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PERSONAL DATA
PROTECTION BILL
A STEP IN THE
**RIGHT
DIRECTION**

Industry
Experts' **”**
VIEWPOINT

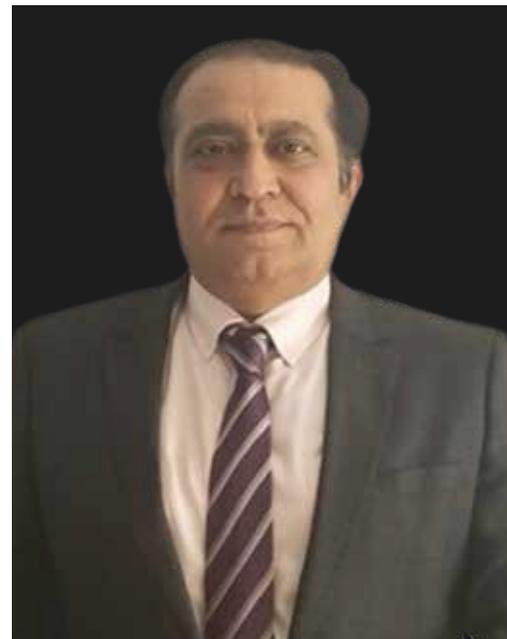
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DECLINE TO ANSWER

The principle of protection against compulsion of self-incrimination is a fundamental canon of the British system of criminal jurisprudence, which has been adopted by the US and incorporated as a fundamental right under the 5th Amendment

“I decline to answer, using the fifth amendment right”, “I plead the Fifth”, “The information is privileged, Your Honor” are phrases we hear while watching legal dramas on various OTT platforms like Netflix, Amazon Prime etc. We wonder if we have such laws in India as well. The answer is yes, we do. Our constitution provides us with the right to remain silent under Article 20(3)¹.

A Privilege is a special right, or an advantage provided to a person. For examples, the right against self-incrimination, spousal privileges, attorney client privilege etc. The principle of protection against compulsion of self-incrimination is a fundamental canon of the British system of criminal jurisprudence. It has been adopted by the United States and has been incorporated as a fundamental right under the fifth

Amendment. The said principle has been adopted by our system under various provisions. The Supreme Court has given a refreshing analysis of Article 20(3) in the context of national and international developments in human rights.²

NEED FOR PROVIDING PRIVILEGE UNDER THE CRIMINAL LEGAL SYSTEM

A democracy cannot function efficiently without having an efficient legal system. The objective of any legal system is to maintain law and order and to remove arbitrariness. Therefore, if proper safeguards and checks are not incorporated, arbitrariness is bound to infiltrate the system due to the human interface. Across jurisdictions, the objective is to establish a reformative system instead of a punitive one.

¹ Protection in respect of conviction for offenses : No person accused of any offense shall be compelled to be a witness against himself

² V.N. Shukla – The Constitution of India 12th Edition Page 200



VINOD CHAUHAN
Associate



Humans, intentionally or unintentionally, have their prejudices. These prejudices make us function in a manner which may not always be as per the rule book. Hence, it is imperative to have appropriate safeguards. To prevent injustice and to reach the desired conclusion, safeguards and privileges are provided to an accused. It is important to state that any sort of harassment, torture etc. is not only unwarranted but also illegal. The custodial deaths in Tamil Nadu are a recent example. In many countries, apart from penal consequences, such conduct could also invite civil suits seeking damages.

The criminal jurisprudence in our country functions on the presumption of innocence. It is for the prosecution to prove the guilt of the accused beyond reasonable doubt. Thus, the task of the prosecution is more difficult. This could be an additional factor for resorting to unwarranted and illegal methods of unearthing the truth or sometimes achieving the desired narrative. However, our constitution requires that dignity and sanctity of human life shall be maintained.

The Code of Criminal Procedure (“CRPC”) along with the Indian Evidence Act (“IEA”) provides a comprehensive set

of rules which are based on the constitutional principles and are intended to prevent any miscarriage of justice while granting certain rights or privileges to the accused to enable them to maintain the dignity and sanctity of their life.

PRIVILEGES ACCORDED TO THE ACCUSED WHILE BEING UNDER TRIAL OR UNDER INVESTIGATION

Various privileges are accorded to accused persons to ensure that justice prevails and legal objectives are met with. Some of the privileges that are available to under-trials during the investigation as abovementioned and are highlighted hereinafter.

