Jurisprudence – Article 20(3) Constitution of India

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Introduction

Article 20(3) Right against Self-Incrimination incorporated in the Constitution of India, 1950 enhances the legal stance of the fundamental rights provided in Part III as it is the only right which cannot be retracted by the State even during an emergency; post 44th Amendment in 1978 article 20 has been granted a non-derogable status[2]. This article originated in the 16th and 17th century in England by the Puritans through ecclesiastical Courts who sought testimony from those involved in religious activities through torture and coercion by administering *ex officio* oath invariably making those who remained silent be pronounced guilty. The genesis of this right came from the Latin maxim *'Nemoteneturseipsumaccusare'*which implies that 'No man is obliged to accuse himself'.[3]

Natural Law School & John Locke

The objective of this article can be further comprehended by the 5th Amendment of the US Constitution wherein it's stated that no person shall be intimidated or coerced to become a witness against his own self. [4] It can be derived by this enactment that the right against self incrimination comes from the famous jurist John Locke's Bill of Right's(5th Amendment of the US Constitution), He belongs from the Natural Law School which

[1] Institute of Law, Nirma University.
[2]Sec. 40, The Constitution (Forty-fourth Amendment) Act, 1978.
[3] Law Commission of India, 180th Report, May, 2002, *available at*http://lawcommissionofindia.nic.in/reports/180rpt.pdf
[4] The Charters of Freedom, Bill of Rights, *available at*http://www.archives.gov/exhibits/charters/bill_of_rights_transcript.html

identifies a law as good if it has some amount of moral considerations attached to it as its intrinsic quality, it has a normative approach to law and answers what law ought to be and not take law at its face value of law as it is. Locke identified this procedural right as a natural right that is all laws are subject to certain moral laws.[5]His main considerations were primarily safeguarding the right to life and the right against self-incrimination according to him can be considered as a facet of right to life.

His position is of a liberal who seeks to attain utmost freedom for all individual, this right provides those accused in a criminal suit the freedom or the right to remain silent, the liberty which is conferred is not only given during trial but after a recent pronouncement it can be used immediately after the filing of an FIR against the accused.[6]

Thomas Hobbes

Another political philosopher who has given much significance to this Right is Thomas Hobbes. Hobbes in his work *Leviathan* discusses the aspects of the social contract entered by people formulating a State wherein the Sovereign has the power of *Monopoly of Violence* upon its subjects.[7]Hobbes had a belief that under no circumstances an individual is to defy the State but he had a very rigid stand on self-preservation, he believed that you can and you ought to defy the State and the laws only if it is threatening your right to preserve yourself. Hobbes believed that you ought to resist against testifying against yourself as it might lead to conviction which would threaten your existence or your life, therefore, he was a staunch supporter of resistance against punishment as the primary reason of entering into a social contract is for self preservation and by testifying against yourself you destroy the main purpose of it. In fact, Hobbes not only advocated for right against self-incrimination but also against testimonies given by those who had any close relationship with the accused like wife, father, mother, etc.[8] Hobbes did not theorize upon

[5]Natural Law, Natural Rights, and American Constitutionalism
John Locke and the Natural Law, available at http://www.nlnrac.org/earlymodern/locke
[6]*M.P. Sharma v. Satish Chandra*, AIR 1954 SC 300:1954 SC1077
[7] Thomas Hobbes, Leviathan
[8]Susanne Sreedhar Hobbes on Resistance: Defying the Leviathan,Cambridge University Press, 2010. P.70

this right on the basis of any moral consideration but only considered it as an individual right which was of much significance in itself.[9]

Hohfeld

Article 20(3) is a fundamental right, a right is an interest or desire of an individual and hence, we can use the term given by Hohfield to define this right as a Privilege, *A privilege is one's freedom from the right or claim of another*,[10] this implies that the right conferred by art. 20(3) is a right which gives a privilege to an accused to remain silent during a trial or investigation whereas the State has no claim on the confession made by him.Hohfield describes these corresponding terms of Privilege and No Claim or No Right as legal relationship between two individuals.As right to silence is a privilege and not a right, it "only lasts till no affirmative claim
is made against it."[11]

This privilege is the quintessential aspect of Common Law like the ones conferred by article 21, Right to Life or Right to have a fair trial as laid down in *Maneka Gandhi v. Union of India*[12], certain aspects of this privilege are that it is only confined to the accused and no other witness can take this protection [13] in the very famous case of *NandiniSathpathy v. P.L. Dani*wherein the appellant who was a suspect and not an accused was charged with offence under section 179 of IPC as she refused to answer the questions raised by the Police during the interrogation. The Supreme Court broadened its view on article 20(3) in this case when it included that a suspect also has the same protection conferred by this provision of the Constitution of India.[14] The accused has the

[9]supra note 4
[10]W. HOHFELD, SOME FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING 23YALE,L.J. 16,28–59(1913)
[11] Rock v. Ireland [1997] 3 IR 484, "the right to silence is not absolute but is subject to public order and morality".
[12] AIR 1978 SC 597
[13] R.12, ibid
[14] V.N. Shukla, Constitution of India,12th Edition by Mahendra P. Singh, Eastern Book Company,2013. P.202

privilege to not be compelled to be a witness which means making oral or written statements under compulsion in or out of Court, not only confessions but other incriminatory statements are also protected by this article and lastly, the State has no claim on compelling a witness to furnish evidence against himself. [15] Narcoanalysis technique, polygraph tests or Brain Electrical Activation Profile(BEAP) all fall under testimonial compulsion of article 20(3)[16]

