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## **PROTECTION OF RIGHT AGAINST SELF-INCRIMINATION**

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### **ABSTRACT**

The paper provides detailed study of the fundamental right against self-incrimination which is given under Article 20(3) of the Constitution of India and under various provisions of Indian Evidence Act. The paper mainly pertains to the necessary requirements for protecting such a right; analysis of various provisions of Indian Evidence Act which are relating to such a right; admissibility of narco-analysis test, polygraph tests, brain-mapping, DNA Test and tape recordings of statements made by the accused which have the tendency to violate the right against self-incrimination; and whether waiver of the above mentioned right can be claimed by the right-holder.

**KEYWORDS-** Right against self-incrimination, Article 20 (3) of Indian Constitution, narco-analysis test, polygraph tests, brain-mapping and DNA Test

## INTRODUCTION

The right against self-incrimination means a person who is accused of an offence shall not be impelled to be a witness against himself. This is a fundamental right provided in the Indian constitution under Article 20 (3). It is based upon a legal maxim “nemo tenetur prodere accusare seipsum”, which means no individual is obligated to become a witness to support a prosecution against himself. The word witness includes both oral and documentary evidences and such immunity is made available to an individual only against criminal proceedings. One of the most requirement for applying the provision is that there must be a formal allegation against the individual at the time of interrogation and such immunity cannot be claimed by him at the time of general enquiry or investigation. The said provision stands inapplicable in cases where an article or document is searched or seized from the possession of the individual, medical examination of the accused is necessary to be held, where the accused needs to provide his thumb impression or specimen signature and where the accused has been granted pardon under section 306 of the Criminal Procedure Code.

## NECESSARY REQUIREMENT FOR PROTECTION AGAINST SELF INCRIMINATION

**1) The individual needs to be accused of an offence-** The said privilege is available to individual against whom a formal accusation (even in the form of a FIR or a formal complaint against him) is done which may cause prosecution. Thus, Article 20(3) is not applicable to departmental inquiries which is done against a government employee as there is no formal accusation of an offence against such an individual.

In **M.P. Sharma v. Satish Chandra**,<sup>i</sup> it was held that the immunity against self-incrimination is available to an individual at both trial and pretrial stages i.e. when the investigation against the person is carried out and he is considered as an accused or even at the stage where his name is not mentioned in the FIR. In **Nandini Satpathy v. P.L. Dani**,<sup>ii</sup> the Supreme Court held that the protection under Article 20(3) is basically to steer clear of redundant harassment by the police during investigation or at any point of time where information is furnished and also that such protection is available to both witness and the person accused.

The right to silence and the right to not answer the questions asked which may tend to implicate the person is also safeguarded under the right to self-incrimination.

**2) Compulsion to be a witness through inducement or threat and such compulsion must result in giving information against himself: -**

Compulsion can be made through forcing the accused to give his thumb impressions or specimen for writings or exposing his body for the purpose of identification.<sup>iii</sup>

In **State of Bombay v. Kathi Kalu Oghad**,<sup>iv</sup> it was held that, for proving protection against self-incrimination, it is required that the witness or the accused is compelled to provide information or give a statement against himself through use of force or threat and such compulsion has to be physical in nature and not mental. Article 20(3) stands inapplicable in cases where the accused makes a statement or confession voluntarily without force or compulsion.

**PROVISIONS FOR PROTECTION AGAINST SELF INCRIMINATION IN INDIAN EVIDENCE ACT**

**Section 24 of the Evidence Act** states that a confession made by an accused person is irrelevant in a criminal proceeding, if it is caused by inducement, threat, promise or pledge. Confession over here means to admit the offence committed by the accused, own up and accept the claim made against him and the blame made. The following ingredients need to be established for making the said section applicable:-

**1) The confession has to be made because of inducement, threat or promise-** Confessions that are not voluntary in nature and has not been made by free mind cannot be held admissible before the court of law.

**2) Such inducement, threat or promise must be related to the charge in question-** Such force or inducement must be done by the person who has been given the charge to take a confessional statement.

**3) The inducement, threat or promise must be served by a person in authority-** A person in authority is the one who has the authority or power to charge the accused and generally the police in charge of the accused and the magistrate handling the case are considered to be the person in authority.

**4) The inducement, threat or promise holds the accused with some advantageous position-** Such inducement, force or promise must cause reasonable belief in the mind of the accused

that by giving a particular confession, he would get an advantage of temporal nature with regard to the proceeding against him.

