CHAPTER I

POLICY BEHIND THE PRIVILEGE AGAINST SELF-INCRIMINATION

The origin of the privilege against self-incrimination now adopted by the Indian Constitution in Art. 20 (3)[1] has been traced to protests against the inquisitorial methods of interrogating accused persons, which has long obtained in the continental system, and in England until 1688.[2] In a system which permits compulsory examination of the accused to explain his apparent connection with a crime, there is danger of temptation to press him unduly, to browbeat him if he be timid or reluctant, and to entrap him into fatal contradictions. The privilege arose in a desire to safeguard human liberty and to guard against an innocent person being punished. The object of the privilege is that every innocent citizen should feel secure that he can lead his daily life without fear of arbitrary arrest or detention, false accusation and unjust trial.

However, since the establishment of the privilege against self-incrimination in the common law systems serious doubts have been expressed in some quarters that this privilege tends to defeat justice, in so far as it closes one source of obtaining the truth. It may be useful to enumerate the arguments for and against the privilege.[3] In support of the privilege it is stated:

---

1. See *supra* p.1 for the Article. The privilege has also been incorporated to some extent in various statutory provisions. See Section 132 of the Indian Evidence Act and Section 342 of the Code of Criminal Procedure.
2. For the history of the privilege, see Wigmore, *Evidence* Vol. VIII, 3rd ed. (1940), pp. 276-304; Corwin, *The Supreme Court's Construction of the Self-Incrimination Clause*, 29 Mich. L. R. 191 (1930-31); Chafee, *Blessings of Liberty*, Ch. VII (1956); Morgan, *The Privilege Against Self-Incrimination*, 34 Minn. L.R. 1 (1949).
3. Refer to the following material on the subject of policy underlying the privilege. McCormick, *Evidence*, pp. 288-90 (1954); Wigmore, *Evidence*, *op. cit.*, pp. 304-320; Meltzer, *Required Records, The McCarran Act, and the Privilege Against Self-Incrimination*, 18 U. of Chi L.R. 687(1950-51); Chafee, *Blessings of Liberty*, *op. cit.*; Griswold, *The Fifth Amendment today*, chapters, 1 & 3 (1955).

(1) That it promotes active investigation from external sources to find out the truth and proof of alleged or suspected crime instead of extortion of confession on unverified suspicion. Thus Wigmore says: "The real object is that *any system of administration which permits the prosecution to trust habitually to compulsory self-disclosure as a source of proof must suffer morally thereby*. The inclination develops to rely mainly upon such evidence, and to be satisfied with an incomplete investigation of the other sources ... The simple and peaceful process of questioning breeds a readiness to resort to bullying and to physical force and torture. If there is a right to answer, there soon seems to be a right to the expected answer—that is, a confession of guilt...ultimately, the innocents are jeopardised by the encroachment of bad system.....For the sake, then, not of guilty, but of the innocent accused, and of conservative and healthy principles of judical conduct, the privilege should be preserved."[4] When an experienced official was asked why policemen occasionally applied torture to prisoners, he remarked: "There is a great deal of laziness in it. It is far pleasanter to sit in the shade rubbing red pepper into a poor devil's eyes than to go about in the sun hunting up evidence."[5]

(2) That it protects the innocent. Griswold, in his book *The Fifth Amendment*, 1955, by taking various illustrations tries to show the protection that the privilege affords to an innocent. For example, a man may have killed another in self defence or by accident without design or fault. He has committed no crime yet his answer may well incriminate him.[6]

(3) That it avoids an innocent person from jeopardizing himself because of his timidity and nervousness and the strange atmosphere of the courts. Thus in *Wilson* v. *U. S.*[6a], Supreme Court of the United States said: "It is not every one who can safely venture on the witness stand though entirely innocent of the charge against him. Excessive

4. Wigmore, *Evidence*, *op. cit.*, p. 309. Emphasis as in original. Also confer Das Gupta, J.'s concurring opinion in *State of Bombay* v. *Kathi Kalu Oghad*, A. I. R. 1961 S.C. 1808, 1819.

5. Stephen, *A History of the Criminal Law of England*, Vol. I, p. 442 (1883).

6. At p. 9.

6a. 149 U. S. 60 (1893).

timidity, nervousness when facing others and attempting to explain transactions of a suspicious character, and offences charged against him, will often confuse and embarrass him to such a degree as to increase rather than remove prejudices against him. It is not every one, however honest, who would therefore willingly be placed on the witness stand."[7] There is also the danger that bullying and abuse would be promoted if questioning of the accused were permitted. Thus McCormick states: "The evil exists under the present system when the accused 'voluntarily' takes the stand, and subjects himself to cross-examination. This may often be savage in tone and unduly prejudicial in matter."[8]

(4) That the privilege in its application to witnesses persuades them to come forward and help the courts in ascertaining the truth.

