resources have been largely used to gather information and data about the topic.

Objective

- To analyze the very intent of the provision i.e. Article 20(3).
- To find out whether there is any contradiction between this provision and evidence law.
- To establish the ground reality upon how far such fundamental right is being protected by the guardians of the constitution.
- To know if this right has really got its glory as a fundamental right or still there are certain lacunas.
- To create awareness amongst the public regarding their fundamental right that no one can compel them to be witness against themselves.

- To understand how the right against self-incrimination and right to silence go hand in hand.

1. INTRODUCTION

Right against self incrimination in its simplest meaning conveys that a person who is accused of any offence cannot be compelled to be witness against himself. This evolves through a Latin maxim “Nemon teneter seipsum accusare¹” which means ‘No man is obliged to accuse himself.’ This right basically originated when there were strikes and protests against and as a reaction to certain unfair methods of interrogation of accused persons in England. Hence this way it developed through common law.

1.1 Meaning

Self-Incrimination: Acts or declarations either as testimony at trial or prior to trial by which one implicates himself in a crime.

The Fifth Amendment, U.S. Const. as well as provisions in many state constitutions and laws, prohibit the government from requiring a person to be a witness against himself involuntarily or to furnish evidence against him.²

Throughout the web of English criminal law, *one golden thread is always to be seen, that is the duty of prosecution to prove the prisoner’s guilt.*³

Dean Griswold, of the Harvard Law School pointed out the significance of this privilege as, “Privilege against self –incrimination is one of the great landmarks in man’s struggle to make him civilized. We do not make even the most hardened criminal sign his death warrant, or dig his own grave or pull the lever that springs the trap on which he stands. We have through the course of history, developed a considerable feeling of the dignity and intrinsic importance of the individual man, neither torture nor an oath nor the threat of punishment such as imprisonment for contempt should be used to compel him to provide the evidence to accuse or to convict himself.”⁴

¹ Translated from latin.

² Blacklaw Dictionary US.

³ Woolmington v DPP(1935) AC 462.

⁴ Sujata V Manohar, *T K Tope’s Constitutional Law of India*, 199 (3rd Edition Eastern book company).

Under Indian legal system this right has been embodied in the constitution of India. The right finds its place under article 20(3) of the constitution which reads ‘No person accused of any offence shall be compelled to be a witness against himself.’⁵ The provision is basically borrowed from the Fifth Amendment of the American constitution which says ‘No person shall be compelled in any criminal case to be a witness against himself.’⁶

This right against self incrimination can also be understood to be an excerpt of the common law rule and essential feature of Indian penal code “An accused is innocent until proven guilty.” Which says that until such charges are not proved one cannot be considered guilty. Thus the right is a fundamental right available to any accused person and protects such person to be witness against himself. Unless and until the charges upon the person are proved beyond the reasonable doubts by the court such person will not be considered to be guilty of offence.

It is majorly based upon the presumption of innocence which says that a person accused of any offence is considered innocent unless the charges upon him are proved to be true beyond the reasonable doubts. The protection under this right is available to person accused of offence who has given any confession against himself knowing it to be untrue by the reason of any force or duress. A person cannot be compelled to make any such confessions against him. Confessions made out of force and compulsion will not be admissible as per the Evidence act.

However the protection is limited only to confessions made out of compulsion and threat, if any such confession is made voluntary and is found to be true, the protection under this right will not be applicable. Therefore the right against self incrimination is a fundamental right which is protected by the provisions of the constitution and cannot be taken away. The protection under this right is available not only to the individuals but also to corporate bodies.

This signifies that confessions by the accused can be result of certain force and compulsions for example if we talk about police atrocities and their third degree tortures on an accused we can easily consider a situation where such accused is under the threat of such pain and in order to save himself from the same he may confess for a crime which he never did. Thus this right

⁵ Article 20(3) of Indian Constitution.

⁶ Fifth Amendment of American constitution.

against self incrimination is available to protect this kind of forced confessions and provide justice to such innocent accused persons.