RIGHT TO SILENCE

“Silence isn’t empty, it is full of answers.”

- Swami Vivekanand

Article 20 (3) of the Constitution of India provides that “no person accused of any offense shall be compelled to be a witness against himself” which provides an accused from incriminating herself/himself to the crime being investigated or the right to remain silent. This privilege is extended both before the investigation agencies as well as the court and it is a settled law that if the said protection is intended to be confined to being a witness only before the court then it would not be an effective provision and the same can be defeated by compelling the accused to give all the evidence outside the court and then, having what he was so compelled to do proved in court through other witnesses.³ Article 20(3) is a guarantee of dignity and integrity to a person which is enshrined in the Constitution enabling the rule of law and ensuring that it does not become a police state where unjustified means are adopted in the wake of obtaining information from the accused/witness⁴.

Three important elements to avail Article 20(3) are:

1. The person should be an accused of any offense.
2. The person accused should be under compulsion, and
3. The person should be compelled to be a witness against himself.

It can be said that this privilege extends to criminal proceedings strictly and can be availed before the

³ MP Sharma vs. Satish Chandra (1954) and later affirmed in Kathi Kalu Oghad (1961)

⁴ Nandini Satpathy vs. PL Dani 1978 AIR 1025

⁵ Tofan Singh vs. State of Tamil Nadu Criminal Appeal No.152 of 2013

⁶ (2008) 4 SCC 668

police agencies as well as the courts. However, the same cannot be resorted to before a civil court and a witness is obliged to answer all the questions. As this privilege is also available before 'a police officer', it is also important to understand who qualifies as 'a police officer'.

The Hon'ble Supreme Court in a recent judgment⁵ overruled *Kanhaiyalal Vs. Union of India*⁶, and held that officers under the Narcotic Drugs & Psychotropic Substances (NDPS) Act are police officers. Therefore, the privilege extends to the statements made to them and cannot be made grounds for conviction. The Delhi High Court in *Vakamulla Chandrashekhar vs Enforcement Directorate & Anr*⁷ relied upon *Jeewan Kumar Raut & Anr vs C.B.I*⁸ which relied upon *Raj Kumar Karwal v. Union of India*⁹ which stands over-ruled. Therefore, it may be inferred that officers under the Prevention of Money Laundering Act (PMLA) stand on the same footing as that of those under the NDPS Act.

The Supreme Court in another judgment¹⁰ observed that one must show use of compulsion to fall under the four corners of Article 20(3). Therefore, where there is lack of compulsion, such evidence can be used by the prosecuting agencies and the privilege does not extend. Thus, if an accused provides any information under consent and out of her/his own volition, Article 20 (3) cannot be a bar to such information being used in evidence.

The privilege under Article 20(3) is afforded only to an accused person and not any other person. However, taking a liberal view and broadening the scope of the same, the Supreme Court¹¹ held that to avail the privilege under Article 20(3), a formal acquisition is required. The protection envisaged under section 161(2) CRPC is wider and protects not only the accused but also any person acquainted with the facts and circumstances of the case¹². The right to remain silent stems from the fact that the onus of proving the guilt of the accused lies upon the prosecution. The prosecution has to prove the guilt by strength of its case and not on the weakness of the defense. At the same time, the same does not mean that the rules are wholly one-sided and prevent/hinder conviction.

The following provisions put some light on the fact that our statutes provide a balance to ensure justice.

“The Hon'ble Supreme Court in a recent judgment overruled *Kanhaiyalal Vs. Union of India*, and held that officers under the Narcotic Drugs & Psychotropic Substances (NDPS) Act are police officers

“Section 161 of The Code of Criminal Procedure, 1973 : Examination of the witness by police:

(2) *Such person shall be bound to answer truly all questions relating to such case put to him by such officer, other than questions the answers to which would have a tendency to expose him to a criminal charge or to a penalty or forfeiture.”*

“Section 27 of The Indian Evidence Act, 1872 : How much of information received from accused may be proved. *Provided that, when any fact is deposed to as discovered in consequence of information received from a person accused of any offense, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved.”*

