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Protection against Self-Incrimination – Principles and Practice - A Comparative Analysis

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Abstract

Application of the rule against self-incrimination is one of the important rights recognized under Article 20(3) in Part III of the Constitution of India. The Supreme Court of India applied this principle in its full force and effect in M.P. Sharma v Satish Chandra.[3] *However, in some of the later judgments, application of this protection was diluted. The rationale of the judgments for not recognizing this constitutional protection in the later judgments is not convincing. Such a rationale is also contradictory to the principles enunciated by the Supreme Court in other judgments dealing with the rights and liberties of an individual. In United Kingdom, despite the strong demand for dilution or abandoning this protection, the courts have consistently upheld this protection. In United States of America also, this protection is recognized as one of the fine principle developed by the civilized society. Compelling an individual to be a witness against himself demean the dignity of the individual and such compulsion and reliance on it by the courts would have the effect of dispensing with the proof otherwise required for determining the guilt of an accused. In some of the later cases, the Supreme Court of India has recognized the importance of this protection and applied it. Tracing the history of this protection and its application in United Kingdom and United States America would help understanding the underlying principles for this protection. Comparison of the Indian experience with other jurisdiction would provide an oppourtunity for introspection and consider remedial measures.*

Keywords: *self-incrimination, article 20(3), Constitution of India, Fifth Amendment, star chambers, ex-officio oaths, Miranda, Lilburn.*

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I. Introduction

The rule against self-incrimination is one of the most discussed topics encompassing criminal law and constitutional law. One could not help but wonder about the reason for this simple principle generating so much discussion among judges and scholars. The division among supporters of this principle and its opponents is sharp. The supporters of this principle hail it as one of the finest developments of the civilized society and the opponents dub it as a historical relic impeding the administration of justice.[4] From being a Common Law principle evolved by the English Courts to protect its citizens from *ex-officio* oaths administered by the ecclesiastical courts, this protection has been elevated and recognized as a constitutional right in the United States of America and India. The reason for development of this protection and the importance given to this right in the Constitutional documents of two of the biggest democracies in the free world have not dissuaded its opponents from asking for its abandonment.[5] In its celebrated judgment in *Miranda v Arizona*,[6] a sharply divided the United States Supreme Court, passionately arguing for and against this principle, has severely restricted the right of the law enforcement authorities to extract inculpatory statements. In *M.P. Sharma v.*

[4] In several judgments, the United States Supreme Court has emphasized the importance of the privilege against self-incrimination. After discussing earlier judgments, the United States Supreme Court held that the privilege of self-incrimination "*reflects many of our fundamental values and most noble aspirations: our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt*." Murphy v Waterfront Coom'n, 378 U.S. 52 (1964). The United States Supreme Court rejected the contention that this privilege should be treated as a relic and observed that protection against self-incrimination is a "*privilege of great value, a protection to the innocent though a shelter to the guilty, and a safeguard against heedless, unfounded, or tyrannical prosecutions*." Quinn v United States, 349 U.S. 155, 162 (1955). The Australian High Court also expressed a similar view in *Hugh Nairn Reid v Stanley Joseph Howard* [1955] HCA 40 (Austl.).

[5] "the roster of scholars and judges with reservations about expanding the Fifth Amendment privilege reads like an honor roll of the legal profession" Lakeside v Oregon, 435 U.S. 333 (1978). See also David Dolinko, *Is There a Rationale for the Privilege against Self-Incrimination?,* 33 UCLA L. REV. 1063 (1986).

[6] 384 U.S. 436 (1966).

Satish Chandra,[7] the Supreme Court of India has held that this protection is also available during the pre-trial investigation process. However, in some later judgments, this protection against self-incrimination is diluted despite it being recognized as a fundamental right independently, and also as part of Article 21 of the Constitution of India.[8] The judgments and discussions on this subject show various parameters basis which the privilege can be denied. The courts have generally allowed the application of this privilege in criminal proceedings and denied its application in quasi-judicial and departmental proceedings. This article discusses the principle of protection against self-incrimination and its practice in the United States of America, United Kingdom and India.

II. **Origin of the Privilege Against Self-incrimination**

The privilege against self-incrimination plays a major role in differentiating between the accusatory and inquisitorial criminal system.[9] This privilege is expressed by the Latin maxim *nemo tenetur prodere selpsum*.[10] Under Common Law, the accused was not competent to give evidence for the prosecution.[11] Later, this changed, and an accused could elect to waive this right and choose to give evidence.[12] It is generally accepted that the practice adopted by the Star

[7]AIR 1954 SC 300 (India). See also *Nandini Sathpathy v. P.L.Dani*, 1978 (2) SCC 424 (India).

[8] INDIA. CONST. art. 21 states that no person shall be deprived of his life or personal liberty except according to procedure established by law.

[9] The difference between these systems is explained by Frankfurter, J., as follows "O*urs is an accusatorial and not an inquisitorial system—a system in which the State must establish guilt by evidence independently and freely secured and may not by its own coercion prove its charge against an accused out of his own mouth*." Rogers v Richmond, 365 U.S. 534 (1961).

[10] No man is bound to accuse himself.

[11] Richard Glover, Murphy On Evidence, 558 (13th ed. 2013). The purpose of this protection is to avoid any adverse inference being drawn by his refusal to give evidence.

[12] [In terms of the Criminal Evidence Act, 1898 61 & 62 VICT. CH. 36 (Gr. Brit), the accused is competent to give evidence. Though the accused is now competent to give evidence, the Common Law rule that the accused is not a competent witness for the prosecution still continues. Id. Section 19(b) of the Criminal Evidence Act, 1898 61 & 62 VICT. CH. 36 (Gr. Brit) provided that the prosecution was not permitted to comment on the failure of the accused to give evidence. Section 19(1)(b) has been repealed by the Criminal Justice and Public Order Act, 1994(Gr. Brit). In the United States, many States

Chambers in examining the accused after administering oath led to the development of the privilege against self-incrimination.[13] The oaths administered by the Star Chambers resulted in "cruel trilemma" of (a) refusing to take oath, which would amount to contempt; (b) taking the oath and telling the truth and if it was found to be heretical, face death penalty or (c) taking the oath and telling a lie which was punishable with death, to the people who were administered with the oath.[14] These proceedings were increasingly challenged before the Common Law courts which issued writs of Prohibition and Habeas Corpus to the Star Chamber from proceeding on the basis of the *ex-officio oaths*. Finally, the Parliament intervened and the Star Chamber was abolished and the practice of administering *ex-officio oaths* was abandoned.[15] The rule against self-incrimination is part of the Common Law.[16] Though it is considered as one of the important milestones in the recognition of the rights of the individual, the recent trend shows the tendency of the United Kingdom Parliament to restrict this rule by limiting its application to some areas. In the United States, till the Fifth Amendment, the rule against self-incrimination was originally administered based on Common Law principles. The Fifth Amendment elevated the status of rule-against self-incrimination from a Common Law doctrine to a constitutional protection, thus keeping it away from the reach of the legislature and the executive. The importance of this rule is aptly stated by the United States Supreme Court in Brown v Walker[17] as "So

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had provisions that permitted the prosecution to make a comment. In 1965, the United States Supreme Court held that "comment on the refusal to testify is a remnant of the "*inquisitorial system of criminal justice*"" and further held that "*It is a penalty imposed by courts for exercising a constitutional privilege. It cuts down on the privilege by making its assertion costly*." Griffin v California, 380 U.S. 609 (1965).