The guarantee of Article 20 (3) is available only to the person accused of an offence. A person would become accused if an F.I.R. has been lodged against him or a complaint has been made which in normal course would result in prosecution. A person would thus be accused even if trial has not commenced. The protection of Article 20 (3) would be available if the person is accused when he made the statement or falls in the position of a witness 'but not if he becomes accused' subsequent to the making of the statement. The use of expression 'accused of an offence' indicates that the same is confined to criminal proceedings or proceedings which are in the nature of criminal proceedings before a court of law or Judicial Tribunal.⁷

The benefit of the article 20(3) is available with accused person whose confession is forced one and not a voluntary confession which is free and just. Compulsion means duress and it may be physical or mental and it is upon the Judge to consider whether the case falls under article 20(3) or not.

2. PURPOSE OF ARTICLE 20(3)

The fundamental right guaranteed under Article 20 (3) is protective umbrella against testimonial compulsion in respect of persons accused of an offence to be witness against themselves. This protection, as the language goes, is not confined to evidence before Court but would even cover stage prior to it like investigation subsequent to becoming accused of an offence. The protection is available not only in respect of evidence given in a trial before Court but also at previous stage.⁸

Under the legal system the confessions are many a times influenced by the police and their atrocities and that is the reason that any confession of accused is admissible only if recorded by magistrate in accordance with the procedure.

2.1 Legal Doctrines & Evolution

⁷ Supra 4.

⁸ Justice U.C.Srivastava, "Immunity From Self Incrimination Under Article 20(3) Of Constitution Of India", *J T R I Journal*, Issue 4 & 5, March 1996

Doctrines of 'beyond reasonable doubt' & 'burden of proof on prosecution' along with certain other aids were realized during mid 18th century where an accused was made equipped with certain political rights and privileges which he can use in his favor and to defend himself from any violation of his rights.

Thus the very purpose of this provision was to protect the accused against forced and compelled confessions of crime which they never committed. The need for such protection was realized in one of the cases of United Kingdom even before our constitution came.

*Saunders v. United Kingdom*⁹, This case explained that the right lies for the protection of the accused by the improper compulsion of the authorities, thereby contributing to the avoidance of the miscarriages of justice.

The expression 'to be a witness' has been subject matter of Judicial decisions and has been interpreted even differently till the year 1961 despite Supreme Court's decision in *M.P. Sharma v. Satish Chandra and others*¹⁰. The issue in this case was that whether order as to search and seizure was violative of article 20 (3) of constitution. The court has looked upon the meaning of witness and as per section 139 of Indian Evidence Act which signifies that a person furnishing document on summons is not to be considered a witness but this provision did not guide the meaning of witness and then it was held that a person who furnishes a document is to be understood as witness and even the oral evidence is included under the same. Thus a person who furnishes a document upon any notice of the court is not to be considered violative of article 20(3) of Constitution.

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. This resulted in judgments with apparent imbalance between the right against self-incrimination in Article 20(3) and the necessity to facilitate collection of evidence by investigating trial agencies.¹¹

⁹ (1997) 23 EHRR 313

¹⁰ A.I.R.1954 SC.

¹¹ Shivani Mittal, "The Right Against Self-Incrimination and State of Bombay v. Kathi Kalu Oghad: A Critique", 2(1) *NLUJ Law Review* 75 (2013).

The ethical rationale for voluntariness addresses the need to protect the accused from brutalization and torture by investigation agencies; the rationale is that if involuntary statements were readily given weight age during trial, the investigators would have a strong incentive to compel such statements, often through methods involving coercion, threats, inducement or deception.¹²

The basic right of integrity of an individual cannot be violated even if such confessions are involuntary. The court cannot allow such methods of interrogation which deprive a person of his dignity and bodily integrity. Such situation can be called as violative of basic human rights of life and limb.

Therefore the provision of article 20(3) of the constitution acts as a boon against the police atrocities and their third degree tortures on accused persons to make them confess for a wrong they never did. Also this right serves as a check on the police's procedure of investigation.

Such methods of compelled testimony are to be removed because such practice will further give way to the investigators to follow such methods of interrogation and they will be more inclined towards these ways of extracting information.

Another very rationale of article 20(3) of the constitution is to protect an accused person who is wholly or partially innocent. Such person is to be protected from making any statement against himself under stress or under the terror of being subjected to third degree tortures and thereby protecting him from any legal action.

