Right to Silence: An Indispensable Right in Criminal Jurisprudence

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"…throughout the web of English criminal law, one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt"[1]

INTRODUCTION

The right to silence, which is a cardinal principle of criminal law jurisprudence, is also known as "right against self-incrimination" or "privilege against testimonial compulsion". The privilege against testimonial compulsion is based on the principle "Nemo Tenetur Se Ipsum Accusare" which means that no man, not even the accused himself can be compelled to answer any question, which may tend to prove him guilty of a crime he has been accused of. The origin of this right can be traced to the principle "Nemo Debet Prodere Ipsum", i.e. the privilege against testimonial compulsion. The characteristic feature of this principle is that a person who is accused of an offence is presumed to be innocent and it is for the prosecution to prove his guilt. The person so accused is not required to make any statement against his will. The right to silence has various facets. Firstly, is that the burden is on the State or rather the prosecution to prove that the accused is guilty. Secondly is that an accused is presumed to be innocent till he is proved to be guilty and thirdly it is the right of the accused against self-incrimination, namely, the right to be silent. The privilege against testimonial compulsion could be claimed not only in relation to facts which were directly incriminating but also in relation to so-called clue facts.[2] This paper will make a modest attempt to discuss the legal dimension of right to silence and its relevance in criminal jurisprudence along with a critique of this right in hampering criminal investigation in light of landmark and recent decisions of the Apex Court.

INTERNATIONAL CONCERN FOR RIGHT AGAINST SELF INCRIMINATION

The aspects relating to right to silence came to be included in the Universal Declaration of Human Rights, 1948.[3] Article 14(3) (g) of International Covenant on Civil and Political Rights, 1966 to which India is a party refers to various "minimum guarantees" and states that everyone has a right not to be compelled to

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[1] As per Viscount Sankey in Woolmington vs DPP, 1935 AC 462 at p. 481 cited in 180th Report of Law Commission of India titled 'Report on Article 20(3) of Constitution of India and the Right to Silence', (May 2002).

[2] Wigmore on Evidence, 8, McNaughten Law Review, Sect. 2263(1961).

[3] Article 11.1 of Universal Declaration of Human Rights, 1948 reads: "Everyone charged with a 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."

testify against himself or to confess his guilt. The European Convention for the Protection of Human Rights and Fundamental Freedoms states in Article 6(1) that every person charges has a right to fair trial. Article 6(2) of the European Convention states that every person charged with a criminal offence shall be presumed innocent until proved guilty according to law. Undoubtedly, the position which emerges from these conventions is that every person accused of an offence is presumed to be not guilty and under no circumstances, he is required to confess his guilt barring informed waiver of right against testimonial compulsion. Most commonwealth jurisdictions provide expressly or by necessary implication a fundamental right against self-incrimination. As a general rule, constitutional provisions are construed "as a living tree capable of growth and expansion within its natural limits."[4] The recent developments in this right in other countries are discussed hereunder in subsequent paragraphs.[5]

POSITION IN UK

During the 16th Century, the English Courts of Star Chamber and High Commission, now abolished[6], practices administering "ex-officio" oath to the accused and the accused was obliged to answer questions put by the judge and prosecutor, without even framing of any proper charges. Refusal of accused to take oath permitted the authorities to torture him.[7]

During the late 1980's, the Criminal Evidence (Northern Ireland) Order, 1988 was amended to combat the problem of terrorism. The amendment permitted inferences to be drawn from the silence of an accused where the accused had a duty to speak. Later on, similar changes were carried out by enacting Sections 34 to 37 in the Criminal Justice and Public Order Act, 1994.[8] The statute enabled the Judge to take silence of the accused into account. The matter came up before the House of Lords in John Murray vs DPP.[9] Lord Mustill observed that though the statute enabled 'proper inferences' to be drawn from silence of the accused, it was first necessary to ensure that a prima facie case is made out against the accused. Only then the amended provisions could be resorted to for the purpose of drawing conclusions about the guilt of the

4 Edwards vs Attorney General for Canada, 1930 AC 124 at 136, per Lord Sankey, L.C.

5 For a detailed historical overview of development of right against self-incrimination, See 180th Report of Law commission of India, "Report on Article 20(3) of the Constitution of India and the Right to Silence", (May 2002).

6 R.H. Helmhotz, "Origins of the Privilege against Self-incrimination", 65 New York University Law Review 962 (1990); Michael R.T. Mc Nair, "The Early Development of the Privilege against self-incrimination", 10 Oxford Journal of Legal Studies, 66 (1990); Eben Moglen, "Taking the Fiflt: Reconsidering the origins of the Constitutional Privilege against Self Incrimination" 92, Michigan Law Review 1086 (1994); quoted by Prof. Akhil Reed Amar in 'The Constitution and Criminal Procedure, First Principles' 1999, pp 216-217(Yale University Press).

