

RIGHT AGAINST SELF-INCRIMINATION: A DETAILED STUDY OF THE CONSTITUTIONAL PROTECTION

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ABSTRACT

“The right of silence, like all other good things, may be loved unwisely, may be pursued too keenly, may cost too much”¹. – Adapted from Pearse v Pearse

The research paper is based on the right against self-incrimination and analyzed its scope and nature. This right is based on a Latin maxim- *“Nemo tenetur seipsum accusare”* which means *“No man is obliged to accuse himself”*. It is important for each and every being living in our society to be aware of this right. No one can force a person to give evidence against himself. Indian constitution under Article 20(3) also safeguards and provides protection against right against self-incrimination. This paper would also include the other laws in different countries which aims at protecting the detained person. It is also important to focus on the judicial interpretation of the provisions. Further Narco test is also analyzed in contrast to Article 20(3).

Keywords: *Self Incrimination; Constitution of India; Narco test; Fundamental Rights; Constitutional Protection.*

¹ 63 (1846) Eng Rep 950, 957 (on truth)

INTRODUCTION

It introduces the entire topic in brief. It includes the provision which safeguards the right of an accused person against giving a statement which would incriminate himself.

1. ANALYSIS OF ARTICLE 20(3) OF INDIAN CONSTITUTION

It includes the three essentials of article 20(3), its scope as well as its applicability. Whether this article can be provoked in civil and administrative proceedings or not?

2. ANALYSIS OF SECTION 161 OF CODE OF CRIMINAL PROCEDURE

This right is not only safeguarded in the Indian Constitution but even CrPC provides a protection against the same under section 161 of the code.

3. RIGHT TO SILENCE

It shows the link between 'right to silence' and 'right against self-incrimination'. Every person accused of an offence has the right to remain silent and no compulsion to the accused to speak something which is against himself.

4. WAIVING OF RIGHT AGAINST SELF-INCRIMINATION?

This chapter specifically deals whether an accused can waive this right provided under article 20(3) or not? However if an accused is voluntarily giving a statement without an external force or compulsion then it would be admissible in the court of law.

5. SCIENTIFIC TEST VIOLATING ARTICLE 20(3)?

There are few scientific tests which are used for obtaining the truth from accused. Some of these scientific techniques are Narco test, DNA test etc.

6. RIGHT AGAINST SELF-INCRIMINATION IN OTHER COUNTRIES

This chapter briefly explains this right in countries like U.S.A, Britain and Canada. It even shows its development and need for such provision as a part of their law.

INTRODUCTION

Right against self-incrimination is not just a statutory right but a constitutional right under Article 20(3) of the Indian Constitution. It is based on the concept that no person can be forced to give a witness against himself. No force or compulsion is put against the person who is accused for committing an offence. It is a 'Fundamental Right' and it safeguards a person or a corporation who are accused of an offence. In order to protect their interest, certain rights are also included for them. This provision mentioned is brought into the Indian Constitution by referring into the principles laid down by English and American jurisprudence. As per the jurisprudence no person can give testimony or can be forced or compelled to give testimony which may result in exposing him to conviction.

Every person who is alleged to commit an offence has a right to remain silence and no compulsion to give evidence which may later turn to be against himself. In India section 161(2) of CrPC also protects the person who is accused from forcefully providing a statement in his interrogation. It was in the case of *Nandidni Sathpathy v P. L. Dani*² where it was specifically held that we cannot force or compel the person who is accused of an offence to provide or speak a statement which is against himself. The person is free to remain silent. However it is important to protect such person because a person is innocent unless proved guilty. Moreover a proper explanation and scope of Article 20(3) was held by Supreme Court of India in the case of *M.P. Sharma v Satish Chandra*.³ The Fifth Amendment of the American Constitution also declares that "no person shall be compelled in any criminal case to be a witness against himself."

