VOICE RECORDINGS AND THE RIGHT AGAINST SELF-INCRIMINATION

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In Ritesh Sinha v. State of U.P., the Hon'ble Supreme Court of India held that the recording of voice during the course of investigation is not a violation of the accused's right against self-incrimination and relied majorly on the observations laid down in Kathi Kalu Oghad v. State of Bombay. Both of these cases have observed that the taking of exemplars is non-testimonial in nature. The authors argue that such exemplars have a testimonial aspect to them, and further examine the intent behind this provision to question whether such evidence should be admissible. The argument is presented in four parts: the first part offers a clarification on what is meant by 'testimony'; the second part examines the privilege against self-incrimination in the context of the burden of proof and investigative quality; the third part assesses what it means to be a witness; and lastly, the fourth part examines whether an accused can be directed to provide their voice exemplar in the absence of a legislative provision for the same.

Keywords: Self-Incrimination, Burden of Proof, Testimonial Evidence, Witness, Communicative Evidence

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I. Introduction

The right against self-incrimination finds its earliest origin in the Latin maxim *'Nemo tenetur seipsum accusare'*, which translates to 'no man is obliged to accuse himself'.[1] Article 20(3) of the Constitution of India states that no accused shall be compelled to be a witness against himself.[2] The same provision can be found in the Fifth Amendment to the Constitution of the United States, which has laid down that no person shall be compelled in any criminal case to be a witness against himself.[3] The privilege has the following components: (a) the person should be an "accused of an offence"; (b) the accused must be compelled to be a witness; and (c) the compulsion should result in the accused giving evidence against himself.[4] There are various facets to the right against self-incrimination, including: (i) the burden of proving the guilt of the accused is on the State or rather, the prosecution; (ii) the accused is presumed to be innocent until proven guilty.[5] Additionally, Article 20(3) also serves as a device to improve investigative efficiency and quality.[6]

From the first years of the Constitution of India till this date, there is a certain ambiguity surrounding the nature of the privilege against self-incrimination. The main question at hand is the extent to which this privilege may be granted to an accused- is it permissible to extend this privilege to voice recordings? In Ritesh Sinha v. State of U.P.,[7] the Hon'ble Supreme Court of India held that the recording of voice of the accused during the course of an investigation does not violate their right against self-incrimination, the reasoning behind the same being that a voice sample is a "physical non-testimonial evidence" and does not communicate incriminating information based on the "personal knowledge of the accused". The aim of this paper is to analyze whether the Court was correct in coming to such a conclusion, by examining

[1] Translated from the Latin maxim, "No man is bound to betray himself".
[2] India Const. art. 30, cl. 3.
[3] U.S. Const. amend. V.
[4] India Const. art. 30, cl. 3.
[5] Law Commission of India, Report No. 108: Article 20(3) of the Constitution of India and the Right to Silence (2002).
[6] State of Bombay v. Kathi Kalu Oghad, AIR 1961 SC 1808.
[7] Ritesh Sinha v. State of U.P., (2013) 2 SCC 357.

cases surrounding the right against self-incrimination, including M.P. Sharma v. Satish Chandra[8] and State of Bombay v. Kathi Kalu Oghad.[9]

II. Self-Incrimination And The Nature Of Testimony

The case of State of Bombay v. Kathi Kalu Oghad[10] dealt with the question of sampling of handwriting, impression of palm, finger or foot. In this case, the Court observed that self-incrimination means conveying of information based on the personal knowledge of the accused, and hence, is not inclusive of the mechanical process engaged in the production of a document not containing the statement of the accused based on personal knowledge. Under this context, it is important to analyze the communicative nature of such evidence. In United States v. Rosato,[11] the United States Court of Military Appeals laid down a distinction between the execution of a handwriting exemplar from other instances of compelled conduct, such as fingerprinting. While talking about the latter, the Court held that such instances do not involve an affirmative conscious act on part of the individual, whereas the former does.[12] Analyzing the action of recording of voice through the lens of the aforementioned distinction, it can be established that for the purpose of recording the voice of an accused, there must be an *affirmative action* on part of the accused. Therefore, the sampling of handwriting and the recording of voice of the accused can be placed in the same category.

