RIGHT AGAINST SELF INCrimination: A Comparison BETWEEN INDIA AND U.S.A.

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Abstract

India and USA both have gone through their own process of the development of this right or in providing the scope of application of this right in their own systems. How they have realized and imbibed this right in their constitutional and legal fabric poses various planes or facets of comparison keeping in view the various case laws and interpretations developed over a period of time. It is the endeavor here to lay down in concrete terms that what is the extent and difference between the protection provided through this right in India and US and what can be learnt for realization of this protection in effective manner from both countries. As the witnesses also play a vital role in a court proceeding how far the availability of this right to them extends the utility of this right ensures fair trial and criminal justice. This research paper seeks to lay down the comparison between India and US with respect to the right against self incrimination.

1. INTRODUCTION

The aforesaid right means that no one can be compelled to incriminate himself or be a witness against himself in a crime. Self-incrimination is defined by Black's Law Dictionary as, “Acts or declarations either as testimony at trial or prior to trial by which one implicates himself in a crime”. The basis of the principle lies in the maxim of “nemo teneteur prodre accussare seipsum”, in essence it translates to “No man is bound to accuse himself.” Guiding principle of criminal justice imbibing the principle of fair trial is that, a person is innocent in the eye of law until his guilt is proved, flows with the spirit of human rights which is recognized through various international conventions and constitutions of different countries. This right finds its origin in common law system as a reaction against Star Chamber and Ecclesiastical Courts’ oppressive inquisitorial system (and later with the development of adversarial system) and from there it has travelled to the other legal and constitutional systems like India, USA, Hongkong, China, Spain, Germany, Israel, South Africa and many more. India has recognized this right in the Constitution as a fundamental right under Article 20(3) while on the other hand US has recognized it way prior to India through 5th (1789) and 14th (1868) Constitutional amendments.

Objective of the study is to discuss the right against self-incrimination as applied and interpreted in India and USA and to find out the similarities and differences. Further this research has objective to find and redress those grey areas which if tackled would result in better realization of this precious freedom provided in terms of a fundamental right in both the countries, particularly, in case of witnesses. The study also seeks to touch the issues which are emerging with the development of technology in the field of criminal law to extract information from a person like brain mapping, DNA profiling, polygraph test etc.

The scope of this study shall be confined to the respective constitutions, legislations, various case-laws and other materials within the legal framework of India and USA appropriate to draw out the similarities and differences between the two constitutions with respect to right against self-incrimination. Research is more centralised on the conception concerning the availability of the right to witnesses, & new challenges to the effective exercisability due to new technological developments.
Due to the emergence of new technologies and methods i.e. brain mapping, polygraph test, narcoanalysis test etc. to connect the chains of the accused with that of crime has also created a careful scope for the interpretation and non-violation encroachment of the right in those cases. These methods may also jeopardise or nullify the exercise of right against self-incrimination of the accused person because in those case the person is not conscious to make a choice about the incriminatory and non-incriminatory statements under the effect of a drug or the procedure applied therein.

2. POSITION OF THE RIGHT IN INDIA AND USA

POSITION IN INDIA:

This principle of right against self-incrimination has been provided recognition under Article 20(3) of the Constitution-

“No person accused of any offence shall be compelled to be a witness against himself”

It means that this right has been provided in case of accused only. Accused means a person who is charged with the accusation of offence of formal nature which normally would implicate him for the commission of that offence. Compulsion means duress which may be mental and physical. ‘To be a witness’ means conveying or giving of info based on own knowledge of the person giving it and process of producing documents in court is not included within it. Offence is meant according to the definition provided under the General Clauses Act, section 3(38) as that “an act punishable under the Indian Penal Code or any special or local laws”.

