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Protection Against Self-Incrimination: An Evaluation of Legal Framework in Pakistan

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Abstract: *This paper examines the legal framework of Pakistan in the context of the universally recognized right of protection against self-incrimination. Since there is scarce literature concerning the analysis of the statutory laws and judicial pronouncements in the light of this constitutional protection, this paper aims to bridge this gap by employing a black letter approach to doctrinal legal research methodology. Despite the explicit recognition of this right, there was extensive litigation involving several controversial and unresolved problems concerning the protection against self-incrimination in the apex courts of Pakistan. The examination of statutory laws in Pakistan shows that the protection guaranteed under Art. 13(b) has not been recognized in its full vigour and spirit, necessitating appropriate legislative reforms. The analysis of the judicial pronouncements clearly signifies the resolve of courts in enforcing protection against self-incrimination, but the courts are constrained to make a hard rule to protect individual rights.*

Key Words: Article 13(b), Constitution of Pakistan, Criminal Proceedings, Fair Trial, Self-Incrimination

Introduction

The protection against self-incrimination safeguards persons from being forced to submit testimony or provide information to government authorities that might seem to expose them to punishment. It signifies that public officials are barred from using force or intimidation to gather evidence during criminal proceedings. It may be defined as a privilege against coercion to provide evidence or information which would contribute to substantiating one's own guilt (Queensland Law Reform Commission, 2003). The said protection is now regarded as a substantive human right instead of merely an evidence rule. The concept that those accused or suspected of perpetrating a crime are entitled to some fundamental safeguards is integrated into the international human rights framework. In addition to being an integrant of the right to a fair trial in criminal proceedings, the right against self-incrimination is recognized as a substantive human right in numerous human rights treaties. It is also incorporated in national laws of states across the world. It goes without saying that this protection is crucial to the idea of a fair procedure in criminal cases.

This principle is enshrined in Islamic jurisprudence and a suspect of a crime cannot be forced to make a confession, and a confession under compulsion is not admissible (Muhammad Farooq, 2018). In sharia, the stringent conditions for receiving confessions in Islam emanate from the belief that there is greater justice than what is provided by the courts. Even if the accused is guilty but his guilt is not adequately established in court, he nevertheless will answer to Allah. The concealed truth is thought to be a

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personal affair between the subject and his Creator. The same principle was later adopted in English jurisprudence because of repulsion at the inquisitorial tactics used and the cruel punishment delivered by the Court of Star Chamber, which became notorious for judgment favouring the king. In 1641, the parliament inflamed by the severe treatment of John Lilburne, as well as other religious dissenters passed an Act and abolished the Court of Star Chamber. This principle was carried over into the American legal system, becoming part of its common law before being adopted into their Constitution vide Fifth Amendment as " No person – shall be compelled in any criminal case to be a witness against himself" and the same was given constitutional status in Pakistan in 1973 vide Art. 13(b), that "No person–shall, when accused of an offence, be compelled to be a witness against himself."

Despite the explicit recognition of this right, there was extensive litigation involving several controversial and unresolved problems concerning the protection against self-incrimination in the apex courts of Pakistan. One such issue was whether the protection against self-incrimination may be waived in circumstances of public interest, such as terrorism. Another dilemma was whether a suspect or an alleged perpetrator be shielded from being forced to present documentary or physical evidence. There was also a concern that whether the accused can be compelled by the court to give evidence on oath and on this failure may be liable to punishment. The object of this exercise is to assess the legal framework of Pakistan pertaining to the protection against self-incrimination considering these issues and to stimulate discussion within the academic community, which would undoubtedly help to improve knowledge and correct use of this protection amid criminal proceedings in Pakistan.

Literature Review

The historical origins of this protection are obscure. Ciardiello (1991) maintained that even though it is unknown if the protection existed in the old days before English common law, the Talmudic law has a few allusions to a right analogous to the protection from self-incrimination. The principle that "a man cannot represent himself as guilty or as a transgressor" was an integral aspect of the criminal process of Rabbinic courts in ancient Judaic law. Opposite to the contemporary definition, this ancient Jewish rule granted individuals an exceptionally wide privilege that was not possible to be renounced or abandoned. Trechsel (2006) contended that the preferred view is that the said principle had its roots in the genesis of English common law. Although some writers relate to advances in the eleventh and twelfth centuries, the right's inception is widely attributed to 1641, when both the Star Chamber and the High Commission were disbanded, and the ex officio oath process was abandoned.

