The Privilege Against Self-Incrimination and Criminal Justice BY ANDREW L-T **CHOO** [Oxford: Hart Publishing, 2013. xxvi + 152 pp. Hardcover: £45.00]

This is a book on the privilege against self-incrimination by a leading academic on criminal evidence and procedure. His work, particularly on the abuse of process and judicial stay of proceedings, has influenced decisions of the highest court in the United Kingdom and the Privy Council. The privilege against self-incrimination lacks a clear and widely accepted meaning. A helpful definition is provided in s 4 of the New Zealand *Evidence Act 2006* (NZ), 2006/69. It is used by the author as a framing device. According to that definition, the privilege is the rule that a person may not be compelled, on pain of criminal sanction, to provide information that may lead to or increase the probability of his criminal prosecution. The focus is on the law in England and Wales as shaped by the jurisprudence on the *European Convention on Human Rights* [*ECHR*]. Comparative materials from the United States, Canada, Australia, New Zealand and India are also taken into account. As the author explains, the aim is to "highlight the doctrinal and theoretical issues that are of particular contemporary concern." (at p vii) He has succeeded well in this objective.

Chapter 1 offers a survey of suggested rationales for the privilege. A distinction is drawn between epistemic and non-epistemic justifications. The former rests on the idea that coercion may result in false admissions or confessions. Notwithstanding the wealth of literature that highlights this danger, it is unfortunately still much under-rated and under-noticed. On this view, the protection against compelled self-incrimination cuts off one source of unreliable evidence that, if used at a trial, will increase the risk of a wrongful conviction. Non-epistemic justifications are less concrete. Famous examples include the argument that compelled self-incrimination places the person in the cruel trilemma of self-accusation, perjury or contempt, and the theory that it is an invasion of privacy. Another argument of the same ilk is that it disrespects human dignity; personal autonomy is said to be infringed where one is denied the choice of whether or when to participate in one's own criminal condemnation. Bentham poured scorn on non-epistemic justifications, sometimes of a sexist nature; for instance, he dismissed the 'squeamish' at creating 'hardship' by coercing self-incrimination as 'old woman's reason'.

It is not clear where the author himself stands. He seems sceptical of non-epistemic justifications, noting that they are "regarded by those positing them as self-evident, but may just as easily be criticised." (at p 10) It would be unfortunate to dismiss non-reliability rationales for the privilege as "an emotional argument" (see quotation of a different author at p 10). Emotion and rationality do not exist as separate spheres of the life of the law. Perhaps the insistence on *voluntary* participation in the criminal justice process is indicative of a particular conception of that process, one in which suspects and accused persons are not merely means to an end, having no status other than as a source from which to extract incriminating evidence. If they are properly to be respected as *subjects* of the investigation or trial, they should be engaged in rational discourse as reason-responsive beings rather than treated as targets of coerced self-condemnation. This might provide our starting point, though, like all starting points, there will be potential limitations and restrictions to attend to.

Chapter 2 examines the relevant jurisprudence of the European Court of Human Rights and the response thereto in England and Wales. The privilege against self-incrimination is not explicitly provided for in the *ECHR* but is found to be implicit in the right to a fair trial provided for in art 6(1). Two questions are identified for discussion. First, can someone who is compelled by statute to provide certain information and fails to do so be prosecuted for that refusal where the refusal is criminalised? Secondly, can evidence obtained by statutory compulsion be used in a subsequent criminal prosecution? On the first question, the position adopted by the European Court of Human Rights seems to be that the privilege is violated only if the person, at the time he was compelled to give information, was either charged with an offence or was in sufficient peril of a criminal prosecution. Influenced by the position adopted by the Strasbourg Court, a distinction is drawn in England and Wales between a purely administrative investigation and a criminal enquiry: the privilege is engaged in the latter context but not in the former. The second question is rendered redundant in many situations by statutory provisions on 'use immunity', the effect of which is, briefly, that information obtained by statutory compulsion cannot be used in a subsequent criminal prosecution of the information provider. (In Singapore, a witness has 'use immunity' under s 134(2) of the *Evidence Act* (Cap 97, 1997 Rev Ed Sing).) Where there is no 'use immunity', the court in England and Wales still has discretion under s 78(1) of the *Police and Criminal Evidence Act 1984* (UK), c 60 [*PACE*] to exclude the evidence if admitting it would undermine the fairness of the trial.

In Singapore, one example of the statutory abrogation of the privilege against self-incrimination is in the context of an investigation under the *Prevention of Corruption Act* (Cap 241, 1993 Rev Ed Sing). The power to compel a person to provide relevant information is conferred under s 27 and the refusal of that person to give the required information is an offence under s 26(d). (See *Taw Cheng Kong v Public Prosecutor* [1998] 1 SLR (R) 78 (HC).) There has yet to be recognised any constraints, similar to those examined in chapter 2, on the power of parliament to remove or qualify the privilege. While art 9(1) of the *Constitution of the Republic of Singapore* (1999 Rev Ed) states that no person shall be deprived of his life or personal liberty save in accordance with 'law' and the term 'law' has been read to include fundamental principles of natural justice, the Privy Council in *Haw Tua Tau v PP* [1981-1982] SLR (R) 133 at para 26 declined to rule on the constitutional status of the privilege. (Oddly, this case was interpreted by the High Court in *Public Prosecutor v Mazlan bin Maidun* [1992] SGHC 134 at para 36 as having decided that the privilege is a principle of natural justice that is included in the concept of 'law' in art 9(1) and it is, on appeal, cited by the appellate court (*Public Prosecutor v Mazlan bin Maidun* [1992] 3 SLR (R) 968 (CA) at para 15) in reaching the opposite conclusion.) Another difference is that, in Singapore, the discretion to exclude evidence in the interest of a fair trial is narrower than that provided for in s 78(1) of the *PACE*.