There are some other aspects relating to 'Right to silence'. Some of them are as follows:

- **"Article 11.1 of Universal Declaration of Human Rights"**⁴: This provision under UDHR specifically focuses on the guarantees and safeguards which is important to provide to the person who is accused of an offence as the person is not guilty unless proved, he will still be regarded as an innocent person. So a guaranteed right must exist for an innocent person for his defence.

² AIR 1978 SC 1025

³ AIR 1954 SC 300

⁴ 1948

- “**The International Covenant on Civil and Political Rights**”⁵: India being a part of this convention under Article 14(3)(g). It specifies that no compulsion to a person against himself.
- “**The European Convention for the Protection of Human Rights and Fundamental Freedom**”⁶: Article 6(1) of this convention specifies that a ‘free trial’ must be held for the person accused of an offence by following the principles of Natural Justice. Article 6(2) of the same convention further elaborates that a person accused of an offence is innocent until and unless it is proved beyond any reasonable doubts.

Example of Self-Incrimination: When a police officer uses force or threatens a person who is accused to give an evidence against himself then comes a right against self-incrimination where that person has right to remain silent and not give any sentence against himself out of pressure. It is therefore very important to protect the person unless proved guilty. No man can be seen with a guilty eye until and unless proved guilty in the court of law.

Moreover if a person confesses something in a trial then it is important to look into the aspect that the confession so made was voluntarily made by the person accused of an offence and no force or undue influence was used to force the person to present or put forward a sentence which would harm the person himself. The main object of creating this provision is to maintain human privacy and to set a civilized standards in providing criminal justice.

ANALYSIS OF ARTICLE 20 (3) OF INDIAN CONSTITUTION

“No person accused of any offence shall be compelled to be a witness against himself.”⁷ This article of Indian Constitution referring in the case of *Kanti Kumari v State of Jharkhand*⁸, laid down that no person can be compelled or be forced to give a statement. Moreover in a famous case of *M.P.*

⁵ 1966

⁶ 1953

⁷ Article 20(3) of Indian Constitution

⁸ 2013(1) Crimes 212 (214) (Jhar)

*Sharma v Satish Chandra*⁹ along with the case of *Narain Lal v M.P. Mistry*¹⁰ certain essentials regarding this provision was laid down which was strictly followed in order to provoke this particular article. There are in total three ingredients and all these three ingredients must be fulfilled in order to get the benefits under Art. 20(3) of the Indian Constitution. These are as follows:

1. **Person must be “accused of an offence”**: It is clear that a person who is accused of committing an offence can only acquire this right. Now the question arises that who is a person who is ‘accused of an offence’. How to make a differentiation between a normal person and a person accused of an offence. This aspect was made clear in the case of *K. Joseph v Narayana*¹¹. It was held that a person against whom an accusation is put for committing an offence which further led to either prosecution or conviction is said to be a person accused of an offence. However in the case of *Vera Ibrahim v State of Maharashtra*¹² it was held that where a person is arrested on suspicion in absence of FIR and an immaterial information in Panchnama report then that person is said not be in a formal accusation and thus no right under this article.

Moreover in the light of *Delhi Judicial Service Association v State of Gujarat*¹³ it was held that contemnors do not come under the ambit of “accused person” and this article cannot be attracted for the same. This is so because contempt proceedings in not a part of criminal proceedings.

Another question which arises is that at which stage a person accused of an offence can seek the rights under this provision. This was the contention made in the case of *R.B. Shah v D.K. Guha*¹⁴. Court held that as soon a person’s name is entered in a FIR by the police and an order by the magistrate to investigate is passed then a person accused of an offence can seek protection under this provision in order to protect his rights. This right has limited scope under Indian Constitution as it is only for the accused and witness cannot seek this right. But in contrast to America, it provides such rights to both accused and the witness and gives a broader scope as compared to the Indian Constitution.