The constitutional makers rightly thought of according this right as in absence of such protection the investigators would have discouraged from indulging into the diligent search for the evidence and it would harm the administration of justice.¹³

If law permitted evidence to be obtained by coercion, investigators would never take up the onus of partaking in laborious investigation and prolonged examination of other associated persons, material and documents. It has been rightly said that the absence of the privilege against self-incrimination would incentivize those in charge of the enforcement of the law to

¹² Alschuler, Albert W- "A Peculiar Privilege in Historical Perspective: The Right to remain silent", *Michigan Law Review* 94(8), 1995.

¹³ *State of Bombay v. Kathi Kalu Oghad*, AIR 1961 SC 1808.

sit comfortable in the shade rubbing red pepper into the devil's eye rather than go about in the sun hunting up evidence.¹⁴

3. ARTICLE 20(3) OF THE INDIAN CONSTITUTION

The provision relating to the 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 very feature of this provision is that the accused need not to make any statement against his will as it is for the prosecution to establish his guilt beyond all reasonable doubt and the accused is presumed to be innocent till proved guilty.

It basically means if you are in police custody you cannot be forced to answer questions by the police. If one goes down to the police station voluntarily or calls a detective to talk about the case and not in police custody the right does not apply to such person in this case. This right also means that the accused does not need to testify in his trial and the jury is not supposed to even consider the fact that the accused did not testify. The judge has to decide the case based on whatever evidence is presented and if it doesn't include testimony it doesn't matter.

3.1 Ingredients of Article 20(3):

- It is a right available to a person 'accused of an offence.'
 - It is a protection against 'compulsion to be a witness.'
 - It is a protection against such 'compulsion' resulting in his giving evidence against himself.
- **Person accused of an offence-**

The benefit of this provision is available only with a person who is accused of an offence which results in prosecution. A person against whom such FIR is lodged can claim the protection under this provision. In order to avail this protection, a person must be 'accused of an offence' at the time of making statement.

¹⁴ *Ibid.*

In *M. P. Sharma v. Satish Chandra*¹⁵, it was held that a person, whose name was mentioned as an accused in the first information report by the police investigation was ordered by the Magistrate, could claim the protection of this guarantee. This protection is available both at trial and non-trial stage which is to say it is available if the person concerned can be called as accused.

In case of American laws the right against self-incrimination is available not only to the accused but also to witness but that is not the case with Indian laws.

In *Nandini satpathey v. P. L. Dani*¹⁶ It was subsequently held that, the right extends to witness and accused alike, that the expression 'accused of any offence', must mean formally accused in —”praesenti not in future”, that it applies at every stage at which furnishing of information and collection of materials takes place, that the privilege extends not only to the deployment of the information obtained as evidence in a criminal prosecution, but to the extraction of the information itself.¹⁷

In *Balasaheb v. State of Maharashtra*, Court held that, a witness in a police case, who is also an accused in complaint case about the same incident, cannot claim absolute immunity from testifying in the police case on ground of Article 20(3). He may, however, refuse to answer those questions which tend to incriminate him.¹⁸

➤ **Compulsion to be a witness-**

The protection is available when the person is forced and compelled to be a witness which signifies that accused was compelled to make statement against him. Compulsion means duress which includes threatening, beating, imprisonment of wife, parent or child of the accused. And in cases where the confession is free from such duress and compulsion, article 20(3) does not apply.

➤ **Compulsion resulting in his giving evidence ‘against himself’-**

¹⁵ AIR 1954 SC 300.

¹⁶ AIR 1978 SC 1025.

¹⁷ Aqa Raza & Pankaj Kumar Pandey, “Protection against Self-Incrimination as a Fundamental Right: A Critical Appraisal”. Available at: http://www.papers.ssrn.com/so13/papers.cfm?abstract_id=266117&download=yes .(Last accessed on September 25, 2016).

¹⁸ (2011) 1 SCC 364.

In such cases there are two aspects, firstly that the burden of proof lies with the prosecution and secondly the accused is presumed to be guilty unless and until he is found guilty beyond reasonable doubts. Then there is this aspect which says that the accused has his rights against self-incrimination and he cannot be compelled to be a witness against himself. Thus accused has the right to be silent as well.