7 In this procedure, any person on the street could be picked up, asked to take oath and answer questions for finding out if they were in disagreement on questions of theology with the Crown. The Long Parliament abolished the Star Chamber and High Commissions. R.H. Helmhotz, Supra note 6.

8 These provisions permit 'proper inferences' to be drawn from the silence of the suspect during interrogation or of the accused during the trial. The Court and the jury could take the silence of the accused into consideration.

9 1993 Criminal Appeal Reports 151.

accused. The Court stressed on adopting a 'common sense approach' and not arriving at finding of guilt merely on the silence of the accused.

On appeal, the European Court of Human Rights in John Murray vs United Kingdom[10] held that the trial Judge can not draw an adverse inference merely on account of the silence of the accused and that the guilt of the accused must be prima-facie established by the prosecution. An additional condition was laid down that the amended provisions could not be resorted to unless it was proved that accused was given an opportunity to call for an attorney at the time when he was interrogated by the Police or at the time of trial. After the above judgment, the English Parliament, which had in the meantime introduced similar provisions in the Criminal Justice and Public Order Act, 1994[11], by the Youth Justice and Criminal Evidence Act, 1999 by introducing provisions requiring the suspect or accused to be informed of his right to call an attorney.

In another subsequent judgment of Condron vs The United Kingdom rendered in May 2000, the case directly arose under the Criminal Justice and Public Order Act, 1994. The Court relying upon the judgment in Murray's case stated that the right to silence was not absolute but at the same time a prima facie case must be made out and the safeguards mentioned in that judgment namely, giving an opportunity to the accused or suspect, to call for a lawyer, must be followed. In the instant case, the accused persons exercised their right to call for a lawyer and remained silent during interrogation by the police and at the time of cross-examination, as per their lawyer's advice. The Court held that the accused persons were under no compulsion to disclose the advice given, other than the indirect compulsion to avoid the reason for their silence remaining at the level of a mere explanation. The applicants chose to make the content of their solicitor's advice a live issue as part of their defence. For that reason, they cannot complain that the scheme of section 34 of the 1994 Act is such as to override the confidentiality of their discussions with their solicitor.

POSITION IN UNITED STATES OF AMERICA

In The United States of America, the Fifth Amendment relates to the fundamental right against self-incrimination and contains, more or less, the same language as in Article 20(3) of Indian Constitution. In fact, the law declares that it would be competent for an accused to give evidence on his own behalf but on his failure to do so shall not be subject to any unfavorable inference against him.[12] By judicial interpretation, the provision has been given a very wide connotation. The privilege against self-incrimination has been held to apply to witnesses as well as parties in proceedings, both civil as well as criminal. It covers documentary evidence and oral evidence, and extends to all disclosures including answers which by themselves support a

[10] 22 European Human Rights Report 29 (1996).

[11] The Amendments were based on based on the 11th Report of Criminal Law Review Committee as applicable to England and Wales.

[12] The Fifth Amendment of the U.S.A. Constitution reads as follows: "No person shall be compelled in any criminal case, to be a witness against himself."

criminal conviction or furnish a link in chain of evidence needed for conviction.[13] In Boyd vs United States[14], the US Supreme Court laid the proposition that the Fifth Amendment prevented the conscripted production of even seizure of incriminating documents because it compelled an accused to be a witness against himself.[15]

In Adamson vs California[16], though the majority did not refer to the Fifth Amendment, but the minority laid down, while referring to the Fifth Amendment, that the right to remain silent was absolute. Subsequently, in Griffin vs California[17], the Court stated that the defendant has an absolute right not to take the "stand" and that no adverse inference of guilt can be drawn if the defendant exercises his right to silence. In Miranda vs Arizona[18], the constitutional issue was regarding admissibility of statements obtained from the accused questioned while in custody. The accused was questioned by the police officers, detectives and the prosecuting attorney in a room in which he was cut off from the outside world. The questioning elicited oral admissions, and some accused signed confessions also, which were produced during the trial. The US Supreme Court observed that if a person in custody is interrogated he must be told in clear and unequivocal terms that he has a right to be silent and the warning must be accompanied by the explanation that anything said by the accused can be used against him in court. Also, right to have counsel present at the interrogation is indispensable to the protection of the Fifth Amendment privilege. With a lawyer present the likelihood that the police will practice coercion is reduced, and if coercion is nevertheless exercised the lawyer can testify to it in court. The Supreme Court nowhere laid down that on account of the silence of the accused, an adverse inference can be drawn or that the silence can be treated as corroboration for inferring of guilt.

POSITION IN INDIA

[13] McCarthy vs Arndstain, 266 US 34.

[14] 116 US 616 (1886).