Though, nothing can be forced out of the accused, yet any recovery based on information obtained by the investigating agencies can be used to validate the case of the prosecution. However, whether any discovery being a result of unlawful means should be allowed to be read as a part of the evidence, is an important question which needs to be addressed as it would not be outrageous to suggest that not all rules are followed when nobody is watching. The Fourth Amendment Rights¹³ do not find a parallel in the Indian Judicial System. The doctrine of “Fruits of the poisonous tree” needs re-consideration especially

⁷ W.P.(CRL) 852/2017

⁸ (2009) 7 SCC 526

⁹ (1990) 2 SCC 409

¹⁰ *The State Of Bombay vs Kathi Kalu Oghad And Others* 1961 AIR 1808

¹¹ *The State Of Bombay vs Kathi Kalu Oghad And Others* 1961 AIR 1808

¹² *Selvi & Ors vs State Of Karnataka & Anr*

¹³ The Constitution of USA, through the Fourth Amendment, protects people from unreasonable searches and seizures by the government. The Fourth Amendment, however, is not a guarantee against all searches and seizures, but only those that are deemed unreasonable under the law

¹⁴ 2018 SCC Online SC 2548

in light of the judgment of *K.S. Puttaswamy v. Union of India*, also it is known that investigating agencies have been known to adopt “out of the box” methods in order to derive relevant information. However, if one resorts to such methods, can we say that Article 20(3) is an absolute right?

In *Prahlad Kumar Vs State of Rajasthan*¹⁴, the Court found that the accused did not provide for sufficient explanations to certain accusations under Section 313 of the CRPC and concluded that negative inference can be taken if the accused remains silent. It was held that the courts are empowered to draw adverse inference to the silence of the accused as per the provisions of the law¹⁵. The Supreme Court¹⁶ held that an adverse inference can be drawn against the accused, however, the case against the accused was proved beyond reasonable doubt by circumstantial evidence. Further, the Supreme Court held that when an inference regarding the existence of one fact against an accused was drawn from another set of proved facts, the burden lay on the accused to rebut such inference by virtue of his special knowledge about such facts.¹⁷

One must always remember that in a matter of circumstantial evidence, the prosecution should establish its case beyond reasonable doubt. Without there being any possibility of any other explanation and if there is any, the same has to benefit the accused. Therefore, drawing adverse inference to the silence when done without observing the requirements as prescribed by the law invalidates the basic law of criminal jurisprudence in India. Thus, it is not the duty of the defense to provide for such missing links, but to demolish the case of the prosecution only after they have established guilt.

WHATSAPP MESSAGES AND SELF-INCRIMINATION

A new trend of prosecution based on the chats/messages of individuals and using the same as evidence in various investigations is on rise and the same is not bereft of controversy. Apart from raising questions of violation of the right to privacy, a pertinent issue raised is whether compelling a person to open his/her chats/messages violates the protection against self-incrimination. The Indiana Supreme Court (USA) held that compelling a person to open one’s phone would



indeed violate the Fifth Amendment right against self-incrimination. Because in doing so, the individual is providing the law enforcement information which they do not already know.¹⁸ But the said question is open to debate and yet to be crystallized in the Indian judicial system.

Another way to prosecute agencies to access a person’s chat is through section 91 CRPC notice to a service provider (Whatsapp/iMessage etc.). But recent technological advancement of end-to-end encryption whereby the service providers’ claims not to have any knowledge of the users’ personal information makes it difficult for them to provide such information to the investigating agencies. In *Facebook Inc. v UOI*¹⁹, Whatsapp reiterated the aforesaid stand.

ATTORNEY-CLIENT PRIVILEGE

Everyone has the right to fair trial and fair representation, even an accused in the most heinous crimes. To ensure fair representation before the courts, it is important that the accused is provided with an opportunity to consult and seek legal advise

¹⁵ Ramnaresh & Ors. v. State of Chattisgarh (2012) 4 SCC 257

¹⁶ Ronny V State of Maharashtra (1998) 3 SCC 625

¹⁷ State of West Bengal V mir Mohd Omar (2000) 8 SCC 382

¹⁸ Katelin Eunjo Seo v. State of Indiana Supreme Court Case No. 18S-CR-595

¹⁹ Facebook Inc. v. Union of India 2019 (13) SCALE13

²⁰ Greenough v. Gaskell (1833)1 Myl. & K. 98 as per Brougham L.C)

²¹ Cecilia Fernandes v State represented by the Director General of Police Goa and Anr, Criminal Miscellaneous Application No. 9 of 2005.



without any apprehensions and doubts and share all the necessary facts in complete honesty. The attorney-client privilege ensures the accused of this confidence. The courts in England held that if this privilege is not provided, people would be left to defend themselves. Deprivation of professional expertise may render them exposed to unnecessary perils or even if one approaches a legal counsel, she/he may be sceptical of sharing the complete details²⁰. The Bombay High Court held that the right to consult a legal practitioner under Article 22(1) of the Constitution of India could only be exercised meaningfully in confidence.²¹ Thus, a police officer, while entitled to stay within a certain distance of an accused, cannot insist on being within hearing distance so as to prevent an accused from instructing his or her lawyer in confidence.