The judgment in M.P. Sharma, however, failed to settle the scope of Article 20(3) especially with respect to the scope of 'non-verbal' evidence to which the protection was extended. As a result, the cases that followed M.P. Sharma and preceded Oghad had a sharp difference of judicial opinion.¹⁹

To bring the evidence within ambit of this provision it must be shown that the accused was compelled to make the statement having material bearing on the criminality of the maker. Compulsion here means what in law is called duress i.e. "Duress is where a man is compelled to do an act by injury, beating or unlawful imprisonment or by threat of being killed, suffering some grievous bodily harm or being unlawfully imprisoned. It also includes threatening beating or imprisoning of wife, parent or child of a person."²⁰

3.2 Right to call a lawyer- In *Nandini Satpathi*, the court also laid down some guidelines for the due observance of Article 20(3) by police authorities one of which was that they must inform the accused that he has a right to call a lawyer before answering to any of their questions.²¹

Section 27, Evidence Act- It has been held that the information furnished by an accused person after his arrest to the investigating officer which leads to the discovery of articles under section 27 of the evidence act 1872 is admissible in evidence and does not in any way offend Article 20 (3) of the constitution of India, because an accused person cannot be said to have been compelled to be a witness against himself simply because he made a statement while in police custody, without anything more.²²

¹⁹ H.M. Seervai, *Constitutional Law Of India*, Vol. 2, 1063-1064 (4th edn, 1996).

²⁰ Mahendra P. Singh, *V. N. Shukla's Constitution of India* (11th edition, Eastern book company).

²¹ *Ibid.*

²² *Ibid.*

4. POSITION IN DIFFERENT COUNTRIES

The right against self-incrimination has been given protection in other countries as well. The chapter focuses upon the statutes and provisions prevailing in the countries like U.S. & U.K. that guarantees the right and their salient features.

4.1 Indian Laws

Article 20(3) of the Indian Constitution-

“No person accused of any offence shall be compelled to be a witness against himself.”

Salient features-

- The accused is presumed to be innocent.
- It is for the prosecution to establish the guilt of accused.
- Accused is not supposed to make any statement without his consent.

4.2 U.S. Laws

The Fifth Amendment of the US constitution provides-

“No person shall be compelled in any criminal case, to be a witness against himself.”

It has a very wide connotation and the protection is available to both witness and parties in proceeding as well. Applies in both civil and criminal matters and covers both documentary and oral evidence.

Also the Supreme Court of America observed “This privilege is the result of long struggle between the opposing forces of the spirit of individual liberty on one hand and collective power of the state on other.”²³

4.3 U.K. Laws

It is a fundamental principle of the Common Law that a person accused of any offence shall not be compelled to discover documents or objects which incriminate him. No witness, whether party or stranger is, except in a few case, compellable to answer any question or to produce any

²³ Supra Note 4.

document the tendency of which is to expose the witness, to any criminal charge, penalty or forfeiture. The privilege is based on the policy of encouraging persons to come forward with evidence in courts of justice, protecting them, as far as possible, from injury, or needless annoyance, in consequence of doing so.²⁴

A survey of 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 suspect.²⁵

5. ARTICLE 20(3) OF CONSTITUTION AND RIGHT TO SILENCE

The right to silence is a principle of Common Law. The courts and tribunals cannot consider an accused as guilty of offence merely because the person has refused to answer any questions by the court.

The origins of right to silence 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. These Star Chambers and Commissions were later abolished. The right to silence is based on the principle ‘nemo debet prodere ipsum’, the privilege against self-incrimination.²⁶

The right of silence, which has emerged at both the pre-trial and trial stages, is underpinned by the privilege against self incrimination, and the broader notions of the rule of law espoused by the liberal tradition. The consequence of this right proposes that one cannot be required to

²⁴ Harshit Khare, “Privilege against Self-Incrimination”, Available at- <http://www.legalserviceindia.com/article/I466-Privilege-Against-Self----Incrimination.html> (last accessed on September 24, 2016).

²⁵ *Ibid.*

²⁶ 180th Report of the Law Commission of India, Article 20(3) the Constitution of India and the Right to Silence, 3, (2002).

answer a question that might tend to expose oneself to criminal conviction. The presumption of innocence has been constructed so as to require the prosecution to prove guilt.²⁷

The accused shall have the right to have the assistance of a counsel for his defense. So if the police interrogate or arrest someone, asking for lawyer is a good way to assert right to remain silent. This right protects the accused against unfair interrogation. The accused has all the rights to say anything in the presence of attorney. Even a person who is not guilty should not give statement to police. By giving such statements things go easy for the prosecution. The prosecution tries to take away the liberty and make the person guilty. Often times the police asks the accused for explanation about how things happen. When the person is questioned again and again then out of stress and terror sometimes they explain things which even they don't have idea about and this way it looks as if the person is making or changing the story as per him and hold you guilty.