[15] The ratio laid in Boyd's case was specifically overruled in Fisher vs United States, 425 US 391(1976) at p. 407.The Supreme Court of India in M.P. Sharma vs Satish Chandra, 1954 INDLAW SC 154, distinguished Boyd as not lending "support for any general doctrine that a search and seizure in all circumstances is tantamount to a compelled production in violation of the Fifth Amendment."

[16] 332 US 46 (1947).

[17] 380 US 609 (1965); In this case, the Supreme Court of United States refused to permit judicial comment to the jury upon a defendant's refusal to take the 'stand' in his own behalf, because such comment was a "penalty imposed by courts for exercising a constitutional privilege" and it "cuts down on the privilege by making its assertion costly". The penalty would have grossly encouraged a waiver of the defendant's right to plead not guilty under the Fifth Amendment.

[18] 384 US 436 (1966); In this case, the constitutional issue was regarding admissibility of statements obtained from the accused questioned while in custody. The accused was questioned by the police officers, detectives and the prosecuting attorney in a room in which he was cut off from the outside world. The questioning elicited oral admissions, and some accused signed confessions also, which were produced during the trial. The court further observed that that if a person in custody is interrogated he must be told in clear and unequivocal terms that he has a right to be silent. Warning of the right to remain silent must be accompanied by the explanation that anything said by the accused can be used against him in court. Also, right to have counsel present at the interrogation is indispensable to the protection of the Fifth Amendment privilege. With a lawyer present the likelihood that the police will practice coercion is reduced, and if coercion is nevertheless exercised the lawyer can testify it in court.

In India, the adverse inference rule was extensively applied till 1861. After the commencement of the Constitution, Section 342(2) of Criminal Procedure Code, 1898 was assailed as violative of Article 20(3) of the Constitution. In Banwarilal vs State [19] the Court concluded that even assuming that there was some compulsion in Section 342(2) of Criminal Procedure Code, it was "a far cry from saying that it compels him to be a witness against himself."[20] The criminal system in India has adopted an "adversary system of trial" which provides that a person accused is presumed innocent and it is the prosecution which is required to prove his guilt beyond reasonable doubt. The person so accused is not required to make any self-incriminating statement during interrogation by police or during trial before court. The principle is one of the fundamental canons of the British system of criminal jurisprudence and has been incorporated in Article 20(3) of our Constitution[21].

The Constitution of India raises the rule against self-incrimination to the status of constitutional prohibition. The prohibitions imposed by Article 20(3) are directly relevant to the criminal procedure during investigation by police and trial before court. The purpose of this protection is to prevent torture and inhuman treatment of the accused at the hands of investigating agencies to extort confessions[22]. The guarantee in Article 20(3) in substance is against testimonial compulsion[23] and in order to claim benefit of the guarantee against testimonial compulsion embodied in Article 20(3) of the Constitution, it must be shown:

1. that the person who made the statement was "accused of any offence";
2. that he made that statement under compulsion[24];
3. the statement so made was self-incriminating in nature.

The privilege under clause (3) is confined only to an accused, i.e. a person against whom a formal accusation relating to the commission of an offence has been levelled which in the normal course may result in prosecution. But it is not necessary, to avail the privilege, that actual trial or enquiry should have commenced before the court. Thus, a person against whom the first information report has been recorded by the police and investigation is ordered by the Magistrate can claim benefit of this protection as he is a "person

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19 AIR 1956 All 341.
20 Followed by Mysore High Court in Govinda Reddy, Re, 1958 INDLAW SC 214.
21 Article 20(3) of the Constitution reads as under: No person accused of any offence shall be compelled to be a witness against himself.
22 An interesting question arises as to why confession to the police was made inadmissible in evidence by the British rulers who made the Indian Evidence Act in 1872. The answer is obvious. In India there is no proper training given to police inspectors for conducting scientific investigation nor are they provided with proper equipment for this purpose. On the other hand the police inspector has to show that he has solved the crimes in an area, and since that can truthfully be done only by scientific investigations for which he is neither given training nor the equipment, the only way for him is to secure a conviction by using torture in police custody; Justice Markandey Katju; "Torture as a challenge to Civil Society and Administration of Justice", 2000(2) SCC (Jour) 39.
23 M.P. Sharma vs Satish Chandra, 1954 INDLAW SC 154
24 Veera Ibrahim vs State of Maharashtra, 1976 INDLAW SC 539

accused of an offence" within the meaning of Article 20(3).[25] Article 20(3) can be invoked in a case where the statement in question was made by a person at a time when he was accused of an offence[26] In Balkishan A. Devidayal Etc vs State of Maharashtra[27] on the aspect of "person accused of an offence" in Article 20(3) it was observed by the Supreme Court speaking through Justice Sarkaria, "that determination of the issue whether a person is said to be an accused for any offence will depend on whether at the time when the person made the self-incriminatory statement, a formal accusation of the commission of an offence had been made against him." Where a customs officer arrests a person and informs him of the grounds of arrest, there is no formal accusation of an offence and the person cannot be said to be an accused[28]. When a person is called upon under Section 240 of the Companies Act to give evidence and produce documents, he cannot be said to be a person accused of any offence within the meaning of Article 20(3)[29].