[13] Richard. H. Helmbolz, *Origins of the Privilege against Self-Incrimination: The Role of the European Ius Commune*, 65 N.Y.U. L. Rev. 962 (1990).

[14] Steven M. Salky, The Privilege of Silence: Fifth Amendment Protections Against Self-incrimination, (2nd ed. 2009). See also *Murphy*, note 21.

[15] Hembolz., *supra* note 10, at 966.

[16] "a defendant's fault was not to be wrung out of himself, but rather to be discovered by other means and other men." 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *293 The privilege against self-incrimination is "*a basic and substantive common law right, and not just a rule of evidence*", *Reid v Howard*, [1995] HCA 40 (Austl).

[17] 161 U.S. 591, 597 (1896).

deeply did the iniquities of the ancient system impress themselves upon the minds of the American colonists that the States, with one accord, made a denial of the right to question an accused person a part of their fundamental law, so that a maxim, which in England was a mere rule of evidence, became clothed in this country with the impregnability of a constitutional enactment." Levy describes this privilege as, "*In the broadest sense it was a protection not of the guilty, or of the innocent, but of freedom of expression, of political liberty, of the right to worship as one pleased*."[18]After India obtained independence, the framers of the Constitution had the benefit of considering our own country's suffering under the foreign rule in addition to the experiences in England and America. The application of the principles of Common Law, and certain statutory provisions in the extant Indian Evidence Act and the Code of Criminal Procedure, were found not sufficient to protect the freedom earned. The framers also had the advantage of considering the Fifth Amendment in America. They embodied this protection in Part III of the Constitution of India under 'Fundamental Rights'. Certain fundamental rights listed in Article 19 of the Constitution of India are subject to restrictions contained in the same Article. However, Article 14 (right to equality), Article 20 (double jeopardy, self-incrimination) and Article 21 (personal liberty) are kept away from any form of restriction by any organ of the State, clearly signifying the importance attached to these rights.

III. Position in America

The Common Law principles apply in United States of America. The courts in the United States of America originally applied the rule against self-incrimination as a Common Law principle. Subsequently, protection against self-incrimination was guaranteed under the Fifth Amendment. While implementing this protection, the courts are often confronted with two conflicting objectives viz., the protection of individual rights and the perceived social benefits. The issue of jurisdiction of the law enforcing authorities in the States and the Federal Government added complexity to this issue.[19]

[18] L. Levy, Origins of the Fifth Amendment, 332 (2nd ed. 1986).

[19] Originally the United States Supreme Court held that the Fifth Amendment does not protect a witness from testifying in a State prosecution. See e.g., Brown v Walker, 161

Frankfurter's proclamation that "*ours is an accusatorial, and not an inquisitorial system…*"[20] remained, for a long time a desire of the court. Despite all the safeguards in Common Law and the Constitutional protections, a *de facto* inquisitorial system was prevailing,[21] and the courts applied the involuntariness test[22] to determine if the incriminating statement obtained from the defendant was obtained by coercion. The application of the involuntariness test only resulted in judicial approval of the custodial interrogation techniques. The police brutalities to obtain confession forced the court to observe that the transcript of the proceedings show that the treatment meted out to the hapless prisoners "*reads more like pages torn from some medieval account than a record made within the confines of a modern civilization*".[23] Most of these issues were settled by the United States Supreme Court in *Murphy v Waterfront Commission*.[24] Prior to *Murphy*, in *Ullmann v United States*,[25] the Supreme

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U.S. 591 (1895). This position was regularly applied for a long period of time. See e.g., Feldman v U.S. 322 (1943). In State cases, the courts have applied the due process rule under the Fourteenth Amendment to provide relief to the defendants. See e.g., Mooney v Hologan, 294 U.S. 103 (1935). Later, the court held that "*The Fourteenth Amendment secures against state invasion the same privilege that the Fifth Amendment guarantees against federal infringement -- the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty*" Malloy v Hogan, 378 U.S. 1 (1964).

[20] *Supra* note 6.

[21]Yale Kamisar, *Kauper's "Judicial Examination of the Accused" Forty Years Later- Some Comments on a Remarkable Article*, 73 Mich. L. Rev. 15, 22. (1974).

[22] Bator & Vorenberg, *Arrest, Detention, Interrogation and the Right to Counsel*, 66 COLUM L..REV.62, 73 (1966), quoted with approval in *Miranda*, See *Kamisar*, *id*.,

[T]he concept of involuntariness seems to be used by the courts as a shorthand to refer to practices which are repellent to civilized standards of decency or which, under the circumstances, are thought to apply a degree of pressure to an individual which unfairly impairs his capacity to make a rational choice

[23]*Brown v Missipsipi*, 297 U.S. 278 (1936).

[24] 378 U.S. 52 (1964).

[25] 350 U.S. 422 (1955).

This constitutional protection must not be interpreted in a hostile or niggardly spirit. Too many, even those who should be better advised, view this privilege as a shelter for wrongdoers. They too readily assume that those who invoke it are either guilty of crime or commit perjury in claiming the privilege. Such a view does scant honor to the patriots who sponsored the Bill of Rights as a condition to acceptance of the Constitution by the ratifying States. The Founders of the Nation were not naïve or

Court had held that the protection 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*." In *Quinn v United States*,[26] the court explained that this rule shows "*our distrust of self-deprecatory statements; and our realization that the privilege, while sometimes a shelter to the guilty, is often a protection of the innocent*." In *Murphy*, the petitioners were subpoenaed to testify at a hearing conducted by the Waterfront Commission concerning a stoppage of work. The petitioners contended that answering the questions posed to them before the Commission would incriminate them. The petitioners were granted immunity under the state laws. The petitioners still refused contending that the protection does not grant extend to federal prosecution. The petitioners were held for contempt, civil as well as criminal, for their refusal. The New Jersey Supreme Court exonerated the petitioners from the criminal contempt but they were held liable for the civil contempt. The case travelled to the United States Supreme Court.

The contentions made before the United States. Supreme Court in *Murphy* explain the arduous journey of this principle in America. The court was asked to adhere to the established rule – (a) Federal Government could compel a witness to give testimony which might incriminate him under State law[27]; (b) a State could compel a witness to give testimony which might incriminate him under the federal law[28] and (c) a testimony compelled by a State could be introduced into evidence in the federal courts.[29]

Finally, in *Murphy* the court rejected the principles laid out in United States v Murdock[30] holding that *Murdock* did not consider the relevant authorities, and

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disregardful of the interest of justice … They made a judgment, and expressed it in our fundamental law, that it were better for occasional crime to go unpunished than that the prosecution should be free to build up a criminal case, in whole or in part, with the assistance of enclosed disclosures by the accused. The privilege against self-incrimination serves as a protection to the innocent as well as to the guilty, and we have been admonished that it should be given the liberal application.
Frankfurter, J., in *Ullman* 426

[26] 349 U.S. 155 (1955).

[27] *United States v Murdock*, 284 U.S. 141 (1933).

[28] *Knapp v Schweitzer*, 357 U.S. 371 (1958).

[29] *Feldman v United States*, 322 U.S. 487 (1944).

[30] See Note 24.