The statement must be given at the time of trial in the presence of the attorney where no compulsion and force can influence your statement and hence it will be free and fair.

Right to remain silent protects an accused as the accused will not make any statement which can be used against him criminally. Also the jury will not make any inferences on such decision of accused to not to testify. If the accused is of opinion that incriminating questions have been asked he can absolutely remain silent on that.

The right to silence is the right of an accused to remain silent in the front of police. Such right is well justified as a protection against self-incrimination. The right of an accused in a criminal trial to remain silent at the pre-trial stage provides a particular manifestation of the privilege against self-incrimination such that a person who believes, on reasonable grounds, that he or she is suspected of having been a party to an offence is entitled to remain silent when questioned or asked to supply information by any person in authority about the occurrence of an offence, the identity of the participants, and the roles they played.

Some of the aspects relating to right to silence came to be included in the *Universal Declaration of Human Rights*, 1948. Art. 11.1 thereof reads: "11.1 Everyone charged with a

²⁷ Dr. Barbara Ann Hocking and Laura Leigh Manville, "What Of The Right To Silence: Still Supporting The Presumption Of Innocence, Or A Growing Legal Fiction?" *Macquarie Law Journal* (2001) Vol 1 No 1.

penal offence has the 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 state in Art. 9.1 That none shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law; Art. 9.2 states that anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.²⁸

6. ARTICLE 20(3) – THE JUDICIAL INTERPRETATION

The Supreme Court of India interpreted this clause in a number of cases, taking into consideration the Indian conditions, while defining the extent of this privilege. It is laid down that this protection is available only to an accused person. An accused person in Article 20(3) means a person accused of an offence. An accused referred in section 167 of the Criminal procedure code also covers a person arrested under FERA or Customs Act and is used in Generic sense as denoting a person whose liberty is restrained by a competent authority. Every accused under section 167 does not necessarily get this protection.²⁹

Gajendragadkar, J. pointed out that one of the essential conditions for invoking the constitutional guarantee enshrined in article 20(3) is that a formal accusation relating to the commission of and of an offence, which would normally lead to his prosecution must have been leveled against the party which is being compelled to give evidence against himself.³⁰

No witness can claim this privilege. Section 132 of Evidence Act does not exempt a witness from answering even incriminating questions. Such privilege can be used only in a criminal proceeding before a court of law or tribunal which is empowered to take evidence. Hence the privilege does not extend to inquiry proceedings.³¹

²⁸ Supra Note 20.

²⁹ Supra Note 4.

³⁰ Raja Narayanlal Bansilal v Maneck phiroz, AIR 1961 SC 29-38.

³¹ Supra Note 4 at 199-200.

6.1 Guiding Principles laid by Supreme Court of India in case of State of Bombay v Kathi Kalu Oghad:

- An accused person cannot be said to have been compelled to be a witness against himself simply because he made a statement while in police custody, without anything more. In other words, the mere fact of being in police custody at the time when the statement in question was made would not by itself as a proposition of law, lend itself to the inference that the accused was compelled to make the statement, though that fact, in conjunction with other circumstances disclosed in evidence in a particular case, would be a relevant consideration in an enquiry whether or not the accused person had been compelled to make the impugned statement.
- The mere questioning of an accused person by a police officer resulting in a voluntary statement, which may ultimately turn resulting in a voluntary statement, is not compulsion.
- “To be a witness” is not equivalent to “furnishing evidence” in its widest significance, that is to say, as including not merely making oral or written statements but also production of documents or giving materials, which may be relevant at a trial to determine the guilt or innocence of the accused.
- Giving thumb impressions or impressions of foot or palm or fingers or specimen writing or showing parts of body by way of identification are not included in the expression “to be a witness.”
- “To be a witness “means imparting knowledge in respect of relevant facts by an oral statement or a statement in writing made or given in court.
- “To be a witness” in its ordinary grammatical sense means giving oral testimony in court.
- To bring the statement in question within the prohibition of Article 20(3), the person accused must have stood in the character of an accused person at the time he made the statement. It is not enough that he should become an accused any time after the statement has been made.³²

³² Supra Note 4 at 202-203.