As the word self-incrimination implies, this protection is restricted to criminal proceedings (Trechsel, 2005). It does not restrict the employment of mandatory questioning power in non-criminal procedures. The protection, however, may prevail even in non-criminal procedures if a scenario appears to lead to self-incrimination in any subsequent criminal proceedings. Moreover, this protection is exclusively available to natural persons and not to corporations (Fantaye, 2014). Therefore, it does not apply to a corporate agent or employee who is compelled by law to turn over records or other material that may be used against the company as his individual claim is superseded by the collective entity rule. This rule is justified to provide law enforcement more access to company records and ensure that companies are held accountable for fraud and other illicit acts that frequently go undetected. Furthermore, this protection is typically restricted to testimonial evidence rather than physical evidence (Ashworth, 2008). Therefore, the materials, even though they are incriminating in nature, that can be procured from the accused by means of coercive powers but that exist independently of the suspect's will, e.g., documents, breath, blood, urine samples and body tissue, do not fall under the purview of this protection.

Several justifications for this protection have been presented by various Anglo-American intellectuals throughout history. There are two primary categories that may be used to classify the justifications for the protection against self-incrimination: systemic and individual (Fantaye, 2014). The systemic justifications are associated with the criminal justice mechanism and perceive the protection as a method of attaining objectives inside the system instead of an aim in itself (Queensland Law Reform Commission, 2003). These include the necessity to curb state power, avoid convictions based on false confessions, safeguard the reliability of evidence together and preserve the uprightness or trustworthiness of the judiciary. Whereas individual rationales are engaged with the protection's inherent value that protects human dignity and is founded on ideas of human rights. These consist of the protection of human dignity and privacy, the free will of a person, the presumption of innocence and the burden of proof on the prosecution.

Alschuler (1996) argued that one of the primary rationales for this protection was the necessity to shield the accused from torture and other inhumane interrogation techniques utilized by the investigating agency. The basic logic for this privilege is that if assertions made under duress or against a person's will were readily accepted in a court of law, it would operate as a temptation to the interrogator, who would then turn to unethical techniques to get such evidence from an accused. Torture, extortion, fraud, and threats would eventually taint the very concept of justice. Kessel (1977) maintained that forcing a person to choose between denouncing himself and submitting himself to perjury or contempt is intrinsically cruel. Either option results in punishment. It is cruel to provide an individual with no alternative, to compel him to cause suffering himself and to make him an agent of his own demise.

Notwithstanding the foregoing justifications, the protection against self-incrimination has also stirred controversy about the principle's value, with some expressing severe concerns that it has a propensity to undermine justice. Green (2002) argued that it undermines the trial's truth-seeking tasks by providing refuge to the guilty. Therefore, it has been harshly condemned for resulting in the loss of the most credible proof of guilt, maybe the only accessible evidence. A person who has perpetrated an offence will be in a special position because of his awareness of the circumstances. This is especially true for crimes that take place in secret and may leave little to no physical evidence of their commission (Queensland Law Reform Commission, 2003). It may also be chastised for prioritizing perpetrators above victims of crime. Crime victims could believe that when an offence is perpetrated that causes them harm, the accused's rights take precedence over theirs, which may have a detrimental impact on victims' rights.

Research Methods and Methodology

The black letter approach to doctrinal legal research methodology has been applied by employing a deductive style of legal reasoning and descriptive exposition of legal principles incorporated in primary sources i.e., cases and statutes. For this research, data such as legislation and judicial decisions of courts from Pakistan were expounded. Additionally, legal data from various human rights treaties like "International Covenant on Civil and Political Rights" (ICCPR), "European Convention on Human Rights" (ECHR) and "Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment" (CAT) along with reports of Human Rights Commission (HRC) and judgments of "European Court of Human Rights" (ECtHR) were taken into consideration. Secondary data that consisted of a range of research articles, journals and reference books were also examined to gather in-depth information, analysis of data and achieve the aims of the research.