Feldman v United States[31] and *Knapp v Schweitzer*,[32] have since been rejected in the subsequent judgments. It held that "*the constitutional privilege against self-incrimination protects a state witness against incrimination under federal as well as state law and a federal witness against incrimination under state as well as federal law*." The Government cited two English cases[33] to justify the contention that the statements made before the State authorities could be used in Federal proceedings. The court rejected the contentions and held that, "*there is no continuing legal vitality to, or historical justification for, the rule that one jurisdiction within our federal structure may compel a witness to testimony which could be used to convict him of a crime in another jurisdiction*."[34] Shortly thereafter, the protection against self-incrimination again considered by the United States Supreme Court in *Miranda.* The majority in *Miranda*, invoked the dictum of Marshall, C.J., in *Cohen v Virginia*[35] that "*No person .... shall be compelled in any criminal case to be a witness against himself*"[36] and certain other rights in the Constitution were protected *"for ages to come, and .... designed to approach immortality as nearly as human institutions can approach it*."[37] The Majority emphasized that they were not making an innovation in American jurisprudence but only applying the long cherished principles. Harlan, J., (with whom Stewart and White, JJ joined) in the Minority strongly disagreed with this view and held that the Majority opinion "*reveals no adequate basis for extending the Fifth Amendment's privilege against self-incrimination to the police station*." Harlan, J., also held that "*Historically, the privilege against self-incrimination did not bear at all on the use of extra-legal confessions, for which distinct standards evolved"* and quoted Wigmore[38] that *"the history of the two principles is wide apart, differing*

[31] See Note 26.

[32] 357 U.S. 371

[33] *East India Co. v. Campbell*, 1 Ves.Sen. 246, 27 Eng.Rep.2010 and King of the *Two Sicilies v. Wilcox*, 1 Sim (N.S.) 301, 61 Eng.Rep.116. In these cases, the issue involved was whether the privilege against self-incrimination is available if the statement made could implicate the defendant in some other jurisdiction. The courts held that even in such cases, the privilege would be available.

[34] Murphy, *supra* note 21 at 77.

[35] 19 U.S. (6 Wheat.) 264, 387 (1821).

[36] *Id.*

[37] *Id.*

[38] Wigmore on Evidence, § 2266, at 401 (McNaughton rev.1961).

by one hundred years in origin, and delivered through separate lines of precedents….".[39] The opinion of the minority underscores the difference between a common law principle that could be varied by the courts or a statutory protection, and a constitutional guarantee which is outside the competence of the legislature.

In *Miranda*, four cases were heard together. (a) In *Miranda v Arizona*[40], Miranda was arrested, interrogated and a confession was taken from him. He was not advised that he could have his attorney at the time of his questioning. The statement obtained from him stated that it was made voluntarily and without any threat. The trial court convicted him. The Arizona Supreme Court affirmed the conviction. (b) In *Vignera v New York*[41], Vignera was arrested in connection with a robbery and he orally admitted to the crime. The transcript of the statement did not show any warning was given to him. He was found guilty. (c) In *Westover v United States*[42], Westover was arrested by the state police in a robbery case. After his arrest, the police were informed that he was wanted by the Federal Bureau of Investigations (FBI) in connection with a criminal case in California. The State police interrogated him first and thereafter the FBI interrogated him. After interrogation by the FBI, Westover signed two confession statements admitting to both the charges. The statements signed by him recorded that he was informed that he did not have to make a statement and he has the right to have an attorney. He was convicted. The court noticed that Westover was in police custody for over 14 hours and endured a lengthy interrogation. (d) In *People v Stewart*[43], Stewart was arrested by the police from his residence in connection with series of purse snatching incidents. With his permission, the police searched his house and found certain items linked to robbery victims. Stewart, his wife and three persons who were visiting him were arrested. Stewart was interrogated nine times during his five days custody. On the ninth occasion he admitted to the crime. He was produced before the

[39] The minority referred to the exclusionary rule under which the court has the discretion to exclude certain evidence including evidence collected through illegal means. For application of exclusionary rule in Common Law, *see* Noor Mohamed v. R [1949] AC 182.
[40] *Supra* Note 3.
[41] 384 U.S. 436 (1966).
[42] 342 F.2d 684 (9th Cir. 1965).
[43] 62 Cal. 2d.573.

Magistrate. His wife and other arrested persons were released as police did not have any materials to connect them to the offence. There was no evidence that Stewart was advised either of his right to remain silent or his right to have a counsel. The jury found him guilty and the State Supreme Court reversed the decision. The Majority in *Miranda* held that the statements in all the four cases before it in *Miranda*, were involuntary in traditional terms. It held that the interrogation environment created in these cases was only to subjugate the individual to the will of his examiner.[44] The court opined that the treatment by the police in these cases is destructive of human dignity though there was no evidence of physical intimidation. The court's rejection of the prosecution's contention stems from its observation that the "*practice of incommunicado interrogation is at odds with one of our Nation's most cherished principles – that the individual may not be compelled to incriminate himself*."[45] Some of the observations of the Majority viz., "*We sometimes forget how long it has taken to establish the privilege against self-incrimination, the source from which it came, and the fervor with which it was defended*…"[46] show the importance the court has attached to the dignity of the individual. The court held that an individual "*swept from familiar surroundings into police custody, surrounded by antagonistic forces, and subjected to the techniques of persuasion … cannot be otherwise than under compulsion to speak*."[47] It also held that the Fifth Amendment privilege is available not only in criminal court proceedings but also in in all settings in which the freedom of action of persons is curtailed in any significant way.

The court also rejected the contention that distinction should be made between inculpatory statements and exculpatory statements.[48] Most importantly, the court rejected the contention that the society's need for interrogation outweighs

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[44] See also *Davis v North Carolina*, 384 U.S. 731 (1966), wherein the court held that confession extracted as a result of the sustained pressure and by breaking the will was not free, and constitutionally inadmissible.

[45] *Miranda*, *supra* note 3 at 457-458.

[46] *Id*. at 458.

[47] *Id.* at 461.

[48] In *Nishi Kant Jha v. State of Bihar*, (1969) 1 SCC 347 (India), the Indian Supreme Court has held that the inculpatory part of the statement could be accepted and the exculpatory part could be rejected. See also Jethamal Pithaji v. Asst. Collector of Customs, (1974) 3 SCC 393 (India).

the privilege, though it noted that it was mindful of the burden which the law enforcement officials must bear by reason of its judgment in *Miranda*. The court explained that the Constitution has prescribed that the power of the government is circumscribed by the rights of the individual and no individual can be compelled to give evidence against himself; and that such a right cannot be restricted. It laid down the principles to be followed in interrogation. This celebrated judgment is one of the hallmarks of a nation that protects and preserves individual dignity as the court recognizes that "*[T]he quality of a nation's civilization can be largely measured by the methods it uses in the enforcement of its criminal law*."[49] After noticing instances of police brutality in the above cases, the Majority was categorical in its conclusion that *"[Un]less proper limitation upon custodial interrogation is achieved …… there can be no assurance that practices of this nature will be eradicated in the foreseeable future*."[50] It quoted the conclusion in Wickersham Commission Report[51] that "*[T]o the contention that the third degree is necessary to get the facts, the reporters aptly reply in the language of the present Lord Chancellor of England (Lord Sankey): It is not admissible to do a great thing by doing a little wrong … It is not sufficient to do justice by obtaining a proper result by irregular or improper means*."[52] The Minority in *Miranda* made a scathing attack on the Majority view. The Minority held that the Majority view is not supported by the Constitution and it would result in a dictum that statement, whether compelled or not, from the accused could not be used against him.[53] They also held that the interest of the society is paramount in the allowing the interrogation.[54] The minority view reflects the initial understanding of the American courts that the Fifth Amendment was a reiteration of the safeguards

[49]*Miranda* note 3 at 480. The court referred to Schaefer, Federalism and State Criminal Procedure, 70 Harv.L.Rev. 1, 26 (1956).