PERSON ACCUSED OF AN OFFENCE

The privilege under Article 20(3) is available to an individual as well as an incorporated company, if accused of an offence.[30] In order to avail the protection available against self-incrimination, the person claiming the same should be one "accused of an offence" at the time when he makes the statement. This means a person against whom a formal accusation relating to commission of an offence has been leveled and although actual trial may not have commenced yet, but may in normal course result in prosecution.[31] The privilege in Article 20(3) is undoubtedly available at the trial stage but is also available at the pre-trial stage i.e. during police investigation if the person concerned can be regarded as an accused. Giving evidence and producing documents under section 240 of the Companies Act does not constitute any offence under Article 20(3) of the Constitution.[32] Similarly the information collected under Section 19 of Foreign Exchange Regulation Act, 1947 is for the purpose of seeing whether prosecution should be launched or not and at this stage there is no accusation against the person from whom information is collected. It may be after that the information has been collected; the central government or Reserve Bank may come to the conclusion that there is no case for prosecution and person concerned may never be accused.[33]

The phrase "accused of an offence" includes within its ambit only a person against whom a formal accusation relating to the commission of an offence has been levelled which in the normal course may result in prosecution. A more logical interpretation was given to 'person accused of an offence' and it was held that

[25] Ramanlal Bhogilal Shah vs D.K. Guha, 1973 INDLAW SC 78
[26] R.K. Dalmia vs Delhi Administration, 1962 INDLAW SC 534
[27] 1980 INDLAW SC 298
[28] Romesh Chandra Mehta vs State of West Bengal., 1968 INDLAW SC 2
[29] Raja Narayanlal Bansilal vs Maneck Phiroz Mistry, AIR 1961 SC 29.
[30] M.P.Sharma vs Satish Chandra, supra, note 21.
[31] Supra Note 29
[32] Ibid.
[33] Bhagwandas Goenka vs Union of India, 1963 SC (Notes) 285.

if a person who is not accused of any offence, is compelled to give evidence, and evidence taken from him under compulsion ultimately leads to an accusation against him, that would not be a case which would attract provisions of Article 20(3) of the Constitution.[34] The court categorically laid down that this provision protects a person who is accused of an offence and not those questioned as witnesses. A person who voluntarily answers questions from witness box waives this privilege, which is against being compelled to be a witness against himself because he is then not a witness against himself but against others.[35]

Lastly it is very much essential that a formal accusation has been made against a person to claim guarantee against testimonial compulsion. A formal accusation is deemed to be made when an authority which is statutorily authorized and bound to call for an explanation before a complaint is filed, serves a notice calling for explanation.[36] The Supreme Court while elaborating further upon privilege against testimonial compulsion, granted protection to an approver from being prosecuted on basis of his testimony in other cases. The Court in State (Delhi Administration) vs Jagjit Singh[37] held that once an accused is granted pardon under section 306 of Criminal Procedure Code, he ceases to be an accused and becomes a witness for prosecution and his evidence, as approver cannot be used against him in other cases and he is protected under proviso to Section 132 of Indian Evidence Act. The proviso to Section 132 of Indian Evidence Act clearly protect a witness from being prosecuted as the basis of the answers given by him in a criminal proceeding which tend to incriminate him directly or indirectly. He is absolutely protected from criminal prosecution on the basis of the evidence to be given by him when examined by the prosecution as approver.

Mere issuance of notice or pendency of contempt proceedings does not attract Article 20(3) of the Constitution as the contemners were not accused of any offence. A criminal contempt is punishable by fine or imprisonment, has many characteristics, which distinguishes it from ordinary offence. A contemnor is not of an accused merely on account of issue of notice by the court.[38]

COMPULSION: MEANING

Compulsion is duress; compulsion has to be a physical objective act and not the state of mind of the person making the statement, except where the mind has been so conditioned by some extraneous process as to render the making of the statement involuntary and, therefore, extorted. The mere asking by a police officer investigating a crime against a certain individual to do a certain thing is not within the meaning of

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34 K. Joseph Augusthi vs M. A. Narayanan, Official Liquidator, Palai Central Bank Limited, 1964 INDLAW SC 412
35 Laxmipat Choraria vs State of Maharashtra, 1967 INDLAW SC 393
36 Supra note 28
37 AIR 1989 SC 598; 1989 CriLJ 986.
38 Delhi Judicial Service Association, Tis Hazari Court, Delhi vs State of Gujarat and Others, 1991 INDLAW SC 99