Oghad has failed to take this distinction into consideration. It is submitted that writing or speaking are not mere mechanical processes but require the application of intelligence and attention. An accused cannot write or speak unless they have "personal knowledge" of the language, or without the use of the conscious process of their mind. The handwriting or the voice recording of an accused can only be obtained if there is an active co-operation or affirmative action on part of the accused. On the other hand, an impression of the finger or foot

[8] M.P. Sharma v. Satish Chandra, AIR 1954 SC 300.
[9] State of Bombay v. Kathi Kalu Oghad, AIR 1961 SC 1808.
[10] State of Bombay v. Kathi Kalu Oghad, AIR 1961 SC 1808.
[11] United States v. Rosato, 11 CMR 143 (1953).
[12] *Id.*

of the accused may be obtained without such active co-operation.[13] An act, in this sense, becomes testimonial if it involves the defendant's consciousness of the facts and the operation of their mind in expressing the same.[14] It has been suggested that when an accused is directed to project their mental image of their handwriting or voice, the contents of the mind of the accused are probed. The contention is that when an accused is compelled to do an act which involves their veracity, the consciousness of the accused is activated.[15] It is, therefore, questionable whether the act of writing or speaking can be grouped as mere "mechanical processes". In light of the distinction drawn, it is further disputed whether handwriting and voice exemplars can be grouped together with impressions of fingers, foot, etc.

However, coming to the *communicative effect* of such evidence, it cannot be established that such evidence do not assertively communicate knowledge.[16] It has been indicated that even the taking of blood samples must entail a communicative effect to a certain extent.[17] For instance, while the taking of a blood sample falls in a completely different category than an oral testimony, it can still function to communicate the guilt of the defendant to the judge.[18] When a sample of the accused's blood is taken to establish whether he was drinking and driving, the results of this blood test are "testimonial" in the sense that it provides information enabling a witness to "communicate" to the court the fact that they were intoxicated.[19] Similarly, the act of giving handwriting or speech exemplars serves as a testimonial communication of the

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[13] S.N. Jain, *Constitutional Law- Article 20(3)- Physical Examination of the Accused and the Privilege against Self-Incrimination- State of Bombay v. Kothi Kalu Oghad*, 4 JILI 552, 557 (1962) (hereinafter 'Jain').

[14] John Henry Wigmore, Evidence in Trials at Common Law (Brown Little, 4th ed. 1961) (hereinafter 'Wigmore').

[15] Russell J. Weintraub, *Voice Identification, Writing Exemplars and the Privilege against Self-Incrimination*, 10 Vand. L. Rev. 485, 507 (1957) (hereinafter 'Weintraub').

[16] Constantine Theophilopoulos, *The Privilege against Self-Incrimination and the Distinction between Testimonial and Non-Testimonial Evidence*, 127 S. African L. J. 107, 122 (2010) (hereinafter 'Theophilopoulos').

[17] Schmerber v. State of California, 1966 SCC OnLine US SC 124 : 16 L Ed 2d 908 : 384 US 757 (1966).

[18] Theophilopoulos, *supra* note 16, at 122.

[19] H. Breithaupt v. Abram, 1957 SCC OnLine US SC 23 : 1 L Ed 2d 448 : 352 US 432 (1957) (Black, J., dissenting) (highlighting Wigmore's translation of "testimonial" to mean "communicative").

ability of the accused to speak or write the words.[20] When an accused is directed to write dictated words, the handwriting exemplar has the capacity of revealing how the accused spells the words, amounting to a constitutionally protected "testimonial message".[21] The compelling of an accused to provide a handwriting exemplar testifies that the accused can write.[22] Similarly, a voice exemplar has the capacity of revealing how an individual may, for instance, pronounce a word. While it is not disputed that "physical evidence" such as fingerprints and DNA involve passive co-operation as compared to active co-operation involved in giving handwriting and voice exemplars, it is contended that it cannot be said that such evidence does not have any communicative effect as has been held in *Oghad*. To conclude, the argument put forth in this section of the paper is that even though handwriting/voice exemplars have been grouped differently than blood stains (on the basis of whether the participation of the accused was active or passive), it does not mean that the communicative or testimonial aspect in either of these groups of evidence is absent. The distinction is put forth merely to argue against the decision of the Apex Court in *Oghad* and *Ritesh Sinha* to categorize handwriting or speech exemplars as mere mechanical processes.

