“RIGHT AGAINST SELF INCRIMINATION”

A COMPARATIVE STUDY

DISSERTATION

Submitted in Partial Fulfillment of the Requirement for the Degree of

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CHAPTER 1

Right Against Self-Incrimination Introduction And Objectives

The privilege against self-incrimination registers an important advance in the development of our liberty – one of the great landmarks in man's struggle to make himself civilized. It reflects many of our fundamental values and most noble aspirations**:** our unwillingness to subject those suspected of crime to the cruel dilemma of self-accusation, perjury or contempt; our preference for an accusatorial rather than an inquisitorial system of criminal justice; our fear that self incriminating statements will be elicited by inhumane treatment and abuses; our sense of fair play which dictates a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the individual to shoulder the entire load; our respect for the inviolability of the human personality and of the right of each individual to a private enclave where he may lead a private life**;** our distrust of self-deprecatory statements; and our realization that the privilege, while sometimes a shelter to the guilty, is often "a protection to the innocent."[1] The privilege against self-incrimination has been described as "part of the common law of human rights"[2] and as a "fundamental bulwark of liberty, standing apart from other forms of privilege*".*[3]

This doctrine reflects the values inherent in individual sovereignty. These values are autonomy, dignity and privacy. Underlying them are separate interests in bodily integrity and mental integrity (repose, peace of mind, and control of information about one's self).[4]

Under Indian Constitution, the right against self-incrimination is enshrined in Article 20(3) of the constitution. It says that –

"**No person accused of an offence shall be compelled to be a witness against himself**"

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[1] *Murphy* v *Waterfront Commission* 378 US (1964) 52, 55
[2] *Sorby* v *Commonwealth of Australia* (1983) ALR 237, 249
[3] *Pyneboard Pty Ltd* v *Australian Trade Practices Commission* (1983) 45 ALR 609
[4] *Brown* v *Walker* 161 U.S. 591 (1896)

and under US Constitution under fifth Amendment that says:

"**No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation**".

This article requires that any confession admitted against an accused person in a criminal trial should be a voluntary confession and that any confession which is involuntary cannot be taken into account in deciding guilt of accused person. This principle rest on the right of presumption of innocence of accused which is a basis of adversarial system. Doctrine of presumption of innocence requires that Burden of proving guilt on an accused person is on prosecution or state and the accused is presumed to be innocent until that time and cannot be made to give incriminating evidence against himself as the burden of it is put by law on prosecution and not on him.

Some of the aspects relating to the right to silence came to be included in the Universal Declaration of Human Rights, 1948. Art. 11.1 thereof read:

"11.1 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 defense."

The International Covenant on Civil and Political Rights, 1966 to which India is a party states in Art 9.1 that none shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law; Art. 9.2 states that any one who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him. Art. 11.3 refers to the right to be produced in a Court promptly and for a trial. Art. 14(3)(g) refers to various "minimum guarantees" and states that everyone has a right:

"Art. 14(3)(g): Not to be compelled to testify against himself or to confess guilt."

The European Convention for the Protection of Human Rights and Fundamental Freedoms states in Art. 6(1) that every person charged has a right to a 'fair' trial and Art. 6(2) thereof states**:**

"Art. 6(2) Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law."

Meaning of privilege against self-incrimination

According to **Black's Law Dictionary** self-incrimination refers to the acts or declarations either as testimony at trial or prior to trial by which one implicates himself in a crime.

Barron's Law Dictionary defines privilege against self-incrimination as the constitutional right of a person to refuse to answer questions or otherwise give testimony against himself or herself which will subject him or her to an incrimination.

The right against self-incrimination grew out of the Latin maxim "nemo tenetur seipsum accusare", literally translated means "no one is bound to accuse himself". It evolved as a reaction to the excessive employment of ex–officio oath by Star Chamber and High Commission to extract involuntary confession. It was gradually developed as a bulwark against custodial torture and tyranny in the Common law countries. This right is generally regarded as a "landmark in man's struggle to make himself civilized". This protection is looked upon as the law's response against investigative compelling brutality and is premised on model human conduct that views human beings as free will actors with pre-existing preferences capable of exercising choice It protects in the absence of coercion the dignity, promote self preservation and autonomous conscience of individuals charged with a crime. This privilege of Self-incrimination limits the power of the State to acquire and present evidence 'through' the accused himself in the interests of his autonomy and privacy; it thus interferes with the State's ability to control crime and maintain order in pursuance of the same interests. Today these interests are seen as fundamental in acting as a check against rapidly growing government power. It enables the maintenance of human privacy and the observance of civilized standards of criminal jurisprudence. The major features of this privilege are:

1. The accused is presumed to be innocent and the State has to make a case of prosecution independent of his involvement in the trial.

2. That it is for the prosecution to establish his guilt.

3. That the accused need not make any statement against his will.

This privilege is also known as the *right to remain silent;* in essence barring coercion and other forms of duress in the State's endeavor of criminal prosecution. This represents a form of the 'Liberty –

Order' debate and the nature of the privilege affords no exact idea as to placing a balance between the competing interests of State order and individual liberties unlike various other rights. Modern jurisprudence has sought to place such a balance.

Historic Evolution

India and the United States of America were under the colonial rule of Britain for a long time. The English settlers in different parts of America had carried with them. The English common law as a sort of personal law regulating their rights and liberties inter se as well as between them and the States. The English Magna Carta represents to them the idea of a written document of fundamental importance. Under British rule in India various statutes were passed for the regulation of the criminal justice system in British-India, and the impact of the common law of England upon the statutes were quite evident. Some of the important principles of British criminal justice system which are of fundamental importance have also been incorporated in the Indian Constitution.

"The principle against self-incrimination" has its roots in the English common law. That is why the doctrine of privilege against self-incrimination as applied in India and United States of America has a dependence upon English common law. To understand the doctrine correctly, it is necessary to have a brief view of its historical origin and developments of the privilege. In this chapter an attempt is made briefly to study the evolution of the right against self-incrimination in England, America.

Origin in England

The settlement of the English colonials in the new world took place at a time in English History when opposition to the ex-officio oath of the ecclesiastical courts was most pronounced and at the period when the insistence upon the privilege against self-incrimination in the courts of common law had begun to have decided effect. So in discussing the colonial development of this privilege not to incriminate oneself, it is necessary to pick up the threads in England and follow them into the colonies. During the years between 1629 and 1640, the tyranny of Charles I and the zealous persecutions of Archbishop Laud of Canterbury made the conditions of the Puritans and Separatists unbearable. Innumerably little congregations of these people were tracked out and broken up throughout the realm of England. To them a forced show of outward conformity was a mere shell that concealed hearts festering with hatred both for the Established Church and for the means which had

been and were being used to foster it and thereby sadden their own existence. The ex-officio oath, as employed in the ecclesiastical courts, which regulated the most intimate details of men's daily life, and more particularly by the Court of High Commission, was possibly the most hated instrument employed to create the unhappy plight of these Puritans and Separatists. As early as 1604, when the cannons of the Anglican Church were drawn up, puritans had voiced a protest against the ex-officio oath. By 1637, the crisis had come. The trial of John Lilburn (1637-1645) focused the attention of the whole of England upon the proceedings in the Star Chamber, High Commission and other courts using ex-officio proceedings wherein persons accused were forced by oath or other compulsion to speak truly and confess their own delinquency. The obstinacy on the part of John Lilburn in refusing to take oath or to answer against himself was merely representative of a like attitude on the part of hundreds of others who likewise refused to be sworn or, being sworn, refused to answer.[5] This rebellion against a system or procedure had reached such proportions by the time of Lilburn's trial that Charles I seemed to be wavering between despair and indignation. In his letter to the High Commission February 4, 1637,[6] he was insistent upon continued observance and reassuring upon the question of validity. He demanded that these non-conformists, who, incidentally, were making up the ship lists to New England who according to Charles I had "withdrawn themselves from their obedience to our ecclesiastical law, into several ways of separation, sects, schisms"and who had "grown to that obstinacy--that some of them refuse to take their oaths, and others being sworn, refuse to answer --" should be forced" to answer upon their oath in causes against themselves -- and also to answer interrogations touching their own contempt and crimes objected against them, which course in those courts (Courts of Star Chamber, Chancery, or Courts of Requests and Exchequer) (is) daily practiced and held agreeable to the laws and customs of--(the) realm."

He commanded further that the High Commission should proceed to bring these refractory people before them where they were to be

"Enjoined to take their corporal oaths and by virtue thereof, to answer to such articles and interrogatories as shall be there objected against them,"

And then if those accused refused to be sworn or being sworn refused to answer, they were to be declared by the Commission

"pro confesso--held and had as confessed and convicted legally."[7]

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[5] King Chas. I letters to the High Commission Court (1637). HAZARD, STATE PAPERS, Vol. I, p. 428; (Rymer, Vol. XX, p. 190.)
[6] *Ibid.*.
[7] *Supra 5.*

What more than this would be calculated to drive the Puritans and Separatists into either New England or insanity? It was certainly enough to cause them "to be ill affected and discontented as well with the Civil as the Ecclesiastical Government."[8] Such proceedings as the foregoing, are quite enough to explain the picture one gets, when reading the Acts of the Privy Council (1634-1640), of "divers ships--in the river Thames ready to set sail, freighted with passengers" for New England.

About getting out of England there was much "red tape" and it consisted in the most part of taking oaths--the oath of Supremacy and the oath of Allegiance, etc. For days and weeks thousands waited aboard ships in the river Thames until this oath ordeal was over and after that they were forced with a refined cruelty to say the prayers in the Anglican prayer books twice a day at sea.[9]

The Long Parliament by a statute[10] in 1641 abolished the Court of the Star Chamber and the Court of High Commission, but even this, midst the high tide of Puritan frenzy, was like throwing a tub to the whale. Those who remained in England became zealous crusaders in Cromwell's Army and achieved a revolution. After the most decisive fighting was over, this strange army became impatient and began to insist that the fruits of victory should be vouchsafed to posterity. In all of the declarations, demands and proposals which were sent up to the General Council direct from the army camps around 1647, we find standing out in bold relief the demands for the complete abolishing of all the ecclesiastical proceedings, under which the hated oaths were required and self-incrimination forced, and for a complete protection against enforced testimony in all courts. For example, in the "Declaration" of the Army (1647)

"Containing the particulars of their desires in pursuance of former declarations and papers, in order to the clearing and securing of the rights and liberties of the Kingdom, and the settling of a just and lasting peace. To which are added some further particular desires for the removing and redressing of divers present pressing grievances," the army demanded that,

"An Act--be passed to take away all coercive power, authority and jurisdiction of Bishops and all other Ecclesiastical officers, whatsoever intending to any civil penalties upon any; and to repeal all laws whereby the Civil Magistrate hath been, or is bound, upon any Ecclesiastical censure to proceed (ex-officio) unto any civil penalties against any person so censured."[11]

Also in the "Case of the Army Truly Stated" (1647), they insisted,

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[8] Acts of the Privy Council, Vol. I colonial ser., pp. 199-201.
[9] Acts of Privy Council, pp. 199-201, 227-228.
[10] 16 CAR. I, cc. 10, 11.
[11] "A Declaration" from Sir Thos. Fairfax and his council of warr (1647 pamphlet).

"That all statutes enjoining the taking of oaths, as in towns corporate, the oath of Supremacy, &c. wherein either the whole oaths or some clauses in them are burthem and snares to conscientious people may be repealed and nulled"--(Also)--"That it be declared that no person or court shall have power or be permitted to enforce any person to make oath, to answer to any Interrogatories against himself in any criminal cause."[12]

Cromwell's army was not alone in agitating for the privilege against self-incrimination. The entire revolutionary forces were consciously seeking it. The great body of English Citizens known as the Levellers presented "The Humble Petition of Many Thousands" to Parliament in 1647 demanding the enactment of revolutionary constitutional changes to accord with the principles and reforms which Lilburn, Walwyn and Overton had been advocating. That petition contained thirteen demands. The demand for the privilege against self-incrimination was number 3 as follows**:**

"Thirdly, that you permit no authority whatsoever to compel any person or persons, to answer to any questions against themselves or nearest relations except in cases of private interest between party and party in a legal way, and to release such as suffer by imprisonment, or otherwise, for refusing to answer to such interrogatories."[13]

The Puritan agitation for the privilege against self-incrimination progressed rapidly and with heated intensity from 1637 through the 1650's. Anterior to the commonwealth torture was used as a matter of course in grave accusations at the mere discretion of the King and the Privy Council with no restraint other than the prerogative of the sovereign.[14]

The trials of John Lilburn (1637-1645),[15] the trials of the twelve Bishops (1641),[16] King Charles Trial (1649)[17] and Scroop's trial (1660)[18] all illustrate how the privilege against self-incrimination settled into the bedrock of the English common law. In the early 1650's this privilege was so well established in the customary law of England that it was never even thought necessary by any English Parliament to pass an act or resolution touching the matter.

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[12] *"The Case of the Army Truly Staled,"* (1647), (pamphlet); Rushworth papers (1646-1648); Clarke papers (1646-1648) ; GODWIN, HISTORY OF THE COMMONWEALTH (1646-1648).
[13] WILLIAM HALLER, TRACTS ON LIBERTY IN THE PURITAN REVOLUTION, Vol. 3, p. 403. See also, *"A Remonstrance of many thousand citizens to their own House of Commons"* (1646), pamphlet, p. 361; WILLIAM HALLER, Vol. 3, p. 361.
[14] 48 JARDINE, USE OF TORTURE IN CRIMINAL LAW OF ENGLAND, p. 13.
[15] 3 HOWARD STATE TRIALS, 1315; 4 HOWARD STATE TRIALS, 1269, 1280, 1292, 1342.
[16] 4 HOWARD STATE TRIALS, 3, 65.
[17] 4 HOWARD STATS TRIALS, 993, 1101.
[18] 5 HOWARD STATE TRIALS, 1034, 1039.

The implications to be found in WIGMORE ON EVIDENCE, Section 2250, and in the case of **Twining** v**. New Jersey**[19], to the effect that the privilege against self-incrimination was never regarded in England as the constitutional land-mark that our own constitution makers of 1789 regarded it, seems unjustifiable. No constitutional documents came out of the Puritan revolution and the civil convulsion immediately following it. By the time of the English Bills of Rights of 1689, the privilege had become so well established and universally recognized that to have inserted it would have been very much like re-affirming the law of gravitation. McCauley, the English historian, seems nearer correct when he cites Fortescue and says:

"Torture was not mentioned in the Petition of Right, or in any of the statutes framed by the Long Parliament. No member of the Convention of 1689 dreamed of proposing that the instrument which called the Prince and Princess of Orange to the throne should contain a declaration against the using of racks and thumbscrews for the purpose of forcing prisoners to accuse themselves. Such a declaration would have been justly regarded as weakening rather than strengthening a rule which--had been proudly declared by the most illustrious sages of Westminster Hall to be a distinguishing feature of the English jurisprudence."[20]

APPLICATION OF THE PRIVILEGE IN THE AMERICAN COLONIES

Coming back now to the development in Puritan New England, we are faced with a series of questions**;** was this puritan agitation for the privilege against self-incrimination confined to England? Was there something in the new world that changed the puritan's whole mental attitude on this matter? And did they re-institute here the very instruments that did so much to drive them out of England? Or did they establish the privilege against self-incrimination as their kin and kind in England were seeking to do, all the way from hearthstones to campfires? These questions seem to cry out their own answers.

Professor Wigmore, answers these questions as follows**:**

"It (the privilege against self-incrimination) remained an unknown doctrine for this whole generation (after 1641) in the colony of Massachusetts.--In this colony, the privilege which began its career after

[19] 211 U. S. 78
[20] MACAULEY, HISTORY OF ENGLAND, Vol. 3, p. 265.

the departure of its founders from England, was unrecognized till at least as late as 1685; more; they formally sanctioned the ecclesiastical rule by which the inquisitional oath was allowed."[21]

History does not sustain that conclusion. Before the storm of the Puritan Revolution had passed in old England the privilege against self-incrimination had become a cherished reality in New England.[22]

The Puritan opposition to testamentary compulsion and the attempts at enforced conformance to the established church came to be manifested in two distinct theatres around 1640, one in the forests of New England, the other in the Puritan revolution at home. The same motives that led the early New England colonists to leave their homeland and seek a new life and a freer existence in a new world, also actuated Cromwell's soldiers during the revolution. The New England magistrates, claiming authority from God, were the only dissenters when the colonists sought to clothe their ideas of adequate protection in the language of the Body of Liberties. The provisions of the Body of Liberties enacted in 1641 afforded the colonists complete protection against compulsion, either by torture or by an oath, to confess their own delinquency Liberty No. 45 is as follows**:**

"No man shall be forced by torture to confess any crime against himself nor any other unless it be in some capital case where he is first fully convicted by clear and sufficient evidence to be guilty, after which if the cause be of that nature that it is very apparent there be other conspirators or confederates with him, then he may be tortured, yet not with such torture as be barbarous and inhumane."[23]

Liberty No. 61 provides that no person,

"shall be bound to inform, present or reveal any private crime or offence, wherein there is no peril or danger to this plantation or any member thereof, when any necessaries tie of conscience bind him to secrecies grounded upon the word of God, unless it be the case of testimony lawfully required."