Article 20(3) of the Constitution.[39] The mere fact of being in police custody at the time of making the statement does not by itself lead to the inference that the accused has been compelled to make the statement.[40] In Nandini Satpathy vs P. L. Dani, Justice V. R. Krishna Iyer advocated an expansive interpretation of the phrase "compelled testimony". According to him, it is evidence procured "not merely by physical threats or violence" but also by "psychic torture, atmospheric pressure, environmental coercion, tiring interrogative prolixity, over-bearing and intimidatory methods and the like." Any mode of pressure, "subtle or crude, mental or physical, direct or indirect but sufficiently substantial" applied by police to obtain information from an accused strongly suggestive of guilt becomes compulsion. Further "frequent threats of prosecution if there is failure to answer may take on the complexion of undue pressure" violation mandate of right against self-incrimination.

PROVISIONS CONSISTENT TO ARTICLE 20(3) OF THE CONSTITUTION

Clause (3) of Article 20 of the Constitution guarantees a fundamental right against self incrimination and Article 21 of the Constitution grants a further fundamental right to life and liberty and states that liberty of a person cannot be curtailed except by a procedure laid down by law. In Mrs. Maneka Gandhi vs Union of India[41], it was further interpreted that the procedure envisaged by Article 21 is a procedure which must be just, fair and equitable. The Criminal Procedure Code contains several provisions which correspond with the spirit of Article 20(3) of the Constitution. Section 161(2) of Criminal Procedure Code, 1973 grants a right to silence during interrogation by police.[42] The degree of protection granted by Article 20(3) and Section 161(2) of Criminal Procedure Code is substantially the same. The Supreme Court in Nandini Satpathy vs P.L. Dani[43], held the accused person may remain silent or refuse to answer when confronted with incriminating questions. The ban on self-accusation while investigation or trial is under way goes beyond that case and protects the accused in regard to other offences pending or imminent. 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. Further Section 315(1) of Criminal

[39] See Generally M.P.Jain, "Indian Constitutional Law" Fifth Edition 2003, Wadhwa and Company, Nagpur.
[40] State of Bombay vs Kathi Kalu Oghad, 1961 INDLAW SC 144; Pershadi vs State of Uttar Pradesh, 1956 INDLAW SC 120
[41] 1978 INDLAW SC 212
[42] Section 161(2) of Criminal Procedure Code, 1973 reads as follows: "Such person shall be bound to answer truly all questions relating to such case put to him such officer, other than questions the answers to which would have tendency to expose him to a criminal charge or to a penalty or forfeiture."
[43] 1978 INDLAW SC 318

Procedure Code contains a proviso and clause (b) of the said proviso precludes any comment by any of the parties or the court in regard to failure of the accused to give evidence.[44]

Similar protection is available to a person accused under Sections 25 of Indian Evidence Act, 1872[45]. The Legislature, apprehensive that the police might extort confessions from accused by hook or by crook, inserted this section as a measure of safeguard for the accused. The import of this section very well presumes the confession made to a police officer to be involuntary and such confessions shall not be proved.[46] Section 26 of the Indian Evidence Ac[47]t renders any confession made in police custody to be inadmissible except when the same is made in presence of Magistrate. The section is based upon the same fear, i.e. use of force by police. Police custody is not confined to a police station and may be in a house, open space, during a journey etc. Temporary absence of a police official will be irrelevant till the accused is in effective police control. Right to silence is granted both at the stage of investigation and trial and any party is precluded from commenting upon the silence of the accused. It is clear that the court cannot draw any adverse inference against the accused from his silence or refusal to answer any questions put by court under any circumstances. The policy and objectives underlying the limitation are clear. It is manifest to every one's experience that from the moment a person feels himself in custody on a criminal charge, his mental condition undergoes a remarkable change and he naturally becomes much more accessible to every influence that addresses itself to either his hopes or fears[48].

The debate has been long enduring that Section 27 of the Indian Evidence Act is a proviso to Sections 25 and 26 of Indian Evidence Act.[49] This section allows a partial lifting of ban imposed under Sections 25 and 26 of Indian Evidence Act if there is a discovery of a fact in consequence of information received from the accused in police custody but only "so much of the information" is admissible as relates distinctly to the fact discovered. Section 27 is a proviso to Sections 25 and 26 of Indian Evidence Act. Such statements are generally termed as disclosure statements leading to the discovery of facts which are

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[44] Section 315(1) of Criminal Procedure Code, 1973 reads as follows: (1) any person accused of an offence before a criminal court shall be a competent witness for the defence and may give evidence on oath in disproof of the charges made against him or any person charged together with him at the same trial.