BUT EVERY COMMUNICATION IS NOT COVERED BY THE PRIVILEGE

Section 126 of the Indian Evidence Act inscribes the abovementioned privilege but incorporates certain exceptions. These exceptions cast a duty on the counsel to report certain events when falling in the said category. It is obvious that a counsel represents

the accused in best of its capacity with facts as is, she/he is not to counsel the accused in a manner which would be aggravating the nature of offense. It is to say that a lawyer only represents and does not become an accomplice to any crime. Therefore, not all client-attorney relationships are covered by the privilege. Even within the provided degree of the relationship, not every communication with one's legal counsel is protected by the privilege. The communications made confidentially, with a view to obtain professional advice are covered by privileged. The privilege extends to communication only once pleader-client relationship has been formed and not prior to that²². In an interesting event, a client was advised to stay absconding by the attorney through a written communication, the Madras High Court gave an observation that communication is privileged and is an advice in the capacity of an advocate. The exception under Section 129 IEA was not attracted.²³

COURTS CAN SUMMON ANY DOCUMENT FROM THE LAWYER

The courts have clarified that summons issued under section 91 CRPC by the court even to a lawyer to produce the summoned documents. The summons cannot be opposed on the grounds of privilege. However, as a safeguard the courts are empowered to decide on its admissibility whether they are covered under privilege. Therefore, documents must be produced and then, under Section 162 of the Act, it will be for the Court, after inspection of the documents and if it deems fit, to consider and decide any objection regarding their production or admissibility.²⁴ The Gujarat High Court elaborated on this while stating that while holding a document the lawyer acts as an agent of the client and thus can be asked to produce the document in the same capacity as the client herself/himself could have been asked. Additionally, a document handed over to the lawyer by the client cannot be said to be privileged unless the document contains any communication made to the lawyer by the client in the course and for the purpose of the engagement as an attorney.²⁵

The privilege cannot be claimed against an order to produce documents under Section 91 of the Code of Criminal Procedure. In February 2018, the office of lawyers of Mr. Nirav Modi was raided by CBI in an ongoing investigation. The important question is, whether such actions compromise attorney-client privilege? If it does, to what extent?

²² Kalikumar Pal v. Rajkumar Pal (1931)58 Cal 1379

²³ D. Veeraseharan v. State of Tamil Nadu 1992 Cr. L.J. 2168 (Mad)

²⁴ Ganga Ram v. Habib Ullah (1935)58 All 364

²⁵ Chandubhai v State, AIR 1962 Guj 290

The practice of raiding offices of lawyers for investigation runs contrary to the scheme of the Constitution. Such practices take away the basic intent of confidence in the accused of approaching a lawyer. Furthermore, this also puts pressure on the advocates that their records are not safe and such raids could be detrimental to them.

PRIVILEGES ENSURE FAIR TRIAL

“Equality before the law is probably forever unattainable. It is a noble ideal, but it can never be realized, for what men value in this world is not rights but privileges.”

— H.L. Mencken

Equality, privacy, dignity, fair trial, inter alia, are a few objectives of our Constitution. Fair trial, which means a trial in which bias or prejudice for or against the accused, the witness or the cause which is being tried, is eliminated.²⁶ The task at hand is herculean and needs positive and continuous attention. To ensure such atmosphere, the legislation has consciously introduced safeguards and the same must continue to evolve in this domain. The safeguards of the past may be helpful in current times but may not be enough in future. The courts in our country have stood the test of time and ensured that law does not stop evolving. Time and again the apex court has come out with interpretations which are best suited to allow humanity to thrive and not just have an animal existence.

²⁶ Zahira Habibullah Sheikh and Ors v. State of Gujarat and Ors. (2006) 3 SCC 374

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