

Privacy and Self Incrimination

Dr. Shwetha P

Associate Professor

B.M.S College of Law, Bangalore, India

Abstract: Under Article 20(3) of the Indian Constitution, "No person accused of an offence shall be compelled to be a witness against himself," the accused is protected from being forced to testify against themselves. "Nemo tenetur prodre accusare seipsum" which literally translates to "No Man is Obligated to be a Witness against Himself," serves as its foundation. This privilege is typically thought to grant the accused the ability to legally keep silent when confronted with potentially damning inquiries. It was first incorporated in Criminal Procedure and later ingrained in Part III of the Constitution of India under Article 20(3). A person against whom criminal proceedings have been instituted must be conceded the right to remain silent about the accusation. The privilege has been conferred upon the accused by the application of the doctrine of presumption of the innocence which is considered as a cardinal principle in the administration of criminal; justice.¹ In this article, I want to emphasise how the right against self-incrimination is founded on the right to privacy and further examine the ramifications of this link with technological development.

Keywords: Privacy, Self Incrimination

I. INTRODUCTION

The right against self-incrimination is a constitutional right as well as a legislative one. It is predicated on the idea that no one can be made to testify against themselves. The person accused of committing a crime is not subjected to any coercion or force. It is a "Fundamental Right" that protects a person or a company that is accused of committing a crime. Certain rights are also included for them in order to safeguard their interests. Every person who is alleged to commit an offence has a right to remain silent and no compulsion to give evidence which may later turn to be against himself. One thing necessary to ensure that entire process of due process has been conformed with fundamental fairness is by judging the way evidence has been obtained. One principle of ensuring fundamental fairness is that the accused shall not be convicted upon coerced or involuntary confession². The guarantee of *Due Process* that the security of one's privacy in his own home against arbitrary is a basic to free society³.

Personal devices improve connectivity and accessibility for the general public. Numerous applications that may be downloaded on smartphones and tablets offer a wide range of services, such as GPS, instant messaging, email, online dating, and location-based services. In these circumstances concerns have been raised about individual's rights of self-incrimination and the right to privacy. Both these rights are fundamental rights under the Indian Constitution, the former explicitly provided for under Article 20(3) of the Constitution,⁴ while the latter has been read into Article 21 of the Constitution.⁵

This interrelationship between privacy and the right against self-incrimination has not been explored much by the Indian courts, which have been altogether reluctant to engage with either right in a dynamic manner. A few years ago,

¹ Available at : <https://www.ijllr.com/post/self-incrimination-under-article-20-3-of-the-constitution-of-india> (last visited on June 10, 2023)

² *Director of Revenue v. Mohammad Nissar Holia*; (2008) 2 SCC 370

³ *Lyunman v. Illionois*; (1963) 372 US 528

⁴ Article 20(3) “

No person shall be compelled to be a witness against himself”.

⁵ Article 21 “ . person shall be deprived of his life and personal liberty except according to procedure established by law”.

however the Supreme Court examined Article 20(3) in a detailed manner in *Selvi v. State of Karnataka*⁶ highlighting the interrelationship between Article 21 and Article 20(3), by analysing how privacy and the right against self-incrimination share a fundamentally complementary relationship⁷

II. HISTORY

The origins of right dates back to the Middle Ages in England. During the 16th century, the English Courts of Star Chamber and High Commission developed the practice of compelling suspects to take an oath known as the ex-officio oath and, the accused had to answer questions, put by the judge and the prosecutor. If a person refused to take oath, he could be tortured. These Star Chambers and Commissions were later abolished. The right to silence is based on the principle 'nemo debet prodere ipsum', the privilege against self-incrimination⁸.

According to Black's Law Dictionary, self-incrimination is a declaration or act that occurs during an investigation in which a person or witness incriminates themselves either explicitly or implicitly. The appearance of the privilege against self-incrimination - the guaranty that no person "shall be compelled in any criminal case to be a witness against himself" - was a landmark event in the history of Anglo-American criminal procedure.⁹ Article 20(3) of the Indian Constitution protects an accused against self-incrimination under compulsion: "No person accused of an offence shall be compelled to be a witness against himself." Article 20 of the Indian Constitution was granted non-derogable status in 1978, under the Constitution (Fourth Amendment) Act, 1978, i.e., the state has no legal basis, even in a state of emergency, to refuse to honour this right. This is a testimony to the importance it has been accorded in our Constitution¹⁰.

Construing the relationship between the right to privacy and the right against self-incrimination as a harmonious interrelationship as was done in *Selvi* has often come in for attack from various scholars.¹¹ Alex Stein, one of the biggest proponents of the right against self-incrimination has described the 'Privacy defence' of the 'Right of flawed.'¹² Hence, Article 20(3) has to be read such a manner so as to include within its scope the right to privacy.