Discussion

International Human Rights Framework

The significance of the right against self-incrimination is universally acknowledged and recognized as a substantive human right in numerous human rights treaties. Art. 14(3)(g) of the ICCPR explicitly recognizes the protection against self-incrimination. This clause prohibits forcing suspects or accused individuals to depose against themselves or admit guilt. Likewise, the presumption of innocence is also expressly guaranteed in Art. 14(2). Moreover, torture and cruel, inhumane, or degrading treatment or punishment are expressly forbidden vide its Art. 7. Lastly, Art. 10(1) provides that all those who have been divested of their freedom should be dealt with humanity and regard for the intrinsic dignity of every individual. Consequently, all statements gathered by coercion are inadmissible and cannot be utilized as evidence against the persons facing criminal proceedings or trial since they breach many ICCPR rules, including the protection against self-incrimination.

In its General Comment 13 (1984), the HRC urged States Parties to enact laws to guarantee that any evidence gained through compulsion, including coercing a suspect or accused into confessing or testifying against themselves, is entirely inadmissible. In its Concluding Observations on Romania (1999), the HRC expressed concern over the absence of laws rejecting statements acquired by accused persons in transgression of Art. 7 of the Covenant. Furthermore, the State party was instructed by the HRC to enact suitable law that rests the burden of proof on the public authorities to demonstrate that statements provided by suspects in a criminal proceeding were stated voluntarily and that statements procured in infringement of Art. 7 are precluded from the evidence.

Torture is expressly forbidden by CAT. Art. 1(1) of CAT expounds torture as "... any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession...." This clause prohibits the utilization of torture to get information from victims during

criminal cases. Therefore, it is forbidden to inflict any pain or suffering on people when acquiring evidence for a criminal case, whether it be physical or psychological.

The ECHR, on the other hand, does not specifically acknowledge the right to protection against self-incrimination and the same has not been incorporated in any of its protocols (Veas, 2022). Nevertheless, it was generally believed that the "right to a fair trial" vide Art. 6 of ECHR encompasses protection against self-incrimination and was recognized for the first time in the Funke case (1993) by the ECtHR. The ECtHR also ruled that the right against self-incrimination is inextricably linked to the presumption of innocence (Aleksandr Zaichenko, 2010) and its goal is to shield people against undue compulsion by the law enforcement agencies, so assisting in preventing miscarriages of justice and accomplishing the objectives of the right to a fair trial (Bajic, 2021).

Legal Framework of Pakistan

Constitutional Provisions

The protection against self-incrimination has been provided as a fundamental right vide Art. 13(b) of the Constitution, as discussed above. The Supreme Court in the Alpha Insurance Company case (1996) enumerated the preconditions to make the protection of this clause available:

1. There has to be a person accused of an offence.
2. There has to be a compulsion of a sort.
3. The object is to make the accused a witness against himself.

The protection provided by Art. 13(2) is only extended to those who have been officially accused of committing an offence, i.e., those who may be prosecuted in the normal course of events. The Lahore High Court held in Noor Muhammad case (1968) that the words "any person accused of an offence" are to be interpreted in the ordinary dictionary sense as meaning any person against whom a charge of an offence has been brought, irrespective of the fact whether such an accusation is brought by way of a first information report or a report submitted under section 173 of the "Code of Criminal Procedure" (CrPC), or is contained in a private complaint instituted in a court. The words are not limited to only those persons who are sent up for trial before an ordinary Court.

The Supreme Court held that the guarantee under Art. 13(b) is not applicable to incorporated organizations but is confined to natural persons (Alpha Insurance Company, 1996). The court opined that in our laws regarding witnesses, evidence and testimonial compulsion, Qanun-e-Shahadat Order 1984 (QSO) holds the field. Its Art. 3 provides the test for persons to be witnesses which envisages a natural person and not an incorporated entity. The word "compel" is well understood to mean constrain, or force. It can be tangible and intangible. The prohibition attaches only to incriminating material that the accused does not want to produce. It is the privilege of the accused. It can be exercised against the whole world. Its exercise can be waived as well.

In addition to being an independent right, the protection against self-incrimination is also recognised as a component of the right of "Inviolability of dignity of man, etc." vide Art. 14(2) as "No person shall be subjected to torture for the purpose of extracting evidence." Hence, protection against torture has been extended not only to the accused persons but even to witnesses. Because there is no definition of torture in our Constitution, it is reasonable to adopt its definition and the objective of proscription under the CAT, owing to the fact that Pakistan is a party to the CAT, having signed it on April 17, 2008, and ratification was done on June 23, 2010.