Liberty No. 58 provides that civil authority has power to enforce,

"The rules of Christ--according to his word so it is done in a civil and not in an Ecclesiastical way."

Liberty No. 3 provides that,

"No man shall be urged to take any oath or subscribe any articles, covenants or remonstrances of a public and civil nature, but such as the general court hath considered, allowed and required."

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[21] WIGMORE, EVIDENCE, Vol. IV, sec. 2250.
[22] WIGMORE, EVIDENCE, Vol. IV, sec. 2250.
[23] *Bradford, History of Plymouth Plantation*, Mass. Hist. Soc. Coll. Ser. 4, Vol. 3, pp. 390-397.

Though this privilege, as it appears in Liberty No. 45 after going the round of the magistrates, is so qualified as to sanction torture after conviction, much like the "question definitive" as known to continental procedure prior to 1789, it ended judicial torture. It produced an enormous effect in the criminal procedure of Massachusetts. The Records of the Court of Assistants (1630-1692) reveal that up until the later body of most persecuted puritans arrived with the consequent agitation for this protection, there were, relatively, many more confessions than there were after it became an effective law.

The Massachusetts people, augmented by these hordes fresh from the seething cauldron created by Charles I and Archbishop Laud were undoubtedly insisting that this provision of the Body of Liberties should give full effect to the maxim *"nemo tenetur prodere seipsum"*. The magistrates and officials at any rate appeared to have been keenly embarrassed by it. In 1642, Richard Bellingham, Deputy-Governor of Massachusetts, who had been assigned to "peruse the laws", with a view to revision wrote to Governor Bradford of Plymouth propounding the following questions:[24]

"Question (2)**:** How far a magistrate may extract a confession from a delinquent, to accuse himself of a capital crime, seeing nemo tenetur prodere seipsum," and "Quest. (3) In what cases of capital crimes one witness with other circumstances shall be sufficient to convict? or is there no conviction without two witnesses."

Governor Bradford turned these questions over to three of his ministers to be answered. Their answers gave very little consolation to the Massachusetts officials as the majority view (two to one) was that in no cause could physical compulsion be used; and the unanimous opinion was that to give an oath to answer truly was against both the laws of man and the laws of God. To the first point, Mr. Patrick answered in part**:**

"A magistrate is bound--to sift ye accused and by force of argument to draw him to an acknowledgment of ye truth; but he may not extract a confession--by any violent means--by any punishment inflicted or threatened to be inflicted, for so he may draw forth an acknowledgment of a crime from a fearful innocent; if guilty he shall be compelled to be his own accuser, when no other can, which is against ye rule of justice."

"in matters of highest consequence, such as doe concerned ye safety or ruin of state or countries--especially when presumptions are strange; but otherwise by no means."

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[24] Bradford, *Hist. of Plymouth Plantation*, Mass. Hist. Soc. Coll. ser. 4, Vol. 3, pp. 390-397

These opinions stand for the reverse of Professor Wigmore's conclusion that the inquisitional oath was allowed in this colony as late as 1685. This view of the matter is supported by the early Massachusetts colonial decisions.[25]

This privilege against self-incrimination came up through colonial history as a privilege against physical compulsion and against the moral compulsion that an oath to a revengeful God commands of a pious soul. It was insisted upon as a defensive weapon of society and society's patriots against laws and proceedings that did not have the sanction of public opinion. In all the cases that have made the formative history of this privilege and have lent to it its color, all that the accused asked for was a fair trial before a fair and impartial jury of his peers, to whom he should not be forced by the state or sovereignty to confess his guilt of the fact charged. Once before a jury, the person accused needed not to concern himself with the inferences that the jury might draw from his silence, as the jurors themselves were only too eager to render verdicts of not guilty in the cases alluded to.

The scope of the right as it existed in both America and the colonies during the eighteenth century was narrower than today. The right was against compulsory self- incrimination, and almost always had to be claimed by the defendant. The suspect's incriminating statements at preliminary examinations or arraignment could be used against him at trial. Nor were the authorities under any obligation to warn the defendant of his rights. Nevertheless the application of the right was expansive. Now the right is applied to witnesses and parties at all stages of equity and common law proceedings.

The history of the privilege against self-incrimination has something more than the rule of evidence has given a constitutional sanction by almost all the democratic constitutions of the World.

Regarding this right there was an elaborate review of English practice in **Twining** v. **State**[26]. In it, it was observed: We think it is manifest from this review of the origin, growth, extent and limits of the exemption from compulsory self-incrimination, in English law it is not regarded as a part of laws of the land of 'Magna Carta' or the 'due process' of law which has been an equivalent expression, but on the contrary is regarded as separate from and independent of due process. It came into existence not as an essential part of "due process" but as a wise and beneficent rule of evidence developed in the course of "Judicial decision;"

[25] *Trial of Ann Hutchinson*, 1 HART. AMER. HIST. TOLD BY CONTEMPORARIES 382; I CHANDLER CRIM. TRIAL 1; Winslow, *Hypocrisie Unmasked* (1645).
[26] 211 U.S. 78 (1908)

OBJECTIVE

The main objective this study are as follows:

- application of the narco analysis test as a technique for investigation.
- To examine the legality of confession with any inducement, treat or promise or without .
- The main objective of "Right against self incrimination" is to protect the accused from unnecessary police harassment and it is applicable at every stage where information is furnished.

HYPOTHESIS

In this dissertation the researcher presumes that this privilege is only available to a person To highlight the need and importance of this protection right against self incrimination .

To identify the legal and human right issue relating to accused of an offence.

The "right against self incrimination" is available at both trial and pre-trial stage.

No person accused of an offence shall be compelled to be witness against himself.

METHODOLOGY

The research which had been adopted by the researcher is doctorinal . The data collected is through various e -data sources and are used for research study. The different types of cases of various countries are analysed. The landmark cases analyzed.The condition of India is compared with the condition of foreign countries various thoughts given by the person on the right against self incrimination are also included under this research .

In this research the researcher will mainly focus on the positive and negative aspect of protection of self incrimination.

CHAPTER 2

Historic Evolution

The privilege against self-incrimination adopted by the Indian constitution in Article 20(3} has been traced to protests against the inquisitorial methods of interrogating accused persons which has long been obtained in the continental system and in England. In a system which permits compulsory examination of the accused to explain his apparent connection with a crime, there is danger of temptation to press him unduly, to brow beat him if he be timid or reluctant, and to entrap him into fatal[27] contradictions. The privilege arose in a desire to safeguard human liberty and to guard against an innocent person being punished. The object of the privilege is that every innocent citizen should feel secure that he can lead his daily life without fear of arbitrary arrest or detention, false accusation and unjust trial. The policy that is said to be at the core of privileges: The privilege protects a fair State-individual balance so that the power of the state does not overwhelm the individual in such a way that undermines the adversary process. However, since the establishment of the "privilege against self-incrimination" in the common law systems serious doubts have been expressed in some quarters that this privilege tends to defeat justice insofar as it closes one source of obtaining the truth. The claims of a prominent police spokesperson that unless the police have a substantial period of unfettered control over the suspect for the purpose of employing tactics; suspects would choose not to confess, confirming the notion that most confessions are obtained in violation of suspects' autonomy.

The police tactics taught in the polite mantis) however appear to be effective because they play upon such psychological pressures on the suspects.

Professor McCormick finds a kinship between the confession rule and the privilege against self-incrimination and he see in the test of voluntariness an indication that the rules restricting the use of confessions are prompted by a desire to protect the subject against torture as well as a desire to safeguard the trustworthiness of the evidence; on the other hand Wigmore[28] said that the privilege against self-incrimination was designed to cover only statements in Court under process as a witness; where I as confession rule was intended to cover statements both in court and out of the court. Jeremy Bentham[29] argues that the privilege denies the court the best available evidence regarding the defendant's conduct with respect to the crime charged.

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[27]

[28] Wigmore, *Supra* note 5

[29] . J. Bentham, of Rationale of Judicial Evidence, 229 (1827).

It may be useful to enumerate the arguments for and against the privilege**:**

1) In support of the privilege it is stated that it protects the innocent defendant from convicting himself by a bad performance on the witness stand.

2) It avoids burdening the courts with false testimony.

3) It encourages third party witnesses to appear and testify by removing the fear that they might be compelled to incriminate themselves.

4) It is a limitation on governmental power and self- incriminating answers cannot be obtained by third degree methods. In short, the privilege prevents inquisitorial procedures of the kind used by the infamous courts of Star Chamber, High Commission and the like.

5) It preserves respect for the legal process by avoiding situations which are likely to degenerate into undignified, uncivilized and regrettable scenes.

6) It spurs the prosecutor to do a complete and competent independent investigation.

7) It aids in the frustration of 'law' and bad 'procedures', especially in the area of political and religious trials.

8) It protects the individual from being prosecuted from crimes of notoriety which are of real concern to society.

9) It contributes toward a fair-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and by. requiring the government in its contest with the individual to shoulder the entire load.

Wigmore although deeply skeptical about the privileges Justification maintained that without it any system of Justice would degenerate because of the invitation to take brutal and oppressive short cuts, [30] On the basis of this understanding, the privilege is itself a prophylactic rule against abusive interrogation. It is a notorious fact that the police for various reasons in all countries have been inclined to depend on easy methods of convicting the accused on his own person. An English Jurist

[30] *Supra* note27

put it once while commenting on the problem in India**:** "If the police and prosecutors were relieved of this restriction, there would be a temptation to sit comfortably in the shade, rubbing red pepper into a poor devil's eyes, than to go about in the Sun hunting up evidence".[31]This policy reason plus the persuasive force of history, render it highly unlikely that the privilege will ever be abolished as one of the democratic concepts. Inquiry may be made, however, as to the possibility of attaching some limitations upon its use without a risk to our essential civil liberties.

Thus the privilege in its application to witnesses persuades them to come forward and help the courts in ascertaining the truth. The privilege protects the privacy of the individual by shielding him from judicial inquisition. Further the privilege reflects the legal determination to eradicate investigative brutality.

ARGUMENTS AGAINST THE PRIVILEGE

1) This privilege has become a shelter to criminals. In modern times overwhelming difficulties confront the government in detection and prosecution of a crime. In case of a large number of offences, the proof is difficult to ascertain without the testimony of the individual who has committed the crime.

2) It is only the guilty who claim the privilege are protected by it. Prof. Knox states: "It is the experience of each one of us....if he can be content to maintain silence in the face of direct accusation, or of incriminating circumstances, we immediately conclude that he can not exculpate himself. In ninety-nine cases out of hundred, we know that such a conclusion is justified...The only answer that can be formulated is that law in seeking to be properly sensitive to the rights of a culprit, has developed a callousness for those of the public".[32]

3) It is said that an accused person's rights are amply protected even without the privilege. The following factors which contributed to the origin and development of the privilege are now absent**:**

(i) The frequent employment of torture and duress by public authorities to extort incriminating evidence from an a accused;

[31] J.F. Stephen, A History of the Criminal Law of England,442,(1883).

[32] Knox, Self-incrimination,74 U.Pa.L.Rev., 139 at 148 (1924).

(ii) The practice of brow-beating and duping prisoners into making spurious confessions;

(iii) The denial to the defendant of a compulsory process to obtain his witness and the right to have counsel;

(iv) The refusal to permit a defendant to take the witness stand in his own behalf, the rationale being that since the accused was an interested party; his testimony would be of little probative value. Therefore, it is concluded that no innocent person is in need of it. It may be pointed out that the improvements stated above apply at the trial stage rather than at the stage of investigation. Therefore, they are only grounds to abolish the privilege at the trial[33] and not at the investigation stage.

4) With regard to the argument that the privilege protects the privacy of the individual, it is to be stated that the protection of privacy afforded by the privilege is limited. "It is only when a person is formally accused, or officially suspected of crime that he may not be examined as a witness at all. In all other situations the witness must answer non-incriminating questions and must suffer the humiliation of claiming his privilege when the question is incriminating. Not much is left of his privacy then". [34]
Further a suspected person (though it ultimately turns out to be that he was innocent) is liable to be taken into police custody and his house may be searched under a search warrant. In all these cases privacy of an individual is jeopardized.

There is substance in each of these arguments. A reconciliation however, has to be effected between the interest of the innocent individual and those of the society in detecting crime and bringing the criminals to book.[35]

In 1827, Jeremy Bentham Parodied the various arguments put forward in favor of the privilege. [36]
One of the arguments Bentham attacked was the "Fox--hunters' reason". The argument that "demands that the defendant not have to give evidence that may incriminate himself because it would take the sport out of prosecution by making conviction easy". Bentham also attacked the "Old Woman's

[33] Meltzer, Required Records, The McCarran Act and the Privilege Against Self-incrimination, 18U.Chi.L.Rev. 687 at 692-93 (1950).
[34] McCormick, Evidence 288(1954).
[35] See study No.5 Indian Law Institute, New Delhi, Self-incrimination - Physical and medical examination of the accused, 8 (1963).

[36] J. Bentham, *supra* at 29

reason". [37]He argues that it is hard on a defendant to be put in a situation where he may have to incriminate himself.

In the 1940's two evidence scholars urged to be cautious while interpreting the privilege. Wigmore concluded a section in his treatise that analyzed the policies offered in support of the privilege, with the following warning: "In preserving the privilege, however, we must resolve not to give it more than its due significance- We are to respect it rationally for its merits, not worship it blindly as a fetish.

The privilege can not be enforced without protecting crime, but that is a necessary evil inseparable from it, and not a reason for its existence. We should regret evil not magnify it by approval. In the same passage Wigmore criticized the "current Judicial habit" with respect to the privilege, which is "to land it discriminatingly with a false cant", and he urged that the privilege" be kept within limits the "strictest possible". Similarly in 1946, Professor Charles Mc Cormick expressed the hope that", the courts as they become more conversant with the history of the privilege will see that it is a survival that has outlived the context that gave it moaning, and that its application today is not to be extended under the influence of a vague sentimentality but is to kept within limits of realism and common sense".

On the other hand, Robert Gerste-in argues that the clause protects, "the innermost recesses of conscience". Professor Kamisar, a leading authority on the privilege wrote that "the application of the privilege to police interrogation can be depended as either a logical deduction from the constitutional provision or a practical condition upon its successful operation". Further Kamisar strongly argued for the extension of the Fifth Amendment privilege to police investigative questioning, because the interrogators main purpose is to elicit incriminating statements, and thus endangers the privilege of criminal defendants to be silent at interrogation. His point is that all police conduct that is likely to elicit

incriminating statements endangers the privilege. He suggests that now police are performing the investigative function previously handled by magistrates, the privilege should apply to the police in

[37] According to Bentham, the Fox-hunter's reason consists in introducing upon the carpet of legal procedure the ideal of fairness, in the sense in which the word is used by sportsmen. The fox is to have a fair chance for his life; he must have (so close is the analogy) what is I called law; leave to run a certain length of way, for the express purpose of giving him a chance for escape. This rationale emphasizes preservation of the accusatorial system in which the government" must establish guilt by evidence independently and freely secured and not by coercion to prove its charge against the accused out of his own mouth"; (J.Bentham, Rationale of Judicial evidence 238-39 (1927). Bentham referred to this rationale as the old-woman's reason. The essence of this reason is contained in the word "tis" hard upon a man to be obliged to criminate himself

that capacity. According to the Burger Court “the Fundamental purpose of the Fifth Amendment is the preservation of an adversary system of criminal Justice".[38]

Professor O'Brien notes that "the fifth amendment confers only a privilege and not a right against self-accusation". Thus, the amendment may be extended or contracted depending upon judicial evaluations of its utility in different circumstances for maintaining an accusation system.It is to be noted that courts and commentators have adduced a multitude of rationales for the privilege. The catalogue offered in **Murphy** v. **Water Front Commissioner of New York Harbor** [39] illustrates this diversity as follows:

(T)he privilege reflects many of our fundamental values and most noble aspirations; our willingness to subject those suspected of crime to the cruel trilemma of self--accusation, perjury, or contempt; our preference for an accusatorial rather than an inquisitorial system of criminal justice; Our fear that self-incriminating statements will be elicited by inhuman treatment and abuses, our sense of lair play which dictates a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the individual to shoulder the I entire load .... Our distrust of self-deprecatory statements; and our realization that the privilege, while sometimes "a shelter to the guilty" is often' a protection to the innocent".