Whereas, the right in US and England both is available to accused as well as to any witness (witness to a proceeding) so as to protect them from posing answers to questions which are of self-incriminatory nature, though, a mere witness has no such protection under the Constitution of India under the provision of Article 20(3). Article 20(3) is of no use where the self-incriminatory statements are made voluntarily by the accused himself and no element of coercion is there. “Article 20(3) comprehends within its scope not merely oral testimony given by an accused in a criminal case pending against him, but also evidence of whatever character including documentary evidence compelled out of a person who is or is likely to become incriminated thereby as an accused.” Moreover, to give finger print impression or sample signature is not covered within the term “to be a witness”. In order to find out that the testimony by an accused person may be said to have been self-incriminatory which by its inherent character has the tendency of incriminating the accused, if not also of actually doing so. Testimonial compulsion has a protection against it in favour of the accused with respect to proceedings in the Court but it is not available in case where the orders are made (maybe made) by a police officer during the investigation proceedings (Article 20(3) and sec.94 of CrPC). Article 20(3) also includes right to remain silence within it.

This principle is realized through its incorporation in criminal and procedural laws in India i.e. Code of Criminal Procedure 1973 and Indian Evidence Act, 1872 etc.

Section 27 of the Evidence Act 1872 lays down that the information given by an accused which leads to unearthing of information or fact which is of a nature that may or may not prove to be incriminatory, is admissible as evidence unless no compulsion to the accused was exercised and it is to be seen on a case to case basis and it cannot be assumed that in police custody he was subjected to compulsion necessarily. Sec. 24, Sec. 25 and Sec. 26 of the Evidence Act provide for the reliability and voluntariness in a custodial setting and ensures that the criminal justice system and fair trial does not get jeopardized due to forced testimonies.
According to the Supreme Court a person who is accused cannot be compelled to answer the questions asked to him in the court only just because the answers given by him are not linked to the case and are not in the ambit of the case when viewed with the case. Accused has privilege to say nothing if he reasonably feels that the answer that he is going to tell will expose him in another case or any other accusation and he will be guilty for that offence or accusation, even if the inquiry under way does not apply to that.\textsuperscript{viii}(sec 161(2) Cr.P.C.) Sec.161 of Cr.P.C. Conjunctive effect of Article 20(3) of Constitution, Sec. 161(2), 313 and 315(b) of Cr.P.C. is that even in a case accused is himself a competent witness in his own trial, he can not be compelled to answer questions that would expose him to incrimination and that his silence to those questions cannot be interpreted adversely. 180th Law Commission Report also took note of it and considered the arguments for diluting the ‘rule against adverse inferences from silence’.

\textbf{POSITION IN USA:}

Fifth Amendment of the US Constitution provides inter alia:

“No person...shall be compelled in any criminal case, to be a witness against himself.”

It involves three elements i.e. testimony, testimony and self-incrimination. \textbf{Compulsion} under US Law may be understood in terms of subpoena (ad testificatum) is a court order to appear and testify, on penalty of being charged for contempt of court and imprisonment or fine. Testimony was held to be compelled when a police officer was given a choice between incriminating him or losing his job\textsuperscript{ix}. Fifth Amendment directs \textbf{Testimony} to be defined as including any words or actions that disclose things a person has knowledge of\textsuperscript{x}. Taking fingerprints, identification parade, photographing\textsuperscript{xi}, handwriting, voice samples etc does not amount to testimony (appearance evidence), whereas in the case of any procedure that involves penetrating the body surface; taking saliva, blood, semen, public hair or other tissue samples; or that involves severe risk or discomfort or risk to health, police should obtain a warrant from the court. \textbf{Self-incrimination;} disclosures must create a risk of the person’s being convicted of the crimes revealed\textsuperscript{xii}. Criminal defendants invoke this right by not taking the witness stand. A defendant’s decision not to testify is final and nothing can be drawn from his silence as to the incrimination or connection therefore\textsuperscript{xiii}.