Statutory Provisions

Even before this constitutional protection, the principle against said compulsion to the accused has been recognized in the criminal administration of justice in Pakistan by various statutory provisions. Section 5 of the Oaths Act, of 1873, which made it compulsory for witnesses to make an oath or affirmation before giving evidence, did not render it lawful to administer an oath or affirmation to the accused person, in a criminal proceeding. However, an exception was created to this rule where the accused is examined as a witness for the defence, by Federal Laws (Revision and Declaration) Ordinance, 1981. Similarly, a provision was inserted in section 342(4) CrPC making an exception to the prohibitory rule of oath by the accused in the case of section 340(2) only.

As discussed above, in our laws regarding witnesses, evidence and testimonial compulsion QSO 1984 holds the field. According to its Art. 15, a witness cannot be excused from testifying on the grounds that his response may lead to his incrimination or that it may directly or indirectly subject him to a penalty or forfeiture of any kind, in both criminal cases or civil proceedings. However, a safeguard has been provided in the form of a restriction that such a response under compulsion shall not expose him to arrest or prosecution, or be proven against him in any criminal trial, save a prosecution for false evidence. These

safeguards have also been extended to civil suits and proceedings vide Art. 142.

The law related to confessions is enumerated in Articles 37-43 of QSO which contain sufficient guarantees as to the protection against self-incrimination. As per Art. 37, a confession given by an alleged perpetrator is not relevant in a criminal case if the court believes the confession was induced, threatened, or promised in relation to the accusation against the accused person. However, as per Art. 41 the said confession becomes relevant after the removal of such inducement, threat or promise. Art. 38 declared a confession by an accused inadmissible in evidence if given before a police officer. Similarly, an extra-judicial confession made by a person in the custody of police is inadmissible in evidence against that person under Art. 39. However, a confession given before a Magistrate even under police custody is an admissible piece of evidence.

The Supreme Court ruled that an honest and voluntary confession is a prerequisite of the law, and its veracity may be confirmed by the eyewitness accounts, medical evidence, and other corroborating evidence available on the record. (Zahir Shah, 2002). The rules in the above provision are sufficient to ensure that the confessions made are true and voluntary. However, Art. 42 makes such confessions relevant even if they are caused by a pledge of confidentiality, deception, drunkenness, in response to questions he did not have to answer and in the absence of warning of non-obligation and its probable use against him. This provision casts serious doubts about the resolve to uphold the protection against self-incrimination. Art. 44 extends compulsory cross-examination on all accused, including an accomplice.

The procedural law relating to criminal prosecutions before courts is enumerated in the CrPC, 1898. As per section 161, a person being examined by an investigation officer is obliged to respond to any questions the officer poses about the case, excluding such that might potentially subject him to criminal prosecution, a fine, or forfeiture. Section 162 directs that a statement given to a police officer must not be signed by the individual making the statement if put into writing. Section 163 prohibits the use of any incentive, warning, or assurance by a police officer or other person in a position of power. Section 164 lays out the power of the Magistrate to record confessions. The confession is to be recorded in accordance with the procedure laid down in section 364. It is significant to note that the Magistrate must take all precautions to see that it is voluntary and the provisions of sections 164 and 364 CrPC are not violative of Art. 13(b) (Zahir Shah, 2002). Section 343 provides that no accused person may be compelled to reveal or hide information that is in his knowledge by means of threats, promises, or any other kind of coercion, except as provided in sections 337 and 338 which relate to tendering of pardon to accused and accomplices on certain conditions, respectively.

However, inroads on the protection against self-incrimination have also been made in some provisions of the said code. As per section 164B, it is obligatory that DNA samples of the accused be examined by a registered medical practitioner in cases of rape, unnatural offence or sexual abuse or their attempt. Similarly, provisions making compulsory production of documents in sections 94 and 96, and compulsion to give evidence on oath and power to draw adverse inferences have been provided under sections 340 and 342, which will be discussed in succeeding paragraphs.