Commentators have consolidated this normative consideration into three which are Fundamental: Privacy, the moral dignity and humanity of the individual and fair balance between the state and the individual.

In the light of preceding discussion, let us discuss, in brief the concept of fair state-individual balance as a Justification for the preservation of privilege.

One of the fundamental premises of the Indo- American system of Justice concerns the balance of power between government and the accused. Under an adversary system it is essential that courts maintain a fair state-individual balance at criminal trials. The reasons for insisting on this principle related to distrust of government as well as deep empathy for an individual faced with a threat of criminal sanction. There is not only a concern that the government should not be allowed to use its superior resources to overwhelm a criminal defendant, but also a sense that the adversary system should incorporate procedural norms that are not tilted against the defendant.

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[38] *Garner* v. *United States,* 424 US 648 at 655 (1976).
[39] 378 U.S. 52 (1964).

The fair state-individual balances a normative concept, not a description of the ordinary state of affairs. Nevertheless, there will undoubtedly be some correlation between the ideal fair state-individual balance and the balance of advantage that has been developed in connection with modern criminal trials.

CHAPTER 2 (A)

Constitutional And Statutory Provisions In India

The rule of protection against self-incrimination prevailing in the United Kingdom or as interpreted by courts in the United States of America has never been accepted in India. Scattered through the main body of the statute law of India are provisions which establish beyond doubt that the rule has received no countenance in India. S.132 of the Indian Evidence Act 1872 enacts in no uncertain terms that a witness shall not be excused from answering any questions as to any matter relevant to the matter in issue in any suit or in any civil or criminal proceeding, upon the ground that the answer to such question will criminate or may tend directly or indirectly to criminate such witness or that it will expose or tend directly or indirectly to expose, such witness to a penalty or forfeiture of any kind. This provision runs directly contrary to the protection against self-incrimination as understood in the Common Law in the United Kingdom.

Statutory provisions have also been made which compel a person to produce information, or evidence in proceedings which may invoke imposition of penalties against him. For example, under sections 45-G and 45-L of the Banking Companies Act, 1949, as amended by Act 52 of 1953 provision has been made for public examination of persons against whom an inquiry is made. Provisions are also made under section 140 of the Indian Companies Act, 1913, Section 240 of the Companies Act, 1956, Section 19 (2) of the Foreign Exchange Regulation Act, 1947, Section 171-A of the Sea Customs Act 1878, Section 54-A of the

Calcutta Police Act, section 10 of the Medicinal and Toilet Preparation Act, 1955, Section 8 of the Official Secrets Act 1923, Section 27 of the Petroleum Act, 1934, Section 7 of the Public Gambling Oct, 186/, Section 95 (i) of the Representation of the People Act, 1951 -- to ention only a few - compelling persons to furnish information which may be incriminatory or expose them to penalties.

Provisions have also been made under diverse statutes compelling a person including an accused to supply evidence against himself. For instance by Section 73 of the Evidence Act, 1872, the court is authorized in order to ascertain whether a signature, writing or seal is that of the person by whom it purports to have been written or made to direct any person present in court to write any words or figures for the purpose of enabling the court to compare the words or figures so written with any words or figures alleged to have been written by such person. Section 4 of the identification of prisoners Act, 1920, obliges a person arrested in connection with an offence punishable with rigorous imprisonment, if so required by a Police Officer to give his measurements. Section 5 of the Act,

authorizes a Magistrate for the purpose of any investigation or proceeding under the code of criminal procedure,1898, to order any person to be produced it or attend at any time for his measurements or photograph to be taken by a police officer. Similarly under Section 129 A of the Bombay Prohibition Act, 1949, the prohibition officer is authorized to have a person suspected to be intoxicated, medically examined and have his blood tested for determining the percentage of alcohol therein. Offer of resistance to production of his body or the collection of blood may be overcome by all means reasonably necessary to secure the production of such person or the examination of his body or the collection of blood necessary for the test. Section 16 of the Arms Act, 1878, requires a person possessing arms, ammunition or military stores,

when such possession has become unlawful, to deposit the same at the nearest police accused of an offence. These features have not been altered in the Criminal Procedure Code of 1B9B, but they were incorporated in Section 342(1) of the Criminal Procedure Code of 1898. The Prevention of Corruption Act, 1947 by Section 7 makes an accused person a competent witness on his owns application in respect of fences under that Act.

But criminal Procedure Code underwent revolutionary change by the amendment carried to it by Act, XXVI, of 1955. The Criminal Procedure Amendment Act 1955, by Section 342-A makes any person accused of an offence before a criminal court, a competent witness for the defense and he may give evidence on Oath in disproof of the charges made against him or any person charged together with him at the same trial. But he should not be cal led as a witness except on his own request in writing. Section 315 of Criminal Procedure Code 1973, reproduces the provisions of Section 342-A of the Criminal Procedure Code 1898. Under the Government of India Act, 1935, there was no constitutional protection provided against self-incrimination. Whatever protection against self-incrimination available to the accused was provided by the ordinary law of the land.

In India an accused cannot ever give evidence on behalf of the prosecution. Even a few years ago he could not appear as a witness in his awn defense, for Section 342 (4)of the Criminal Procedure Code, provided that no Oath should be administered to him, while Section 5and6 of the Indian Oaths Act,1873 provided that no witness can be examined without oath or affirmation. There are, however, a number of safeguards in the Indian Law subject to which oral evidence of the accused can be recorded by the police so that chances of police exerting duress or compulsion against the accused may be minimized. Section 342-A (Section 315(1) Cr.P.C.1973) enables an accused person to offer himself as a competent witness provided he makes a request in writing after the charge has been framed against him. It, however, lays down that the accused's failure to give evidence is not to be the subject of any

comment by any party[40] or the court, or is not to give rise to any presumption against him.[41] No adverse inference can thus be drawn from the failure of the accused to testify.[42]

CONSTITUTIONAL ASSEMBLY DEBATES AND THE RIGHT AGAINST SELF-INCRIMINATION

Before we proceed to deal with the scope of the right against self-incrimination as embodied in Article 20 (3) of the Indian Constitution, it may not be out of place to trace, though briefly its evolution through the various Committees before finally embodied in the Indian Constitution as
Article 20 (3). The principle of guaranteeing every person protection against self-incrimination was provided for in K. M. Munshi's draft it[43] in Article Xll Clause (2) which provided, No person shall be...compelled in any criminal case to be witness against himself., nor shall the burden of proving his innocence be thrown on him.

The sub-committee on fundamental rights considered this clause on March 28, 1947 and deleted the last part (nor shall the burden of proving his innocence be thrown on him) of this clause. The sub-committee adopted it on April, 15, 1947 and incorporated it in its report to the Advisory Committee as Clause 27 (5).[44] When the Advisory Committee took up this clause for consideration on April 22, 1947 Rajagopalacliari remarked that it was not necessary to put in three general principles of criminal law as a fundamental right in the constitution.

K.M.Munshi replied that while it was true that generally criminal laws were passed by the legislature, the clause was intended to be a safeguard against a specific grievance. The drafting committee considered clause 26 of the Constitutional Adviser's Draft Constitution on November 1, 1947and held that the intention of the second part of sub clause (2) was only to prohibit compulsion of an accused to be a witness against himself" and if that intention was made clear, the additional words proposed by the Constitutional Advisor would not be necessary. The committee split up sub clause (2) into two independent clauses, the former dealing with "double jeopardy" and the latter with "self-incrimination" and these provisions appeared as Article 14 of Draft Constitution. Draft Article 14 was discussed in the Assembly on December 2, 3 and 6, 1948. No discussion took place on sub clause (3) of Article 14, however Syed Karimuddin proposed the addition of a new clause regarding unreasonable searches and seizures, but it was not accepted. This clause eventually became Article

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[40] *Baidyanath* v. *State of Bihar*, AIR 1968 S.C.1393.
[41] *Hargun Sunderdas* v. *State* AIR 1970 S.C. 1514.
[42] *T.G.Gaokar* v. *R.N.Sukla*, AIR 1968, S.C.1981
[43] B. Shiva Rao, The Framing of Indian Constitution Select Documents, 79 (Indian lnsti.t.ute of Public Administration , New Delhi,(VoI.11 1967).
[44] Shiva Rao, *Supra* note 43.

20(3) of the Constitution as emerged from the Constituent Assembly. In other words, it was for the first time by the Constitution of India under Article 20(3), that a limited protection has been conferred upon a person charged with the Commission of an offence against self-incrimination by affording him protection against testimonial compulsion. Before 1978, the President had powers under Article 359 of the Constitution to suspend the enforcement of any fundamental right guaranteed in part-III of Indian Constitution. Article 359 was amended in 1978, 19 and after this amendment the rights guaranteed under Article 20 and 21 cannot be suspended by the President. The privilege and also the other rights guaranteed by Article 20 (Expost-Facto-Laws and Double Jeopardy) and Article 21 (Right to life and personal liberty), are always available to the people.

The sanctity of the doctrine was well known to the framers of the Indian Constitution and hence, it was given due place by placing it in part-III of the Fundamental Rights in the Constitution of India. The provisions of Part III and Part IV of the Indian Constitution should not be treated as mere legal precepts and they form part of the Conscience of the Constitution. It can safely assume that the framers intended the said provisions to be instrumental in spreading a new Constitutional culture.

CHAPTER 2(B)

Comparative Study-India And USA

The elevation of written Constitutions to the Supreme Laws of India and America represents an important moment in the development of democratic values in the administration of justice. There is a consequent formal shift of power from the legislature and the executive to the judiciary which is responsible for the administration of justice[45]. The United States and Indian Constitutions as interpreted by the courts lay down the basic minimum requirements that must be followed in dealing with a suspect. Through its decisions and Constitutional issues the courts in America and India set out basic minimum standards that must be adhered throughout the Nation[46].

The Judiciary is mainly responsible for the administration of Justice in all political systems. Even authoritarian regimes try to win public support by instituting courts of law and giving their acts the appearance of judicial approval. As an administrator of Justice and Protector of rights and fundamental freedoms of citizens, the court of law holds a key position in the life of the individual and the society. Henry Sidgwick said**:**

In determining a nation's rank in political civilization no test is more decisive than the degree in which justice as defined by the law is actually realized in its judicial administration; both as between one private citizen and other and as between private citizens and members of the government[47].

PRESUMPTION OF INNOCENCE AND RIGHT AGAINST SELF-INCRIMINATION

A person who has been indicted of criminal proceedings has been conceded a "privilege of keeping silent" about the accusations. This is recognized as a cardinal principle in the administration of criminal justice and is designated as "presumption of innocence". Sir Stephen explains the rationale of the rule by remarking that**:**

In the present day the rule is that a man is presumed to be innocent till he is proved to be guilty is carried out in all its consequences. The plea of not guilty puts every thing that he alleges from the beginning. If it be asked why an accused person is presumed innocent...the true answer is, not that the

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[45] See Andrew L.T. Chou, International kidnapping : Disguised Extradition and Abuse of Process,57 Mod.L.Rev.,626

[46] Henry W_ Mannle & David Hirschel, Fundamentals of Criminology, 324 (1988).

[47] Henry Sidgwick, Elements of Politics, 481 (4th ed.1919).

presumption is probably true, but the society in the present day is so much stronger than the individual, and is capable of inflicting so very much more harm on the individual than the individual as a rule can inflict upon society, that it can afford to be generous[48].

The presumption of innocence of an accused person is a matter of law of evidence. The burden of proof is thrown upon the prosecutor to prove the prisoner's guilt beyond all imaginations of reasonable doubt[49]. It gives the present day recognized right of benefit of doubt to an individual accused of crime.

The presumption is also connected with false defense, failure of the accused to explain the circumstances adverse to him, testimonial compulsion, coerced admission and confessions, circumstantial evidence and the strict construction of the statues relating to the crimes, criminals, procedure and the like. Thus the presumption of innocence is particularly a warning not to treat certain things improperly as evidence[50]. In practice the presumption warrants the search for independent evidence.

The right of silence stands for the proposition that citizens have the freedom in the sense that no legal penalty attaches to refuse to answer questions put to them by persons charged with investigating an offence. It exists in two distinct situations, one at the pre-trial stage, where the right can be exercised by a suspect; and at the trial itself-where the right can be exercised by an accused. We are here concerned, principally with the pre-trial right of silence of suspects only.

The phrase 'Privilege against self-incrimination has been used as a synonym for the term 'Right to Silence'. The two terms are not, however equivalent. A suspect who remains silent in the police station and or in the court room may well be motivated by a desire to avoid incriminating himself. But there can also be other motives, for example, the desire to avoid incriminating others. It should not go unnoticed either that ‘privilege’ or 'right' are both loaded terms. "Privilege" implies special treatment accorded as a favor or concession, whereas right' denotes an interest protected as an expression of basic values. The view taken here is that in an accusatorial system, silence should be regarded as a 'right' than a "privilege". The presumption of innocence is applicable only in the common law countries, viz., England, Canada, Australia, U.S.A., and India. To say that there is a right to silence available to citizens suspected of an offence, it does not merely mean that generally no legal obligation is imposed upon citizens to talk to the police or to give evidence in court. It implies in

[48] J F Stephen, History of CrirninaI Law of England, 354,(Vol.1,1883).
[49] Sections 111, 112, 113, 114 of the Indian Evidence Act., 1872
[50] Wigmore, Evidence, 407-9, (Vol.IX, 1940).

addition to that no disadvantages should be attached to a defendant's refusal to cooperate with the police or to testify.[51]

TESTIMONIAL COMPULSION AND THE RULE AGAINST SELF-INCRIMINATION An attempt is made in this section to discuss the meaning of accused', to be a

witness and compulsion' within the framework of the Fifth Amendment and Article 20(3) of the American and Indian Constitutions respectively.

Position Of Law In United States Of America

Courts originally interpreted the self- incrimination clause of the Fifth Amendment as prohibiting only the extraction of confessions in the course of proceedings conducted under oath. Not long after Wigmore[52] published his treatise, courts began to shift the focus from the suspects will to police conduct.[53] By the mid of 1940's disciplining of the "state law enforcement officers became a principle purpose of the confession rule". The rationale for this was never clearly expressed. One explanation is that some police conduct should be prohibited simply because it is normatively unfair and thus denies suspects the fairness guaranteed by the fourteenth amendment "due process clause".

The Fifth Amendment was no doubt intended to prohibit Star Chamber inquisition tactics such as the rack and the thumb screw. But the brutal torture is not the only method of interrogation that the amendment prohibits. Fifth Amendment compulsion perhaps can be identified more naturally with the requirement of 'voluntariness' under the "due process clause ". Under this approach, a person is compelled for Fifth Amendment purposes when his "will" is over borne by pressure, be it whether physical or psychological. This conception of Fifth Amendment test appears to be common and it has been reinforced in numerous decisions. [54]Prior to Miranda[55], the court articulated several tests for the admissibility of custodial confessions.

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[51] Steven Green, *The Right to Silence: A Review ot the Current Debate***,** 53 Mod .L.Rev. , 709 a t 710, (1990)
[52] J.H. Wigmore, A Treatise on Evidence, See. 829 2ed. (1923).
[53] Miranda v, Arizona, 364 US 436 at 506, 512 (1966) (Harlan J, dissenting)(noting the court's " initial emphasis on reliability, which was later Supplemented by concern over the legality and fairness of the police practices in an accusatorial system of law enforcement)

[54] *Haynes* V *Washington* 373 US 503 (1963);
[55] *Supra* at 53

In **Hopt** v. **Utah**[56], the court fashioned a "voluntariness test" under which confessions were presumed voluntary if made without threats or inducements. This test focused on the suspect's state of mind and the trustworthiness and believability of his statement rather than on tactics of police in eliciting the confession. Later, the court included police conduct as one of several factors to be considered in determining voluntariness.