III. What Does A Witness Do?

While analyzing the Fifth Amendment, Richard A. Nagareda, in his article *Compulsion "To be a Witness" and the Resurrection of Boyd*[23] has put forth that "to be a witness" means "to give evidence". This means that to compel a person to be a witness means to compel them to provide evidence. It is argued by him that the right against self-incrimination is violated by the very act of compelling an accused to give evidence, be it in the form of speech, production of documents and so on. It is important to note that in *Oghad,*[24] the Court observed that "to

[20] United States v. S. Fisher, 1966 SCC OnLine US SC 92 : 16 L Ed 2d 479 : 384 US 212 (1966).
[21] United States v. Campbell, 732 F 2d 1017 (1st Cir 1984).
[22] Charles Gardner Geyh, *The Testimonial Component of the Right against Self-Incrimination*, 36 Cath. U. L. Rev. 611, 614 (1987) (hereinafter 'Geyh').
[23] Richard A. Nagareda, *Compulsion "to be a Witness" and the Resurrection of Boyd*, 74 N.Y.U. L. Rev. 1575, 1603 (1999) (hereinafter 'Nagareda').
[24] State of Bombay v. Kathi Kalu Oghad, AIR 1961 SC 1808.

be a witness" means "to furnish evidence". However, observing so, the Court went on to depart from M.P. Sharma v. Satish Chandra[25] to hold that this statement is true only in case of oral or written statements, but does not include handwriting exemplars, impression of foot or fingers, etc. However, Nagareda proposes that to compel an accused to produce *any* evidence is unconstitutional, and not just the production of those evidence the content of which have the capacity to incriminate the accused.[26] The same view was observed in Stillman v. R.,[27] in which the Canadian Supreme Court reiterated that there can be no distinction between evidence in the form of a compelled confession and evidence in the form of bodily samples. The word 'evidence' was held to include all forms of compelled evidence within its ambit.

The Supreme Court of India has also highlighted that the phrase used in the clause is 'to be' and not 'to appear as a witness'.[28] This implies that the privilege extends to immunity against being compelled to give *any kind of evidence* which may support the case of the prosecution against the accused. Testimony, therefore, includes within its ambit every positive act which furnishes evidence.[29] What is further questionable is how the bench in *Oghad* came to limit the privilege to only oral and written statements and exclude the rest, considering Article 20(3) had been passed without much debate in the Constituent Assembly, leaving behind an immense number of questions about the scope and the intent of the provision unanswered.[30] The conclusion of the Court that such exemplars are not sufficiently testimonial is unhelpful and confusing. It is more accurate, however, to contend that the compelled production of such exemplars is testimonial but may not be informative enough to incriminate the accused.[31] The incriminating aspect of the exemplars, however, varies from case to case. The case of Selvi v. State of Karnataka[32] has shed light on what constitutes as

[25] M.P. Sharma v. Satish Chandra, AIR 1954 SC 300.
[26] Nagareda, *supra* note 23, at 1603.
[27] Stillman v. R., 1997 SCC OnLine Can SC 33 : (1997) 1 SCR 607.
[28] M.P. Sharma v. Satish Chandra, AIR 1954 SC 300.
[29] Durga Das Basu, Commentary on the Constitution of India 3031 (LexisNexis, 8th ed. 2008).
[30] Abhinav Sekhri, *The Right against Self-Incrimination in India: The Compelling Case of Kathi Kalu Oghad*, 3 Indian Law Rev. 180, 180 (2019).
[31] Geyh, *supra* note 22, at 625.
[32] Selvi v. State of Karnataka, (2010) 7 SCC 263 : AIR 2010 SC 1974 (hereinafter 'Selvi').