Conditional Admissibility of Extra Judicial Confession under Anti-Terrorism Law

As discussed above, the confession before a police officer or even in police custody is declared as not relevant in evidence. However, a question may arise whether the protection against self-incrimination may be waived in circumstances of public interest, such as terrorism. The first attempt, by the legislature, on this pretext can be observed in the form of the "Anti-Terrorism Act 1997" (ATA) with the objective "to prevent terrorism, sectarian violence and for speedy trial of heinous offences". In a non-obstante clause superseding QSO, section 26, "Admissibility of confession made before Police", provided that a confessional statement made before a police official not lower than the level of a Deputy Superintendent may be substantiated against such person. However, a safeguard was provided in the proviso empowering the special court under the said Act to order the police officer to submit a videotape as well as the equipment used to record the confession for the confession to be admitted as evidence. The aforementioned section clearly deviated from the long-standing provisions and acknowledged the stance outlined in QSO.

The validity and vires of this enactment were questioned in various petitions before Lahore High Court on the touchstone of fundamental rights (Mehram Ali Alias Yawar Ali, 1998). The full bench, by a majority of four to one, held that the ATA was validly enacted, but certain provisions of the ATA required to be amended in order to validate the same. In respect of section 26, the majority ruled that the confession to be recorded by the Police Officer under the new law has been made merely admissible but not conclusive. This

confession shall be scrutinized by the courts and in any case, it does not carry more value than extra-judicial confession. The judges ruled that a confession made by an accused before a police officer would have to stand the test of strict scrutiny by the trial court and to make sure that the provision in question is not misused certain additional safeguards should be provided, which should be that ordinarily the confession should be recorded in the presence of a Magistrate but if he is not available for some reasons which shall have to be stated by the police officer, the confession shall be recorded in the presence of a Superintendent of Police, who shall not be from the same Division in which the investigation is being carried out. Karamat Nazir Bhandari, J, in his dissenting opinion, stated that the legislature may take into account the relative merits of magisterial availability at the time of confession before the Deputy Superintendent of Police or other an alternative measure to alleviate the suspicion of obtaining confessions through the use of third-degree methods or brutality, which is precluded by Articles 13 and 14(2) of the Constitution.

The above judgment was challenged before the Supreme Court (Mehram Ali, 1998). Ajmal Mian, C.J., writing for the bench held that section 26 is an infringement of Art. 13(b) of the Constitution which confers a fundamental right to an accused against compulsion to be a witness against himself. The same must be appropriately modified by replacing "police officer not below the level of a Deputy Superintendent of Police" with "Judicial Magistrate". Even though it will ultimately be up to the Special Court to accept or reject a confession taken by a police officer, the fact of the matter remains that this kind of confession is contrary to the law and the Constitution.

The said section was omitted by section 16 of the "Anti-Terrorism (Second Amendment) Ordinance, 1999". Afterwards, the same provision, with additional safeguards, was inserted as section 21-H of ATA as Conditional Admissibility of Confession vides Anti-Terrorism (Amendment) Ordinance, 2001 and still holds the field. The said provision is nearly a replica of section 164 CrPC with a substitution that the power of Magistrate is given to the District Superintendent of Police with additional safeguards of corroboration by circumstantial and other evidence, and admissibility is made conditional upon the satisfaction of the Court. Despite the insertion of these safeguards, the High Courts have ruled this provision repugnant to Art. 13(b) of the Constitution.

Ejaz Afzal Khan, J, in the Aftab Ahmad case (2004) raised serious questions about the voluntariness of a confessional statement of the accused before the District Superintendent of Police. How an accused when produced by one Police Officer before another Police Officer can feel free and think that now he is in safe hands? How an accused produced before a Superintendent of Police in a bewildered state or even otherwise can understand that a Superintendent of Police is different in his attitude and outlook from other Police Officers? Why was the accused not produced before a Magistrate and what was that extraordinary and unusual to warrant his bypass? He gave caution to the trial courts that since the decision about its admissibility in view of section 21-H of the ATA has been left to the judicial discretion of the court, the court before relying upon it must see and satisfy itself whether the questions enumerated above have been satisfactorily answered. If the answers are in the affirmative, alright it can be relied upon. But if in the negative, it will neither be credible nor even relevant.

In Dhani Bakhsh case (2006), Mehta Kailash Nath Kohli, J held that statements of accused persons under section 21-H of A.T.A. were not worth credence, not above board and cannot be made basis for conviction, since statements were recorded after lapse of fourteen days, the Judicial Magistrate was available in the town and after recording confessional statements the accused persons were sent to Judicial Magistrate for transfer of their custody to judicial lock-up. He opined that when a police official produces the accused before another police official, who is directly supervising the said police station, the voluntariness of the said statements is seriously to be doubted. In The State case (2015) Yar Muhammad, J. held that section 21-H of ATA admittedly is contrary to Art. 13(b) of the Constitution and if the confession made under section 21-H of the ATA was not corroborated by solid evidence, it cannot be used as the solitary piece of evidence upon which a conviction might be founded.