(5) That the privilege protects the privacy of the individual by shielding him from judicial inquisition. But see below with regard to this argument in favour of the privilege.

Arguments against the privilege

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

(2) It is only the guilty who claim the privilege or are protected by it. "It is the exeperience of each one of us . . . If he can be content to maintain silence in the face of direct accusation, or of incriminating circumstances, we immediately conclude that he cannot exculpate himself. In ninety-nine cases out of hundred, we know that such a conclusion is justified . . . . The only answer that I can formulate is that law, in seeking to be properly sensitive to the rights of a culprit, has developed a callousness for those of the public."[9]

---

7. *Ibid.*, p. 66.
8. McCormick, *Evidence*, p. 289 (1954).
9. Knox, *Self Incrimination*, 74 U. Pa. L. Rev. 139, 148 (1924).

(3) It is said that an accused person's rights are amply protected even without the privilege. The following factors which contributed to the origin and development of the privilege are now absent: (i) the frequent employment of torture and duress by public authorities to extort incriminating evidence from an accused;[10] (ii) the practice of brow-beating and duping prisoners into making spurious confessions; (iii) the denial to the defendant of a compulsory process to obtain his witnesses and the right to have counsel; (iv) the refusal to permit a defendant to take the witness stand in his own behalf, the rationale being that since the accused was an interested party, his testimony would be of little probative value. Therefore, it is concluded that no innocent person is in need of it. It may be pointed out that the improvements stated above apply at the trial stage rather than at the stage of investigation. Therefore, they are only grounds to abolish the privilege at the trial[11] but not at the investigation stage.

(4) With regard to the argument that the privilege protects the privacy of the individual, it is to be stated that the protection of privacy afforded by the privilege is limited. "It is only when a person is formally accused, or officially suspected of crime that he may not be examined as a witness at all. In all other situations the witness must answer non-incriminating question and must suffer

---

10. There is contrary evidence also that police torture is still common.

11. Meltzer argues that "the principal justification for continuing to recognize it there (at the trial stage) would appear to be the practical difficulties inherent in any requirement that the defendant testify. Such a requirement would involve great dangers of perjury or recalcitrance. It is true that there is the danger of prejury when the defendant elects to take the stand..... The danger of prejury would be increased if any unwilling defendant were required to testify. Where recalcitrance rather than prejury resulted, the remedy of contempt would be awkward to enforce during the trial without jeopardising an orderly trial. The efficacy of its application after the trial as a deterrent to future recalcitrance seems doubtful in situation where the law of self-preservation commands perjury or disobedience." Further, maintenance of the privilege at the trial stage "is a reflection of law's unwillingness to command the impossible, of its respect for the law of self-preservation invoked by Lilburn. It is also perhaps a reflection of a humane attitude which saves even the guilty from a harsh choice among perjury, recalcitrance, or confession." *Supra* note 3 at 692-93.

> the humiliation of claiming his privilege when the question is incriminating. Not much is left of his privacy then."[12] Further, a suspected person (though it ultimately turns out to be that he was innocent) is liable to be taken into police custody and his house may be searched under a search warrant. In all these cases privacy of an individual is jeopardised.

There is substance in each of these arguments. A reconciliation has to be effected between the interests of the innocent individual and those of the society in detecting crime and bringing criminals to book. A broad interpretation of the previlege bringing within its coverage all evidence obtained from the accused will be an undue concession to the criminal; and a very narrow interpretation will probably entail encroachments on basic human rights. Of course every compulsory taking of evidence will be somewhat inconvenient to a person, but every inconvenience cannot be said to infringe the privilege. If it were so, detection of crime would have become difficult. Thus Wigmore states that "Courts should unite to keep the privilege strictly within the limits dictated by historic fact, cool reasoning, and sound policy."[13]

It is universally agreed that the privilege against self-incrimination applies to oral testimony. The arguments stated above in favour of the privilege generally apply to oral testimony by the accused. Whether it covers other types of evidence, particularly evidence involving physical and medical evidence of the accused, does not seem to be very clear. The problem of general applicability of the privilege against self-incrimination to physical and medical examination of the accused is considered in the next chapter. Subsequent chapters deal with specific types of such examination.

---

12. McCormick, *Evidence*, p. 288 (1954).
13. Wigmore, *Evidence*, *op. cit.*, p. 319.