[50]*Miranda*, note 3.

[51] NAT'L COMM'N ON LAW OBSERVANCE AND ENFORCEMENT, REPORT ON LAWLESSNESS IN LAW ENFORCEMENT 5 (169R), (1931).

[52] *Miranda,* note 3 at 447.

[53] In the context of the minority's statement that "the Court's result in that case adds up to a judicial judgment that *evidence from the accused should not be used against him in any way, whether compelled or not*", it was noted that "*this is as it should be*" by O. John Rogge, *Proof by Confession*, 12 VILL. L. Rev. 1 (1966).

[54] Similar arguments were considered by the Wickersham Commission in its Report, *supra* note 48 at 173.

inherited by America from the criminal procedures prevailing in England concerning the evidentiary value of the involuntary confessions. It ignores the purpose of elevating this protection to a constitutional status and the principles governing interpretation of the Constitution.[55] Before *Miranda*, it was thought that the Fifth Amendment did not address the informal, pre-trial pressure that resulted in confessions in the station house.[56] The courts earlier attempted to address police interrogation out of general due process principles. These attempts did not effectively deal with the difficulties faced by the courts and *Miranda* is believed to be the Court's next attempt to remedy difficulties.[57] Later, in *Fisher v United States*,[58] the court held that in order to invoke the protection of the Fifth Amendment, three requisites should be fulfilled. They are (a) compulsion, (b) incrimination and (c) testimony. In *Fisher*'s case, the issue was whether the defendant is entitled to invoke privilege in respect of the work papers of the accountant handed over to the attorney of the defendant. The court held that the protection was not available in this case. The court's reasoning was premised on the principle that the compelled production of the documents does not amount to self-incrimination.[59] Though *Miranda* is hailed as an important milestone and helped the spread of awareness concerning self-incrimination, it is also recognised that once the warning is given any statement made by the defendant would be admissible. This brings us to the question of 'waiver' of the privilege.[60] One of the main problems that remains unresolved is

[55] See Hoffman v United States, 341 U.S. 422 (1956), where the United States Supreme Court held that the Fifth Amendment "*be accorded liberal construction in favour of the right it was intended to secure*." See also *Ullman*, note 22.

[56] Louis M. Seidman, *Rubashov's Question : Self-Incrimination and the problem of Coerced Preferences*, 2 Yale J.L. & Human. (149) (1990), citing "Development in the Law of Confession", 79 Har. L. Rev. 935, 960-61 (1966).

[57] *Id.* at 163.

[58] 425 U.S. 391 (1976).

[59] This conclusion is contrary to the judgment in Hoffman v United States,341 U.S. 479 (1951) wherein the court held that if the documents sought to provide the missing link in proving the crime, the protection of the Fifth Amendment is available. See Brian M. Lidji, *Fifth Amendment Protection against Self-Incrimination in Tax Records : Fisher v United States*, 30 Sw.L.J.788 (1976).

[60] The *Miranda* warning puts the obligation on police officers to issue the warning and prove that it was issued. This has been commented upon by Chief Judge David L.

the emphasis placed by many courts on the term 'accused' to extend the privilege. Discussions surrounding, and analysis of *Miranda* continues. But, the fact that Miranda is still followed clearly shows that the United States Supreme Court does not accept the Minority view in *Miranda*.

IV. Position in United Kingdom

England is the origin of the privilege against self-incrimination. As noted earlier, the protection was necessitated by the *ex-officio* oaths administered by the Star Chamber in England. The English judges issued writs of prohibition and habeas corpus against the Star Chamber and High Commission from proceedings on the basis of the *ex-officio* oath.[61] The contention of John Lilburn when compelled to swear the *ex-officio* oath in the Star Chamber that, "*Another fundamental right I then contended for was that no man's conscience ought to be racked by oaths imposed to answer to questions concerning himself in matters criminal, or pretended to be so*."[62] explains the spirit with which the people fought for this protection. Finally, the Parliament abolished the Star Chamber in 1640. The earlier judgments in the United Kingdom leave no doubt concerning this protection. In *R v. Purnell*[63] the court held that "*We know of no instance wherein this court has granted a rule to inspect the books in a criminal prosecution nakedly considered*." In *Roe v. Harvey*[64] the court took a somewhat similar position and held that "[*I]n a criminal or penal cause the defendant is never forced to produce any evidence though he should hold it in his hands in Court*." In administering this principle, the courts were confronted with the issue of whether the refusal to answer a discovery is justifiable on the ground that such discovery would expose the defendant to prosecution in some other jurisdiction. In East India Co. v. Campbell,[65] the Court held that "*this court shall not oblige one to discover that which, if he answers in the*

Bazelon that a system that places reliance on police warning places mouse under the protective custody of the cat.

[61] Helmbolz, *supra* note 10,citing L. Levy, Origins of the Fifth Amendment: The Right Against Self-Incrimination (2nd ed. 1986).

[62] The Trial of John Lilburn and John Wharton. 3 How.St.Tr.1315 (1637), as cited in *Miranda,* note [3] at [460].

[63] 1 WB 137, as cited in *Shyamlal Mohanlal*, note 94.

[64] 4 Burr 2494, as cited in *Shyamlal Mohanlal*, note 94.

[65] 27 E.R.1010.

affirmative will subject him to punishment of a crime …"[66] In *King of Two Sicilies v. Wilcox*, the court refused the protection.[67] In *United States of America v McRae*,[68] the Lord Chancellor distinguished *Two Sicilies* and held that *Two Sicilies* went beyond the scope of the case and laid down a broad proposition without any necessity. Finally, the Lord Chancellor held that the "*The United States coming into our Courts must be subject to every rule of evidence which prevails in them, and, amongst others, to that which protects a witness from exposing himself to penalties by his answer*." The court rejected the contention of the prosecution that the protection is available only where a person might expose himself to penal proceedings in England and it cannot be extended to cases where the penalty or forfeiture is in breach of laws of another country. In *Redfern v. Redfern*,[69] the Court held that a spouse cannot be compelled to answer the interrogatories if the answers would implicate the witness for adultery. In *Blunt v. Park Lane Hotel*,[70] the Court of Appeal rejected the protection when the interrogatories were made to establish justification in an action for slander. In *Blunt*, the court held that "[T]*he rule is that no one is bound to answer any question if the answer thereto would, in the opinion of the judge, have a tendency to expose the deponent to any criminal charge, penalty, or forfeiture which the judge regards as reasonably likely to be preferred or sued for*."[71] In *Blunt*, the court followed the principle laid down in *Lamb v Munster*[72] that "*The words "criminate, himself" may have several meanings, but my interpretation of them is "may tend to bring him into the peril and possibility of being convicted as a criminal*." The current tendency of the Parliament in United Kingdom is to limit this protection against self-incrimination. Section 72 of the Senior Courts Act, 1981 excludes the privilege against self-incrimination in relation to proceedings for infringement of rights pertaining to any intellectual property or for passing of. This restriction was

[66] *Murphy* note 21. This case was followed in United States v Saline Bank of Virginia, 1 Pet 100 as cited in *Murphy*.
[67] Cited and followed in *Murdock*, Note 24 as stating the legal position in England. *Murphy* Note 21, clarified this position later and Murdock was overruled.
[68] L.R., 3 Ch.App. 79.
[69] [1891] K.B P.139.
[70] [1942] 2 K.B. 253.
[71] *Id*.
[72] (1882) 10 Q. B. D. 110.