In **Bram** v**. United States**[57], the court had relied on the Fifth Amendment to suppress a statement made during a brief custodial interrogation. The court did not question the fairness of the police tactics but, rather, "their resultant effect upon the mind of the suspect". The Court reasoned**:**

But a confession, in order to be admissible must be free and voluntary: that is, must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promise, however, slight, not by the exertion of any improper influence.

Wigmore later criticized the court's decision in Bram for its sentimentalism, a false tenderness to guilty defendants, and unnecessary deviation from principle - the principle being the reliability justification for the confession rule.

Nonetheless, in the United States, attention has been focused much on the basic requirement of voluntariness than on threats, promises and oppression,[58] which would be regarded as factors capable of depriving a confession of its voluntary quality, but not to the exclusion of other factors. It seems to be generally accepted that it is necessary for the court to look at "the totality of the relevant circumstances".[59]

In 1966, US Supreme Court delivered a landmark decision in **Miranda** v**, Arizona**,[60] which established strict guidelines governing both police procedure in custodial questioning and admissibility evidence derived from such interrogation. Chief Justice Earl Warren clearly stated that the suspect is subject to certain psychologically intimidating factors during interrogation which are likely to over bear his will and compel him to confess. He described the progression from physical coercion, which had been the norm into the 20th century to modern use of psychological tricks to obtain confessions. In view of the long standing existence of the privilege against self- incrimination

[56] 110 US 574 at 585 (1884).
[57] 168 US 532 (1897).
[58] See *Ibrahim* v. *The King* [1914] A.C. 599..
[59] The phrase is of Justice Frankfurter's in Culombe V. 368 US 568 at 606 (1961).
[60] *Supra* at 53

as a principle of law and the threat posed to it by the "inherently compelling pressures" of custodial interrogation the court was determined in Miranda to restrict actions of police interrogators.

In **Miranda**, the court prohibited the law enforcement officials from obtaining physical evidence from the suspects, by setting forth new famous procedural safeguards which the court believed would ensure that no suspect's Fifth Amendment rights were violated.

Following Warren Burger's appointment as Chief Justice in 1969, the American Supreme Court had consistently interpreted the Fifth Amendment as providing no bar against compulsion to produce evidence of real or physical nature. Burger court repeatedly suggested that Miranda's prohibitions were prophylactic and not constitutionally required.

In **Oregon** v. **Elstad**,[61] for example, the court said that actual violation of the Fifth Amendment (as distinguished from a mere presumption of compulsion) occurs only when there is physical violence or other deliberate means calculated to break the suspect's will.

POSITION OF LAW IN INDIA

One of the fundamental canons of Anglo-American Jurisprudence is that the accused should not be compelled to be a witness against himself. The Indian legislature was aware of the above fundamental cannon of criminal Jurisprudence and gives effect to it in various Sections of the Criminal Procedure[62] .

Article 20(3) of the Constitution of India consists of the following components:

(a) It is right pertaining to a person "accused of an offence",

(b) It is a protection against compulsion to be a witness,

[61] 470 US 298(1985).

[62] See Sections 174, 175, 337, 338, 342-A Criminal Procedure Code, 1898, (Sections 61,62,163,317 of New Code of Criminal Procedure 1973). Section 175 Cr.P.C provides every person summoned by a police officer in a proceeding under Section174, shall be bound to attend and to answer truly all questions other than the questions, the answers which would have a tendency to expose him to a criminal charge or to a penalty or forfeiture. Section 348 provides that except as provided in Sections 337 and 338 no influence by means of any promise or threat or otherwise shall be used to an accused person to induce him to disclose or withhold any matter within his knowledge. Again when the accused is examined under S. 342, the accused does not render himself liable to punishment if he refuses to answer any questions put to him.

(c) It is a protection against such compulsion resulting in his "giving evidence against himself"

The protection is against the accused to incriminate himself under compulsion. This does not mean that he need not give information regarding matters which do not tend to incriminate him.

Persons Accused of Offence**:**

The protection of Article 20(3) is available to a person "accused of an offence". This means a person against whom a formal accusation relating to commission of an offence has been leveled which in normal course may result in his prosecution. In explaining the intendment of Article 20(3) relating to search and seizure of documents under Section 94 and 96 of the Criminal Procedure Code, 1861, a eight Judges Bench of the Supreme Court in **M. P. Sharma** v**. Satish Chandra**[63], held that one of the components for invoking sub-clause (3) of Article 20 should be that it is a right pertaining to a person "accused of an offence". In Sharma case, as a result of the first information report filed against the directors of a certain banking company searches were carried out and voluminous mass of records were seized from various places. The petitioner prayed that the search warrants as being absolutely illegal and asked for a return of the documents seized. It has been held that persons against whom the search warrants were issued, were all of them persons against whom the first information report was lodged and who were included in the category of accused therein and they are persons "accused of an offence" within the meaning of Article 20(3) and also that the documents for whose search the warrants were issued, being required for Investigation into alleged offences, such searches were for incriminating material".

Thereafter a Constitutional Bench of the Supreme Court **in Raja Narayanlal Bansilal** v. **Manekphiroz Mistry**,[64] dealing with reference to certain provisions of the Indian Companies Act stated that one of the essential conditions for invoking the Constitutional guarantee enshrined in Article 20(3) is that a formal accusation has been made against the party pleading the guarantee and that it relates to the commission of an offence which in the normal course may result in prosecution, which being compelled to give evidence against the party. It follows the lodging of the first information report, the filing of a complaint in the court or the issue of show cause notice under a special Criminal Statute to bring Article 20(3) in to play.

Subsequently eleven Judges Bench of this Court in **State of Bombay** v**. Kathikalu Oghad**[65]held that a person cannot claim the guarantee if at the time he made the statement he was not an accused 'but

[63] AIR 1954 SC300
[64] AIR 1961 SC 29
[65] AIR 1961 SC 1909

become an accused thereafter. The essence of the decision is that to bring a person within the meaning of "accused of any offence", that person must assimilate the character of an accused person in the sense that he must be accused of any offence. In **Ramesh Chandra Mehta** v**. State of West Bengal,** [66] a Constitutional Bench of the Supreme Court while examining the admissibility of a statement recorded under Section 171A of the Sea Customs Act of 1878 (now repealed) corresponding to Section 108 of the Customs Act of 1962 has held that a person arrested by a customs officer is not a person accused of an offence within the meaning of Article20 (3) of the Constitution or within the meaning of Section 25 of the Evidence Act.

In **Veera Ibrahim** v**. State of Maharashtra**, [67]a Division Bench of the Supreme Court following the dictum laid down in **Ramesh Chandra Mehta**[68] observed that in order to claim the benefit of the guarantee against testimonial compulsion embodied in clause (3) of Article 20, it must be shown firstly that the person who made the statement was "accused of any offence". Secondly, he made the statement under compulsion. It has been further held that when the statement of a person is recorded by the Customs Officer under Section 108, he is not a person "accused of an offence" under the Customs Act and that an accusation which would stamp a person with the character of an accused of any offence is leveled only when the complaint is filed against that person by the custom officer, complaining of the commission of any offence under the provisions of the Customs Act.

In **Nandini Satpathy** v. **P. L. Dani**[69], the Supreme Court Article 20 (3) of the Constitution lays down that no person shall be compelled to be a witness against her/himself. Section 161(2) of the Code of Criminal Procedure, 1973 [CRPC], casts a duty on a person to truthfully answer all questions, except those which establish personal guilt to an investigating officer. The Supreme Court accepted that there is a rivalry between societal interest in crime detection and the constitutional rights of an accused person. They admitted that the police had a difficult job to do especially when crimes were growing and criminals were outwitting detectives. Despite this, the protection of fundamental rights enshrined in our Constitution is of utmost importance, the Court said. In the interest of protecting these rights, we cannot afford to write off fear of police torture leading to forced self-incrimination. While any statement given freely and voluntarily by an accused person is admissible and even invaluable to an investigation, use of pressure whether? Subtle or crude, mental or physical, direct or indirect but sufficiently substantial? By the police to get information is not permitted as it violates the constitutional guarantee of fair procedure. The Supreme Court affirmed that the accused has a right to silence during interrogation if the answer exposes her/him into admitting guilt in either the case under

[66] AIR 1971 SC 940
[67] AIR 1976 SC 1167
[68] *Supra* at 66
[69] A1R 1978 SC 1025.

investigation or in any other offence. They pointed out that ground realities were such that a police officer is a commanding and authoritative figure and therefore, clearly in a position to exercise influence over the accused.

Supreme Court Directives

1. An accused person cannot be coerced or influenced into giving a statement pointing to her/his guilt.
2. The accused person must be informed of her/his right to remain silent and also of the right against self-incrimination.
3. The person being interrogated has the right to have a lawyer by her/his side if she/he so wishes.
4. An accused person must be informed of the right to consult a lawyer at the time of questioning, irrespective of the fact whether s/he is under arrest or in detention.
5. Women should not be summoned to the police station for questioning in breach of Section 160 (1) CRPC.

An essential element of a fair trial is that the accused cannot be forced to give evidence against her/himself. Forcing suspects to sign statements admitting their guilt violates the constitutional guarantee against self-incrimination and breaches provisions of the Code of Criminal Procedure, 1973 (CRPC). It is also inadmissible as evidence in a court of law. In addition, causing 'hurt' to get a confession is punishable by imprisonment up to seven years.

Thus **Nandini Satpathy Case** throws a new light, as to the meaning of accused and emphasized the similarity in the spiritual thrust of the Indian and American rights against self-incrimination and the burning relevance of the moral theme from **Miranda Case**[70] to India. And it held that it sought light from Miranda for interpretation and not for innovation.

[70] *Supra* at 53

CHAPTER 3

Analysis And Implementation Of Statutory Provisions

Having discussed the various aspect of law associated with the right against self-incrimination in India, and U.S.A, an attempt is made in this chapter to explore the similarities and contrasts in the methodology of police in India and the United States of America during three key stages of the investigative process i.e. search and seizure, interrogation and identification of suspects.

While the American public often alternates between respect and resentment in a love-hate relationship with those who enforce law, we, the Indians have almost universally a negative attitude towards our police. One reason for this acute and chronic distrust is historical. The long years of faithful service by our police in support of the British rulers had designed the existing Indian police system to preserve their empire through iron hand, the prevention and detection of crime was also accomplished much the same way that is through free use of third degree methods. The higher officers usually turned a blind eye to police excess and extortion of money by lower ranks to keep them happy and obedient.[71]

Additionally a police constable is frequently used as a servant by his superiors for such personal tasks as baby sitting, shopping and house cleaning. Another cause of the lack of public respect is the low education of the constable, the backbone of the Indian police force, who has come from the lower strata of the society the police are also poorly paid even by Indian Standards. The low salaries of the subordinate police coupled with lack of other- compensating facilities have led to a number of consequences'. Their training for the prevention and detection of crime is defective and out of date and they are made and brutal in their behavior. Further the police force as a whole not, even today, is regarded as a friend of the citizen. Abuse of power and corruption in the police ranks is widespread and blatant.

Indian Law reflects the citizens' low opinion of the constable by granting him restricted powers. Basically his functions are to maintain order, either- while standing at a fixed post or by patrolling on foot; to serve legal process, e.g. summons and subpoenas, and to acquire information, including the identity of those unfortunates who regularly sleep on the sidewalks of his urban beat.

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[71] *Sita Ram Singh*,Vol.97 Cr.L.J., 52 (1991).

SEARCH AND SEIZURE

While there are numerous theoretical and procedural similarities because of the common derivation from British law, there are two important differences in the law of search and seizure. Indian courts have not fashioned an "exclusionary rule" of evidence to bar the fruits of an unjustified or improperly conducted search. Instead, by statute, India mandates the presence of citizens- observers at a search as the means of assuring proper police behavior.

Under the Indian Code of Criminal Procedure, the Police are generally required to obtain a warrant from a magistrate before undertaking a search. The magistrate is empowered to issue a search warrant if he has reason to believe an item such as stolen property, counterfeit currency, a forged document, a false seal, or an obscene object is to be found in a particular place. The magistrate may authorize a search as well for "any document or other thing necessary or desirable for the purpose of any investigation, inquiry, trial or other proceeding. This last broadly defined and exceedingly useful category of evidentiary items has been amenable to seizure in the United States upon a showing of probable cause only since 1967 when the Supreme Court eliminated the distinction between contraband, instrumentalities or fruits as mere evidence.

Both Countries realistically provide for exceptions to the general requirement of a search warrant. The right of the police to search incidental to an arrest has been recognized by the U.S. Supreme Court[72] and in India by statute[73]. Similarly, prior judicial authorization may be dispensed with when search is appropriate but exigent circumstances make it impracticable for the police first to obtain a warrant. If an Indian Sub-Inspector has reasonable grounds to believe that something necessary for the investigation of an offence may be found in a particular place and cannot otherwise be obtained without undue delay, he may search on his own authority[74]. Two safeguards however are included in the law to minimize the likelihood of abuse in the absence of prior judicial determination of probable cause. First, the Sub-Inspector must record in writing before embarking on the search, the grounds for his belief of the need for haste and the specific items he expects to find. He must deliver this record promptly to the nearest magistrate facilitating a limited judicial scrutiny of the officer's motives and information. Secondly, the Sub-Inspector should conduct the search in person. Any delegation of this responsibility to a subordinate requires an explanation preserved in writing for later review by the magistrate.

[72] *Robinsorn's* case 41A U.S. 21R (1973).
[73] Sections 51, 52, code of criminal procedure 1973
[74] Section 165 Criminal Procedure Code, 1973.

An Indian police officer executes a search warrant with many of the same powers and formalities as his American equivalent. For example, when the officer is refused "free ingress" by the occupant of the premises to be searched, he is empowered to "break open any outer or inner door or window to gain entry"[75].

In lieu of the exclusionary rule to deter illegal police searches, India relies on two other methods, both of which exist in the United States but have not been considered sufficiently effective by American courts. The Indian Penal Code expressly recognizes the right of the citizen to protect his home and family by resisting a patently illegal search. And the occupant of premises illegally searched may institute a civil action for damages resulting from the trespass.

INTERROGATION

The right to remain silent found in the Fifth Amendment of the U.S. Constitution is also part of the Indian Constitution. Yet the consequences for the police seeking to question a suspect are vastly different. A statement made by an accused while in custody to an American police officer may be admissible in court as evidence if the officer complied with certain conditions set out by the Supreme Court in **Miranda** v. **Arizona**[76]. A statement made to all Indian Police Officer of any rank by an accused in custody is almost always inadmissible at trial[77]. And an accused is considered to be in custody in India not only when he has been formally placed under arrest but whenever his freedom of action is impaired in a significant way.

The only exception to this prohibition, another example of India's lack of faith in its police,arises when the information received from the accused is subject to independent verification. If the suspect reveals to the police the location of the proceeds of the crime or the body of the victim or some other material fact, only that part of the statement may be used as evidence against the accused since its reliability is not dependent on police credibility alone.[78]

In the United States, the courts do not require corroboration for admissibility, though it serves to augment the weight attached to a confession by the jury. The American courts however, bars as involuntary those confessions obtained as a result of physical force, Psychological coercion, lengthy interrogation, or the irrationality or incompetence of the accused regardless of the existence of independent corroborating evidence derived from the statement Similarly, before accepting a

[75] Section 100 Criminal Procedure Code, 1973
[76] *Supra* at 53
[77] Section 25 of the Indian evidence Act, 1872
[78] AIR 1917 PC 67.

confession containing a discoverable material fact, most Indian courts insist that there should be no police, duress, or inducements to negate the reliability of the statement.[79]

IDENTIFICATION OF ACCUSED

Doubts plague courts in both India and the United States as to the reliability of identification at trial by an eyewitness to a crime which may have occurred months or sometimes years earlier. Any contact between the witness, and the accused from the time of the trial is strictly monitored to reduce the inherent possibility of confusion or manipulation.

The American legal preference is to use a “line-up"; so too in India, where it is called an "identification parade" the procedures bear a strong resemblance with certain modifications dictated by the physical and social realities of life in India.

In the United States a line--up may be held under the auspices of the police, p prosecutor, or court. Once again the Indian Police are not trusted. Whether because of their Lin-use of scientific aids or low level of education or the tendency to prompt the witness to make a positive identification, the role of the police in the identification of suspects is limited to escorting witnesses and providing security. The parade is conducted by a magistrate and witnessed by two or more respected citizens. If a magistrate was not available the panch witnesses alone may supervise the proceedings[80], but it is the universal practice to have identification Proceedings conducted by magistrates. The parade is held not in the police station but in the local jail to take advantage of the availability of other prisoners and the assistance of the staff. To increase the accuracy of the identification, the parade must be scheduled as soon as possible after the arrest or the delay must be explained to the satisfaction of the court. Thus it is desirable that such test parades are held at the earliest possible opportunity. Early opportunity to identify also tends to minimize the chances of memory of identifying witnesses fading away by reason of lapse of time. But delay in the test identification parade by itself cannot be a ground to reject identification if otherwise the same is acceptable.

