SELF-INCRIMINATION : PHYSICAL AND MEDICAL EXAMINATION OF THE ACCUSED. STUDY No. 5. Prepared under the auspices of The Indian Law Institute, New Delhi. [Bombay: Tripathi. xi + 62 pp. (incl. appendix and index). Rs. 6.00]

Article 20 (3) of the Constitution of India reads "No person accused of any offence shall be compelled to be a witness against himself." This article of the Constitution which "embodies the privilege against self-crimination," has its parallel in the Fifth Amendment of the Constitution of the United States of America which prohibits compelling any person "in any criminal case to be a witness against himself." The purpose of this Indian Law Institute Study is to examine, in view of the development of modern scientific techniques of crime detection, whether "compelling an accused to subject himself to tests and to physical and medical examination violates the privilege." One of the difficulties which the study team has not even indicated is that there is no such thing as *"the"* privilege against self-incrimination. According to Wigmore: [1] "it is many things in as many settings. The privilege is the prerogative of a defendant not to take the stand in his own prosecution, it is also an option of a witness not to disclose self-incriminating knowledge in a criminal case, ...it is alleged by some to apply to suppress substances removed from the body.... etc." A comparison of the two Indian cases of *M. P. Sharma* v. *Satish Chandra* [2] and *State of Bombay* v. *Kathi Kalu Oghad* [3] however, shows quite clearly that the Courts in India have also had some difficulty in defining the privilege against self-incrimination embodied in article 20 (3) of the Constitution of India.

The study is essentially a comparison between the Indian and the American authorities and the English Law is not referred to for two reasons. The first is that in England one would look at the "privilege" from the point of view of limits on the powers of the police in relation to detained persons. It is interesting, therefore, to find Jagannadhadas J. stating in *Sharma's case*[4] that the privilege against self-

1. (1961) 8 Wigmore, Evidence S 2251 p. 296.
2. A.I.R. 1954 S.C. 300.
3. A.I.R. 1961 S.C. 1808.
4. *Ibid.* p. 302.

incrimination is "one of the fundamental canons of the British system of criminal jurisprudence". Under the Criminal Evidence Act, 1898 Section 1 (a) an accused person may not be called as a witness except upon his own application, and section 1(b) states that failure to give evidence is not to be made the subject of any comment by the prosecution. The second reason is that American sources were more easily available. It is surprising, therefore, that the quotations from Wigmore are from the third edition of 1940. This edition was not readily available to the reviewer, because the 1961 edition is now on the shelves. It is certain, however, that in the quotation from Wigmore on page 5 the phrase "the real object" should in fact be "the real objection."

Oral evidence, it is argued, comes within the privilege against self-incrimination because oral evidence obtained under torture or pressure may be false. Since "no such argument is applicable to obtaining of physical evidence through the physical or medical examination of the accused," it is concluded that bodily examination of the accused does not violate the privilege against self-incrimination. The *Oghad case* is regarded as stating the law in India, and the *Sharma case* is regarded as overruled. It might be relevant to mention here the English case of *Agnew* v. *Jobson,*[5] where on a charge of concealment of birth, the medical examination of a female, against her consent, was held to be illegal. It is admitted however in the study that the obtaining of physical evidence might be disallowed on other grounds, such as pain to the accused, or because it is extremely degrading. The case of *Rochin* v. *State of California*[6] (use of stomach pump to extract morphine capsules) is given as an illustration. Perhaps a case similar to *Agnew's* case may be decided the same way on this ground.

With regard to the compulsory taking of fingerprints and footprints, the study team indicates that there is "almost unanimity" in America that it does not violate the privilege against self-incrimination. *People* v. *Swallow*[7] and *U.S.* v. *Kelly*[8] are the two American authorities cited on fingerprints, but no case is cited for footprints. *Slate* v. *Rogers*[9] is a case which has come to the notice of the reviewer. In India, since, the police can under Section 51 of the Criminal Procedure Code take away and keep in safe custody the shoes of the accused, they can easily obtain shoe prints, but bare footprints, it seems, can only be obtained at the investigation stage, under the provisions of the Identification of Prisoners Act, 1920, and not at the trial stage.

No statutory provision exists in India to require an accused "to wear particular clothes, to grow a beard or to shave etc." All these activities have been held in America not to violate the privilege against self-incrimination as also the taking of photographs by the police when the accused is in custody. In India, any magistrate of the first class can order the police to take a photograph of the accused [10] and section 6 of the same Act allows the use of all necessary means to secure the taking of such photographs. This latter provision is oddly omitted from the Appendix which includes all the statutory provisions in India pertaining to physical and medical examination of the accused.