'incrimination' for the purpose of Article 20(3) by laying down various circumstances in which the information can prove to be incriminatory. One of the circumstances laid down relates to the extraction of materials or information which are used for the purpose of comparing with materials in the possession of the investigators.[33]

The question that is sought to be answered is what a witness does, and the answer is, a witness furnishes evidence. The majority judgment in *Oghad*, while seeking backing for their narrow definition of 'witness', relied on Section 139 of the Indian Evidence Act, 1872. This Section lays down the provision for the cross-examination of a person called to produce a document, and states that a person does not become a witness merely by producing a document.[34] The *Sharma* case, while referring to this Section, clarified that this provision was laid down in order to regulate the cross-examination of witness, and not to provide a definition for the term 'witness'. However, the majority judgment in *Oghad* rejected this clarification without providing a substantial reasoning behind the same. The expression "unless he becomes a witness" at the end of S. 139 IEA implies that a person may not become a witness by way of producing a document; however, they do not cease to be a witness if they produce a document. Therefore, the meaning attached to the expression "to be a witness" in the *Sharma* case is more acceptable.[35]

To conclude this section, the author has taken an extensive view of self-incrimination, according to which the state is prevented from deriving *all* self-incriminatory evidences, which force the accused to contribute to the prosecution's development of a case. This view places all evidences (be it documentary, testimonial or non-testimonial) under the purview of the privilege. This view is justified by a literal interpretation of the text of the constitutional definitions of the right against-self-incrimination.[36]

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[33] *Id.*, ¶114.
[34] Indian Evidence Act, 1872, § 139, No. 1, Acts of Parliament, 1872 (India).
[35] K.R. Dixit, *Protection against Self-Incrimination*, 4 JILI 144, 147 (1962).
[36] Theophilopoulos, supra note 16, at 109.

IV. Self-Incrimination And The Burden Of Proof

The maxim *nemo teneturseipsumaccusare* emerged in the form of a protest against the inquisitorial and manifestly unjust methods adopted by interrogators towards the accused.[37] The right seeks to protect the accused from improper compulsion from the authorities, in order to prevent miscarriage of justice.[38] Therefore, the ethical rational behind this right is to provide protection to the accused from torture during investigation- if involuntary statements are held to be admissible, then the investigative agencies would be incentivized to use unjust means (like coercion and deception) to compel such statements.[39] There is, however, another rationale, which takes into consideration the *reliability* of the evidence. The inadmissibility of compelled testimony is important to prevent investigators from extracting information through compulsion, and to encourage them to collect evidence independently.[40] The procurement of evidence through compulsion would lead to a hindrance to the administration of justice by discouraging investigative agencies to adopt reliable methods of investigation to ascertain the truth. A very important facet of the right against self-incrimination is that if such evidence is accepted in a court of law, investigators would be not be incentivized to engage in qualitative investigation and proper examination of other witnesses, documents and materials.[41]

The right against self-incrimination is based on the presumption of innocence of the accused, and therefore, evidence against the accused are derived from sources *other* than the accused.[42] This privilege exists to ensure that the prosecution secures evidence through its own endeavors and without the coerced assistance of the defendant.[43] In this sense, another underlying purpose of the right against self-incrimination

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[37] Brown v. Walker, 1896 SCC OnLine US SC 85 : 40 L Ed 819 : 161 US 591 (1896).
[38] Saunders v. United Kingdom, (1997) 23 EHRR 313.
[39] Albert Alschuler, *A Peculiar Privilege in Historical Perspective: The Right to Remain Silent*, 94 Mich. Law Rev. 2625, 2627 (1995).
[40] State of Bombay v. Kathi Kalu Oghad, AIR 1961 SC 1808.
[41] James Fitzjames Stephen, A History of the Criminal Law of England (Macmillan and Co. 1883).
[42] Jaishree Jaiswal, *Right of an Accused to be Protected against Self-Incrimination – Its Availability and Emerging Judicial Dimensions under Criminal Law*, 3 IJLJ 72, 72 (2012).
[43] Wigmore, *supra* note14.