Provided that: - (b) his failure to give evidence shall not be made the subject of any comment by any of the parties or the Court or give rise to any presumption against himself or any person charged together with him at the same trial.

[45] Section 25 of the Indian Evidence Act, 1872 reads: No confession made to a police officer, shall be proved as against a person accused of any offence.

[46] Such confessions cannot be used to corroborate any other evidence. Yasin Gulam Haider vs State of Maharashtra, 1979 INDLAW SC 480

[47] Section 26 of the Indian Evidence Act reads: No confession made by any person whilst he is in the custody of a police officer, unless it be made in the immediate presence of a Magistrate, shall be proved as against such person.

[48] Culambe vs Connecticut, 367 US 568 (1961) at p. 575.

[49] Section 27 of the Indian Evidence Act reads - 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.

presumably in the exclusive knowledge of the maker. Section 27 based on the view that if a fact is actually discovered in consequence of information given, some guarantee is afforded thereby that the information was true and accordingly it can be safely allowed to be given in evidence.[50]

To avoid nullifying the substance of Sections 25 and 26 for the purpose of Section 27, the "fact discovered" includes the place from which object is produced and knowledge of accused as to this, and the information given must relate distinctly to this fact. Where the accused, while in custody revealed possibility of deceased having been buried in the backyard of her residential house, only that part of the confession leading to the discovery of fact was held admissible in evidence.[51] Similarly recovery of murder weapon i.e. knife at the pointing of accused from a pitch not accessible to the public, was admissible in evidence.[52]

INCRIMINATING EVIDENCE – TESTIMONIAL AND REAL

Judicial opinion has for a long time fluctuated as to whether Article 20(3) covers something more besides oral evidence. The Supreme Court in M.P. Sharma vs Satish Chandra53, took a broad view of the same and observed that to limit Article 20(3) to the oral evidence of a person standing trial for an offence is "to confine the content of the constitutional guarantee to its barely literal import"; and so to limit Article 20(3) would be to rob the guarantee of its substantial purpose and to miss the substance.54 The question was reconsidered in State of Bombay vs Kathi Kalu Oghad, where the main question involved was whether Article 20(3) was violated when the accused is directed to give his specimen hand writing, or signatures or the impression of his palm and fingers. The court now ruled that Article 20(3) is not violated in any of the above situations. The court stated that "self incrimination must mean conveying information based upon personal knowledge of the person giving information" and covers only "personal testimony which must depend upon his volition." The Court further stated "to be a witness may be equivalent to furnishing evidence in the sense of making oral or written statement, but not in the larger sense of the expression so as to include giving of thumb impression or impression of palm or foot or fingers or specimen writing or exposing a part of the body by an accused person for purposes of identification. Although "it may amount to furnishing evidence in larger sense, it is not included within the expression to be a witness".55 A retracted confession has little

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[50] Geejaganda Somaiah vs State of Karnataka; 2007 AIR (SC) 1355.
[51] Swamy Sharaddanandea vs State of Karnataka 2007 INDLAW SC 1403.
[52] Ramkrushna vs State of Maharashtra, 2007(6) Scale 247.
[53] Supra note 21.
[54] It was also held to cover not only oral testimony or statements in writing of the accused but also production of a thing or of evidence by other modes. A person can be a witness not merely by giving oral evidence but also by producing or making gestures as in the case of a dumb witness. The phrase 'to be a witness' in Article 20(3), the Court ruled, meant nothing more than 'to furnish evidence' and this could be done through lips, or by production of a thing or document, or in any other mode. Every positive volitional act which furnishes evidence is testimony, and testimonial compulsion connotes coercion which procures the positive volitional evidentiary acts of the person as opposed to the negative attitude of silence or submission on his part.
[55] State of Uttar Pradesh vs Boota Singh and Others, 1978 INDLAW SC 291.

probative value but is not inadmissible under Article 20(3) of the Constitution.56 The different categories of evidence which have been classified by the Supreme Court as not incriminating is discussed in the following paragraphs.

Search and Seizure

The privilege against self-incrimination is not applicable to search and seizure of documents or any other object under a search warrant. Search of premises in possession of the person accused of an offence, under a search warrant and seizure of documents under Section 94 of Code of Criminal Procedure does not amount to compelled production within the meaning of Article 20(3), the reason being that search warrant is issued to a police officer and he is directed to conduct the search. The accused is not required to be privy to the search in any manner.[57] It is permissible in execution of a general search warrant issued under Section 93(1)(c) of Criminal Procedure Code, 1973 to search premises in possession of accused and documents found therein can be seized irrespective of the fact that they may contain some statement made by accused upon his personal knowledge and which proved may have a tendency to incriminate him. A general search warrant may be issued to procure the document or thing and it can be recovered from any person who may be ultimately found in possession of it and it was not known to the Court that the person from whose possession it was found was in possession of it.[58]