CONCLUSION

It is submitted that to American law enforcement personnel the pancha system and reliance on a magistrate in lieu of the police during a criminal investigation may seem time consuming and inefficient, not to mention insulting. It is essential that the searches conducted by a police officer should be done as far as possible, by observing the provisions of.100 CRPC1973. That is, a police

[79] *Amit* v *State of Maharashtra* AIR 1960 Bom 488.
[80] *Ramakrishna* v *State of Bombay* AIR 1958 SC 104

officer making a search has to send forthwith copies of the reasons written by him for causing the search without a magisterial warrant to the nearest Magistrate having jurisdiction to try offence. Just as in magisterial search warrants the judicial act of a Magistrate interposes in the matter of issuing of search warrant, so also searches conducted by the police are taken to the knowledge of a magistrate.

Further, the pancha system is an innovative method of corroborating police evidence at little or no public cost crucial in a country like India with perpetually precarious finances but, at the same time, it leads to the involvement of the public in the enforcement of the criminal law. Though his participation in a search or line-up; he is called upon to play an active role in the administration of justice. This last collateral benefit in turn might prove to be of interest in eradicating the police lawlessness in law enforcement in India.

CHAPTER 4

Scientific Methods And Right Against Self-Incrimination

As science has outpaced the development of law or at least the laypersons understanding of it, there is unavoidable complexity regarding what can be admitted as evidence in court. Narco analysis is one such scientific development that has become an increasingly, perhaps alarmingly, common term in India. The term Narco Analysis is derived from the Greek word Narco (meaning "anesthesia" or "torpor") and is used to describe a diagnostic and psychotherapeutic technique that uses psychotropic drugs, particularly barbiturates, to induce a stupor in which mental elements with strong associated affects come to the surface, where they can be exploited by the therapist.Often endorsed as an antidote to “third–degree methods”, the narco analysis test is being increasingly used by the police in India to gather evidence in cases. Narco Analysis or the ‘truth serum’ test is a process by which a person is injected with barbiturates in order to induce a state of hypnosis and release repressed feelings, thoughts or memories. This semi-conscious state is said to facilitate interrogation. Narco Analysis is performed in a hospital under the supervision of a psychoanalyst and anesthetist. The interrogation function of the police is delegated to the psychoanalyst who is provided with a detailed questionnaire. These tests have been performed on suspects in a number of cases since 2000 maps the brain to reveal 'guilty knowledge.'

The brain-mapping is done to interpret the behavior of the suspect and corroborate the investigating officers' observation and the suspect's statements. During such a process, forensic experts apply unique technologies to find out if a suspect's brain recognizes things from the crime scene that an innocent suspect would have no knowledge of. In a nutshell, experts say the brain fingerprinting analyst-- as the brain-mapping is also called -- matches information stored in the brain with information from the crime scene. Studies have shown that an innocent suspect's brain would not have stored or recorded certain information, which an actual perpetrator's brain would have stored. During the test, the accused is first interrogated to find out whether he/she is concealing any information.

Lie Detector or A polygraph instrument is basically a combination of medical devices that are used to monitor changes occurring in the body. As a person is questioned about a certain event or incident, the examiner looks to see how the person's heart rate, Blood Pressure, respiratory rate and electro-dermal activity (sweatiness, in this case of the fingers) change in comparison to normal levels. Fluctuations may indicate that a person is being deceptive, but exam results are open to interpretation by the examiner.

However, the narcoanalysis, brain-mapping test, lie Detector has been criticised for its unreliability. Scientific studies demonstrate that the test is not foolproof and even induces confessions from innocent persons, as the subject is in a highly suggestible state and prone to give false or misleading answers to questions that may be improperly framed. Research suggests that these tests are ineffective on individuals who are determined to lie, as they are usually still able to lie even when drugged. Now a question arises whether narco analysis test infringe against constitutional right against self-incrimination.

Impact on the right against self-incrimination

Article 20(3) of the Indian Constitution states that "No person accused of an offence shall be compelled to be a witness against himself". It operates as a protection against testimonial compulsion. Section 161(2) of the Indian Criminal Procedure Code (CRPC) provides a similar protection to the accused. It provides that a person is bound to truly answer all questions while being examined by the police except those that "would have a tendency to expose him to a criminal charge or penalty…" The protection against self-incrimination is available to both – accused persons and suspects who have not been charged with the commission of an offence.

The application of Narco Analysis test etc. involves the fundamental question pertaining to judicial matters and also to Human Rights. The legal position of applying this technique as an investigative aid raises genuine issues like encroachment of an individual's rights, liberties and freedom. In case of **State Bombay** v**. Kathegalu**[81], it must be shown that the accused was compelled to make a statement likely to be incriminated of himself. Compulsion means duress, which includes threatening, beating or imprisonment of a wife, parent or child of a person. Thus where the accused makes a confession without any inducement, threat or promise art 20(3) does not apply. The rationale informing this was that the framers of the Constitution could not have intended to burden the criminal justice system with obstacles to investigation.

Informed consent is intrinsically linked to the exercise of the right against self-incrimination. In **Ramchandra Ram Reddy** v **The State of Maharashtra**[82], the Bombay High Court examined the issue of "whether requiring the accused to undergo these tests against his will would amount to compelling him to be a witness against himself". The Court concluded that "…such [a] statement will attract the bar of Article 20(3) only if it is inculpating or incriminating to the person making it. Whether it is so or not can be ascertained only after the test is administered and not before." Further, the Court was of the view that there are sufficient safeguards under the CRPC, the Indian Evidence

[81] 1961 AIR SC 1808
[82] MANU/MH/0067/2004

Act and the Constitution to prevent the admission of an incriminating statement in a court of law. In **Smt Selvi** v. **Karnataka**[83] The Karnataka High Court took an extremely narrow view of "compulsion" and held that the only pain caused is from the injection prick and that there is, therefore, no compulsion.

The Madras High Incite in **Dinesh Dalmia** v**. State of Madras**[84] held that subjecting an accused to undergo such scientific tests would not amount to breaking his silence by force. He may be full to the laboratory for such a test against is quite voluntary. Therefore, such administer does not amount to compelling witness to give evidence against him. When the human rights activist adopt third degree methods to extract information from the accused, it is high time the investigating agency took recourse to scientific methods of investigation.

The Bombay High Incite in Abdul Karim Telgi case held that "certain physical tests involving minimal bodily harm" like narco analysis test and brain mapping does not violate Art. 20(3) and did not compromise the constitutional protection against self-incrimination. The vital point is that the confession or statement made during narco analysis is not admissible as evidence in law, and that is the reason why the protection against self-incrimination under Art 20(3) are not breached. In the above-mentioned case Bombay High Incite seems to have held that narco analysis is permissible because it involves "minimal bodily harm", which implies that all such methods of extracting information that inflict minimal bodily harm are with permission permissible

In effect, by classifying the concerns relating to consent as "premature", the High Courts failed to appreciate the problematic aspects of an involuntary statement made under a state of unconsciousness. Consent of the subject is a non-issue for the judges. The court's ruling has completely obliterated the constitutional protection by essentially holding that the accused does not have the right to remain silent.

Firstly, administration of the drug against the subject's will amounts to compulsion, defined in the English Law Dictionary to mean "…[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." Secondly, the evidence gathered based on the results of the test can be admitted as corroboratory evidence. Sriram Lakshman, a lawyer, rightly asserts that "[t]his is, arguably, a roundabout way of subverting the right to silence - acquiring the information on where to find the weapon from the subject when, in his right senses, he

[83] 2004(7) KarLJ 501
[84] (2007) 8 SCC 770

would not turn witness against himself." Finally, while the results of the narco analysis tests conducted may not be admitted in court, the broadcast of the test conducted on a suspect in a fake stamp paper scam, Abdul Telgi, for instance, has created a prejudice and vitiated the guarantee of a fair trial.

Right to life and personal liberty

It is also argued that subjecting persons to such intrusive tests against their will is a violation of their right to privacy and amounts to torture. The right to privacy is not expressly mentioned in the Constitution, but falls within the ambit of the 'personal liberty' guaranteed under Article 21 of the Constitution.

Narco Analysis arguably falls within the scope of Article 21 by virtue of the invasion of the body and mind, which constitutes an invasion of privacy. The test directly intrudes on the mental processes of the subject, who lacks control over the questioning. There is a risk that the unconscious mind may reveal personal information that is irrelevant to the investigation. It is therefore imperative to establish standards of confidentiality and other safeguards, as privacy can be violated only by "procedure established by law". No such safeguards exist in India and therefore narco analysis particularly if performed without consent amounts to a violation of privacy.

Regrettably, in **Rojo George** v**. Deputy Superintendent of Police**[85]The Kerala High Court disagreed and held that narco analysis test does not amount to deprivation of personal liberty or intrusion into privacy". Notably, the Court did not substantiate its position and declined to address the intrusion into mental privacy but narrowly restricted the scope of privacy to bodily integrity. The Court also rejected the contention that narco analysis can be potentially hazardous and can violate the right to health.

As narcoanalysis involves the involuntary injection of mind-altering drugs into one's body, there necessarily arises a question of whether this may constitute torture. Doctors cannot be a party to the "infliction of mental or physical trauma" nor aid or abet torture, as per the Code of Medical Ethics.

The most commonly cited definition of torture is found in Article 1(1) of the United Nations Convention against Torture (CAT). Mental suffering is a component of this definition. In the narco analysis context, this suffering is (1) intentionally inflicted with the purpose of obtaining a confession (2) at the instigation of a public police official. Thus the narcoanalysis test clearly falls within these

[85] 2006(2)KLT197

boundaries of torture as defined here. Unfortunately, there is no such definition of torture under Indian law and the country has not yet ratified the CAT.

The United Nations Committee against Torture, while assessing France where truth serums are used in criminal investigation, condemned the use of drugs to extract information, as "although the objective is to lay bare the truth, the truth cannot be sought by any means whatsoever".

While the courts in India have dispensed with the requirement of consent of the subjects, they have also declined from exercising judicial oversight over the conduct of the test. In the Rojo George case, the Kerala High Court held that narco analysis does not require judicial sanction because it is a "recognised test for an effective investigation." In the Selvi case the Karnataka High Court erroneously conflated the conducting of the test with the collection of evidence, which squarely falls within the investigation function of the police.

Conclusion

Narco Analysis tests severely impact the right against self-incrimination and have the potential to impact the fairness of a trial. They foster laxity in the investigation standards of the police who may increasingly rely on the seemingly facile nature of the test.

Unfortunately, the lack of a clear judicial opinion on the issues of consent and violation of right against self-incrimination makes it difficult to determine the exact legal position of narco analysis in India. There is consensus among the High Courts that narco analysis may be used as an investigative tool only and not as a source of evidence. This is of little solace, however, due the fact that the process remains unregulated and is a threat to fundamental rights. The Indian Supreme Court is poised to address the issue in the Krishi Bank case. Until then, the tests are likely to continue despite the many problems relating to its use.

CHAPTER 5

Procedural Similarity And Other Provisions

The Constitutionality of taking thumb impressions, or foot prints and handwriting of a person accused of an offence for the purpose of comparison with his proved thumb impressions or handwriting, etc., is coming increasingly for question. So it is worthwhile to examine the law pertaining to this aspect in some detail. The provision relating to taking of thumb impressions and handwriting etc., are contained in the Identification of Prisoners Act, 1920 and the Indian Evidence Act, 1872. The taking of finger-impressions, foot marks and measurements of the body of an accused person or convicted persons, can be found to be of use for tracing habitual offenders. The advancement pertaining to this branch of investigation, has been a gradual growth and now the whole methodological system of classifying individual offenders for purpose of identification has reached new heights of usefulness and perfection, In India Section 4 of the Identification of Prisoners Act, 1920, authorizes a police officer to take measurements (including finger and footprint impressions) from any person arrested for an offence punishable with rigorous imprisonment for a term of one year or upwards[86]. Section 5 of the same Act gives power to a Magistrate to direct any person to allow his measurements, or photograph (including finger and footprints impressions) to be taken for purposes of any investigation or proceeding under the Code of Criminal Procedure[87], the second part of Section 73 of the Indian Evidence Act also empowers the court to direct any person present in the court to give his finger impressions for the purposes of comparison by the court[88].

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[86] Section 4 of the Identification of Prisoners Act reads: Any person who has been arrested in connection with an offence punishable with rigorous imprisonment for a term of one year or upwards shall if so required by a police officer, allow his measurements be taken in title prescribed manner.

[87] Section 5 of the Identification of Prisoners Act, 1920 reads-If a Magistrate is satisfied that, for the purposes of any investigation or proceeding under the Code of Criminal Procedure, 1898,(5 of 1898). it is expedient to direct any person to allow his measurements or photograph to be taken, he may make an order to that effect, and in that case the person to whom the order relates shall be produced or shall attend at the time and place specified in the order and shall allow his measurements or photograph to be taken, as the case may be, by a police officer : Provided that no order shall be made directing any person to be photographed except by a Magistrate of the first class : Provided further, that no order shall be made under this section unless the person has at some time been arrested in connection with such investigation or proceeding.

[88] Section 73 of the Indian Evidence Act reads: In order to ascertain whether a signature, writing or seal is that of the person by whom it purports to have been written or made, any signature, writing or seal admitted or proved to the satisfaction of court to have been written or made by that person may be compared with the one which is to be proved although that signature, writing or seal has not been produced or proved for any other purpose... The court may direct any person present in court to write any words or figures for the purpose of enabling the court to compare the words or figures so written with any other words or figures alleged to have been written by such person. The Section applies also, with any necessary modifications, to finger impressions.

A view is taken with regard to Section 73 of the Evidence Act that a court alone is enabled by this section to compare the words or figures or thumb impressions made or written in the presence of court with any words, figures or thumb impressions shown to be of the concerned person. This is the view taken in some decided cases. But a court can more effectively grid usefully compare the words and figures, etc., with words and figures proved to have been made by the person concerned, by taking the aid of an expert.[89] This appears to be necessary if we consider the difficulties involved in comparing his specimen handwriting with the handwriting said to be the person whose handwriting is in question.

In the United States there are three different views reflected in the opinion of the courts as to the applicability of the privilege to physical and medical examination of the accused.

Under the first view, the privilege protects against compulsory oral testimony and production of documents exclusively on the basis that the privilege traditionally applied only to these forms of testimonial compulsion. No other compelled conduct, however, unlawful or inadmissible on other grounds is held to be within the protection of the privilege. In jurisdiction following this view, the accused without infringing the privilege may be fingerprinted or photographed, may be physically examined, may have his blood or bodily fluids taken for tests without his consent, may be required to give a specimen of his handwriting, may be compelled to demonstrate something and may be forced to participate on a public line up, to stand up for identification, to put on articles of clothing or to display a Scar or limb[90].

The second view draws a line between passivity and enforced activity on the part of the accused. He may be compelled to submit his body but cannot be compelled to actively cooperate for them; he is made "to be a witness" or to give evidence. According to this view the prisoner could, for example, be required to submit finger printing and the exaction of blood. He could not be required to aid in re-enacting the crime or to give a specimen of his handwriting.

According to the third view, for which only scattering support can be found, any evidence secured by compulsion from the prisoner, whether by requiring him to act or by his passive submission is within the privilege. The first view stated above is consistent with the practical needs, origin, history and policy of the privilege.

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[89] Section 45 of the Indian Evidence Act, 1872, makes the opinion of an expert who is skilled to compare hand-writing etc., relevant. See Lilly V. Vijayalakshmi, 1985 Cr.L.J 696 (Ker).

[90] McCormick, Evidence 263 (1954).