challenged in *Stephen John Coogan v. News Group Newspapers Limited*.[73] Prior to *Coogan,* the courts had requested the Parliament to consider removing the privilege against self-incrimination in relation to all civil claims. In *Coogan*, this request was repeated. The court rejected the plea for extending the privilege and also rejected the argument that Section 72 contravenes Article 6 of the European Convention on Human Rights holding that Article 6 could be invoked only if any criminal action is brought based on the information furnished. In a number of enactments, the Parliament has cut down the protection against self-incrimination.[74] The reluctance of the courts in rejecting this principle completely is evidenced by the words of Lord Denning, M.R. who has held that it can be invoked in case of "*a real and appreciable risk as distinct from a remote or insubstantial risk*."[75]

V. Legal Framework and Position in India

The Common Law rule against self-incrimination was incorporated in some of the pre-independence laws. Section 25 of the Indian Evidence Act, 1872 (Act No. 1 of 1872) (hereinafter referred to as Evidence Act) makes a cryptic and categorical statement that "*No confession made to a police officer shall be proved against a person accused of an offence*."[76] Section 27 of the Evidence Act prescribes the extent to which the statement made by a person while in

[73] [2012] EWCA (Civ) 48 [Eng].

[74] *Id.* at para 16. See also Criminal Justice and Public Order Act, 1994 and sub-section 2A to Section 34 introduced in 1999.

[75] Rio Tinto Zinc Ltd v. Westinghouse Electric Co., [1978] AC 547 [HL] 574. The court has not considered what would happen if the risk materialized.

[76] Because of the prohibition contained in Section 25 of the Evidence Act, the cases in India do not arise out of the confessions made to the police. However, since Section 27 permits admissibility of the evidence recovered based on the statement made to the police while in custody, the rigour of Section 25 is diluted. The Supreme Court of India has held that any discovery made in pursuance of statements made while in custody is admissible. See Navaneethakrishnan v. State, AIR 2018 SC 2027 (India) and Selvi v. State of Karnataka, (2010) 7 SCC 263 (India). See also *Kathi Kalu Oghad, infra* note 89, para 13. A clear distinction in this regard has been brought out by the Canadian Supreme Court in The Queen v John Wray, [1971] S.C.R. 272, where a murder weapon was recovered based on the statement made by the accused. In his dissenting judgment, Cartwright, C.J., had stated that the fact that the weapon was recovered pursuant to the statement made by him is admissible and not the statement that he had thrown it there.

police custody may be proved.[77] Section 161 of the Code of Criminal Procedure, 1973 (Act No. 2 of 1974) hereinafter referred to as Cr.P.C) stipulates that the person examined by the police officers shall be bound to answer all questions 'other than questions the answers to which would have a tendency to expose him to a criminal charge or to a penalty or forfeiture'.[78] Section 162 of the Cr.P.C mandates that no statement made to the police officer, if reduced into writing, be signed by the person making the statement.[79] Section 163 of the Cr.P.C prohibits the police officer from making any inducement, threat or promise. Section 165 of the Cr.P.C deals with the procedure to be followed by the Magistrate for recording confessions. Section 132 of the Evidence Act provides that a witness is not excused from answering a question on the ground that the answer would incriminate him. However, the proviso to Section 132 grants immunity to such a witness by declaring that "*no such answer given by the witness shall subject him to any arrest or prosecution or be proved against him in any criminal proceeding*".[80] Section 4(2) of the

[77] "*That part of the information given by a person whilst in police custody whether the information is confessional or otherwise, which distinctly relates to the fact thereby discovered but no more, is provable in a proceeding in which he is charged with the commission of an offence*." *State of U.P. v Deoman Upadhyaya*, (1961) 1 SCR 14 (India). The Supreme Court has held that if a self-incriminating statement is given by an accused whilst in police custody, such a statement cannot be proved by using Section 27. These observations are similar to the observations of the Canadian Supreme Court in *John Wray*. Though the Majority rejected the challenge to Section 27 on the basis of Article 14 of the Constitution of India, Subba Rao, J wrote a strong dissenting judgment holding that Section 27 offends Article 14. *Kathi Kalu Oghad* also observed that the information and discovery made as a result of such information may be proved under Section 27 even if such evidence may incriminate the person who made the statement. See also note 73.

[78] Section 161 in the Code of Criminal Procedure, 1898 is the corresponding provision in the previous Act. The Supreme Court held that the scope of the words 'expose him to a criminal charge' cover "*not only cases where the person is already exposed to a criminal charge but also instances which will imminently expose him to criminal charges*." *Nandini Satpathy,* note 87.

[79] For a discussion on Section 162 See Tahsildar Singh v State of U.P., 1959 Supp (2) SCR 875 (India).

[80] See R. *Dineshkumar v. State*, (2015) 7 SCC 497 (India) at 523. The court held that no prosecution can be launched against the maker of a statement falling within the sweep of Section 132 of the Evidence Act on the basis of the "answer" given by a person while deposing as a "witness" before a Court. The court approved the view expressed by the

Oaths Act, 1969 (Act No. 44 of 1969) prohibits administering oaths to an accused person unless he is examined as a witness for the defence.[81] The protection against self-incrimination has been incorporated as a fundamental right under Article 20(3) of the Constitution of India.[82] In addition to being an independent right, the protection against self-incrimination is also recognised as part of the right of 'personal liberty' under Article 21.[83] Articles 20 and 21 are

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dissenting judges in R v. Gopal Doss, ILR (1881) 3 Mad 271 (India) in which the court explained the scope of compulsion under Section 132 as:

"Section 132 abolishes the law of privilege and creates an obligation in a witness to answer every question material to the issue, whether the answer criminate him or not, and gives him a right, as correlated to that duty, to claim that the answer shall not be admitted in evidence against him in a criminal prosecution".

In dealing with the issue of a co-conspirator who was not arraigned as an accused giving the evidence and its admissibility, the court held that:

"In India the privilege of refusing to answer has been removed so that temptation to tell a lie may be avoided but it was necessary to give this protection. The protection is further fortified by Art. 20(3) which says 'that no person accused of any offence shall be compelled to be a witness against himself. This article protects a person who is accused of an offence and not those questioned as witnesses. A person who voluntarily answer questions from the witness box waives the privilege which is against being compelled to be a witness against himself, because he is then not a witness against himself but against others. Section 132 of the Indian Evidence Act sufficiently protects him since his testimony does not go against himself."

Lakshmipat Choraria v. State of Maharashtra, AIR 1968 SC 938 (India).

[81] In Laxmipat Choraria v. Jagjit Singh, AIR 1968 SC 938 (India), the Supreme Court rejected the contention that the evidence of the co-conspirator is not admissible without first granting pardon under Section 306 of Cr.P.C as it violates Article 20(3) and the administration of oath is also prohibited under the Oaths Act, 1969. The court held that the witness was not an accused in the case and Section 132 of the Evidence Act provides sufficient safeguard. In State (Delhi Administration) v. Jagit Singh, AIR 1989 SC 598 (India) the court rejected the contention that an accused who was granted pardon could claim that he had rejected the pardon and he could resist the claim of the prosecution to examine him as a witness.

[82] INDIA. CONST. art. 20, cl. 3 states that "*No person accused of any offence shall be compelled to be a witness against himself*".