United States Constitution, Fifth and Fourteenth Amendments, has concretised this right against self-incrimination. The immunity is available to witnesses also, other than the accused, on the basis that a witness in any proceeding, civil or criminal, has the privilege of not answering a question on the ground that the answer might make him liable to a criminal charge.\textsuperscript{xiv} Again, if a witness who claims the privilege is improperly compelled to answer, such answer cannot be used against him in a subsequent trial on a criminal charge based on the incriminating statement.\textsuperscript{xv}

\textbf{Miranda rights in Miranda v. Arizona}, defined protocols to ensure that police notify suspected suspects of this right under constitutional protections and ensure that police protect the rights of witnesses and that information obtained by the accused without revealing his right to stay quiet in the constitution is not admissible in court. A person also has a right to attorney and its presence before any interrogation starts. These are called Miranda warnings which are fourfold:

1). Person or accused has the right to keep quiet
2). Anything the person or accused said could be used and will be used in the court of law against him.
3). The person or accused, has the right to have an attorney during the process of investigation or questioning process to be present with him; and
4). If the person or accused is not able to avail an attorney then one attorney will be provided to him by the procedure established by law.
“The mere fact that the accused may have answered some questions or volunteered some statements on his own does not deprive him of his right to refrain from answering any further inquiries until he has consulted with his attorney and thereafter consents to be questioned. Miranda warnings are required to be given prior to any questioning initiated by the officer who is appointed for the enforcement of the law when a person is going to be taken into custody otherwise the person will be stripped of his liberty of action in any significant way. The warnings provided in Miranda as Miranda warning must be issued while the police:

1. Investigates a suspect, (a cross examination happens when police pose inquiries or participate at the end of the day or activities that they should know are sensibly prone to inspire an implicating reaction from the suspect)
2. Who is then in detention (if the relevant circumstances surrounding the incident are such that the case would be judged by a reasonable person as equal to an arrest)
3. About an offence he has still not been charged with. (If the defendant has already been arrested, Sixth Amendment rule comes into play, which means that the police may not intentionally collect statements which are of incriminatory nature from the accused at a time when the lawyer is unavailable, unless the accused offers a legitimate waiver)

A clear and unequivocal response from the suspect is required with regard to exercise of Miranda Rights or to have the presence of a lawyer, otherwise a waiver will be inferred from the suspect’s conduct if the suspect at any time during the interview, answers a question with awareness and understanding of his rights and without asserting them. Where a criminal refuse to take the protection of right to silence then a person’s secrecy or silence can also be used against him without violating the protections of the Fifth Amendment, as happened in the case of Salinas v. Texas: the person suspected of committing the offence willingly told the police while a homicide investigation was going on and when he was not under arrest but when the investigating officer asked about his role in the murder, he was very still and his entire body demeanor and disposition shifted and the police presented silence and behavioural changes as incriminating evidence and embraced them.

3. JUDICIAL RESPONSE

In the famous case, Nandini Satpathy v. P.L. Dani, there was a FIR was registered against the former chief minister of Orissa and her sons under the Prevention of Corruption Act, and she was called for questioning in a Vigilance Police Station, Cuttack. She denied to reply the questions of Vigilance team that was asked to her through a questionnaire. She said that she has a right to keep quiet under the Article20(3) of the Indian Constitution. Upon her refusal she was charged under sec. 179 of IPC to deny the answers to a public servant. Supreme Court settled the position by stating that under sec.179 the person may be compelled only for the answers which are not incriminating and refusal to answer questions which are self-incriminating, lies well within the protection of Article 20(3) and also under sec.161(2) of Cr.P.C. Assurance of Art. 20(3) is acknowledged under section 161 of Cr.P.C. that an individual when inspected under sec.161 of Cr.P.C isn't required to respond to questions that tend to self-incriminate. Moreover, in the case it was also held that the protection of Article 20(3) and Sec.161 extends to witness also.