In *Ramanlal Bhogilal Shah v D.K. Guha*, it was held that a person against whom FIR in respect of an offence is lodged is a person accused of an offence.³³

M. P. Sharma v. Satish Chandra gave this right a broad interpretation and held that it is not possible to limit this provision to oral evidence; the Supreme Court here brought in various other forms of evidence such as production of a thing' and evidence by other modes within the ambit of this Article. Scientific evidence has not been accorded its due place in our country owing to the pace of developments in the field. Thus even though *M. P. Sharma* case attempted to answer all major questions posed to the Self Incrimination Doctrine in its current times, advancements in forensic science quickly put forth new challenges to it.³⁴

Kalu Kathi Oghad answered the question of compelling the accused to give specimen handwriting, thumb impressions and signatures stated that the right of the accused against self incrimination is not violated in such cases since —self incrimination must mean conveying information based upon the personal knowledge of the person giving the information” and covers only “personal testimony which must depend upon his volition”. Here the court restricted the meaning of the phrase —to be witness” to furnishing evidence in the form of oral or written statement and not large enough to include impressions and specimen signatures.³⁵

The leading case that has guided precedent in our country with respect to narco-tests has been *U.S. v. Solomon* where the United States Supreme Court held used expert witnesses to establish that adequate safeguarding against the unreliability of narco-tests was possible; on the whole however, while narco-tests were held as unreliable, their acceptance as an investigative technique was upheld.³⁶

A previous judgment of the court in the case of *Nandini Satpathy v. P.L.Dani* places any form of duress, physical or mental under the definition of compelled testimony and holds it as violative of the privilege. The aspect of narco analysis, keeping in mind the compelling interest of the state in security and order, cannot be put away without further explanation.³⁷

³³ (1973) 1 SCC 696: AIR 1973 SC 1196.

³⁴ AIR 1954 SC 300.

³⁵ AIR 1961 SC 1808.

³⁶ 753 F.2d.1522 (9th Cir. 1985).

³⁷ AIR 1978 SC 1025.

In *Kalawati v State of HP*, As a confession is a voluntary act, a person making a confession cannot afterwards claim the privilege of this clause on the ground that he was compelled to be a witness.³⁸

In case of *Kartar Singh v State of Punjab*, it was held that the protection under article 20(3) extends not only to oral testimony inside the court but also to compel testimony previously obtained from an accused.³⁹

In *Yusufalli Esmail Nagree v State of Maharashtra* it was held that a tape recorded conversation without the knowledge of the person concerned is not compelled evidence as the accused person was free to speak whatever he wanted to speak.⁴⁰

In case of *Dushyant Somal v Shushma Somal* it was held that, protection against testimonial compulsion did not convert the position of a person accused of an offence into a position of privilege with immunity from any other action contemplated by law. Immunity against testimonial compulsion did not extend to refusal to examine and cross-examine witnesses and it was not open to a party proceeding to refuse to examine himself or anyone else as a witness, on his side to and to cross-examine the witness for the opposite party on the ground of testimonial compulsion and then to contend that no relief should be given to the opposite party on the basis of evidence adduced by the other party.⁴¹

7. ARTICLE 20(3) OF THE CONSTITUTION AND INVESTIGATION TECHNOLOGY

Laying emphasis on today's era we very well know about the growing technology and growth of crime in the country. If the country is making technological advancements then growth of crimes and new ways of doing it are no less. So somehow law and technology both have relevance in our lives. A system of check and balance has been there, which is to say whenever technology exceeds its limit, law is there to check the same. Like in case of cyber crimes and

³⁸ AIR 1953 SC131.

³⁹ (1994) 3 SCC 569.

⁴⁰ AIR 1968 SC147

⁴¹ (1981)2 SCC 277:AIR 1981 SC 1026

similarly for the protection of law and legal rights and strengthening of evidence with the help of science cannot be denied.