There is no question that the interests of society should supersede those of individuals, but it cannot be overlooked that the fundamental aim of society is to preserve the dignity of its citizens. The problems encountered by the prosecution are not grounds for the courts to weaken constitutional protection and allow authorities to compel confessions or incriminating utterances. The analysis of the judicial pronouncements clearly signifies the resolve of courts in enforcing protection against self-incrimination and not equating an extra-judicial confession with the sanctity as that of judicial confession, even on the pretext of the state's war against terrorism.

Compelled Production of Documentary and Physical Evidence

The question relevant under discussion here is whether a suspect or an alleged perpetrator having said protection can be shielded from being forced to present documentary or physical evidence. Section 94 CrPC confers powers on a Court and Station House Officer of a police station for issuance of summons and order respectively to produce any document or other item indispensable or useful for any investigation, enquiry, or trial. Its sub-section 2 provides that a person directed to just present documents or other items shall be regarded to have fulfilled such demand if he made arrangements for the production of such document or thing rather than attending himself. While section 96 confers authority on the Court to issue search warrants if there are grounds to assume that the people summoned under section 94 will not provide the document or where it considers that the purpose of any enquiry or proceedings before it would be aided by a general search or inspection and the person to whom such search warrants are provided, may search the premises of the person in whose possession the documents are alleged to be.

In the Masood Qureshi case (1971), Shameem Hussain Kadri, J. held that a search warrant can be issued to an accused person and that the word 'person' in sections 94 and 96 CrPC also includes an accused in the case. Even though the said judgment was given prior to the enactment of Art. 13(b) but relying on M. P. Sharma's case (1954) it was held that the issuance of search warrants under section 96 CrPC does not infringe any Fundamental Right. In Syed Ikram Gardezi's case (1980) Khalilur Rehman, J. rejected the contention that if the Legislature intended to include an accused using the word "person" in sections 94 and 96 CrPC the same is ultra vires of Art. 13(b) of the Constitution. He ruled that Legislature has taken care of the situation in subsection (2) of section 94. Asking for documents from a suspect is one thing, forcing him to testify against himself is quite another; the two cannot be compared. The case, therefore, does not involve the enforcement of any fundamental right.

In the Adamjee Insurance Company Ltd case (1989), Ajmal Mian, C.J. rejected the contention that the summons/notice requiring insurance companies to produce the records of the companies for investigation and inquiry vide sections 94 and 96 CrPC was repugnant to Art. 13(b) of the Constitution and ruled that there is a distinction between the investigation stage and the trial stage in a criminal case. The said case came before August Supreme Court in appeal (Alpha Insurance Company Ltd. Karachi, 1996). Shafiur Rahman, J held that section 94 CRPC does not exclude the accused from its purview. He opined that as regards the protection afforded by this Art. 13(b) if the accused considers any piece of evidence as incriminating him, the privilege granted can be claimed. He must refer the authority, be it police or Court or any other, to his privilege and the exercise of it by him. The police thereafter cannot take the coercive steps that are reserved for it under section 94 for getting through the accused such documents. The exercise of privilege and protection against self-incrimination enjoyed by the accused cannot be adjudicated by any authority other than the Court and the Court will take note of it when the protection is claimed. There is, therefore, no need to exclude the accused altogether from section 94, Cr.P.C.

However, in a recent case of Muhammad Farooq case (2018), Fahim Ahmed Siddiqui, J. held that a direction for the discovery of documents or things vide section 94 cannot be issued to an accused, against whom an enquiry or investigation is being carried out and/or trial is being held, as it is not only against the settled principle of jurisprudence but it is contrary to the Article 13(b) of the Constitution. It would be interesting to see the fate of this judicial pronouncement is contrary to the settled principle that a suspect or an alleged perpetrator cannot be shielded from being forced to present documentary or physical evidence on the pretext of protection against self-incrimination.