⁹ AIR 1954 SC 300

¹⁰ AIR 1961 SC 29

¹¹ AIR 1964 SC 1552

¹² AIR 1976 SC 1167

¹³ (1991) 4 SCC 406

¹⁴ AIR 1964 SC 1196

2. Protection against “compulsion” “to be a witness”: To understand the scope of “compulsion” “to be a witness” it is important to understand the judicial proceedings which specifically tried to provide a better understanding and scope of this article. The Sharma’s case had given a very wide interpretation of the phrase “to be a witness”. It was held that the compulsory taking of fingerprints or specimen handwriting would also violate the right of a person and can invoke Art. 20(3).

However this case was overruled by another case named *State of Bombay v Kathi Kalu*¹⁵ held that “to be a witness” is not equivalent to “furnishing evidence”. Thus taking or finger prints or specimen handwriting or compulsory photographs would not come under the scope of “to be a witness”, if that is the case then it will infringe the real essence of justice system. The court also clarified the meaning of the “to be witness” and stated that it would only include personal information. The same was also elaborated and referred in the case of *State v M. Krishna Mohan*¹⁶.

Now the question arises whether any information given by the accused after the arrest will be considered as the evidence under section 27 of The Evidence Act or not. This was the contention in the case of *Parshadi v U.P. State*¹⁷ where the SC said that the information given by the appellant will be admissible as an evidence under the Evidence Act.

3. “Compulsion” to give evidence against himself: When it is observed that the accused is being forced to give a statement after which it will incriminate the accused, then that is the point when the accused can seek right under this provision. Compulsion is different from request. If an accused is giving an evidence voluntarily or under a request then he cannot invoke article 20(3). Compulsion includes force, undue influence or beating and threatening. Also when a confession is made by the accused. The scope of this provision was expanded and a broader meaning was given in the case of *Nandini Satpathy v P.L. Dani*¹⁸ where it was held that even a mental torture which includes tiring interrogations, atmospheric and environmental pressure or any kind of intimidatory ways will also come under a threat and this provision can further be invoked. Thus

¹⁵ AIR 1961 SC 1808

¹⁶ AIR 2008 SC 368

¹⁷ AIR 1957 SC 211

¹⁸ AIR 1977 SC 1025

when a police officer examined under section 161 of CrPC this right can be used to remain silent. In the case of *Mohd. Dstgir v State of Madras*¹⁹ it was held that a person can only use this provision when he is an accused and a duress was applied on him for a particular action.

Now the question arises that if an information is taken by the accused without his knowledge then it will be admissible or not?

This was the contention in the case of *Yusufali v State of Maharashtra*²⁰ where the information given by the accused was recorded without his knowledge and court held that the recording will be admissible as a piece of evidence. This is so because however it was without the knowledge of the accused but the information which the accused had provided was not out of a compulsion. Moreover if any document is seized from the premise of the accused then it will not be violative of this provision.

Thus it is cleared that a person who is accused of an offence is not compelled to provide any such statement or evidence which later turns against the accused only. The right to silence exists for an accused. This was further held in the case of *Amrit Singh v State of Punjab*²¹.

Applicability of Above Mentioned Provisions: Following are the proceedings and it is now important to see whether the right against self-incrimination exists or not?

1. Civil proceedings: There was a contention whether Section 151 of Civil Procedure Code could be invoked for compelling a person. This was further elaborated in the case of *Sharda v Dharmpal*.²² In this case the court held that the power of the court under Section 151 of CPC is a suo-moto power of the court and it lead to truth. Thus protection of self-incrimination as provided under section 20(3) is not provided in a civil proceedings.

¹⁹ AIR 1960 SC 756

²⁰ AIR 1968 SC 147

²¹ AIR 2007 SC 132

²² (2003) 4 SCC 493

2. Administrative proceedings: Though the aim of the administrative proceedings are also to figure out whether the offence has been committed or not but still the benefits of art 20(3) is not available in an administrative proceedings. The main reason behind this is that in an administrative proceedings facts and documents are investigated and there is no such involvement of persons. Thus there exists no such right of self-incrimination due to absence of the fulfilment of the essentials required in order to provoke article 20(3).