Selvi v. State of Karnataka, came before the Supreme Court landed as a special leave petition criminal in nature against the State of Karnataka against the use of the polygraph and narcoanalysis tests against the accused persons in the case without their consent. It was a case of honour killing. The accused versions were not in consonance while the polygraph test was conducted and they attempted to crush the test and it was indicated that there was their contribution in wrongdoing. Consequently, the police looked for authorization to direct narco-examination from the magistrate against the request for which accused people appealed under the watchful eye of Supreme Court. The questions raised and dealt with and decided in the case are hereunder:

1. Whether the management of narcoanalysis, polygraph test (lie-detector test) and BEAP (Brain Activation Profile) test led against the desire of the individual comes under outbreak of Article 20(3)- Yes, because during
the conduct of these tests there is no conscious control of the subject on the responses he is giving or making but under the effect of the drug or the process of the test which involves testimonial compulsion. Thus, test subject’s right not to reveal any information which may incriminate him, is violated. Articles 20(3) & 21 and sec. 161(2) Cr.P.C are violated by the narcoanalysis, polygraph and BEAP tests.

2). Whether these tests violate fundamental right to privacy- Yes, Article 21 provides that through the judicial expansion of it, that mental privacy is an aspect of personal liberty and peeping into the mind of a person to obtain responses is a violation of this right because he is not conscious control over them. It also violates the right to fair trial because access to legal advice becomes meaningless when subject is put to such tests.

3). Admissibility of the information obtained through these tests- Limited and corroborative use within the meaning of sec.27 of the Evidence Act if the test is taken voluntarily from the subject complying with the recommendations of National Human Rights Commission (NHRC) (in case of polygraph test and similar safeguards were directed to be devised for the narcoanalysis and BEAP test also).

Court concluded that:

“We are also of the view that forcing an individual to undergo any of the impugned techniques violates the standard of ‘substantive due process’ which is required for restraining 247 personal liberty. Such a violation will occur irrespective of whether these techniques are forcibly administered during the course of an investigation or for any other purpose since the test results could also expose a person to adverse consequences of a non-penal nature. The impugned techniques cannot be read into the statutory provisions which enable medical examination during investigation in criminal cases, i.e. the Explanation to Sections 53, 53-A and 54 of the Code of Criminal Procedure, 1973. Such an expansive interpretation is not feasible in light of the rule of ‘ejusdem generis’ and the considerations which govern the interpretation of statutes in relation to scientific advancements.” (Para 222)

Supreme Court in the case of N.D. Tiwari held that the taking of blood samples for the purposes of DNA profiling is not under attack of Article 21 with respect to violation of right to privacy.

Miranda v. Arizona (US SUPREME COURT): The Supreme Court decided that before the interrogation by the police starts, the constitutional right to have a lawyer and right against self-incrimination is to be informed to the confined criminal suspects. The case began with the capture of Ernesto Miranda an inhabitant of Phoenix accused of kidnapping, rape and robbery and during the two-hour cross examination by the police he admitted his wrongdoing which was recorded by the police. Miranda had no guidance or lawyer present. He was convicted to 20 to 30 years on the charge of rape and kidnapping. Later he went Arizona Supreme Court and appealed that the admission acquired by the police was unlawful, yet the court oppose this idea. He at that point went and appealed in US Supreme Court which held that in a 5-4 decision composed by Earl Warren (Chief Justice), the admission of Miranda was not permissible as it was taken from him without illuminating him his privilege regarding a lawyer and against self-incrimination. It explored towards the Fifth Amendment where the constitution gives right to a criminal suspect to decline to be an observer against himself and Sixth Constitutional right to a lawyer. Court disclosed the admonitions to be given to the criminal suspect about the privilege against self-incrimination and to have a lawyer present except if he forgoes it. This law despite everything holds great and these alerts are known as Miranda Warnings or Miranda Rights.

**COMPARISON**

There is not any substantial difference between the realisation of the right against self-incrimination in the both countries in criminal cases when applicable in case of natural persons. Though the differences are upon the
coverage and protection of this right against self-incrimination due to the interpretation of term person in the legal system of the both the countries and with respect to the inherent applicability or availability of this right in some particular fields.