Individual-State balance can only be achieved by enabling the state in its efforts to maintain public order and prevent crime while imposing clear and unambiguous restrictions on such power. The courts have clearly manifested that the protection against self-incrimination is typically restricted to testimonial evidence rather than physical evidence. Therefore, the materials that exist independently of the suspect's will, even though incriminating in nature, do not fall under the purview of this protection. Denying the investigating officer, the opportunity to look for a document or material in the accused person's possession eventually occurs in the investigation turning into a charade.

Compulsion to Give Evidence on Oath

The issue under analysis is whether the accused can be compelled by the Court to give evidence on oath and on this failure may be liable to punishment. This part is going to make an analysis regarding section 340(2) CrPC in juxtaposition to the protection against self-incrimination. The accused became a competent witness, for the very first time vide section 7 of the

"Prevention of Corruption Act, 1947", and was granted the opportunity to offer testimony under oath in opposition to the accusations made against him or any other accused in the same trial. However, the safeguards were provided to the accused in three ways. Firstly, the decision to be a witness was solely of the accused. Secondly, the prosecution shall not be able to condemn him or any co-accused at the same trial for failing to testify, and no inference of guilt shall be drawn from such failure. Lastly, he may not be asked any questions, and if he is, he may not be forced to respond, which may indicate that he has committed or been found guilty of an offence other than the one for which he is being prosecuted, or that he has a bad character. However, an exception was created for the said safeguards in three scenarios. Firstly, the evidence proving his involvement or conviction of such like offence is admissible. Secondly, he himself or via his pleader has out a question to any prosecution witness to prove his own good character and lastly, has testified against any co-accused.

Subsequently, the same provisions were inserted in section 340(2) CrPC, vide Law Reforms Ordinance 1972, extending the competency of the accused person as a witness in all criminal proceedings. In Muhammad Siddique's case (1983) the said section 340(2) came under consideration vis-a-vis Article 13 of the Constitution before "Federal Shariat Court". The court ruled that although the accused was a capable witness for the defence, he had the choice of whether to testify under oath or not, and it was a well-known rule of Islamic criminal law that no one could be forced to testify against himself.

Afterwards, section 340(2), was again amended vide "Code of Criminal Procedure (Amendment) Ordinance 1985" to the extent that if an accused person does not enter a plea guilty before the court, he must testify under oath to refute the accusations or claims made against him or any other defendant charged with the same offence. However, a safeguard was provided that he may not be asked any questions, and if he is, he may not be forced to respond, which may indicate that he has committed or been found guilty of an offence other than the one for which he is being prosecuted, or that he has a bad character. Consequently, the said provisions are repugnant to Art. 13(b) are unconstitutional (Chaudhry, 1994) and made an accused person a compellable witness, liable to cross-examination (Khan, 2008). The substitution of said provisions raised the following issues:

I. Whether the accused can be compelled by the Court to give evidence on oath?
II. Whether on his failure to give evidence any adverse inference can be drawn against him or that the prosecution can be allowed to comment on such failure?
III. Whether on his failure to take oath or give evidence he will render himself liable to punishment (Faqir Hussain, 1985)?

In the Faqir Hussain case (1985), Muhammad Munir Khan, J. held that section 340(2) CrPC gave the valuable right to an accused to give evidence in disproof of allegation against him and that failure to give evidence on oath could make him subject of prosecution's comment and that an adverse inference/presumption could also be drawn against him. Since the accused was then a competent witness and can give evidence on oath as and when called by the Court as a witness, therefore by refusing to take an oath or affirmation, he will render himself liable to prosecution and punished under section 178 Pakistan Penal Code (PPC) and if after having taken the oath or affirmation, he refuses to make a statement or answer permissible questions he will render himself liable to punishment vide section 179 PPC. In the Rizwan case (1986), Qurban Sadiq Ikram, J. held that section 340(2) was not ultra vires of Art. 13(b) of the Constitution but an unjust provision of law, for the reason that it does not impel the accused to testify against himself but only obliges him to make a statement on oath to refute the allegations against him. However, the accused can be punished for purgery under section 193 PPC. He can be cross-examined like any other witness to any extent as provided by Articles 44, 132 and 133 of QSO. In the Arshad Mehmood case (1989), the Sindh High Court held that section 340(2) was not in conflict with Art. 13(b) of the Constitution because it did not envisage and propose the accused to testify against himself. On the other hand, the facility is given to the accused to appear as a witness himself.