*Kharak Singh v. Union of India*¹³, was the first case in which the court acknowledged the existence of a right to privacy. The bench, however, refused to interpret the right to privacy as a part of Article 21 and made no attempt to resolve the issue between the opposing interests of private and public policy. However, Justice Subba Rao remarked in his well-known dissent that the right to privacy is a crucial component of human liberty. *Gobind v. State of M.P.*¹⁴, The right to life and personal liberty were recognised by the Supreme Court for the first time. *People's Union for Civil Liberties v. Union of India*¹⁵, in this case, the petitioner's organization challenged the actions of the State in tapping telephone calls as a violation of the right to privacy. The court in this case held that "Conversations on the telephone are often an intimate and confidential character hence telephone tapping is a serious violation of the right to privacy of an

⁶ (2010) 7 S.C.C. 263

⁷ Available at : <https://docs.manupatra.in/newsline/articles/Upload/E978E05B-6194-4CB1-A7FC-C0E30B6FC7EC.pdf#> (last visited on June 10, 2023)

⁸ Available at : <https://www.legalserviceindia.com/article/l466-Privilege-Against-Self---Incrimination.html> (last visited on June 14, 2023)

⁹ John H. Langbein, "The historical origins of the privilege against self-incrimination at common law" Michigan Law Review, Vol. 92:1047

¹⁰ Available at : <https://primelegal.in/2023/04/16/right-against-self-incrimination-in-the-digital-age/>

¹¹ Akhil Amar & Renée Lettow, Fifth Amendment First Principles: The Self-Incrimination Clause, 93 MICH. L.REV. 857,890- 91 (1995); Dolinko, supra note 26, 1107-37; William Stuntz, Self-Incrimination and Excuse, 88 COLUM. L. REV. 1227,1234 (1988)

¹² Alex Stein, The Right to Silence helps the Innocent: A Response to Critics, 30(3) CARDOZO L.REV. 1115, 1122 (2008).

¹³ AIR 1963 SC 1295

¹⁴ AIR 1975 SC 1378

¹⁵ (1997) 1 SCC 301

individual¹⁶. This inchoate understanding of privacy was again on display in *Ram Jethmalani v. Union of India*¹⁶ and *Suresh Koushal v. Naz Foundation*¹⁷ where compelling state interest prevailed over information control and decisional autonomy respectively, with the Court failing to properly delve into either aspect of privacy. In 2012, Justice K.S. Puttaswamy (Retired) filed a petition in the Supreme Court challenging the constitutionality of Aadhaar because it violates the right to privacy.

Privacy must always be given the highest possible priority in a post-Puttuswamy world. The Indian populace is rapidly expanding its use of smartphones and other personal electronics, and as a result, the Internet has essentially evolved into a forum for the exchange of ideas. It has developed into a rich mine of information that includes not only knowledge but also the personal details of the individuals. These devices provide information on a person's personality and activities, and are thought to be a crucial source of data that can be utilised against a person when necessary. The issue of privacy is one that must be resolved in this day and age. In *Virendra Khanna v. State of Karnataka*¹⁸, in this case, the Petitioner was charged under NDPS Act and the Foreigners Act. The petitioner's laptop and mobile device had been taken by the police, who also demanded his passwords. The police submitted two applications to the Trial Court in response to the petitioner's refusal to act in a similar manner. In one request, the police asked to administer a polygraph test without the petitioner's permission. In the other, they asked for a court order telling the petitioner to reveal the necessary passwords. The Trial Court approved both applications. The Court relied on the judgment of *State of Bombay v. Kathi Kalu Oghad*¹⁹ and observed that an order to provide a password, passcode, or biometric would not amount to testimonial compulsion as the petitioner is not answering any question that would expose the petitioner to guilt. Disclosure of such details is similar to that of supplying fingerprints or thumb impressions as they are merely evidence for the officer to prove and establish a certain fact in a court of law and do not amount to forced testimony from the accused. The mere presence of a document on a smartphone or email account wouldn't establish the guilt or innocence of the accused, and any documents so recovered will have to be proved according to the evidence law.

Regarding the matter of infringing an accused person's right to privacy, the Court observed that, even if access is granted for a specific purpose, it nevertheless gives full and unrestricted access to all of the person's activity on the device. The Court stated that because such information was covered by exceptions, its use in the course of an investigation would not constitute a violation of one's right to privacy. Additionally, it was noted that any information obtained during the course of an investigation that was unlawfully disclosed would constitute a civil wrong. In *CBI v. Mahesh Kumar Sharma*²⁰ An application for disclosure of the passcode of the computer seized from the accused was moved before the Delhi Special CBI Court, relying on the judgment of *Virendra Khanna v. State of Karnataka*²¹. The Court ruled that the investigators have the right to request any information or documents from anybody, including the accused, under sections 102 and 161 of the Criminal Procedure Code, but neither the accused nor a witness is obligated to provide any information that could be used against them. The Court additionally declared that it is against Article 20(3) of the Indian Constitution to require a witness to disclose a password or security pattern. The Court relied on the judgment of *Selvi v. State of Karnataka*²² and observed that the password is protected within the ambit of personal information that resides in the mental zone and therefore disclosure of passcode would amount to a violation of the right guaranteed by Article 20(3) of the Indian Constitution.