[83] Kartar Singh v. State of Punjab, (1994) 3 SCC 569 (India). The Supreme Court noted that Articles 20 and 21 of the Constitution of India are non-derogable within Part III. See also Selvi v. State of Karnataka, (2010) 7 SCC 263 (India). Some of the earlier judgments of the Supreme Court took the view that the right to privacy is not guaranteed under the Constitution. See Kharak Singh v State of U.P., AIR 1963 SC 1295 (India) dealing with

given a special status as the right to enforce them cannot be suspended even during an emergency declared under Part XVIII of the Constitution.[84] The term "offence" is defined under the General Clauses Act, 1897 to mean "*any act or omission made punishable by any law for the time being in force*."[85] The cumulative effect of all these provisions could be summarised as thus: any statement made to the police officer is not admissible in evidence; a police officer should not make any threat or inducement to extract any statement; confessions made to the Magistrate is admissible in evidence provided the procedure prescribed under Cr.P.C are followed to record such confession; no evidence given by a person can be used against him for arrest, prosecution or proved against him in criminal proceedings; no person accused of any offence shall be compelled to be a witness against himself - this is a non-derogable fundamental right guaranteed under the Constitution and the term "offence" means any act or omission punishable under the law. However, the effect of this protective umbrella has been subjected to various interpretations depending on factors such as whether the person is accused of an offence; whether the proceedings are criminal in nature; presence of compulsion; providing evidence against himself and statements made in pre-trial investigation.[86] Some of these aspects are discussed in the succeeding paragraphs.

V. Judicial Response for Self-Incrimination

The scope of the protection afforded under Article 20(3) came up for consideration before the courts in several circumstances. In *M.P. Sharma*[87] the

police surveillance and *M.P. Sharma*, while dealing with the implication of Article 20(3) of the Constitution of India on search and seizure. In K.S. Puttaswamy v Union of India, (2017) 10 SCC 1 (India), a Constitution Bench has overruled the observations in *M.P. Sharma* and *Kharak Singh* that the right to privacy cannot be read into Article 20(3) and that the Constitution of India does not contain a provision to protect privacy.

[84] See INDIA. CONST. art. 359, amended by the Constitution (Forty-fourth Amendment) Act, 1978.

[85] Section 3(38) of the General Clauses Act, 1897 Act No. 10 of 1897) (India)

[86] In *Kathi Kalu* Oghad, the Union of India submitted that four conditions must be met in order for a person to avail the protection of Article 20(3): (a) he must be an accused; (b) he must have been compelled; (c) the compulsion must be to be a witness and (d) against himself.

[87] Note 4.

court refused to provide a restricted interpretation of the phrase 'to be a witness' used in Article 20(3) holding that it covers 'testimonial compulsions' also. The court rejected the contention that the protection is available only against 'appear as a witness'.[88] Earlier, in Mohammed Dastagir v. State of Madras[89] the court refused the application of Article 20(3) of the Constitution of India holding that Dastagir was not accused of an offence and the Deputy Superintendent of Police who asked him to produce the money, which was allegedly offered as bribe, was not investigating the case. However, later, in *Nandini Satpathy v P.L. Dani,*[90] the court rejected the contention that the protection under Article 20(3) commences only in court, and held that the prohibitive sweep of Article 20(3) goes back to the stage of police interrogation. Article 20(3) of the Constitution of India and Section 161 of Cr.P.C are held to be applicable at anterior stages also i.e., before the case comes to the court.[91] The correctness of the propositions laid down by the court in *M.P. Sharma* came up for consideration for a larger Bench of 11 judges in *State of Bombay v. Kathi Kalu Oghad*.[92] The issue involved in the case was

[88] The issue involved in *M. P. Sharma* was whether the search and seizure of documents from an accused would violate Article 20(3). As noted by the larger Bench in *Kathi Kalu Oghad*, note 89, the court in *M. P. Sharma* had covered a much wider field. This leads to a question as to whether the view expressed in *M.P. Sharma* as well as *Kathi Kalu Oghad* which are not relating to the issue before the court could be treated as *obiter*, but for INDIA. CONST. art. 142.

[89] AIR 1960 SC 756 (India). The facts of this case show that there was no warning given to Dastagir that he was not required to produce any evidence and the limits on authority of the Deputy Superintendent of Police to demand Dastagir to produce evidence. The court has not considered the implied compulsion when a police officer was asking for production of documents. These circumstances justify application of the warnings directed by the United States Supreme Court in *Miranda,* note 3.

[90] 1978 (2) SCC 424 (India). The court held that the rule against self-incrimination and the right to remain silent, goes beyond that case and protects the accused in regard to other offences, pending or imminent. This proposition casts a shadow on the use of Section 132 of the Evidence Act.

[91] Agnoo Nagesia v. State of Bihar, (1966) 1 SCR 134 (India); State (NCT of Delhi) v. Navjot Sandhu, (2005) 11 SCC 600 (India). See also *Nandini Satpathy*, note 87.

[92] AIR 1961 SC 1808 (India). The Majority held that *M. P. Sharma* did not state anything contrary to what was decided in *Mohammad Dastagir*. For an interesting analysis of the judgment in this case and the history of this subject, see Abhinav Sekhri, *The right against self-incrimination in India: the compelling case of Kathi Kalu Oghad*,

whether compelling the accused person to give specimen handwriting or signature; or impression of his fingers etc., would result in violation of Article 20(3). The majority concluded that it would not and the minority agreed with that conclusion.[93] The majority had stated that the mere fact that the accused was in custody at the time of making the statement or that such a statement was made while the police officer was questioning is not sufficient to hold that such a statement was extracted by compulsion.[94] The majority also held that in order to bring the statement under the protection of Article 20(3), the person who made the statement should be an accused at the time of making the statement and it is not enough if he became an accused after the statement has been made.[95] The majority also held that "to be a witness" means imparting knowledge in respect of the relevant facts by an oral or written statement. The minority disagreed with the conclusion of the majority concerning the meaning of "to be a witness". A search warrant issued against the accused person was held to be hit by Article 20(3) but a general search warrant is not prohibited under Article 20(3).[96] A similar proposition was approved by the court in *State*

Indian Law Review, DOI: 10.1080/24730580.2019.1646963 (2019). For a critique on this judgment, see Shivani Mittal, *The Right Against Self-Incrimination and State of Bombay v. Kathi Kalu Oghad: A Critique*, 2(1) NLUJ Law Review 75 (2013).

[93] A similar approach has been adopted in *State of U.P. v. Boota Singh*, (1979) 1 SCC 31 (India) and *Sukhvinder Singh v. State of Punjab*, (1994) 5 SCC 152 (India), holding that providing specimen signature was not covered by Article 20(3). However in *Amrit Singh v. State of Punjab*,(2006) 12 SCC 79, the court held that a person could refuse to provide a strand of his hair for analysis.

[94] *Miranda* recognises that duration of custody plays a crucial role in determining the non-voluntariness of the statements made to the police. Another problem in the proposition is the burden of proof in establishing the presence or absence of compulsion. As noticed in *R.K. Dalmia, note 103*, the court puts the burden on the person who made the statement, which is an uphill, if not impossible, task that defeats the purpose of the protection.

[95] But see *Agnoo Nagesia v. State of Bihar*, (1966) 1 SCR 134 (India), the court held that Section 25 of the Evidence Act covers a confession made when the accused was free and not in police custody, as also a confession made before any investigation has begun. The expression "accused of any offence" covers a person accused of an offence at the trial whether or not he was accused of the offence when he made the confession.