The right against self-incrimination includes the right to remain silent as the purpose of criminal trial is for the prosecution to prove the defense guilty beyond reasonable doubt and every suspect is innocent until proven guilty. But this right can be considered, in Hohfeld's term, a privilege rather than an immunity as the State does not have a claim/right on the confession of the accused but the State has the Power to submit to investigation by giving various types of evidences like blood samples, DNA profiling, voice recordings, thumb imprints, etc. [17]

Salmond

Professor Salmond on the other hand believed that Hohfeldian idea of Privilege wasn't a privilege *per se* but it is liberty of the accused or a mere absence of duty of the accused towards the state hence the state cannot claim that it has a right to which the accused has a corresponding duty. He supported Jeremy Bentham who belongs from the Positive School which believes in the analytical approach and not the normative approach towards laws and takes all laws as it is, was extremely critical of the right to remain silent as he believed that *'Innocence never takes advantage of it; innocence claims the right of speaking, as guilt invokes the privilege of silence.'* [18] Salmond believed that the interrogation of the accused is an important aspect in terms of a criminal procedure and this rule or right is *'destitute of any rational foundation'*[19]and following suit is Professor

[15] ibid
[16]*Selvi v. State of Karnataka,(2010)* 7 SCC 263:AIR2010 SC 1974
[17]supra note 2
[18] Glanville Williams The Proof of Guilt (1963)
[19]Salmond on Jurisprudence 11th ed by Glanville Williams (1957)

Glanville Willams who believed this right to be *"an irrational psychological reaction to past barbarism to refuse questioning of an accused."*[20]

The most problematic aspect of this right conferred by article 20(3) is the presumption of silence as guilt by the Courts. It is inevitable for the judges to have any other opinion as the very fact that an accused has refused to answer a question on grounds of self-incrimination or as the US Constitution puts it, pleading the fifth, it has to be due to something which is unfavorable to his case and therefore, there are no provisions which would prevent the Courts from drawing adverse judgments from the silence of the accused.[21] As much as the Court and the Judges would like to deny it, the purpose of this article gets instantly shattered when a biased conclusion is given on the basis of the silence of an accused. This affects the cases so much that the accused believes that taking the stand is far more lucrative than remaining silent.[22]

Critique

Therefore, there is a binary view of very eminent political philosophers as well as jurists on this particular right. But we can see that Indian interpretation since the commencement of the constitution has been very liberal as this right is conferred on the basis of natural right of an individual.

It has a moral stance attached to it, this article which is a right and a codified law belongs to the natural law school as it is open to the moral and divine considerations of the higher laws. We can even to a certain extent bring in other jurists from the Natural Law school who would have a similar perspective like St. Thomas Acquinas who believed that a law should appeal to higher laws or be consistent with the divine laws made by God. Such a law, which protects human life, is indeed a law which is in consistence with the laws

[20]supra note 16
[21]PREKSHA MALIK ADVERSE INFERENCE FROM SILENCE: AN URGENT NEED IN RAPE CASES, SSRN, 2009
[22]Tom R. Tyler et al., Re-integrative Shaming, Procedural Justice, and Recidivism: The Engagement ofOffenders' Psychological Mechanisms in the Canberra RISE Drinking-and-Driving Experiment, 41LAW &Soc'Y REV. 553, 575-76 (2007)

made by the Almighty. This article/ right also appeals to the reason and logic of any normal human being and can be justified on ethical and moral grounds.

The Courts interpretations have been commendable in the recent past as the scope of this article has broadened and has indeed left no ambiguity. The protection of an accused should be done in the manner as to prove that the jurisprudential canon of criminal law which believes that everyone is innocent until proven guilty. John Locke who can be considered as the founding father of this legal right sought moral sanctity attached to it and we can see in several cases and in the broadening of the scope of this article that the Courts have given an interpretation based on moral considerations, to a certain extent. Thomas Hobbes although was not a proper natural law theorist has also considered the right to self-preservation to be a right which is an individual and natural right and cannot be taken away even by the State, He also believed that if the State coerces you into testifying coercion you must resist and even defy the State if and when required. Although his ideology is purely logical it is appealing to law of nature, which calls for protection of each individuals life.

Hohfield and Salmond seem to have opposing views primarily in terms of labeling this right. Hohfield who considered this legal right a privilege was more supportive of right against self-incrimination and has theorized that the jural correlative of privilege would be having no right or no claim. So, if the accused has a privilege, which is a choice, to remain silent or not testify against himself the State has no right to coerce, threaten or compel him into furnishing evidence or giving oral/written testimony.

Whereas Salmond, who has an extensive work on Legal Rights has criticized Hohfieldian idea of the right against self-incrimination for being called a ‘privilege’ as he believes that this is a mere absence of duty or liberty given to every accused. The State doesn’t have a right and that’s the reason the accused doesn’t have a duty to testify. Salmond has been critical about this legal right given to an accused, unlike his stance on rights, he is

unfavorable to the right against self-incrimination as he has found it to be extremely irrational because he believed that the criminal laws aim is to punish the convict and by providing such a right to the accused you're going against the fundamentals of criminal law.

Hence, I would like to conclude that this law is a just law which is in consonance with the laws of nature. The purpose of this law is being utilized in its true sense by the judiciary and the jurisprudential underpinning of this right is at par with the way in which it is being interpreted. Also, the objective with which the framers of the constitution have added this article to our Constitution is indeed being fulfilled.