Now days where criminals are taking utmost precautions in order to safeguard themselves from law and leaves no evidence behind and traces of their crimes, it has become a necessity to adopt scientific methods and technology to trace their involvements.

With the technological advancements various interrogative techniques have been developed which are considered to be safe and civilized way of conducting interrogation. The techniques are Narco Analysis Test, Polygraphy test and Brain Mapping Test. These techniques together are termed as Deception Detection Test (DDT).

These technological advancements have no doubt aided the legal process of interrogation but have certain limitations as well. These may have adverse impact on certain Constitutional Rights like article 20(3) Right against Self Incrimination, Right to Privacy and Right to Health guaranteed under article 21 Right to Life.

These techniques affirm certain attributes like Order of Court, Consent of the Subject, Non Manipulated Statement by the Subject, & Secure Public Interest.

7.1 Application of techniques for investigation-

The law needs to find the truth to resolve “human conflict” and one method of doing so is to use the field of science. Today’s society has improved upon the methods of the past to bring about more precise and accurate techniques. Forensic Science has expanded to Trauma Inducing Drugs and Psychotropic Substances. The application of science to matters of law has made great strides in recent years. Development of new tools of investigation has led to the emergence of scientific tools of interrogation like:

- Narco Analysis Test
- Brain Mapping Test/ Brain Electrical Oscillation Signature Profile (Beos)
- Polygraphy Test
- Dna Profiling

- Fingerprinting Test⁴²

7.2 Following are the essentials to be followed before carrying on such tests-

1. The permission of the court and written consent of the person undergoing such a test should be made compulsorily.
2. The person who is supposed to undergo such a test must be given all the necessary details about the test before he is asked to sign the consent form.
3. Control and supervision of the forensic laboratories should be made under the autonomous bodies like NHRC and the States Human Rights Commissions.
4. NHRC has suggested that at the time of polygraph test a forensic psychologist, a psychiatrist and an anesthetist should remain present. Similar team can be directed to remain present at the time of Narco Analysis with the additional safeguard of entire proceeding audio and videotaped.

In case of *Ramchandra Ram Reddy v The State of Maharashtra*⁴³ the court observed:

“The question which falls for consideration therefore, is whether such statement can be forcibly taken from the accused from the accused by requiring him to undergo the Truth serum test against his will. It will be seen that such statement will attract the bar of 20(3) only if it is inculcating or incriminating the person making it.

Whether it is so or not can be ascertained only after the test is administered and not before. In our opinion therefore there is no reason to prevent administration of this test and also because there are enough protection available under Indian Evidence Act and Article 20 (3) to prevent inclusion of any incriminating statement if one comes out after administration of test. So far as Narco analysis test is concerned enough protection exists, recourse to which can be taken if and when the investigating agency seeks to introduce such statement as evidence.”⁴⁴

In case of *Rojo George v Deputy Superintendent of police*⁴⁵, the Court while allowing a Narco Analysis test observed that in present days the techniques used by criminals for commission of crime are very modern. The conventional way of questioning may not yield any result at all.

⁴² Manu Saxena, “Striking a Balance: Efficient Investigation & Individual Rights”, *Legal Service India* 2016.

⁴³ 2004 All MR (Cri) 1704

⁴⁵ (2006) 2 KLT 197

That is why the scientific tests like narco analysis are now used in the investigation of a case. When such cases are conducted under the supervision of the expert, it cannot be said that there is any violation of Fundamental rights guaranteed to citizen.

As far as these technologies are concerned it has to be noted that they cannot be practiced easily. The check of the legal provisions of the constitution of India i.e. Article 20(3) will always prevail over it. To the extent the practice is not violative of the right, it can be operated if it really helps to further the process of investigation however it should be well within the controlled circumstances and the subject should be well taken care of and such practices are allowed depending upon the circumstances of the case in question.

Thus these practices of interrogation can be violative of Right against self incrimination, so unless and until the subject upon whom it is to be carried upon consents for the same and the process is not going to effect the health and dignity of the subject, it can be allowed to that extent with the judicial permissions.