is the preservation of the integrity of the judicial system, in which the prosecution must "shoulder the entire load".[44] The right against self-incrimination was afforded to the accused in accordance with the principles of an adversarial system of justice.[45] When an accused is compelled to provide affirmative assistance to their accusers by the production of incriminating evidence, the prosecution does not shoulder the burden of furnishing evidence against the accused exclusively on its own efforts. Instead, the burden shifts to the accused, and is therefore contrary to the adversarial system of justice.[46]

As has already been noted, an important facet of the right against self-incrimination is that it serves to improve the investigative quality.[47] In this context, it is important to draw a distinction between the creation of a voice or handwriting exemplar and the impression of fingers, foot, etc., which is that the former is an act which involves the veracity of the accused, which means that there will always exist a possibility that the accused may disguise their handwriting or voice. The results of the latter, however, are not in the control of the accused.[48] While discussing the unreliable nature of such evidence, it is important to take a note of the technique used in comparing voices- voice spectrography. The accuracy of voice spectography is vulnerable to various factors, including the condition in which the voice sample is recorded, characteristics of the voice in contention (such as pronunciation), the quality of the device used for recording the voice, skills of the examiner, and so on.[49] The investigative quality is naturally compromised, considering the technique is susceptible to such major constraints.

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[44] Tehan v. United States, 1966 SCC OnLine US SC 12 : 15 L Ed 2d 453 : 382 US 406 (1966).
[45] Shruti Mittal, *The Right against Self-Incrimination and State of Bombay v. Kathi Kalu Oghad: A Critique*, 2 NLUJ Law Rev. 75, 78 (2013).
[46] Geyh, *supra* note 22, at 618.
[47] State of Bombay v. Kathi Kalu Oghad, AIR 1961 SC 1808.
[48] Weintraub, *supra* note 15, at 497.
[49] G.K. Goswami, *Obligated Voice Sampling: A Judicial Endorsement in Ritesh Sinha v. State of Uttar Pradesh,* 61 JILI 455, 460 (2020).

V. Absence Of Provision

The Code of Criminal Procedure, 1973 (hereinafter referred to as "CrPC") has not laid down any specific provision under which an accused may be directed to give their voice sample. However, in Ritesh Sinha v. State of U.P.,[50] the Hon'ble Supreme Court established that a magistrate is empowered to pass such an order by way of the phrase "such other tests" in explanation (a) to Section 53 of the CrPC. This provision[51] lays down the procedure for examination of the accused by a medical practitioner at the request of a police officer, and explanation (a) brings into the ambit of examination the following- "blood, blood stains, semen...*and such other tests*". In *Selvi*, it was highlighted the phrase "and such other tests" should be interpreted to limit its meaning to include only those tests which involve the "examination of physical evidence". This means that the phrase should be interpreted in include within its ambit tests which fall in the category of the kind of medical examinations that have been enumerated.[52] Alam J., in his dissenting judgment in *Ritesh Sinha*, observed that in order to compel an accused to give their voice sample, the law must be laid down by the legislature, and cannot be established through court processes as such an order can result in the violation of the right against self-incrimination. The matter was referred to a larger bench in 2019,[53] and it was reiterated that the CrPC is silent on the issue of voice sampling. In this context, it is important to note that considering the absence of a provision on the issue of voice exemplars in the CrPC, if the accused was compelled to provide a voice sample during the stage of investigation, it is illegal as it is not authorized by law,[54] and if the voice sample was given by the accused voluntarily, then the constitutional issue does not arise.[55]

It is also important to note that procedures must be interpreted by courts the way they are found. In cases of policy anomalies, it falls upon the legislature to correct the same.[56] The intention of the legislature is

[50] Ritesh Sinha v. State of U.P., (2013) 2 SCC 357.
[51] Code of Criminal Procedure, 1973, § 53, No. 2, Acts of Parliament, 1973 (India).
[52] Selvi, *supra* note 32, at ¶149-152.
[53] Ritesh Sinha v. State of U.P., (2019) 8 SCC 1.
[54] Bhondar v. Emperor, 1931 SCC OnLine Cal 23 : AIR 1931 Cal 601.
[55] Jain, *supra* note 13, at 556.
[56] CST v. Popular Trading Co., (2000) 5 SCC 511.