Chapter 3 turns to the scope of the privilege. The typical case in which the privilege is engaged is one where a person is being compelled to answer incriminating questions. But what if the compulsion is to do something else, such as producing a pre-existing document which contains incriminating information or supplying a blood or hair sample that might, on forensic analysis, link the person to a crime? The privilege ought not to apply to such cases if its only rationale is to prevent the situation

from arising where a person gives false information as a result of being pressured to speak; in the cases under contemplation, there is no risk of this occurring since the document or other physical evidence either pre-exists the compulsion or (to adopt the language of the court) exists independently of the will of the person. However, there may still be room for the privilege if the rationale rests on non-reliability concerns. For example, if the privilege is underpinned by respect for personal autonomy, it is not obvious that there is a material difference between forcing a person to give incriminating evidence verbally and forcing him to produce incriminating evidence in another form. What, perhaps, should matter is whether the information ultimately sought to be used against the person can truly be said to have been the product of cognitive efforts undertaken as a result of the compulsion (see pp 52-54). Given the lack of clear thinking on the rationales, it is not surprising, as this chapter shows, that there is no uniformity of approach in the legal systems examined by the author and oftentimes the law is unclear even within a legal system.

Chapter 4 considers the extent to which statutory infringements of the privilege are consistent with the fundamental right to a fair trial. The privilege is not absolute. In England and Wales, the position is taken, under the influence of decisions and judgments of the Strasbourg Court, that an infringement of the privilege preceding a criminal trial does not necessarily make the trial unfair. A balancing of competing considerations is undertaken in deciding fairness on a case-by-case basis. Canadian law takes a similar balancing approach. The author is in favour of a bolder stance, one that accords greater priority to the privilege; it should not be susceptible to being dislodged by a balancing of interests, save in situations where individuals have voluntarily engaged in a lawful activity that presented a serious risk or danger to public health and safety. Ultimately, how much weight we give to the privilege depends on our understanding of its rationale and our belief in its value. As Chapter 1 shows, there is neither clarity nor consensus in these respects.

Chapter 5 examines 'indirect' compulsion to incriminate oneself. By 'indirect', the author means forms of compulsion other than through criminalisation of the refusal to provide information. A suspect under police questioning will face varying degrees of pressure to incriminate himself. One way of tackling the problem is to exclude evidence of the suspect's confession where it was or may have been obtained by oppressive means or in circumstances which put its reliability in doubt (s 76(2) of the *PACE*). There are other possible safeguards, such as ensuring that the suspect has ready access to a lawyer and requiring the police to inform the suspect of his rights, including his right not to answer questions, prior to questioning him. As the author shows, these safeguards vary in strength. For instance, in the United States, a confession obtained without *Miranda* warnings (*Miranda v Arizona*, 384 US 436 (1966)) having been administered is inadmissible. The English approach, on the other hand, is to treat exclusion for lack of adequate warning as a matter of discretion. In Singapore, the test for the admissibility of confession evidence is convoluted and still couched in archaic language, and the other safeguards are largely non-existent.

Another important form of 'indirect' compulsion to self-incriminate that is also considered in Chapter 5 is the power to draw adverse inferences from silence. There is such power in England and Wales under the relevant provisions of the *Criminal Justice and Public Order Act 1994* (UK), c 33. The author notes that it might

be argued that this power does not constitute 'indirect' compulsion to *incriminate* since the compulsion, if it can be called that, is to produce exculpatory rather than inculpatory evidence. He is right not to be convinced by this argument. First, the suspect may not fully understand the caution and, secondly, the "exculpatory information may well be inextricably linked with self-incriminating information." (at p 102)

One general lesson to be drawn from this fascinating comparative study is that while there is widespread recognition of the importance of the privilege against self-incrimination, there is little consensus on its content and effect. In the concluding chapter, the insightful observation is made that the privilege seems on occasion to be used as compensation for inadequate regulation of the pre-trial criminal process. It is misguided to expect the privilege to play much of a role in this connection and unfortunate if the existence of the privilege is used as an excuse for not strengthening other protections of the suspect at the investigative stage.

There is an unusual amount of quotations from judgments in this book. While this may appeal to readers who prefer to examine the original sources, others may find it a little distracting. But this is a small quibble. The monograph displays the kind of careful, thorough and lucid scholarship that one has come to expect of the author. It is an important and significant contribution to the field. Anyone with an interest in criminal justice should read it.

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