MAJOR FINDINGS

As per the problem of the research and study done, following findings were made-

- Article 20(3) is available as a fundamental right but the intent of legislature behind the provision is still not met in its true sense and completely.
- Even today there are cases where an accused is subjected to third degree tortures and some form of duress while investigation.
- The police atrocities are still prevailing and many innocents are made deprived of their rights which they have been given by the constitution.
- However the judiciary has played a vital role in protection of such accused persons in many of its decisions and judgments. Fundamental rights form the basic structure of the constitution and judiciary is to protect these rights.
- When it comes to Narco Analysis tests then there have been cases where judiciary is of the view that it cannot be carried out with prescribed limitations. Thus these tests are not actually the violation of 20 (3) if conducted legally and as per the directions of the court.

- It can be expected though, that with the efficient role of judiciary soon the provision will find its glory in true sense and right against self incrimination can be well justified as a Fundamental right.
- Also the Kathi Kalu Oghad case guidelines have almost cleared the pictures and laid down the major principles to be followed thereby protecting the right and reduced the ambiguity.

CONCLUSION

After going through the number of legal provisions regarding Right against self-Incrimination of various countries it has given a clear picture that such right is a constitutional right and has to be protected. Any violation of the right will attract sanctions and punishments.

Thus any suspect who is made accused of the crime will not be considered guilty unless he is not proved guilty beyond reasonable doubts. There will be presumption of innocence and the burden of proving him guilty totally lies with the prosecution. Thus it is for the prosecution to establish the accused's guilt and the burden of proof lies on them. So the very rationale of the right is to protect such accused in cases where they may be innocent and they should not be compelled to make any such statements which may be used against them criminally.

Thus those involuntary statements by the accused may amount to false testimony and which will hamper the administration of justice and may lead to unjust convictions. Therefore, the privilege ensures that investigation agencies do not take the easy path of involuntary confessions to supplant the diligent route of meaningful investigations and that the reliability of the testimony presented for trial is of a high order.

It has to be realized that the very 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. But the ground reality still remains deviated because today also even after the right being enshrined has not got its glory in true sense. There have been number of instances where the police officers ultra viresly apply third degree tortures on accused just to scare them to the extent where being innocent also they agree to what they never did. Out of the pain and terror of such tortures many innocent people are exposed to trials and punishments.

In this way the police officers are just deviating from what they are supposed to follow in process of investigation. Although tests like narco analysis have certain degree of reliability but the same cannot be carried upon every now and then. These tests have been found to be reliable and must be carried upon the subject only after his willful consent and order of the court. If the case requires such investigation techniques then only such methods should be adopted and must be considered as an aid to the investigation. If such tests are done in a prescribed way they can actually help in the investigation process to an extent.

SUGGESTIONS

Article 20(3) also stretches its privileges to a person who is compulsorily being made a witness and also covers searches and seizures wherein, an accused or the person being searched is under no obligation to be a part of the search. If any confession or a mere statement is made based on which some material corroboration is found then that statement cannot be protected under Article 20(3).

Throughout the research the Author has been of the view that there is this concept called *JUSTICE*. This right under Article 20(3) totally revolves around the justice. The sole motive of the provision is to protect an innocent person from any forced confession against him. Talking about the Indian context we are well aware that now days the police officers in order to carry on with their investigations many a times crosses their lines by carrying out the third degree tortures on the accused. These bodily tortures not only harm them physically but mentally also.

Such practices violate the very essential fundamental right guaranteed to every citizen of Indian i.e. Right to life. (Article 21 of the Constitution)

Thus Article 20(3) is a protector and guardian of such fundamental rights and thereby proving itself to be essentially one of the most significant Fundamental Right.

As per the study done above about the Narco Analysis Test it is said that such techniques are now being used by various investigating agencies but still such process to be carried upon an Individual still puts a question of his right to privacy and right to life. Even though the process is safe and helpful in furtherance of investigation it should be as per the limitations prescribed

and with permission of the subject. However these tests do not give cent percent results but certainly help in furtherance of the investigation. If these are followed in prescribed limits and without violating any constitutional rights of the subject they can be practiced when highly required in any particular case.

But with the advancement in medical sciences, the certainty of such scientific tests has increased and the author thinks that they provide an effective tool to furnish evidence which help in speedy disposal of cases. By balancing the harmony between the protective rights and the need for speedy disposal these techniques can be very well carried out but the limitations of the law -cannot be overridden at any time. Hence right against self –incrimination plays a vital role in protection of accused from making any incriminatory statement under any pressure.