According to the provisions of the Criminal Procedure Code, the state has a broad range of search and seizure powers when conducting investigations, including the ability to seize personal laptops, mobile phones, and other similar devices. Further, the Information Technology Act empowers the government to intercept personal information for the

¹⁶(2011) 8 SCC 1

¹⁷ (2014) 1 SCC 1

¹⁸W.P. No. 11759/2020

¹⁹1961 AIR 1808

²⁰2022 SCC Online Dis Crt (Del) 48.

²¹ W.P. No. 11759/2020

²²(2010) 7 SCC 263

purposes of investigation of an offence.²³ Thus, investigators have access to a tremendous amount of personal data about an individual, which can be used against him at the stage of investigation and trial²⁴.

III. CONCLUSION

Law is a dynamic process that adapts to advancements in society, science, ethics, and other fields. As long as they do not contravene fundamental legal concepts and are beneficial to society, scientific advancements and breakthroughs should be included into the legal system. Justice and equity should be the guiding ideals of the criminal justice system. The Supreme Court of India needs to review and investigate this matter immediately. It is essential for the Court to weigh the rights of an individual against the interests of the State and to strike a balance between the two. The state should be in charge of ensuring that the rights of its inhabitants are upheld, that everyone is given a fair trial, and that the law is implemented impartially. This would enable the development of a society that strikes a balance between competing interests on multiple levels. Only by enabling the state in its attempts to uphold law and order and suppress crime while also putting definite and explicit limitations on such power can individually state balance be attained. Such restrictions must include a system of accountability and information sharing that upholds the public's "Right to Know." Quality, confidentiality, and security must all be upheld concurrently.

REFERENCES

- [1]. Available at :<https://www.ijllr.com/post/self-incrimination-under-article-20-3-of-the-constitution-of-india>(last visited on June 10,2023)
- [2]. Director of Revenue v. Mohammad Nissar Holia; (2008) 2 SCC 370
- [3]. Lyunman v. Illionois; (1963) 372 US 528
- [4]. Article 20(3) “
- [5]. No person shall be compelled to be a witness against himself”.
- [6]. Article 21 “. person shall be deprived of his life and personal liberty except according to procedure established by law”.
- [7]. (2010) 7 S.C.C. 263
- [8]. Available at :<https://docs.manupatra.in/newslines/articles/Upload/E978E05B-6194-4CB1-A7FC-C0E30B6FC7EC.pdf#> (last visited on June 10, 2023)
- [9]. Available at :<https://www.legalserviceindia.com/article/l466-Privilege-Against-Self---Incrimination.html> (last visited on June 14, 2023)
- [10].John H. Langbein, “ The historical origins of the privilege against self-incrimination at common law” Michigan Law Review, Vol. 92:1047
- [11]. Available at : <https://primelegal.in/2023/04/16/right-against-self-incrimination-in-the-digital-age/>
- [12].Akhil Amar & Renée Lettow, Fifth Amendment First Principles: The Self-Incrimination Clause, 93 MICH. L.REV. 857,890- 91 (1995); Dolinko, supra note 26, 1107-37; William Stuntz, Self-Incrimination and Excuse, 88 COLUM. L. REV. 1227,1234 (1988)
- [13].Alex Stein, The Right to Silence helps the Innocent: A Response to Critics, 30(3) CARDOZO L.REV. 1115, 1122 (2008).
- [14].AIR 1963 SC 1295
- [15].AIR 1975 SC 1378
- [16].(1997) 1 SCC 301
- [17].(2011) 8 SCC 1
- [18].(2014) 1 SCC 1
- [19].W.P. No. 11759/2020

²³The Information Technology Act, 2000 read with the Interception Rules, 2009. For a more thorough understanding of the powers under the Information Technology Act, 2000, see Prashant Iyengar, Privacy and the Information Technology Act Do we have the Safeguards for Electronic Privacy? THE CENTRE FOR INTERNET & SOCIETY, April 7, 2011 available at <http://cis-india.org/internet-governance/blog/privacy/safeguards-forelectronic-privacy>

²⁴ 69B, The Information Technology Act, 2000 which empowers the government to monitor and collect traffic data or information through any computer resource for cyber security; See generally Internet Privacy in India, THE CENTRE FOR INTERNET & SOCIETY, available at <http://cis-india.org/telecom/knowledge-repository-on-internetaccess/internet-privacy-in-india>

- [20].1961 AIR 1808
- [21].2022 SCC Online Dis Crt (Del) 48.
- [22].W.P. No. 11759/2020
- [23].(2010) 7 SCC 263
- [24].The Information Technology Act, 2000 read with the Interception Rules, 2009. For a more thorough understanding of the powers under the Information Technology Act, 2000, see Prashant Iyengar, Privacy and the Information Technology Act Do we have the Safeguards for Electronic Privacy? THE CENTRE FOR INTERNET & SOCIETY, April 7, 2011 available at <http://cis-india.org/internet-governance/blog/privacy/safeguards-forelectronic-privacy>
- [25].69B, The Information Technology Act, 2000 which empowers the government to monitor and collect traffic data or information through any computer resource for cyber security; See generally Internet Privacy in India, THE CENTRE FOR INTERNET & SOCIETY, available at <http://cis-india.org/telecom/knowledge-repository-on-internetaccess/internet-privacy-in-india>