In discussing medical tests to secure incriminating evidence from within the body of the accused, the study team examines whether compulsory blood and urine tests are violative of the privilege against self-incrimination. There is a detailed account of *Breithaupt* v. *Abram*[11] where, as the study team indicates, the question of the admissibility of chemical analysis was considered only under the due process clause. In the later Michigan case of *Lebel* v. *Swincechi*[12] (which is not mentioned) the taking of blood from an unconscious person was held unconstitutional,

5. 13 Cox 625.

6. 342 U.S. 165 (1952).

7. 165 N.Y. Supp. 915 (1917).

8. 55 F. 2d. 67 (1937).

9. 233 N.C. 360, 64 SW (2d) 572, 28 A.L.R. (2d) 1104 (1951).

10. Under section 5 Identification of Prisoners Act, 1920.

11. 352 U.S. 432 (1957).

12. 354 Mich. 427 93 N.W. 2d. 281 (1958).

and evidence as to the result of the test inadmissible. Blood and urine tests are not only useful in paternity or rape cases, but also to a very great extent to establish intoxication of a person. The study team argues that as the "compulsory taking of blood does not amount to testimonial compulsion", it is not violative of the privilege against self-incrimination. But whatever the force of the above contention, the team is on much weaker ground when it discusses the fluoroscopic examination of the body of the accused and the extraction of foreign objects from within the body. As is indicated on page 38, two of the judges of the Supreme Court have held in *Rochin's case* that stomach pumping violated the privilege against self-incrimination. With regard to these medical tests also it is said that there is an absence of statutory provisions in India, though *State of Bombay* v. *Balwant Ganpati*[13] (extraction of blood for chemical analysis under Bombay Prohibition Act) is mentioned. Though driving a motor-vehicle under the influence of alcohol or drugs is an offence,[14] it is pointed out that there is no provision for obtaining evidence of this offence through a medical examination

The compulsory obtaining of handwriting for purposes of *comparison* only is not within the privilege against self-incrimination (*Oghad's* case). Neither is the compulsory obtaining of the voice of the accused for purposes of comparison. In America compelling the accused to utter the same words as those uttered by the offender during the commission of the offence has been held to violate the privilege against self-incrimination.[15]

In discussing the examination of the accused to determine insanity, it is suggested that the involuntary mental examination of the accused does not violate the privilege against self-incrimination because the "mental examination does not amount to testimonial compulsion" and secondly because the accused should not be able "both to advance the claim of insanity, and also make it difficult for the court to determine the issue". No American Federal Court decision has come to the notice of the team on this point. Perhaps *Touquette* v. *Bernard*[16] might be considered relevant.

Lie-detector Tests, truth serums and hypnosis are all considered to violate the privilege against self-incrimination in America and to come within the *Oghad* case and Article 20 (3) in India.

The study concludes with a number of suggestions for the enactment of new statutory provisions in order to make full use of modern scientific development in the detection of crimes. Thus it is suggested that Section 73 of the Indian Evidence Act should be replaced by a section which allows the court to order the accused "to submit his body to such examination and tests as it deems appropriate and to do any act in the presence of the court.... other than to testify to, or discuss, the crime". There are provisions that this examination be conducted by competent and qualified medical practitioners and that the Court should not order any bodily examination which is unduly painful or dangerous. There is also a suggestion that sections 4 and 5 of the Identification of Prisoners Act, 1920 be amended. It is significant that the study team suggests on page 54 that "the Government may, by rules exclude such bodily examination.... for which competent administering or interpreting personnel or equipment is not available". It is obvious that the modern scientific facilities available in America cannot in any substantial way be found in India. It is regrettable therefore that this study has in no way indicated the available facilities in India. Is there any laboratory comparable even in a small way to the Federal Bureau of Investigation's Scientific Crime Detection Laboratory established in 1932?

This is not to imply that the proposals made in this Indian Law Institute Study should not be implemented. It is hoped however that in future studies of this kind, a more thorough analysis of the problem will be made.

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13. 1961 Bom. L. Rep. 87.

14. Under Section 117 Motor Vehicles Act, 1939.

15. State v. Taylor 16 A.L.R. 2nd 1317 (1951).

16. 198 F. 2d. 860 (9th Cir. 1952).