The third view is to be rejected forthwith because it ignores these factors and partly because it erroneously, places emphasis on compulsion rather than upon the testimonial aspect of the protection against self-incrimination. This interpretation fails to consider that two elements, instead of one, are necessary to privilege i.e., compulsion and testimony. There is no substantial divergence between the first view and the second whereas both exclude the body of the accused as such from the coverage of the privilege, the first permits compulsion to secure the active co-operation of the accused in his examination, and the second would not. The first view just stated, as well as, to the same extent the second, does not take into consideration the fact that the bodily examination of a person may be so painful or disgraceful that offends the human conscience. As seen above, one of the main reasons for the privilege which discourage torture is the promotion of long-time efficiency in criminal investigation. There is danger that the oral evidence' obtained under torture or pressure may be false. No such argument is applicable to obtaining physical evidence through the physical or medical examination of the accused. The pain involved in extracting evidence from within the body would not change the genuineness of the thing so obtained. The evidence obtained is real evidence and no question of inefficiency on the part of the police to find the real evidence (as distinguished from non-genuine and unreliable evidence) arises in such cases. The above analysis, however, does not rule out the possibility of denying particular types of bodily examination on other grounds than the privilege against self-incrimination. Even though an examination may not violate the privilege as not amounting to testimonial compulsion, it may have to be disallowed because of other policy considerations. Handwriting differs from finger prints in the sense that handwriting can only be obtained by the active co-operation of the accused, where a fingerprint can be taken even though the person is passive. It may be argued against compelling the accused to give his handwriting that writing is not a purely mechanical act, because it requires the application of intelligence and attention and in a sense the accused is compelled to create evidence against himself. the answer- to this reasoning is that the purpose of obtaining handwriting is not to determine the sense of matter written but to secure a physical comparison between the written specimen and other handwriting. This is the same purpose as in fingerprinting. In support of the admissibility of handwriting obtained by compelling the accused Prof. Inbau states**:**

(A) specimen handwriting, obtained for the comparison with a questioned document can logically be considered as nothing more than mere physical. It differs very little in principle, from a fingerprint impression secured by compulsion for purposes of comparison with a fingerprint found at the scene of crime. The purpose for which it is desired is not to make study of the handwriting to determine the mental attitude or character of the accused as bearing upon his guilt or innocence....but merely to observe whatever physical habit-formed peculiarities may be present in a specimen which will serve

as identification data....For these reasons a specimen of handwriting should not be confused with incriminating documents as such-that is any inculcator writings in the possession of the accused, the production of which are sought by process against him as a witness. In the latter case the accused would be at any time liable to make oath to the authenticity or origin of the articles produced and consequently compelled to testify. In other situations, however, only the physical characteristics of the handwriting are of any significance, and it would be immaterial that the production of a specimen of handwriting requires any "creation of positive act" on the part of the accused..... Moreover, policy considerations certain support the view that compulsory handwriting specimens are outside the coverage of the privilege[91].

There is no danger of an innocent person being convicted by requiring him to give his handwriting, since it will be different from all others even though he may have to write in different ways. In fact at times it may be of advantage to the accused to give his handwriting to prove his innocence.

In view of the earlier mentioned observation of Prof. Inbau and of the fact that there is no danger of an innocent person being punished, it is suggested that enforced yielding of the handwriting by the accused does not infringe the privilege against self-incrimination.

Identification of foot prints and shoe marks may occasionally help in investigation. In regard to footprints evidence, a distinction can be made between**:**

(i) forcibly taking the shoes of the accused from him for the purpose of comparing them with the prints or tracks at the scene of crime, and
(ii) compelling him to place his feet into the previous tracks so that a comparison may be made.

Regarding this aspect in the United States of America, where guarantee of "due process" is in vogue, it is felt that taking fingerprints does not violate the privilege against self-incrimination. Hug Evander Willis poses[92] the taking of fingerprints a violation to have been answered in negative:

(T)he accused does not exercise a Volition or give oral testimony. He is passive. He is not giving the testimony about his body, but giving his body. Prof. Willoughby[93] dealing with compulsory taking of fingerprints for evidence states as follows**:**

[91] Fred Inbau, *Self-Incrimination*, 46-48 (1950).
[92] Hug Evander Willis, Treatise of The Constitutional Law of United States, 522 (1936).
[93] Willoughby, on The Constitutional Law of US, 1172, para 1719 (2nd ed. 1979).

(T)he accused right to immunity from self-incrimination is not violated when he is compelled to exhibit himself or a part of his body to the Jury or to allow the record of his fingerprints being taken. In America there is almost unanimity of opinion that compulsory taking of fingerprints or footprints does not violate privilege against self-incrimination[94].

Holding the compulsory taking of fingerprints from the accused to be valid, the court. in **People** v. **Swallow**[95],

(N)o violation- that is, no act of willing on the part of the mind of the defendant is required. Fingerprints of an unconscious person, or even of the requirement that the defendant's fingerprints can be taken there is no danger that the defendant will be required to give false testimony. The witness does not testify – the physical facts speak for themselves, no fears, no hopes, no will of the prisoner to falsify or to exaggerate could produce or create a resemblance or her finger prints or change them in one line, and therefore there is no danger of error being committed or untruth told.

In **US** v. **Kelly**[96], the Federal Court of Appeals also held that taking fingerprints by force did not violate any of the defendant's constitutional rights, even in the absence of state or a Federal statute authorizing them to be taken. The court stated**:**

Any restraint of the person may be burdensome. But some burdens must be borne for the good of the community, the slight interference with the person involved in Fingerprinting seems to us one which must be borne in the common interest

The court also pointed out that as a humiliation finger printing could never amount to as much as the publicity attending a sensational indictment to which innocent people may have to submit. Thus the American cases are practically unanimous to the effect that compulsory taking of finger prints or shoes or taking of measurements or handwriting samples from the accused does not infringe the privilege against self-incrimination.

JUDICIAL TREND IN INDIA

An accused person can be compelled to place his feet into the previous tracks at the investigation

[94] See Cases cited in Annotations: Fingerprints as Evidence, 16 A.L.R 370 (1922), Annotations; fingerPrints as Evidence, 63 A.L.R 1324 (1929).
[95] 165 N.Y. 915 (1917).
[96] 55 F. 2d. 67(1937).

stage under Sections 4 and 5 of the Identification of Prisoners Act. However, no provision in the Indian Evidence Act which gives such a power to the court at the trial stage. Section 73 of the Evidence Act only mentions finger impressions and not foot prints. The weight of authority in USA supports the view that compelling a person to place his foot into a foot print does not violate the

privilege, for the reason that the accused in such instances is "not testifying as a witness or delivering any testimonial evidence". As a matter of substance there is no difference between finger impressions and foot prints, and the observations made with regard to the former also apply to the latter.

Opinion is divided among the High Courts in India with regard to the question whether an accused person can be asked to give specimen handwriting or his finger prints, thumb impressions by order of a court under Section 73 Evidence Act, constituted a compelled testimony. Before the Supreme Court decision in Oghad case, there had been a conflict of judicial opinion amongst the various High Courts [97] as to the question whether compulsory taking fingerprints or specimen writing from the accused violated Article 20(3) of the Constitution. In **RamSwarup** v. **State**[98], the accused was directed by the Sessions Judge to give his specimen writing under Section 73, Evidence Act, for being compared by an Expert. This order was challenged on the plea that the direction to the accused to furnish his specimen writing amounted to compelling him to furnish evidence against himself and therefore was hit by Article 20(3) of the Constitution. It was held that the direction from the court under Section 73 of Evidence Act was not hit by the provisions of Article 20(3) of the Constitution and therefore the accused could not refuse to give his specimen writing when ordered by the court to give it. James J, held that' if the accused refuses to do so the court would be entitled to draw an appropriate presumption against him under Section 114 of the Evidence Act The court noted the observation of the full bench decision of the Rangoon High Court .

[97] Some of the cases which upheld compulsory taking of finger impressions of the accused are: *Pakhar Singh* V. *State*, AIR 1958 Punjab 294; *Mahal Chand* v. *State,* AIR 1961 Cal.123.
[98] AIR 1958 All. 119.(Ragubar Dayal and James J.J.,).

Emperor V. **Nag Tun Hlaing**[99]:

(T)he ridges of his thumb are not provided by him any more than the features of his countenance are provided by him; all that he is asked to do is to display these ridges; for better scrutiny the ridges are inked over and an impression is made on a piece of paper.

The Mysore High Court in **Re Govinda Reddy**[100], held that even if the Sub-Inspector of police took thumb impressions of the accused forcibly on a piece of paper during the course of investigation it could be compared by a person sufficiently experienced in the art of photograph without holding any degree or diploma and could be admitted in an evidence without being hit by Article 20(3) of the Constitution as id did not amount to testimonial compulsion. The protection conferred by Article 20(3) applies to a compelled production of document in the possession of the accused. The Calcutta High Court in **Shailendra Nath Sinha** v. **State**[101]**,** field that a direction to take the specimen writing of a person accused of an offence amounted to a direction compelling the accused to give evidence against himself in disregard to his right guaranteed by Article 20(3); while the Allahabad High Court took the another view[102], and observed that**:**

No presumption of compulsion can be raised in every case where the admission of evidence has not been expressly concluded by statute. To assume compulsion in cases where recovery of incriminating article is made during the course of investigation would be brushed aside as very strong circumstantial evidence and this would not have been the intention of the framers of the Constitution. Thus the accused's thumb impression taken by the police for comparison of the expert as that of the accused can be put in evidence and is not hit by Article 20 (3).

Likewise the Calcutta High Court in **Mahal Chand** v. **State**, held that obtaining a thumb impression from the accused did not involve volition.[103]

The Madras High Court ranged simultaneously between both the views. It was held in **Rajamuthukoil Pillai** V. **Periyasamy**[104] that the Magistrate's direction to the accused to give his thumb impression was violative of Article 20(3) of the Constitution. The accused therefore cannot be compelled to give his thumb impressions as directed by the Magistrate. While the same Judge who

[99] AIR 1924 Rang. 115 (FB).
[100] AIR 1958 Mys. 1509; 1958 Cr.L.J 1489. 30.
[101] AIR 1955 Cal.247.
[102] *Sunder Singh* v *State* AIR 1958 ALL 367.
[103] AIR 1961 Cal 123
[104] AIR 1956 Mad. 632

decided **Rajamuthukoil Pillai's case** dissented in In **Re Sheikh Muhammad Hussain**[105], and said that where the accused a postman was prosecuted under Section 467 and Section 109 of the Penal Code for having forged the thumb impression of the payee by putting his on thumb impression on money order form to whom actually no payment was made. It was for him to prove that he had paid the amount covered by money order to the payee.

Thus the thumb impression taken by the police on a slip of paper which the police later produced in the court could not be said to be testimonial compulsion, and it is admissible in evidence.

In **Balraj Rhalla** v. **Ramesh Chandra**[106]It has been said that where thumb-marks of under-trials or prisoners on conviction are taken under Section 5 and 6 of the Identification of Prisoners Act, 1920. These are not taken "to use them in evidence but to have a record of criminals undergoing trial or who had been convicted of a criminal offence. It cannot, therefore be said that by taking the thumb impressions the persons concerned are being compelled to be witnesses against themselves. The court further has observed that where the accused refuses to give the impressions of thumb and toes in compliance with the order of the court, he cannot be compelled to do so, and the only remedy open to the prosecution is to urge later on before the court that a presumption in accordance with the law be draw against him.

The Rajasthan High Court[107], however, has made a distinction between obtaining a specimen signature and obtaining a thumb impression and the distinction lies on the point that the former is obtainable with co-operation of the accused while the latter does require no co-operation. This distinction does not appear to be of existing character; and, therefore, no distinction can be made between the specimen writing obtained by the police at their own and at the direction of the Magistrate. Where an order was passed by the Magistrate whereby the investigating officer was allowed to take specimen writings and signatures of the accused person, the order was held to be violative of Article 20 (3) of the Constitution as "to be a witness against himself" is not confined to oral testimony; and the protection extends in and out of the court. To get the specimen of handwriting by non- voluntary positive act of the accused thus falls within the prohibition of Article 20(3) of the Constitution.

Another trend of decisions is to hold the Magistrate's direction regarding the taking of specimen handwriting, thumb impressions, etc., as constitutionally valid. A direction to an accused to give his handwriting, fingerprints and impressions, foot and palm prints and specimen of hair, are not act of

[105] AIR 1957 Mad. 47
[106] AIR 1960 All.157.

[107] *Badri Lal* v. *State* AIR 1960 Raj. 189

testimonial compulsion.

M.P.Sharma's[108] case was hoped to settle the scope of Article 20 (3) but it failed in its purpose. The contrast drawn between seizing a thing from an accused person and asking him voluntarily to produce it, and the statement that every positive volitional act which furnished evidence is testimony, and that testimonial compulsion meant coercion which produced the positive volitional evidentiary acts of the person, as opposed to the negative attitude of submission and silence produced unexpected results and gave rise to sharp cleavage of judicial opinion. On the one hand courts held that to compel a person for specimen handwriting etc., was an act of compulsion to be a witness against himself in violation of Article 20(3), so that Section 74 of the Indian Evidence Act which enabled the courts to give directions to any person to write words or figures for the purposes of comparison was void in relation to an accused. The same view is evident in relation to fingerprints under the direction of the court under Section 73 of the Evidence Act, or inspite of the accused's resistance. It is well worth considering the observation of Ramaswami Gounder, J., In re **Palani Goundan**[109]. The learned Judge said**:**

There is one aspect of the matter which calls for mention, namely, the taking of the signature or the thumb impression of an accused person for the purpose of being compared with the signature or the thumb impression of a questioned document with a view to establish offences such as forgery, criminal breach of a trust etc. It appears to me, that the taking of thumb impressions or the signatures of the accused does not stand on a different from the seizure of documents or articles or other facts of evidence from the custody of the accused.... Though he cannot be compelled to produce such evidence, it can be taken or seized from him. That is the act of another to which he is obliged to submit and not the "positive volitional evidentiary act of the accused" to use the language of the Section court.

Section 73 of the evidence act Central Act 33 of 1920, enables the police officers to take what is called the measurements of the accused which include fingerprints and footprints and other impressions. That being so, it seems to me the finger prints or the footprints of the accused is a fact of evidence what he carried with him, and the police officer who is authorized by the said Act, may seize that impression by taking out the same on a piece of paper.

The conflict on the point of specimen handwriting, finger prints, footprints and the like was resolved

[108] AIR 1954 SC 300 at 304

[109] AIR 1957 Mad. 546

by the Supreme Court in State of **Bombay** v. **Kathikalu Oghad**[110]**.** Dominated by the law and order mood operating within the framework of analytical positivism, the Supreme Court of India was sensitive only to the need to reduce the right against self-incrimination to an empty edifice. In that case the police obtained three specimen handwritings from the accused during the course of investigation in order to show that the chit exhibit was in the handwriting of the accused. The respondent was charged along with another person under Section 302 read with Section 34 of Indian Penal Code; as also under Section 19(c) of the Indian Arms Act, 1879. The plea of the accused was that he was forced by the Deputy Superintendent of Police to give writings for comparison with the admitted handwritings. In this case the question before the Supreme Court was whether Article 20(3) of the Constitution was violated by**:**

(a) compulsorily obtaining of specimens of handwriting from the accused by police for the purpose of comparison during investigation;

(b) giving a direction by court to an accused person present in the court to give his specimen writing and signature for the purpose of comparison under the provision of Section 73 of the Indian Evidence Act.

(c) compulsory obtaining of the impressions of the palms and fingers of the accused by the investigating police officer in the presence of a Magistrate. The court held that the Article was not violated in any of the above situations. Chief Justice B.P. Sinha speaking for majority stated**:**

When an accused person is called upon by the court or any other authority holding an investigation to give his finger impressions or signature or specimen of his handwriting he is not giving any testimony of the nature of a personal testimony. The giving of a 'personal testimony' must depend upon his volition. He can make any kind of statement or may refuse to make any statement. But his finger impression or handwriting, inspite of efforts at concealing the true nature of it by dissimulation cannot change their intrinsic character. Thus giving of finger impressions or of specimen writing or of signature by an accused person though it may amount to furnishing evidence in large sense, is not included within the expression to be a witness'[111].

The majority judgment holds that neither the taking of specimen handwriting nor thumb impressions nor documents was included in the Constitutional guarantee for the following reasons**:**

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[110] AIR 1961 SC 1909
[111] *Id at 73.*

(a) The Constitution makers though they may have intended to protect an accused person from self-incrimination, in the light of English law on the subject they could not have intended to put obstacles in the way of efficient and effective investigation into crime and bringing criminals to Justice.

(b) It must be assumed that they were aware of the existing law i.e., Section 73 of the Evidence Act which permits the taking of thumb impressions or specimen handwriting or Section 5 and 6 of Identification of Prisoners Act under which a prisoner can be compelled to permit his photograph or measurement to be taken.