[96] *M.P. Sharma,* note 4. In *V. S. Kuttan Pillai v. Rama Krishnan*, (1980) 1 SCC 264 (India), it was stated that the passive submission to search cannot be styled as compulsion.

of Gujarat v. Shyamlal Mohanlal Choksi,[97] wherein the majority held that the power to issue search warrant under Section 94 of the Code of Criminal Procedure, 1898 (hereinafter referred to as Old Cr.P.C.) does not apply against an accused person. J.C. Shah, J. disagreed with the majority. In his dissenting opinion Shah, J. argued that the power to issue the warrant could not be restricted but Article 20(3) would be available to the accused as a defense for not producing the document in response to a summon issued to him. He also argued that the court could not ignore the power to issue warrant as it is in the statute and suggested that any restriction to issue a warrant to an accused could be circumvented by issuing a general search warrant under paragraph 2 of Section 96 of the Old Cr.P.C. With due respect, it is submitted that the minority view did not take into account the effect of Article 13[98] on existing and new laws and the inherent safeguards provided in the Cr.P.C that the powers to issue summons and warrants are circumscribed with the condition that such powers could be exercised if there were 'reasons to believe'.[99] If the court or the officer seeking issuance of the warrant has 'reasons to believe' that some evidence would be available in a place or with a person, it would be difficult to conclude that such belief would not include a suspicion concerning the role of the person in the said offence. Such a belief would trigger the mandate of Article 20(3) as per the principles laid down in *Nandini Satpathi*. Any action circumventing the constitutional protection would render such an action *mala fide* and without authority. Some of the later judgments show that the court has moved away from the position in *Kathi Kalu Oghad* that only an accused person could invoke the protection of Article 20(3) of the Constitution of India. In *Ramanlal*

[97] AIR 1965 SC 1251 (India). In this case, the Magistrate refused to issue a warrant. The District Court was of the opinion that following the judgment in *State of Bombay v. Kathi Kalu Oghad*, (1962) 2 SCR 10 (India), the court is entitled to compel production of the documents from the accused if they do not contain any statements based on the personal knowledge of the accused concerned. The High Court held that Section 94 does not apply to the accused.

[98] INDIA. CONST. art. 13

[99] Section 26 of the Indian Penal Code, 1860 defines "Reason to believe" as "A person is said to have "reason to believe" a thing, if he has sufficient cause to believe that thing but not otherwise. In A.S. Krishnan v State of Kerala, (2004) 11 SCC 576, the court explained that *"Reason to believe" is another facet of the state of mind. "Reason to believe" is not the same thing as "suspicion" or "doubt" and mere seeing also cannot be equated to believing. "Reason to believe" is a higher level of state of mine*."

Bhogilal Shah v. D. K. Guha,[100] the court rejected the contention that a petitioner who was not named as an accused was not entitled to the protection under Article 20(3) holding that a general allegation made in the complaint against the 'management and other officers' include the petitioner. The proposition in the earlier judgments that the person invoking the protection should be formally arraigned as an accused has been changed in the subsequent judgments in *Nandini Sathpathy*[101], *Navjot Sandhu*[102] and *Aloke Nath Dutta.*[103]

Confessions and their retraction, produced conflicting propositions. Confessions are required to be voluntary and any amount of compulsion, pressure or coercion would infringe the right to life under Article 21[104]. Any confession obtained by such methods would also be hit by Article 20(3). In *Kalawati v. State of Himachal Pradesh*,[105] the court held that a retracted confession would not be hit by Article 20(3) and it may have an impact on its probative value. The court based its decision on the premise that all confessions are required to be voluntary and once a person has chosen to exercise his right to make a confession before the Magistrate, it cannot be assumed that it was a product of a compulsion or threat. However, in some cases, the courts have put the burden to prove that the confession was extracted by coercion on the person who made the confession. In *R.K. Dalmia v. Delhi Admn*.,[106] the court held that

[100] (1973) 1 SCC 696. But see Balkishan Devidayal v State of Maharastra, (1980) 4 SCC 600 (India), where the court held that if there was no formal accusation then the protection is not available.

[101] Note 87.

[102] Note 88.

[103] *Aloke Nath Dutta v. State of West Bengal*, (2007) 12 SCC 230 (India).

[104] INDIA. CONST. art. 21. In *Puttaswamy*, the Supreme Court overruled the observations in *M.P. Sharma* and Kharak Singh v State of U.P., (1964) 1 SCR 332 (India) that the right to privacy is not protected by Article 21 of the Constitution of India, holding that the doctrinal basis on which these judgments were given have been changed in R.C. Cooper v. Union of India, 1970) 1 SCC 248 (India) and Maneka Gandhi v. Union of India, (1978) 1 SCC 248 (India).

[105] AIR 1953 SC 131 (India). Interestingly, the court found that the circumstances of the case and minute details in the confession show that it was unsafe to rely on the confession of Kalawati. This case is an apt example concerning the risks in relying on confessions.

[106] AIR 1962 SC 1821 (India). The court emphasized the importance of state of mind of the accused completely freed from any possible influence from the police. Similar

the statement was made voluntarily under the Insurance Act[107] and there was nothing to suggest that there was any coercion. In reaching this conclusion the court considered that a person of position, grit and intelligence could not be so coerced. This scale appears to be unreasonable. On facts, the High Court found that Dalmia's statement was not voluntary as there was an implied offer of amnesty though there was no threat. The Supreme Court did not appropriately appreciate the fact that Dalmia was given only 30 minutes to make the statement. But in *Adambhai Sulemanbhai Ajmeri v. State of Gujarat*[108] the court held that if reasonable reflection time was not given to the accused then the confession statement could not be considered by the courts. In *Kartar Singh v. State of Punjab*,[109] the court upheld the provision that authorised the police officer to record confession and framed guidelines for recording such confessions. Ramaswamy, J., wrote a separate opinion concurring in part and dissenting in part. In his opinion, Ramaswamy, J., has held that Article 20 is not only confined to individual or common law offences, but also extends to statutory offences.[110]

In relation to other enactments where the law provided that a person could be compelled to give evidence that might inculpate him, there are divergent views.[111] In *K. Joseph Angusthi v. M.A. Narayanan,*[112] the Supreme Court held that a public examination ordered under Section 45-G(6) of the Banking Companies Act, 1949 was not hit by Article 20(3). The court accepted that in some cases, the person so examined might be compelled to be a witness against

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observations have been made in *Miranda*, note 3. The practice of the prosecution to seek custody of the accused for interrogation and the routine manner in which such custody is granted are not part of this article. However, it is suggested that the custody for interrogation should be granted only for a limited period and in other cases custody should be granted only where there is a risk of the accused leaving the jurisdiction or would destroy the evidence pending investigation.

[107] Insurance Act, 1938 (Act No. 4 of 1938).

[108] (2014) 7 SCC 716 (India).

[109] (1994) 3 SCC 569 (India).

[110] *Id.* at 728.

[111] For a list of laws compelling a person to provide information, see *Shyamlal Mohanlal*, Note 94.

[112] AIR 1964 SC 1552 (India). Similarly, in *Raja Narayanlal Bansilal v. Maneck Phiroz Mistry*, AIR 1961 SC 29 (India), the court held that a general enquiry into the affairs of a company would not attract Article 20(3).

himself but denied the application of Article 20(3) holding that unless it is shown that the person ordered to be examined was an accused at the time of examination, the protection would not be available. Subsequently, the court expanded the scope of the judgment in *Joseph Angusthi* stating that even if the application contained allegation of commission of offences, it would not amount to accusation within Article 20(3) if those accusations were idle at the time of the enquiry.[113] These judgments are contradictory to the judgments where the court has held that the protection under Article 20(3) would be available during the investigation stage also.