The Supreme Court has held that "a passive submission to search cannot be styled as a compulsion on the accused and if anything is recovered during such search which may provide incriminating evidence against the accused it cannot be styled as a compelled testimony." A similar approach is also adopted by the Supreme Court in matters pertaining to recovery of contraband holding that a bag, briefcase or any such article or container, etc. can, under no circumstances, be treated as body of a human being. They are given a separate name and are identifiable as such. They cannot even remotely be treated to be part of the body of a human being and these articles cannot be included within the ambit of the word "person" occurring in Section 50 of the Narcotic Drugs and Psychotropic Substances Act, 1985 and recovery of contraband from bags, containers etc. does not amount to compelled submission.[59]

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[56] Smt. Kalawati and Another vs State of Himachal Pradesh, 1953 INDLAW SC 132

[57] M.P. Sharma and Others vs Satish Chandra,District Magistrate,Delhi,and Others, 1954 INDLAW SC 154; The case debated whether the search and seizure of documents according to Sections 94 and 96 of the Code of Criminal Procedure was a compelled production within the meaning of Article 20 (3) of the Constitution. The Court held that a search and seizure under the provisions of the Code of Criminal Procedure was not a compelled production.

[58] V.S. Kuttan Pillai vs Ramakrishnan and Another, 1979 INDLAW SC 572.

[59] State of Rajasthan vs Babu Ram, 2007 INDLAW SC 613; Ravinder @ John vs Superintendent, Customs (2007) 6 SCC 410 ; State of Rajasthan vs Ram Chandra, 2005 INDLAW SC 276.

Test Identification Parade

Article 20(3) is also not violated by compelling an accused to stand up and show his face for purpose of identification for it does not amount to giving of testimony as the physical facts which are noticed speak for themselves. He can also be ordered to disclose any scar or mark on his body for purpose of identification.[60]

Samples of blood, hair, body fluids etc.

The court have time and again reiterated the view that a person can be compelled to give sample of blood against his/her will for analysis, to determine the paternity of a child or for some other purpose and no adverse inference can be drawn for this refusal.[61] The taking of blood samples from the body of a person is considered to be a invasion upon his personal liberty and it has to be done with his consent. Even if an adverse inference is drawn, it will have very little relevance. This view of the Supreme Court continues till date. In Amrit Singh vs. State of Punjab,[62] the accused was charged for rape and murder of an eight year old girl. When the body of the child was recovered, some strands of hair were found in the closed fist of the child. The police wanted to analyse the hair found in the fist of the victim with that of hair of accused, but he refused to give the hair sample. The Supreme Court observed that the accused had protection against self incrimination not to give hair.

The position which emerges is that an accused has been given immunity from giving blood samples, hair sample or any other sample from the body as it amounts to infringement upon his personal liberty. However, the courts have been holding that his thumb impression, handwriting, footprints etc. can be taken by the investigating officer during investigation and during trial. Both these positions are self contradictory. A very interesting situation arose in X vs Y, in which the Delhi High Court in divorce proceedings for adultery, allowed the paternity test of a preserved foetus, holding that the foetus is no longer a part of body of the wife and she is not subjected to any compulsion.[63]

Tape Recorded Conversation as evidence

Admission of tape recorded conversation as evidence against the accused does not violate Article 20(3) when the conversation on the part of the accused was voluntary and without compulsion and the fact

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[60] Pakhar Singh vs State of Punjab, AIR 1978 Punj 294 at 298.
[61] Goutam Kundu vs State of West Bengal and Another, 1993 INDLAW SC 1165.
[62] 2006 INDLAW SC 1304.
[63] In X vs Y, AIR 2002 Del. 217, the wife discharged the foetus and its slides were preserved in the hospital. During divorce proceedings initiated by the husband on grounds of adultery, the husband made an application for DNA test wrt. the said slides. The Delhi High court held that granting permission for the said test would not amount to compelling wife to submit to any test as the discharged foetus was no longer a part of her body.

that the tape-recording instrument was attached without knowledge of the accused will not render the conversation as inadmissible in evidence and the fact remains that the accused person's conversation was not extracted under compulsion or duress. Recording of conversation on tape was "a mechanical contrivance to play the role of an eavesdropper. There was not case against the accused at the time of the conversation and there was no possibility that he was made to incriminate himself.[64] In case of tape recorded evidence against accused, if the statements are not extracted in an oppressive manner or by force or against his wishes, there is no element of duress, coercion or compulsion and therefore no claim lies for protection of Article 20(3) of Constitution.[65] Where there was no case against the accused at the time of conversation, the court held that the conversation was made voluntarily and was not extracted under any duress or compulsion and there was no scope for holding that the appellant was made to incriminate against himself.[66] Further, the Supreme Court in State (N.C.T. of Delhi) vs Navjot Sandhu @ Afsan Guru[67] held that intercepted telephone calls are admissible piece of evidence under ordinary laws even though provisions of Prevention of Terrorism Act cannot be invoked as it presupposes investigation to be set in motion on date of its interception.