Thus this provision is applied only in cases where the offences is committed under the Indian Penal Code i.e. applied only in a criminal proceedings and not in a civil or an administrative proceedings.

ANALYSIS OF SECTION 161 OF CODE OF CRIMINAL PROCEEDINGS

Section 161 of CrPC deals with the examination of witness. Under this section a police officer examines the person. The question arise that what comes under the ambit of 'persons'. This was held in the case of *Pakala Narayan Swami V. Emperor*²³ that the 'persons' include any person who may be accused subsequently.

Under this section the person is obliged to answer truthfully but at the same time this section also protects the person from answering the questions which would later leads to incriminate the person himself. Thus section 161 of CrPC along with article 20(3) of the Indian Constitution safeguards the interest of the accused. Moreover the right to remain silence acts as a fundamental right. It is cleared from this provision that if the person or an accused is giving an answer then it must be a true answer but the accused has full right to remain silent and not utter a word. There is no compulsion or no force is imposed on the accused to forcefully give a statement which can expose them later to conviction. Thus it acts as a shield and a protection for the accused as well as the witness and suspects. So 20(3) read with section 161(2) of CrPC protects from compulsory oral testimony.

²³ AIR 1939 PC 47

RIGHT TO SILENCE

Indian constitution provides a right to remain silent as a part of fundamental rights to all the citizens. This right exists in the form of article 20(3) as it provides a protection to the accused. Under Indian legal system no accused will be treated in a bad manner or rights will be seized until and unless proved guilty beyond reasonable doubts. In the case of *D.K. Basu v State of West Bengal*²⁴ proper rules and procedure was laid down for the purpose of protecting the accused. The court also held that when a person is arrested the right of silence as provided under article 20(3) should be expressly informed. Awareness must be spread and every person has the right to know that a right exists on his favor. Thus it shows that no one can force to give a statement which will affect the person himself and have the right to remain silent. It comes along with the right of free speech and expression.

WAIVING OF RIGHT AGAINST SELF-INCRIMINATION?

The most important question which arises is whether an accused can waive the right which is provided under article 20(3). It solely depends upon situations. There cannot be an answer like a 'yes' or 'no' to this question. As we know the right against self-incrimination is provided under article 20(3) which is a part of fundamental right. As a general rule no one can waive the fundamental right. However the main criteria in order to provoke this particular article is that there must be no 'compulsion' or 'external threat'. But however if a person by his own choice and voluntarily giving a statement against himself and waiving the right available then it is acceptable and said to waive away the right.

However it is very important that the waiver must be a real one. For instance it should not be out of ignorance. Each and every person who is accused of an offence must be made well aware of his rights. This was held in many landmark cases in order to protect the accused in a best possible manner. For example, if an accused is threatened by the police during the time of investigation then the accused can use the benefit under this article and can choose to remain silent. Being silent does not amount to any offence. No person can be held liable for being silent. That is their own personal

²⁴ 1997 1 SCC 416

choice whether to speak or not. Thus this right must be brought into the notice of the accused by the police officer in charge. This was held in the case of *Kartar Singh v State of Punjab*²⁵

SCIENTIFIC TEST VIOLATING ARTICLE 20(3)?

There are certain scientific tests which helps in bringing out the truth from the accused. So the question arises whether it violates the article 20(3) or not?

1. Narco Test Analysis: In Narco analysis test a drug is given to the accused and in The Polygraphy and Brain Finger Printing (BEAP) an electric wave is given in the brain. The only purpose for using these scientific methods are to extract information when the accused is in a subconscious state. In the case of *Kishore Singh v State of Rajasthan*²⁶ it was held that it is important to keep the accused in a humane manner with proper dignity. More ‘right to privacy’ of the accused also exists. It includes both the physical and mental state as held in *Gobind Singh v State of MP*²⁷.