(c) Thumb-impressions, handwritings or documents are not personal testimony that they do not come within the new meaning of the phrase 'to be witness'. Finger impressions or handwriting cannot be changed; while personal testimony, i.e., testimony given on the basis of personal knowledge depends on volition in the sense that the accused can make any kind of statement[112]

Though there may be something to be said against" reasons; 'a' and 'b' seems to be more acceptable. The new meaning given to the phrase to be witnesses is not without defects. It is true that one of the essential qualities of a witness is to have personal knowledge of the facts in respect of which he testifies but a person does not become any the less witness because he gives his specimen handwriting or finger impressions or produces a document. It is said that the giving of personal testimony must depend upon volition so that it can be changed but the intrinsic character of handwriting or fingerprint impressions cannot be changed. One may ask, cannot the meaning of a document be changed by alteration? Does not the question whether intrinsic character of handwriting is changed or not depend upon successful dissimulation and evidence of the handwriting expert? A dissimulation may be so successful as to be no dissimulation at all. And does not all this after all depend on volition?

The court held that an accused person cannot be said to have been compelled to be a witness against himself simply because he made a statement while in police custody, without anything more. In other words, the mere fact being in police custody at the time when the statement in question has made would not, by itself, as a proposition of law, lends itself to the inference that the accused was compelled to make the statement, though that fact, in conjunction with other circumstances disclosed in evidence in a particular case, would be a relevant consideration in an inquiry whether or not the accused person had been compelled to make the impugned statement. The court even suggested that there should be tell-tale marks on the accused by the police, compulsory obtaining of handwriting

[112] *Id at 73.*

from the accused for comparison as distinguished from obtaining his statement with regard to personal knowledge of the facts in issue did not violate Article 20(3) of the Constitution. When the accused person was called upon by the court or any other authority holding an investigation to give his finger impressions, he was not giving any testimony in the nature of "personal testimony" which must depend, upon his volition, and therefore Article 20(3) was not violated[113].

It may be stated against this view that writing is not a purely mechanical act; it requires application of intelligence and attention. A person cannot write unless he has 'personal knowledge' of the language. It may be a mechanical act for a person who is well versed in language but not for a person who is not and he must exercise a conscious process of mind. Whereas finger impressions can be obtained without active cooperation of the accused; handwriting can only be attained when the accused actively co operates. Depending upon the desire of a person, he may write in different ways without in any way commenting on the wisdom of the conclusion of the court. With regard to handwriting it would have been better if the court had given its verdict in the light of this distinction between handwriting and finger impressions, instead of mechanically grouping the two. It may be stated in support of the court's conclusion that the purpose of obtaining handwriting is not to determine the sense of the matter written but to secure a physical comparison, between the written specimen and other writing. It may be noted that some of the High Courts which upheld compulsory taking of finger impressions of the accused, had rejected forcing the accused to write for the purpose of comparison.

If some of the conclusions of the court are detached from the reasoning on which they are based, the results may not be happy. For instance, the court states to be a witness means "imparting knowledge in respect of relevant facts by an oral statement or a statement in writing, made or given in court or otherwise". This raises the question "what about dumb witnesses who cannot speak but explain certain things by indication of his body? What about the detector tests in which the accused does not speak but test records the physiological reactions of the accused through the operation of his mental faculties? In these examples, the acts are certainly volitional and are based on the personal testimony of the accused. They would certainly be covered by Article 20(3) on the basis of the reasoning of the court. At some places, it is difficult to understand the reasoning of the court. For instance, it is stated at one place that a testimony by accused person may be said to have been self-incriminatory, the compulsion of which comes within the prohibition of the Constitutional provision, it must be of such a character that by itself it should have the tendency of incriminating the accused, if not also of actually doing so. In other words, it should be a statement which makes the case against the accused person at

[113] *Id at 73.*

least probable, considered by itself.[114] A specimen handwriting or signature or finger impression from the accused certainly does have a tendency to incriminate him and may in fact incriminate him in those cases in which he is a real offender, though it is true that by itself they will be of no use unless compared with other specimens. However, this may apply to oral testimony also. An oral statement by the accused may have tendency to inculpate him though by itself considered without other circumstantial evidence that oral statement may not be sufficient to convict him.

Consider the following example: Suppose a person is found dead and 'A' is the accused. He is asked the following questions:

Were you at the spot where the dead body was found?

Did you have a gun? Did you shoot the victim?

The answer to the first question may have a tendency to incriminate him, though by 'itself' it may not be sufficient to give rise to any inference against him. It is the consideration of these answers, namely question 2 and 3 or other circumstantial evidence that may convict him. In this respect, the concurring opinion suffers to a greater extent than the majority opinion. It was argued in the majority judgment that though the giving of specimen handwriting or finger impressions may amount to being a "witness" it is not being "a witness against himself". Finger impressions or handwriting, by themselves it was said, do not lead to incriminating any one. There is a suggestion to this effect in the majority judgment also. Such a distinction between witness' and "witness against himself is futile. Evidence cannot be considered in isolation what is 'against himself is to be understood in the context of the case.

The essential question is not who is a witness but what does a witness do? And a witness furnishes evidence. The majority judgment also seeks to derive support for its definition of 'witness'; from Section 139 of the Evidence Act according to which a person does not become a witness by the mere fact that he was produced a document - the meaning of the word 'witness' would be a person who testifies from personal knowledge. It was said in Sharma's case that this Section was merely meant to regulate the right of cross examination not to define the word 'witness'. This interpretation was rejected here by the majority judgment without any satisfactory reason. A person may not become witness because he produces a document but he does not cease to be a witness if he produces one. This is the acceptable interpretation of the words "unless he becomes a witness" at the end of the

[114] *Id at 73.*

Section. The meaning given to the phrase "to be a witness" in Sharma's case is, therefore, more acceptable. Under Section 139 of the

Evidence Act: a witness may not be asked to produce a self-incriminating document and an accused person who may not be asked to be a witness against himself should be entitled to at least as much protection.

The words "every positive volitional act which furnishes evidence is testimony" appearing in Sharma case are not different in substance from the words "the giving of a personal testimony must depend upon his volition" appearing in the majority judgment in the Oghad case. The Sharma case was, however, differently interpreted by the different High Courts and the result was that conflict of judicial opinion arose amongst the various High Courts on the point. Some High Courts took the extreme view that compelling the accused to permit any bodily evidence to be extracted violated the privilege, including compulsion to permit a thumb impression to be taken.

On the other hand, a few High Courts made a distinction between physical evidence which could only to obtained without active co-operation of the accused and physical evidence which could only be obtained by his active co-operation and held compulsion as to the former to be as not involving the volition of the accused, but not compulsion as to the latter.

With the Supreme Court Judgment in Oghad case the High Courts decisions which go contrary to that decision stand overruled. Following the Oghad case the Kerala High Court in **Kumaran Nair** V. **Bhargavi**[115], held that the Magistrate was well within the competence in giving a direction under Section 73 of the Evidence Act to the husband to give his specimen signature for the purpose of comparison by an expert to enable him to form an opinion by comparison in order to decide in the interest of justice whether the letter was written by the husband or not.

The court concluded that by giving specimen handwriting he is not giving evidence against himself. It becomes an evidence against him only when after due comparison with it and formation of opinion it is ultimately found that the disputed writing is that of himself. Section 73 therefore does not offend because by giving a direction under Section 73 to give the specimen writing or signature the court does not compel him to be a witness against himself.

Very recently the Rajasthan High Court in Miss **Swati Lodhi** v. **State of Rajasthan**[116] held that a

[115] 1988 Cr.L.J 1000 at 1001 (Ker) (per S. Padmanabhan, J.).
[116] 1991 Cr.L.J 939 (Raj).

specimen handwriting or signature or finger impressions by themselves are not testimony at all, being wholly innocuous, because they are unchangeable except in rare cases where the ridges of the fingers or style of writing have been tampered with. They are only materials for comparison in order to lend assurance to the court that its inference based on other pieces of evidence is reliable. They are neither oral, nor documentary evidence but belong to the third category of material evidence which is outside the limit of testimony.

In the instant case the accused Rajkumar by mixing the narcotic drug in a coffee made Miss Swati to drink while she was unconscious he had a sexual intercourse with her without her consent. As a result she became pregnant which was confirmed by a doctor in December, 1936.

It has now been settled that a direction by a Magistrate requiring an accused person to give his specimen handwriting, signature, thumb impression, fingerprints or footprints to be used for comparison with some other signatures and the handwritings, thumb impressions etc., which the police may require in the course of investigation will not amount to compelling the accused to be a witness against himself .

IDENTIFICATION TESTS

Identity in simple words is establishing the sameness or individuality of a person. It is derived from Latin word 'idem' meaning the same. When an eye-witness to an occurrence does not know the name of a person committing a crime but claims that he can identify the person if he sees him, and the investigating officer suspects some one to have committed the crime, it is usual to arrange a test identification parade which may serve to test the suspicion of the investigating officer as also the capacity of the witness to identify the miscreant. Identification has two fold object: First to satisfy the investigating authorities before sending a case for trial to court, that the person arrested but not previously known to the witnesses was one of those committed crime, or the property concerned was the subject of such crime second to satisfy the court, that the accused was the real offender or the article was concerned with crime which is being tried. Identification proceedings are therefore, as much, in the interest of the prosecution as in the interest of the accused. Evidence of such identification is relevant under Section 9 of the Indian Evidence Act[117].

[117] Section 9 of the Indian Evidence Act reads: Facts necessary to explain or introduce a fact in issue or relevant fact or which support or rebut an inference suggested by a fact in issue or relevant fact, or which established the identity of anything or person whose
identity is relevant or fix the time or place at which any fact in issue or relevant fact happened, or which show

In **Re Naryana Singh, Amar Singh**,[118] a Division Bench of Madhya Pradesh High Court held as follows**:**

Identification parades are resorted to for testing the power or capacity of the witness to identify the person or thing they claim to identify. These are tests designed to eliminate false assertions as also to guard against honest mistakes. One who asserts that he had clearly seen the accused who thought unknown to him by name and face, was yet one whom he could pick out if he met again, is thus given a chance to prove his assertion in a test designed for the purpose. If he is able to do so, his assertion gets added weight and if he fails to do so cannot reasonably explain his failure, his assertion is considerably weakened. This ability or failure to do so by the identifying witness being facts establishing the identity of the thing or person are themselves made relevant facts and as such admissible in evidence (under Section 9 of Evidence Act) for proof of identity of the thing or person, as the case may be. The value of identification depends on two important factors, namely that the persons who identify an accused have had no opportunity of seeing him after the commission of the crime in question with which the suspect is put up for identification; and secondly that no mistakes have been made by the witness or the mistakes made by them are negligible. Photographs may also be used for the purpose of identification. The procedure to be adopted will be similar to that in case of natural persons. A number of photographs should be mixed up and the identifying . Witnesses should be asked to pick up the photograph of the person concerned in the offence. It is improper to give the photograph of the suspect to the witness and ask him whether that person was the offender. No value can be attached to identification if such procedure is adopted.

With regard to identification parade at the investigation stage there is no provision in statutory laws of India which provided for identification parade to hold. Thus it has been held that it is not necessary for the prosecution to hold an identification parade at the instance of the accused. Of course, if the prosecution turns down the request of the accused to hold an identification parade, there is danger of credibility of eye-witness being adversely affected at the trial stage. Therefore, as a rule of prudence the prosecution should hold the parade if the accused so requests. The Allahabad High Court stated that under Section 540 CRPC, 1898, a court had ample power to direct the holding of regular test identification in order that the witness veracity might be tested. However, the identification proceedings being in the nature of tests, no provision is to be found in the Code or even in the Evidence Act. Proceedings are 'records of facts which establish identity of anything or person and which may be relevant under Section 9 Evidence Act. The facts are to be proved according to law, and

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the relation of parties by whom any such fact was transacted are relevant in so far as they are necessary for that purpose.

[118] AIR 1965 M.P. 225

in the absence of such proof the identification proceedings are valueless. The facts if proved can be used both for purposes of corroboration as well as for contradiction.

Under Section 540 of CRPC, 1898 (now Section 311 CRPC 1973) the court may summon any person as a witness or examine any person in attendance before itself, but certainly it cannot direct the holding of a regular identification parade to test the veracity of a witness.

With reference to the trial stage, it may be mentioned that some of the cases which hold that a court cannot make an order for regular identification parade at the request of the accused also hold that when the accused challenges the credibility of prosecution witness the court may "in its direction, satisfy itself by asking the accused to stand among other persons, present in the court, and then call upon the witnesses who appear before the court to identify the accused and make a note of the result on the record. Therefore, the court in its discretion in the interest of Justice may examine the prosecution witnesses and call upon them to identify the accused and for this purpose mix the accused with other persons. This may be done under Section 165 of the Indian Evidence Act,[119] and Section 540 of the CRPC, 1898.[120] There is however, no statutory provision which empowers the court to require an accused to wear particular clothes, to grow a beard or to shave or to do some other positive act.

The question is whether an identification test is hit by the protective clause of self-incrimination that came up before the Allahabad High Court in **Ashrafi** v. **State**.[121] The appellant was convicted for the offence of dacoity with murder. His identification test was done before a first class Magistrate. It was contended that the identification test was inconsistent with the appellant right protected by Article 20(3) of the Constitution.

The Division Bench upholding the Constitutional validity of the deferred test held that the right of the appellant was not invaded. Thus, it was observed:

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[119] Section 165 of the Evidence Act reads: The Judge may in order to discover or to obtain proper proof of relevant facts, asks any question he pleases, in any form, at any time, of any witness, or of the parties about any fact relevant or irrelevant; and may order the production of any document or thing; and neither the parties nor their agents shall be entitled to make any objection to any such question or order, nor, without the leave of the court, to cross-examine any witness upon any answer in reply to any such question.

[120] Section 540 Cr.P.C., 1898 reads: Any court may at any stage of inquiry, trial or other proceeding under this Code, summon any person as a witness, or examine any person in attendance, though not summoned as 'a witness, or recall and re-examine any person already examined; and the court shall summon and examine or recall and re-examine any such person if his evidence appears to be essential to the just decision of the case (Section 311 CRPC, 1973 is a almost in identical terms).

[121] AIR 1961 All. 157.

(B)beards or clean-shaven faces furnish frequent cause for trouble, for sometimes in order to avoid recognition a bearded criminal after committing the crime gets himself shaved or vice versa. It is notoriously difficult to recognize a bearded man who has got himself shaved or a clean shaven man who has grown a beard. If therefore, the Magistrate comes to entertain good cause for the belief that the suspect has indulged in such a trick, it is open to him to defer the identification of the clean shaven until he has grown a beard of the proportionate size, or to get the bearded suspect shaved. No violation of Article 20(3) of the Constitution occurs if the Magistrate does so.[82]

The Punjab High Court stated in **Pakhar Singh** v. **State,**[122] that "the Constitutional immunity is not violated by compelling a witness to stand up and show his face for the purpose of identification". He can be ordered to disclose a tell-tale scar, for purpose of identification. Similarly finger prints, foot prints, photographs of the accused for the purpose of comparison with those found at the scene of the crime, do not lose their probative character, whether they have been obtained involuntarily or voluntarily.

One matter which may be particularly considered here is the legality of requiring an accused to be shaved or have his hair trimmed. The US Supreme Court held that requiring the accused to undergo a particular process, namely, to wear particular clothes, to grow a beard, or to shave or to do some positive act, does not infringe the privilege against self-incrimination. Thus it was held by the US Supreme Court in **US** v. **Holt**[123], that suspect could be made to don an item of apparel believed to be worn by a murderer[85.] Writing for the court Justice Holmes stated that "the prohibition of compelling a man in a criminal court to be a witness against himself is a prohibition of the use of physical or moral compulsion to extort communication from him not exclusion of his body as evidence when it may be material".

Likewise in **People** v. **Straus,**[124] the New York Supreme Court held that the accused could be required to shave his beard and to have his hair trimmed and this practice does not violate the privilege. Thus, without violation of the privilege against self-incrimination, the accused in America, generally speaking may be required to stand up, walk or assume various positions, to remove glasses, veil, visor or the like, to roll up on a sleeve to disclose tattoo marks etc.