CONFESSION MADE TO A POLICE OFFICER: WHEN ADMISSIBLE IN EVIDENCE

Under Section 15 of the Terrorist and Disruptive Activities (Prevention) Act, 1987[68], confession made to a police officer was made admissible in evidence. The Supreme Court in Ayub vs State of Uttar Pradesh[69] ruled that confession made under Section 15 of Terrorist and Disruptive Activities (Prevention) Act, 1987, if strictly according to the procedure laid down in the statute for recording confession is admissible in evidence. The confession should appear to be made voluntarily and the confession made should indicate that the safeguards provided have been adequately complied. Similarly in State, NCT of Delhi vs Navjot Sandhu @ Afsan Guru[70] the Supreme Court held the confession recorded by a police officer under Section 32(1) of Prevention of Terrorism Act[71] admissible in evidence. The voluntaries and admissibility of the confession can of course be tested by the court. The admission of such confession would also be subject to observance of other provisions which are in the nature of procedural safeguards aimed at ensuring that the confessions are obtained in an atmosphere free from inducement.

It would be further necessary to mention here that view of the courts has undergone a sea-change for the past few years. The Supreme Court has started giving due weight age to the testimony of police officials

64 R.M. Malkani vs State of Maharashtra, AIR 1973 SC 157 at 163-164.
65 Yusufalli Esmail Nagree vs State of Maharashtra, 1967 INDLAW SC 260
66 Percy Rustum Basta vs State of Maharashtra, 1971 INDLAW SC 147.
67 2005 INDLAW SC 1026.
68 Repealed.
69 2002 INDLAW SC 118.
70 Supra note 66.
71 Repealed.

as witness and categorically laid down that their testimony cannot be disregarded because they happen to be police officials. There is no rule of law which states that no conviction can be based on the testimony of Police Officials even if such evidence is otherwise reliable and trustworthy. The rule of prudence may require more careful scrutiny of their evidence. But, if the Court is convinced that what was stated by a witness has a ring of truth, conviction can be based on such evidence.[72] Justice A.S. Anand opined that the absence of some independent witness of the locality to lend corroboration to their evidence, does not in any way affect the creditworthiness of the prosecution case.[73]

CONCLUSION

The position which merges is that while the courts are keenly apprehensive of the torture, which the accused might be subjected to, at times, the courts are simultaneously shutting doors towards scientific investigation, which in certain instances has led to hampering the investigation.[74] Article 20(3) of the Constitution was primarily incorporated to ensure that no torture is subjected on the accused to extract confessions, since it was common knowledge that confessions are obtained under torture. The right to silence was raised to the pedestal of constitutional provision, despite adequate protection being available under Criminal Procedure Code,1973 and Indian Evidence Act, 1872 but the intent of Legislature was never to shut out scientific investigation otherwise the same could have been expressly provided in the statute itself. If the courts are apprehensive of irregularities in obtaining samples of blood, hair or other bodily fluids, adequate safeguards like taking samples in presence of court appointed amicus curiae or in presence of court itself can be resorted to. Imposing a total ban on taking samples of blood, body fluids to match them with the scene of crime would do no good but falter the investigation and ultimately lead to miscarriage of justice.

The aim of the courts should be to reach the truth and to see that while an innocent person is protected zealously, a guilty person is convicted with equal zeal.[75] If the right against self-incrimination is to be considered as one of the fundamental rights tenets of fair trial, peculiarities like narrow construction of the term "to be a witness" and distinction between "real" and "testimonial" evidence are unnecessary to achieve the equilibrium between society's needs to control crime and conviction of guilty vis-à-vis protection of individual from unlawful and unfair treatment.[76]

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[72] Girja Prasad(Dead) by Lrs vs State of Madhya Pradesh; 2007 INDLAW SC 849.

[73] Tahir vs State (Delhi), 1996 INDLAW SC 4085.

[74] Amrit Singh vs State of Punjab, supra, note 61. In Rakesh Bisht vs Central Bureau of Investigation, 2007(2) AD (Delhi) 23, the Delhi High Court relying upon ratio in Amrit Singh, held that in course of investigation, an accused cannot be compelled to provide a voice sample.

[75] Speech by Justice Shiv Narayan Dhingra, Judge, High Court of Delhi, at the Institute of Constitutional and Parliamentary Studies, "Right to Silence of the accused under Constitution of India" on 16 March 2007.

[76] Ashish Chugh, "A Reassessment of Self-Incrimination Clause", (2006) 8 SCC Jour 19.