**Section 25 of the Indian Evidence Act** states that any confession made by the accused or the suspect before the police officer in charge, shall not be presented before the court of law or be admissible in the court of law so as to prove against the person so accused.

**Section 26 of Indian Evidence Act** states that any confession made by an accused while he in custody of the police officer in charge shall not be made admissible before the court of law as a material to be proved against him. But, such confession stands admissible before the court of law if it is made in the immediate presence of the magistrate, even if it is capable of being used as an evidence against himself.

**Section 27 of the Indian Evidence Act** which is also termed as doctrine of confirmation by subsequent facts, states that if a fact is discovered or deduced in a search made on the strength of any information acquired from the accused or suspect who is in custody of the police officer, such a discovery stands as a guarantee of the truth of the information supplied by the person in custody. Thus the statements made by the accused while in custody, is admissible to the extent to which it can be used to prove the subsequent discovery of facts. The basic ingredients that needs to be fulfilled for applying the above provision are- The person giving the information must be accused of an offence; he must be in custody of a police officer; the fact of which such evidence is to be given must be relevant to the issue and such information must distinctly relate to the facts discovered.

**Section 28 of Indian Evidence Act** states that any confession made with reference to section 24 of the said Act, becomes relevant if is made after the removal of the impression caused by any inducement, threat or promise.

**Section 29 of Indian Evidence Act** states that if a confession is otherwise relevant, cannot be held as irrelevant merely because of the following circumstances-

- a) It was made under a promise of secrecy;
- b) The confession was made when he was drunk;
- c) Because such confession was made in answer to the questions which he need not have answered;
- d) Because he was not warned that he was not bound to make such confession before the authority in charge;
- e) That the evidence of it might be given against him.

**Section 30 of Indian Evidence Act** talks about confession by co-accused. When more than one person is accused for the same offence, then the confession made by one of the accused, if found to be admissible as evidence, must be considered as an a confession against all the other accused persons who are jointly tried for the same offence and such other accused have do not have any opportunity to cross examine the accused who made the confession. In **Krishna Singh vs State of MP**,<sup>v</sup> the supreme court laid down certain conditions that needs to be fulfilled for considering the confession made by one of the co-accused against all others and these conditions are as follows-

a) The person making the confession and the other accused persons are tried jointly; b) All the accused are tried for the same offence; c) The confession must affect the commissioner as well as the other accused persons.

Now coming to the reliability or the evidentiary value of such a confession made, the supreme court in the case **Hari Charan Kumri v. State of Bihar**,<sup>vi</sup> held that such a confession made by a co-accused cannot be held as an substantial evidence to be presented before the court of law and can be used as a reliable source of evidence only if the court is inclined to accept other evidences and feels that its necessary for seeking an assurance in support of its conclusion deductible from other evidences.

**Section 130 of Indian Evidence Act** states that a witness who is not a party to a suit shall not be compelled to produce his title-deeds to any property, or any document in virtue of which he holds any property as pledge or mortgagee, or any document the production of which might tend to incriminate him, unless he has agreed in writing to produce them with the person seeking the production of such deeds or some person through whom he claims.

**Section 131 of Indian Evidence Act** states that no individual shall be compelled to produce documents in his possession or electronic records under his control, which any other person would be entitled to refuse to produce if they were in his possession, or control, unless such last-mentioned person consents to their production.

**Section 132 of Indian Evidence Act** states that a witness cannot be excused from answering any question (which are relevant to the matter in issue in the suit or civil or criminal proceeding), on the grounds that the answer to such question will result in criminating the witness or expose the witness to penalty or forfeiture of any kind.

An exception to this rule is mentioned in the proviso of the said section i.e. no such answer which the witness shall be compelled to provide, subject him to any arrest or prosecution or be proved against him in any criminal proceeding, except in case of a prosecution for giving false evidence by such an answer.

### **ADMISSIBILITY OF NARCO-ANALYSIS TEST, POLYGRAPH TESTS AND BRAIN-MAPPING**

One of the most important issues that arises with respect to right against self-incrimination is whether the use of scientific techniques such as Narco-analysis tests or brain mapping test, etc. violates the right against self-incrimination under Article 20(3). In **Gobind Singh v. State of Madhya Pradesh**,<sup>vii</sup> the Court held that if a state compels an individual to uncover or reveal his body or life which he wishes to keep within himself, it would lead to violation of right against self-incrimination and right to privacy, guaranteed under Article 20(3) and Article 21 of the Indian Constitution respectively.