The key differences on comparison of Indian and American Constitution with respect to right against self-incrimination are hereunder-

1. The right is available only to the accused person in India as per the literal interpretation of the language of Article 20(3) though from the jurisprudential development of Nandini Satpathy case, this right is made applicable to witnesses also.
   While in the case of US this right is expressly recognised in the Constitutional text of the 5th Amendment for both accused and witnesses.

2. In India the ambit of interpretation of term ‘person’ also includes corporate personality as well, hence in India the right is available both to natural person and corporate personality; "person" includes any company or association or body of individuals, whether incorporated or not xxvi.
   While in the case of US it is not available to corporations.

3. In India the right is available in case of criminal proceedings only: “the protection under Art.20(3) is available only in criminal proceedings or proceedings of criminal nature before a court of law or other tribunal before which a person accused of an offence as defined in S. 3(38) of the General Clauses Act, that is, an act punishable under the Penal Code or a special or local law”xxvii. While in case of US it is available in both civil and criminal cases. Which makes scope of protection wider in this respect.

4. This privilege isn’t accessible if there should arise an occurrence of regulatory procedures in India for example Ocean Customs Act and so on even on the ground that the individual isn't officially blamed for an offence at the hour of cross examination in presence of the known fact that the purpose of regulatory examinations isn't just to discover facts, yet in addition to gather proof on which an arraignment might be based later.

CONCLUSION AND ANALYSIS

Treatment of the right against self-incrimination in India does not cover witnesses in its ambit as like USA. Due to which Indian approach appears narrower than as realized in USA to provide protection of this right and in absence of this right to witnesses we are not able to realize this right against self-incrimination in its spirit and applicability. We should provide this right to witnesses also in criminal cases otherwise we fail to appreciate this right particularly in Indian setup which requires a dedicated structure of police reforms.

The right in US covers a larger area of application in both civil and criminal cases than in India which makes it seem wider than the Indian law or protection on this subject. Though in application in criminal cases both laws reveal not much of substantial difference. This right is a very important human right as well. Indian constitution provides protection to the rights under Article 20 and Article 21 in the case of the emergency also which reflects the sanctity of these rights for the purpose of human dignity and freedom. Our constitution makers had the idea of the brutalities of British and the history with the struggle against the oppressive laws. The new technologies have changed the scenario.

Criminal Justice System of a nation represents its commitment towards the individual rights and constitutional values enshrined therein the guiding principles of the Constitution. It must be comprehensive and nuanced so as
to cover all aspects of law and must grow with the upcoming times and new situations, for it imposes confidence in the minds of the citizens and their trust towards the system in turn.

Due to the emergence of new technologies and methods i.e. brain mapping, polygraph test, narcoanalysis test etc. to connect the chains of the accused with that of crime has also created a careful scope for the interpretation and non-violation encroachment of the right against self-incrimination in those cases. These methods may also jeopardise or nullify the exercise of right against self-incrimination of the accused person because in those case the person is not conscious to make a choice about the incriminatory and non-incriminatory statements under the effect of a drug or the procedure applied therein. Moreover, these tests may not be accurate which affects their evidentiary value. In some cases, in India these tests are used i.e. Arushi Talwar case, Nithari killings case, Telgi scam and Mumbai blasts case. But the consent of the subject is necessary and the necessary guidelines if formulated, to be followed. Though they may be used as having a corroborative value or collection of information based on that, which leads to the conviction of the accused independently of the results of the tests. Evidence Act also does not recognise them as substantial evidences but only they have opinion value (e.g. expert judgement provision under Evidence Act). It is also necessary for the better and efficient administration of justice delivery system that police reforms that were spoken of about in the Prakash Singh v. Union of India are to be implemented along with the Soli Sorabjee Committee Report to save them subjects from the police torture and unprofessional behaviour of policeman as that conviction rate does not present a very shiny picture for the administration of justice. The optimal cooperation between the various investigative agencies is also the pressing need for the purposes of reducing the response in criminal justice delivery system.

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