In the judgments dealing with the compulsion to make inculpatory statements under enactments like Customs Act, Central Excise Act, Foreign Exchange Regulation Act[114] etc., the conflict is more pronounced. In *Tukaram G. Gaokar v R.N. Shukla*,[115] the court held that if an accused is required to give evidence in support of his case, such a requirement is not hit by Article 20(3). However, if any summons were issued to a person under Section 108 of the Customs Act directing him to give evidence, then different considerations would arise. In *Tukaram*, the counsel for the Customs Department gave an undertaking in the High Court that the statement made by the petitioner would not be used in criminal proceedings. In some judgments, the court held that the Customs authorities are not police officers; and thus neither Section 25 of the Evidence Act nor Article 20(3) would be attracted in respect of the statements made before them.[116] The rationale provided in some of these judgments was that the main purpose of these enactments was the collection of revenue and not crime

[113] Official Liquidator, Popular Bank Ltd v K. Madhava Naik, AIR 1965 SC 654 (India).

[114] Customs Act, 1962, Act No. 52 of 1962); Central Excise Act, 1944 (Act No. 1 of 1944); Foreign Exchange Regulation Act, 1973 (Act No. 46 of 1973)

[115] AIR 1968 SC 1050 (India).

[116] State of Punjab v Barkat Ram, AIR 1962 SC 276 (India); Ramesh Chandra Mehta v State of W.B., AIR 1970 SC 940 (India); Badku Joti Savant v State of Mysore, AIR 1966 SC 1746 (India) and Percy Rustomji Basta v State of Maharastra, (1971) 1 SCC 847 (India). But see Directorate of Enforcement v Deepak Mahajan, (1994) 3 SCC 440 (India) where the court held that "*the word 'investigation' cannot be limited to police investigation but on the other hand, the said word is with wider connotation and flexible so as to include the investigation carried on by any agency whether he be a police officer or empowered or authorized officer or a person not being a police officer under the direction of a Magistrate to make an investigation vested with the power of investigation*."

detection and prosecution.[117] In *Raja Ram Jaiswal v. State of Bihar*,[118] the court distinguished the judgment in *State of Punjab v. Barkat Ram*[119] and held that any statement made to the officers under the Customs Acts would be hit by Section 25 of the Evidence Act. In *Noor Aga v. State of Punjab*,[120] the court held that "*Any confession made under Section 108 of the Customs Act must give way to Article 20(3) wherefor there is a conflict between the two*." The finding in *Kanhaiyalal v. Union of India*[121] and *Raj Kumar Karwal v. Union of India*[122] that the officers under the Narcotic Drugs and Psychotropic Substances Act, 1985 (Act No. 61 of 1985) (hereinafter referred to as NDPS Act) are not police officers has been overruled in *Tofan Singh v. State of Tamil Nadu*.[123] By majority, *Tofan Singh* held that a confession made to the officers investigating offences under the NDPS Act are hit by Article 20(3). The contempt proceedings have been held to be quasi-criminal proceedings to which Article 20(3) would not apply.[124] Many of these judgments have not considered the

[117] See Tofan Singh v. State of Tamil Nadu, AIR 2020 SC 5592 (India), *para* 126. This observation has helped the court to overcome the binding effect of the prior judgments holding contrary to what *Tofan Singh* has held. However, if we analyse this proposition more carefully, even in those cases, the courts have not considered the fact that its own judgments have held that the adjudication proceedings and the prosecution under enactments such as Sea Customs Act, 1878 (Act No. 18 of 1978), Foreign Exchange and Regulation Act, 1973 (Act No. 46 of 1973) are independent of each other and they can proceed simultaneously. See Asst. Commissioner of Customs v L.R. Melwan, AIR 1970 SC 962 (India); Standard Chartered Bank v Director of Enforcement, (2006) 4 SCC 278 (India). The courts have held that only when the adjudication proceedings are dropped in favour of the assessee, the criminal proceedings on the same set of facts would be quashed and not otherwise. See also Radheshyam Kejriwal v State of W.B., (2011) 3 SCC 581 (India).

[118] AIR 1964 SC 828 (India).

[119] Note 113.

[120] (2008) 16 SCC 417 (India).

[121] (2008) 4 SCC 668 (India).

[122](1990) 2 SCC 409 (India).

[123]AIR 2020 SC 5592 (India),. The court approved the principles laid down in Nirmal Singh Pehlwan v Inspector Customs, (2011) 12 SCC 298 (India) and *Noor Aga*. *Tofan Singh* also distinguished the judgments under Customs Act and Central Excise Act etc., holding that the officers under the said enactments are not 'police officers' on the ground that these finding are given on the basis that the purpose of these enactments are revenue collection however the purpose of NDPS Act is prohibition.

[124] Delhi Judicial Services Assn v. State of Gujarat, (1991) 4 SCC 406 (India).

impact of the definition of "offence" under the General Clauses Act, 1897. On the compelled production of documents and other evidence, the court held that compelled production of documents would be covered by Article 20(3).[125] However, a general search is not prohibited by Article 20(3).[126] Since some of the judgments hold that Customs Officers and certain other authorities are not police officers for the purpose of Section 25 of the Evidence Act and consequently excluded the application of Article 20(3) in respect of the statements made to them, there has not been any discussion on the difference between compelled production of documents that are required to be maintained as per law and compelled production of private papers. However, it appears that a compelled production of statutory documents would not be covered by Article 20(3).

VII. Conclusion

The Bill of Rights in the United States and the fundamental rights in the Indian Constitution are natural rights reserved by citizens and they act as restrictions on the State and its organs. These rights are inviolable. The Supreme Court has rejected the contention that in order to achieve the goals of Directive Principles in Part IV of the Constitution of India, the fundamental rights could be abrogated. There is nothing in the language of Article 20(3) to suggest that it would apply only to offences tried under the provisions of Cr.P.C. or to the cases to which the Evidence Act applies. The protection against self-incrimination is available to all proceedings which are criminal in nature i.e., has the potential to inflict a punishment of whatever nature, be it imprisonment, penalty, confiscation etc., It should be remembered that even in civil proceedings the power of the court to compel production of documents from a party to the proceedings is limited and if the document is not produced, the court could only draw an adverse inference. The statutory provisions compelling a person to make inculpatory statements result in a cruel trilemma; and they fall squarely in the field occupied by Article 20(3). Confession is not

[125] *M.P. Sharma*, Note 4. But see *Shyamalal*, Note 94 where the court held that it could be compelled.

[126] *Id*. This position is reiterated in *Justice K. S. Puttaswamy (Retd) v. Union of India*, (2017) 10 SCC 1 (India).

proof, and it has been sufficiently demonstrated that in many cases that confessions are extracted by compulsion. As noted earlier, proof by confession dispenses with the proof of the charges to the satisfaction of the court. The courts have also recognised the risks in relying on such confessions. The difficulties faced by the prosecution is not a ground for the courts to dilute the constitutional protection and permit the authorities to extract confessions or inculpatory statements. There can be no doubt that the interest of the society will take precedence over that of an individual but it cannot be ignored that the very purpose of the society is to ensure dignified living of its subjects. Commission of offences can always be punished by proving them with sufficient evidence. A study of the judgments on the privilege against self-incriminations shows that the attempts by the courts to strike a balance failed and the courts are constrained to make a hard rule to protect individual rights. The experience in India shows that the protection guaranteed under Article 20(3) has not been recognized in its full vigour and spirit. The recent judgments of the Supreme Court lead the way in the correct path. Some of the earlier judgments that have diluted the protection against self-incrimination are required to be reconsidered.