In this context there is a point of significance in India. It may be socially disgraceful for a person who is in the habit of keeping a beard to shave it off, and this matter acquires importance in India in view

[122] AIR 1958 Punj. 294.
[123] 218 US 245 (1910).
[124] 22 N.Y.S 2nd 155 (1955).

of the requirement of a particular religious sect that its followers keep a beard. Whether the purpose is concealment, or not removing the beard or allowing one to grow will not amount to testimonial compulsion. Nevertheless, since the shaving of the beard may be socially disgraceful, it may be necessary apart from applying the privilege, for the court to determine whether the accused is trying to disguise himself before he is asked to remove the beard.

In India due to religious inhibition for certain communities not to shave the beard, it may frequently be necessary to take photographs of the accused immediately on arrest. It may be noted that in order to prevent misuse of photographs by police, it is necessary to have the photographs destroyed after the acquittal of the accused. Section 7 of the identification of the Prisoners Act provides for this. Further, a photograph must be properly verified or authenticated and shown to be accurate and correct, before it may be admitted into evidence. In 1994**,** the Supreme Court of India in **Kartar Singh** v. **State of Punjab,**[125] struck down Section 22 of the terrorists and Disruptive Activities (Prevention) Act, 1987 which permits the identification of an accused on the basis of his photograph which is to be held to have the same value as the evidence of a test identification parade. Justice S. Ratnavel Pandian speaking for a five Judge Bench held that "gross injustice to the detriment of the persons suspected may result due to Section 22 of the TADA Act".

The process of taking photographs of the accused by the police is not an infringement of Article 20(3), since testimonial compulsion is not involved in view of the fact that the photograph can be taken by the accused's passive submission and that he is not required to exercise his volition. No case has occurred in India in which Section 5 of the Identification of the Prisoners Act which empowers a Magistrate of first class to ask an arrested person to allow his photo to be taken by the police has been challenged as violating the privilege against self-incrimination.

In an American case, **Shaffer** v. **United States,**[126] the taking of photographs of the accused by the police while in custody was held not to violate the privilege against self-incrimination. The case furnishes an excellent illustration of the importance of photography in criminal investigation. The accused was photographed at the time of arrest on a charge of murder; upon his trial a witness used those photographs, Rather than personal observation to identify the accused, because during the period between his arrest and trial had grown a beard. Holding the procedure valid the court observed as follows**:**

(I)t could as well be contended that a prisoner could lawfully refuse to allow himself to be seen, while

[125] (1994) Scale 1,(SC);(1994)3 SCC 569.
[126] (1904) 24 All Dist. Column 417

in prison, by a witness brought to identify him, or that he could rightfully refuse to uncover himself, or to remove a mask, in court, to enable witnesses to identify him as the party accused, as that he could rightfully refuse to allow an officer, in whose custody he remained to set an instrument and take his likeness for purposes of proof and identification. It is one of the usual means employed in the police service of the country and it would be a matter of regret to have its use unduly any fanciful theory of Constitutional privilege.

There is no provision in law, in India which compels a person to give a specimen signature of handwriting for the purpose of investigation. Section 73 of the Evidence Act authorizes taking of specimens by the court for the purposes of the proceedings before the court but it does not extend to the stage of investigation. In **State of Uttar Pradesh** v. **Rambabu Misra**[127] while observing that taking of such specimens during the stage of investigation was in the interest of justice and recommending a change in law, accordingly, the Supreme Court: hold that the language of Section 73 of the Evidence Act did not give any authority to take such specimens during the stage of investigation.

VOICE IDENTIFICATION

At times it may be necessary to require the accused to speak, for purposes of comparing his voice with the voice situations. Firstly the crime may have been committed in the dark or the offender may have been so disguised that there may not be possibility of recognizing him except by comparison with voice heard at the time of the commission of the crime. Secondly, in some instances the voice of the criminal obtained by tapping a telephone or recording his voice in some other way. So far as the applicability of the privilege to voice comparison is concerned, a distinction has been made in the United States between asking the accused to say the same words as were heard by witnesses at the time of the commission of crime and asking him to utter some other words for the purpose of identifying his voice. According to the courts that maintain this distinction, the former is precluded by a constitutional protection against self-incrimination. For instance this distinction was maintained by the South Carolina Supreme Court in **State** v.**Taylor,**[128] where the accused was compelled to repeat the same words as were heard by the prosecutor in a rape case. The court held the evidence to be inadmissible on the ground of violation of the privilege against self-incrimination. It pointed out that the testimony as to the identity based on the enforced repetition by appellant of words alleged to have been used at the scene of crime was inadmissible, highly prejudicial, The court seems to approve mere

[127] AIR 1980 SC 791
[128] A.L.R 2nd 1317 (1951).

voice comparison as not violating the privilege. This distinction has not found favour with some other courts and it has been said that both types of voice evidence should be admissible 103. The argument in favour of this conclusion is that in either event the evidence is of physical nature and not testimonial compulsion of the type which the Constitutional privilege is designed to protect and that so long as the accused is not required to discuss the crime or his own possible incrimination the privilege against self-incrimination is not attracted.

It is suggested here that if compulsory voice exhibition is to be disallowed, it should be done upon some grounds other than the privilege against self-incrimination such as**:**

(a) Undue prejudice;

(b) Unreliability of voice identification.

There is no statutory provision in India which expressly gives power to a police officer or a court to require an accused person to speak. It is not clear whether the general power of investigation given to the police under Sections 155-157 CRPC 1973 implies power to require the accused to speak words. In none of the cases in which the voice of the accused was obtained for comparison, with the voice of the criminal offender was the question raised.

CONCLUSION

Article 20(3) of the Constitution of India prohibits the procuring of evidence by compulsion. The judicial policy states that mere exhibition of the body at a test identification parade, even though compelled, does not result in any evidentiary act coming from the accused. The identification

of the accused by a witness in a test identification parade is not his act, even though his body is exhibited for the purpose. It is not the accused who is called upon to testify against himself but somebody else on seeing him. The accused does not produce any evidence or perform any evidentiary act, it may be a positive act and even a volitional act, but only to a limited extent, when he walks to the place where the test identification parade is to be held; but certainly it is not his evidentiary act. Identification test is just like palm and finger impressions and it in no way hits Article 20(3) of the Constitution. The provision of identification test is a statutory one designed to meet the mischief played by notorious criminals.

It is submitted that the statutory provisions in India with regard to criminal investigation and evidence

lags behind modern scientific developments. New statutory provisions would have to be adopted to make full use of such developments. However, the enactment of such provisions should be accompanied by the development of well equipped forensic laboratories and staffed by qualified personnel. If the statutes authorizing examination and extraction of physical and medical evidence were enacted without these accompanying measures there would be danger of the conviction of innocent persons through inept gathering and interpretation of Evidence. There is also a necessity for continuous research and publication of studies relating to methods of crime detection.

CHAPTER 6

SUMMARY AND SUGGESTIONS

Law both punishes and protects what our culture defines a choice. The importance of choice as an organizing metaphor in our moral and legal culture has been recognized for centuries. Plato[129] attributed to human's an element of free choice, which makes us responsible for the good and evil in our lives. Aristotle[130] in one of his classic works "Ethics" devoted a chapter to choice and am worthiness. The criminal law follows Plato and Aristotle by pre-supposing that members of the society, autonomous actors, who can be punished for choosing to act in certain ways.[131] In short many of the "greatest philosophers" of western civilization from Plato to John Hobbes J as well as Rousseau pleaded for the protection of Human Rights.

Self-incrimination clause is premised on a model human conduct that views human beings as freewill actors with pre-existing preferences-actors capable of exercising choice in the absence of coercion. It is the act of an individual furnishing testimony or evidence that may be used in a legal proceeding to implicate the same individual for violating the law. This legal principle dates back to the 17th century

English protest against Star Chamber and Ecclesiastical Courts use of coercive measures to suppress political and religious dissent to extract confessions from persons accused of crimes. It grew out of the Latin maxim "Npmn tenetur seipsUm accusare", literally translated means none is bound to accuse himself. It provides a criminal defendant the right to choose whether to take witness stand in his criminal case. It also forbids the use of out-of-court statements when the choice to speak was sufficiently constrained. This principle in India is based on the Fifth Amendment to the United States Constitution which Provides in part that "no person shall be compelled in any criminal case to buy a witness against himself". The Fourth Amendment provides protection against unreasonable searches and seizures. The Sixth Amendment of the Constitution affords the right to counsel. These amendments along with Fourteenth Amendment[132] are of significant importance in the area of suspects' rights. The Fifth and Sixth Amendments are akin to Article 20(3) and 22(1) of Indian

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[129] Plato, The Republic,250 (F.M Cornford trans1945).

[130] Aristotle, Ethics, Sec.1(A. Wardm.an & J.Creed trans1963).

[131] See generally Roscoe Pound, Introduction to Sayres, Cases on Criminal Law,(1927); S. Mukherjee & P. RamaEswamy, Great Western Political Thinker (1993).

[132] The Fourteenth Amendment guarantees the due process and equal protection of the laws to the citizens of each State and declares that: No State shall abridge the privileges or immunities of citizens of the United States.

Constitution which grants the protection against self-incrimination and right to counsel. The Supreme Court ‘s famous articulation of so called "Miranda rights" in **Miranda** v **Arizona**[133] established procedures which ostensibly guarantees that police shall inform criminal suspects of the constitutional provisions and to ensure that police respect suspect's rights. The court decided that informal pressures can constitute compulsion under the Fifth Amendment standard, for custodial interrogation brings psychological pressure to bear for the specific purpose of overwhelming the suspects unwillingness to talk, and is therefore inherently 'compelling' within the meaning of the Fifth Amendment. The purpose of these warnings was to dispel the compulsion inherent in custodial interrogations. It remains a crucial tool for safeguarding the dignity and physical safety of the suspect, a goal that police administrators and executives surely share and accept. In fact the Fifth and Sixth Amendments were interpreted meaningfully for achieving the results of far reaching consequences for American society. [134]

The framers of the Constitution of India guided by the values of American Constitution elevated the status of Fundamental Rights under Article 20(30) and 20(2). These provisions along with Article 21 seeks to harmonize criminal law by enacting protections and safeguards against possible abuse or misuse of State power in the administration of justice Fearful of the American New Deal experience, the Indian Constitution makers had given vast powers to the state, replaced a "due process" clause with "any process" clause. They included the power of administrative detention as a legitimate derogation from the right to liberty and confidentially enmeshed the general power of judicial review with complicated rules taken from English law that promised conservatism and forbearance rather than activism and challenge. The judicial process developed by the Supreme Court in nineteen fifties and sixties glorified public order at the expenses of individual liberty'[135] It is interesting to note that in the early years of judicial history subsequent to the enactment of the Constitution the principle of protection against self-incrimination did not appear to be looked upon with favor by the courts.

In the beginning of the Constitution the application of the right against self-incrimination was limited to only orally compelled testimony ordered in the court. The need to enlarge its scope for the first time realized in **M.P.Sharma** v **Satish Chandra**[136] where its application was extended to the testimonial compulsion obtained not only in the court but also outside the court. Sharma's ruling left certain confusions for its too wide general observations because of which there was no similarity of approach in the decisions of the various High Courts which was considerably resolved by the Supreme Court in

[133] 384 U.S. 436 (1966)
[134] See generally Michael J. Perry, The Constitution, The Court and Human Rights (1982).
[135] *A K Gopalan* v *State Madras* AIR 1950 SC 27
[136] AIR 1954 SC 300

State of Bombay v. **Kathi Kalu Oghad**[137] The court held that clause 3 of Article 20 does not prohibit the obtaining of evidence from the body of the accused by means of thumb - impression, specimen writing or exhibition of parts of body, and the court would interfere if third degree methods are adopted for obtaining incriminating evidence from the accused. It also ruled that a direction under Section 73 of the India Evidence Act, 1972 to the accused for giving his specimen writings, thumb impressions etc. for the purpose of comparison of the court did not violate the right. It has also settled uncertainty of the admissibility of the facts discovered consequent upon information given by the accused to the police, and it was held that Section 27 of the Indian Evidence Act did not violate clause 3 of Article 20. There was no presumption that a statement by the accused in police custody was involuntary. There was hardly any case where a statement other than a confession made by an accused during custodial interrogation was excluded on the basis of protection against self- incrimination. In other words, a narrow view was taken about the meaning of compulsion. Thus the immunity under Article 20 (3) does not extend to compulsory production of material objects or compulsion to give specimen writing, signature, finger impressions etc. The protection does not apply to searches and seizures under a search warrant.[138]

The American Supreme Court also conceded that blood samples, voice exemplars, handwriting samples, and line-up identifications [139] fell within the category of non testimonial evidence.

It is submitted that the United States Supreme Court in the interpretation and extension of the constitutional rights of the accused have taken a liberal view of the protection against self–incrimination by enlarging its scope to the extent of "mischief" against which it seeks to guard. On the other hand, the Indian interpretation of the right has yet to assume to those dimensions. The basic danger with interrogation is that use of it in many cases undercuts a basic premise of adversarial system of justice. We do not feel that a man should be made against his will to condemn himself out of his own mouth.

As Justice Frankfurter rightly said in **Watts v Indiana.**[140]

"(O)urs is an accusatorial as opposed to an inquisitorial system... Society carries the burden of proving its charge but by evidence independently secured through skilful Investigation".

Thus persons in authority and responsible for the enforcement of law and setting legal machinery in motion to safeguard the interest and well being of the people, should not use and misuse the law for

[137] AIR 1961 SC 1808.
[138] *Shyamlal Mohanlal* v *State of Gujrat* AIR 1965 SC 1251
[139] *United States* v *Wade* 388 US 218
[140] 338 US 49

their personal vain and advantage as depicted in a number of cases decided by the Indian courts. Being the custodians of law they have Special responsibility and solemn duty to protect and preserve the law and the interest of the poor, the weak, and the neglected in the society. If progress is made towards an open society, standards must be set for police performance and they must be implemented sincerely. There should be a continuous comparison of police conduct with established judicial norms and breach of important safeguards must have consequences. It can be taken for granted that if a court decides that a certain conduct is wrongful, police force may discontinue such conduct. In essence criminal courts may promote behavioral changes in the police system.

Therefore to deal with unbridled power of police officers from being abused by them following guidelines as were laid down in **D. K. Basu** v **State of West Bengal**[141], some of which have already been recently incorporated in code of criminal procedure code 1973, should be followed**:**

i) The police personnel carrying out the arrest and handling the interrogation of the arrestee should bear accurate, visible and clear identification and name tags with their designations. The particulars of all such police personnel who handle interrogation of the arrestee must be recorded in a register.

ii) That the police officer carrying out the arrest shall prepare a memo of arrest at the time of arrest and such memo shall be attested by at least one witness, who may be either a member of the family of the arrestee or a respectable person of the locality from where the arrest is made. It shall also be counter signed by the arrestee and shall contain the time and date of arrest.

iii) A person who has been arrested or detained and is being held in custody in a police station or interrogation centre or other lock up, shall be entitled to have one friend or relative or other person known to him or having interest in his welfare being informed, as soon as practicable, that he has been arrested and is being detained at the particular place, unless the attesting witness of the memo of arrest is himself such a friend or a relative of the arrestee.

iv) The time, place of arrest and venue of custody of an arrestee must be notified by the police where the next friend or relative of the arrestee lives outside the district or town through the Legal Aid Organisation in the District and the police station of the area concerned telegraphically within a period of 8 to 12 hours after the arrest.

v) The person arrested must be made aware of his right to have someone informed of his arrest or detention as soon as he is put under arrest or is detained.

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[141] 1996(9) SCALE

vi) An entry must be made in the diary at the place of detention regarding the arrest of the person which shall also disclose the name of the next friend of the person who has been informed of the arrest and the names and particulars of the police officials in whose custody the arrestee is.

vi) The arrestee should, where he requests, be also examined at the time of his arrest and major and minor injuries, if any present on his/her body, must be recorded at that time. The 'Inspection Memo' must be signed both by the arrestee and the police officer affecting the arrest and its copy provided to the arrestee.

vii) The arrestee should be subjected to medical examination by the trained doctor every 48 hours during his detention in custody by a doctor on the panel of approved doctors appointed by Director, Health Services of the concerned State or Union Territory, Director, Health Services should prepare such a panel for all Tehsils and Districts as well.

viii) Copies of all the documents including the memo of arrest, referred to above, should be sent to the Magistrate for his record.

ix) The arrestee may be permitted to meet his lawyer during interrogation, though not throughout the interrogation.

x) A police control room should be provided at all district and State headquarters where information regarding the arrest and the place of custody of the arrestee shall be communicated by the officer causing the arrest, within 12 hours of effecting the arrest and at the police control room it should be displayed on a conspicuous notice board.

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