The above issue was raised before the supreme court of India in **Selvi v. State of Karnataka**, where it was observed that in cases where the accused is asked to undergo narco-analysis test, polygraph tests and brain-mapping, the individual is made to answer the questions without his consciousness where he is unable to know where to keep silent and not answer the question and what needs to be answered so as to not cause incrimination against himself. Thus, it leads to compulsion by the investigating officials, making the accused capable enough to claim for rescue under Article 20(3) and Article 21 of Indian constitution as it is an inhuman treatment shown to an individual which invades into the privacy of the individual. the court therefore cannot permit the above test against the will of the individual until and unless it is necessary for protection of public interest at large.

### **ADMISSIBILITY OF DNA TEST**

Any fundamental right guaranteed under Indian constitution cannot be enjoyed in an absolute manner and is subject to reasonable restriction. Similarly, the right against self-incrimination and right to privacy and personal liberty can be made subject to reasonable restriction by way of DNA test in certain cases. In **Kanchan Bedi v. Gurpreet Singh Bedi**,<sup>viii</sup> it was held that in cases where the parentage is in question, conducting a DNA test would not amount to infringement of fundamental right.

## **ADMISSIBILITY OF TAPE RECORDINGS OF STATEMENTS MADE BY THE ACCUSED**

If the statements made by the accused are recorded (i.e. in the form of tape recordings) without any compulsion through duress, whether with or without his knowledge, are not barred by Article 20(3) and thus are admissible before the court of law.

## **WAIVER OF RIGHT AGAINST SELF INCRIMINATION UNDER ARTICLE 20 (3) OF INDIAN CONSTITUTION**

It is a settled law that a person cannot waive his fundamental right guaranteed under the constitution of India. However, the right provided under Article 20(3) is in the form of a privilege and the person holding such a privilege may deny to enjoy it. In addition to the above point, the right provided under the said provision is a protection against compulsion to testify and not against testify as it is.

However, such a waiver must be real and substantial in nature i.e. the person must deny to enjoy such a privilege with the full knowledge that he is legally entitled to claim such privilege and has not waived from exercise of the above mentioned right by reason of ignorance. Supreme court in various cases has directed the police to bring this right into the knowledge and notice of the person so accused.<sup>ix</sup>

## **CONCLUSION**

The immunity against self-incrimination is provided as a fundamental right under Article 20(3) of the Constitution of India and also under provisions of various other Indian laws. The protection against self-incrimination is also provided to the suspects of crime along with the accused and the individuals in custody of the police. For the ease of interpretation, the Supreme Court has distinguished between the two words “witness” and “furnish evidence”, the former includes furnishing statements from one’s own knowledge and the latter referring to presenting documents required by the court under which protection under Article 20(3) cannot be sought. This article extends to provide privileges to a person who is compulsorily being made a witness. It also covers the cases of searches and seizures wherein, an accused is not under any obligation to be a part of the search. If through any confession voluntarily made, some material corroboration is found then that statement cannot be protected under Article 20(3). An accused cannot be induced or forced to make a statement or a confession which would tend to

criminalise himself. Narco-analysis tests, polygraph analysis and various other scientific test are violative of Article 20 as the process undergoes involuntary administration of mental processes, thereby invading into the right to privacy of an individual. But with the advancement of medical sciences, the reliability and evidentiary value of such scientific tests have increased to much extent, making it capable enough to act as an efficient tool for speedy disposal of cases.<sup>x</sup>

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<sup>i</sup> 1954 AIR 300, 1954 SCR 1077

<sup>ii</sup> 1978 AIR 1025, 1978 SCR (3) 608

<sup>iii</sup> Saxena, S. (n.d.). Right against self incrimination. Ipleaders. <https://blog.ipleaders.in/right-against-self-incrimination/amp/>

<sup>iv</sup> 1961 AIR 1808, 1962 SCR (3) 10

<sup>v</sup> 2003 IIAD Delhi 252, AIR 2003 Delhi 446, 103 (2003) DLT 165, I (2003) DMC 458, 2003 (67) DRJ 297, 2003 RLR 229

<sup>vi</sup> 1964 AIR 1184, 1964 SCR (6) 623

<sup>vii</sup> 1975 AIR 1378, 1975 SCR (3) 946

<sup>ix</sup>Kumar, S. (n.d.). Protection against self incrimination. Tax guru. <https://taxguru.in/excise-duty/protection-against-self-incrimination.html>

<sup>x</sup> (n.d.). Immunity against self incrimination. Lawctopus. <https://www.lawctopus.com/academike/immunity-self-incrimination/>