reflected through the language used in a legislation, and intentions must be ascertained through the words that have been used as well as those that have not.[57] Words cannot be read into legislations unless a clear reason can be found within the legislation itself.[58] In this context, it must be highlighted that Sections 53-A and 311-A were introduced through a statutory amendment in 2005, empowering the Magistrate to order a person to provide their specimen signatures or handwriting for the purpose of investigation. The intention of the legislature is reflected from the fact that voice samples were not included in these provisions. The inclusion of voice samples through the application of the doctrine of *ejusdem generis* in *Ritesh Sinha*, therefore, holds bad in light of an indication towards a different intention of the legislature. It is not permissible for legislative functions to be usurped by courts in the guise of "filling the gap". It is demanded by the principles of separation of power that the three branches of democracy function within their respective spheres and hence, courts should not exceed their powers by taking over the functions of the legislature.[59]

VI. Conclusion

The Supreme Court in *Oghad* observed that the giving of handwriting exemplars is merely a mechanical process, and the same came to be reiterated in *Ritesh Sinha* to hold that voice recordings, like handwriting exemplars, are mechanical processes which are not communicative. However, it is unclear *how* the Court came to establish this, as such processes require the application of the consciousness of the accused, making them communicative and hence, testimonial in nature. This paper has put forth an argument against the decisions of the Court in both these cases that compelling a handwriting or voice exemplar can be grouped together with the taking of blood tests as "mechanical processes". That said, despite the creation of such a distinction, the authors argue that it cannot be established that all of these evidences do not have a communicative aspect to them. A handwriting or voice exemplar may communicate to the court the fact that the accused has

[57] Shiv Shakti Coop. Housing Society v. Swaraj Developers, (2003) 6 SCC 659.
[58] Jumma Masjid v. Kodimaniandra Deviah, AIR 1962 SC 847.
[59] Govt. of A.P. v. P. Laxmi Devi, (2008) 4 SCC 720.

knowledge of a language, or may provide information as to the manner in which an accused spells or pronounces a word. Similarly, the results of a blood test may, for example, communicate to the court whether or not the accused was intoxicated. Additionally, this paper observes that the wording of Article 20(3) of the Constitution of India entails "to be a witness", which means this privilege is available against compelling the accused to furnish *any* evidence, and not just those which are testimonial.

It is also highlighted that one of the facets of the right against self-incrimination is that the burden of proving the guilt of the accused is on the prosecution. This is so that the accused is protected from torture during investigation, as well as to ensure that the reliability of the evidence is maintained. When an accused is compelled to give their speech exemplar as evidence, the accused acts actively in doing so, and hence the prosecution has not derived this evidence entirely on its own, placing the burden of proof on the accused. The reliability of such evidence is questionable, taking into consideration that it is derived from the accused and not from the prosecution, as well as the fact that the technique used for comparing voices, i.e., voice spectography depends on various constraints.

Lastly, there is no provision in the Code of Criminal Procedure which directs the accused to provide their speech exemplar, and in the absence of such provision, the compelling of this evidence becomes completely illegal. Compulsion comes in various forms and is not restricted to physical torture. It extends to psychological pressure or a coercive atmosphere.[60] In this context, it is important to raise the following question: should a right against being compelled to give evidence against oneself extend to an accused only in certain circumstances and cease to exist in others? The production and evaluation of evidence against an accused should be done by a proper court in a fair trial. Methods of compulsion such as torture and threats to force the accused to produce evidence cannot be used.[61]

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[60] Nandini Satpathy v. P.L. Dani, (1978) 2 SCC 424 : AIR 1978 SC 1025.
[61] Tehan v. United States, 1966 SCC OnLine US SC 12 : 15 L Ed 2d 453 : 382 US 406 (1966).

The Court has failed to take into consideration all of the aforementioned factors and has come to conclusions for which substantial backing has become difficult to find. Having departed from the *Sharma* case, the Court in *Oghad* as well as *Ritesh Sinha* has left many gaps that are yet to be filled, and till such ambiguity no longer exists, the right against self-incrimination will remain a tool unused for many defendants in this country.