The main point which arise is whether these techniques are violating the article or not. This was the contention held in the case of *Selvi v State of Karnataka*²⁸. Validity of these scientific techniques were challenged. Here comes a clash between ‘effective investigation’ in order to provide free and fair justice and ‘individual liberty’ to remain silent. The SC made few observations in this case:

- SC observed that the input in the form of scientific technique is acting as a ‘compulsion’ for the accused. It acts as a ‘mental compulsion’ though not a physical threat.
- Moreover after using the scientific methods, accused is not giving any evidence by his own will or voluntarily rather a statement or evidence is provided by the accused out of a ‘compulsion.’

Thus looking into these aspects the SC had held that these scientific tests are violating article 20(3), right to privacy of an accused and also it showcases an inhuman behavior towards the accused. However it is still required to investigate. So certain guidelines were established in this case:

²⁵ AIR 1956 P H 122

²⁶ AIR 1981 SC 265

²⁷ AIR 1975 SC 1378

²⁸ AIR 2010 SC 1974

- a) Consent of the accused is important for installing a No Lie Detector Tests.
- b) If the accused consents to the above mentioned test then it must be explained by his lawyer and police.
- c) Recording of the consent is important. It must be done by the Judicial Magistrate.
- d) During the trial, the accused agreed to the test must appear in the court with his lawyers.
- e) At the hearing stage the statements so made by the accused will not be confidential to the Magistrate but will be made to the police.
- f) All factors in regard to detention, its nature and everything must be considered by the Magistrate.
- g) Actual Lie Detector Test must be conducted by a doctor in a hospital in presence of a lawyer.
- h) A full detail of the entire proceedings must be recorded properly.

2. DNA Test Analysis: There are certain challenges which are raised regarding DNA test. It is contended that it is violating both 'Right to privacy' and 'Right against self-incrimination'. However at the same time it is very crucial now a days to assess the extent of crime with the help of DNA test. As regard to the violation of fundamental rights, in the case of *Govind Singh v State of MP*²⁹ and *Kharak Singh v State of UP*³⁰ it was held that the fundamental rights are not absolute and it is accompanied by restrictions. So it is not violating article 20(3). However there have been many different cases related to DNA test.

In the case of *K. Damayanti v State of Orissa and Ors*³¹ the court highlighted the most important aspect i.e. a balance must be achieved between the rights of the accused and the process of investigating and obtaining information through DNA test. Moreover certain guidelines were also established for the following matters:

- Need to see the extent at which the accused was involved in the commission of an offence.
- Extent and amount of offence committed.
- Consent of the accused is very much required, however if refused then the reason for such refusal must be recorded.

²⁹ AIR 1975 SC 1378

³⁰ AIR 1963 SC 1295

³¹ 2004 Cri. LJ 4003

- It is also important to look into the mental status, age of the accused along with physical condition.

However the question arise as to why DNA tests are so important?: It was in the case of *Mrs. Kanchan Bedi and Anr v Shri Gurpreet Singh Bedi*³² that the parentage of the child was unknown and it was important to use some ways to find out the real parents of the child. So here we see that introduction of DNA test is helping to get the better results and is not violating fundamental right. Thus there are few main aspects which needs to be looked for a better functioning and investigating process:

- Proper provisions needs to be inserted regarding DNA test in CrPC.
- The main object is to provide a better and speedy justice.
- It is required to strike a balance between the rights which are available to the accused and in collecting DNA samples for investigation process.