However, in the Muhammad Yousuf Zai case (1988), the division bench of the Sindh High Court held that section 340(2) is contrary to Art. 13(b) of the Constitution owing to the reason that by testifying under oath vide said section an accused becomes liable to cross-examination by the prosecutor. The prosecutor is then obliged to ask questions that may implicate him in the perpetration of the offence, amounting to a compulsion to testify against himself, forbidden under Art. 13(b). The court ruled that where there is a conflict between a statute's provision and a constitutional provision, particularly one pertaining to fundamental rights, the latter will take precedence. Similarly, in the Saeedullah Alias Bacha case (1988), the Division Bench of the Peshawar High Court held that

under section 340(2) the duty of the Court was only to ask the accused if he would enter upon his defence and then leave it to him to elect to appear as a witness or not and no irregularity or illegality was committed by the trial judge in not recording his statement on oath if he was given an opportunity which he declined.

The above-mentioned judgments of various High Courts show a wide divergence, at times contrariety in deciding the law points. The matter was put at rest by the August Supreme Court by an authoritative pronouncement on the subject in Mst. Amir Khatun case ([1991]). The court held that the interpretation of section 340(2) must be that it has no obligatory impact on the accused. The only thing the Court can do is inquire as to whether he would be willing to make a statement on oath. He has the option to either give or not a statement under oath and doing so will not harm his case in any way. When he does not make a statement, no unfavourable assumption may be inferred. The court opined that the CrPC has two yardsticks of importance to section 340(2). The first touchstone is found in section 342(4) that "except as provided by subsection (2) of section 340, no oath shall be administered to the accused". The other criterion is in section 343 which says, "Except as provided in sections 337 and 338, no influence by means of any promise or threat or otherwise shall be used to any accused person to induce him to disclose or withhold any matter within his knowledge". If a suspect is obliged to give a statement under oath vide section 340(2) or is warned that failure to give that statement would result in drawing an inference against him, he will be subjected to pressure which will breach the provisions of section 343.

Even though the said provision is a clear-cut violation of the constitutional protection against self-incrimination, the study of judgments shows that the courts are constrained to make a hard rule to protect individual rights by declaring it ultra vires the Constitution. However, the rigour of this statutory provision has been diluted to some extent by relying on the principle of interpretation, consistency with the paramount law, that section 340(2) should be interpreted as only conferring a duty or a power on the Court to inform the accused that he has a right under the law to make a statement on oath and it is his option with no risk attaching it to either make or not make that statement.

Conclusion

The notion that investigating authorities may employ different unfair ways to gather information from an accused if there are no safeguards granted against it led to the development of the protection against self-incrimination. The justifications for the protection against self-incrimination comprise of necessities to curb state power, avoid convictions based on false confessions, safeguard the reliability of evidence, preserve uprightness of the judiciary, protection of human dignity and privacy, free will of a person, presumption of innocence and burden of proof on the prosecution. The protection against self-incrimination in Pakistan is asserted by virtue of the fundamental right provided under Art. 13(b) under the influence of the existing American and English principles granting the privilege against self-incrimination.

The examination of statutory laws in Pakistan shows that the protection guaranteed under Art. 13(b) has not been recognized in its full vigour and spirit, necessitating appropriate legislative reforms as a pressing necessity of the day. The analysis of the judicial pronouncements clearly signifies the resolve of courts in enforcing protection against self-incrimination and not equating an extra-judicial confession with the sanctity as that of judicial confession, even on the pretext of the state's war against terrorism. Moreover, the courts have clearly manifested that the protection against self-incrimination is typically restricted to testimonial evidence rather than physical evidence and investigation of a crime will become a mockery by denying the investigating officer the opportunity to look for a document or material in the accused person's possession. The compulsion of the accused to give evidence on oath is a breach of the constitutional protection against self-incrimination but, the study of judgments shows that the courts are constrained to make a hard rule to protect individual rights. Instead of declaring it unconstitutional, the severity has been diminished by declaring it as an option for the accused to make or not to make a statement on oath.

Since it is the responsibility of the state to guarantee that individuals' rights are upheld, everyone has a chance at a fair trial, laws are applied objectively and to ensure the possibility of building a society that strikes a balance between competing interests on many levels. An objective comprehension of the moral, technical, and legal facets of this protection is necessary for a thorough assessment of its ramifications on the criminal justice system in terms of establishing exceptions to this protection and their repercussion on individual liberties.

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