RIGHT AGAINST SELF-INCRIMINATION IN OTHER COUNTRIES

1. **U.S.A:** U.S. Constitution provides that “No person shall be compelled in any Criminal Case, to be a witness against himself.”³³ This provision under the Fifth Amendment was added in the constitution in 1791. It protects the accused from forced incrimination against himself, protect from exposing himself and from the other danger which can accompany along with an evidence against himself. In the case of *United States v Hubbell*³⁴ it was held that tis right is not limited only to the accused but also to any person who gives evidence. So this right in U.S.A. includes to both the accused and witness. Moreover it is applied in both civil and criminal proceedings.
2. **BRITAIN:** “A person accused of any offence shall not be compelled to discover documents or objects which incriminate himself.”³⁵ This right is extended to both the accused and witness but

³² AIR 2003 Delhi 446

³³ Fifth Amendment of U.S. Constitution

³⁴ 530 U.S. 27, 49 (2000)

³⁵ Principal of Common Law

in certain exceptional situations accused and witnesses are forced to answer or give evidences. This was also held in the case of *Lam & Chi-Ming v The Queen*.³⁶

However under the U.K. Jurisprudence there are certain points which needs to be considered. It acts as an exception:

- a) This right is not an absolute right in U.K. It was held in the case of *Brown v Stott*³⁷ that if a police officer is asking a question and if that question is a very important question and basic for further investigation process then the accused person is bound to answer. In this case the police officer was asking the fact that who was driving.
 - b) If there exists any other statute or special law then any specific provision mentioned in other statute will prevail over this right.
 - c) If a statute is silent on this aspect whether it is required to speak forcefully or not will depends upon the object of the statute. This was held in the case of *Customs and Excise v Harz*³⁸ where the information regarding purchase had to be disclosed by the accused.
 - d) In the case of *R (Daly) v Secretary of State for the Home Department*³⁹, it was held that an inclusion in anyone's privacy is only allowed when it is done for the purpose of investigation and is so important that without such information proper justice cannot be met out. Therefore 'compulsion' must be the last resort.
- 3. CANADA:** Section 13 of the Charter Act protects the person who are accused of an offence in Canada. Case of *R v Henry*⁴⁰ emphasized how bad was the condition before for the accused. They were infamous for using oppressive means to force the person to incriminate himself. Moreover 'Right to silence' is protected under section 7 and 11(c) of the "Canada Charter of

³⁶ (1991) 2 AC 212 at 222

³⁷ (2003) 1 AC 681

³⁸ (1967) 1 AC 760 at 816

³⁹ (2001) UKHL 26

⁴⁰ (2005) 3 SCR 609

Rights and Freedom”. Only voluntary evidence will be accepted in the court of law. No evidence which is achieved from the force will be admissible.

CONCLUSION AND SUGGESTION

This research paper is about the right which is protecting the person accused of committing an offence. This protection is required as an accused is not seen as guilty until and unless proved guilty by the court of law. Article 20(3) of the Indian Constitution safeguards the right of the accused. It provides three essentials that needs to be fulfilled in order to provoke this particular section. It is available only to a person who has been accused of committing an offence. Further this article can only be provoked in case of criminal proceedings and cannot be provoked for civil or administrative proceedings. Moreover even section 161(2) of CrPC protects the similar rights for the accused. A person cannot waive his right to remain silent. But if an accused is voluntarily giving a statement then it will be admissible in the court of law. Secondly, every accused must be aware of their rights. It is the duty of the police to make sure that the accused know that a ‘right to remain silent’ exists in his favor. A person accused of committing an offence can avail this right at any stage of his criminal proceedings.

There was a contention that scientific tests are violating article 20(3). However until and unless a ‘compulsion’ is made everything is permissible in order to extract the evidence which is a very important part of investigating process.

According to me it is very important to strike a balance between “right to silence” and “right to obtain evidences”. However I truly agree and supports this provision which safeguards the interest of accused. No person should be forced to speak something against himself. That ‘compulsion’ to speak a particular statement should not be there. However if scientific techniques like DNA tests NARCO tests are used is not violating the provision as there is a difference between forcing to say a particular thing and obtaining information for gathering evidence. Now a days in few cases these techniques are permissible and I truly support these techniques because at the end of the day it is important to gather evidence in order to provide fair and justice in the proceedings.

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