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THE RIGHT AGAINST SELF-INCRIMINATION AND STATE OF BOMBAY V. KATHI KALU OGHAD: A CRITIQUE

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This paper follows the important stages of the evolution of case law on the right against self-incrimination as enshrined in Article 20(3) of the Indian constitution. Weaknesses of case law are highlighted as initially established in M.P. Sharma v. Satish Chandra in terms of its interpretation of self-incriminating evidence. The primary weakness brought out is the liberal interpretation of the constitutional provision which muzzled the process of investigation as envisaged in the Indian Evidence Act. This is followed by a discussion of the landmark case, Kathi Kalu Oghad v. State of Bombay which removed major anomalies in the existing case law and restored the balance between the investigation process and the right against self-incrimination. Further, case law is reviewed for whether the law on self-incrimination as it stands today is explicitly equipped to address issues arising out of technology driven social change such as the role of social media as a source of personal testimony.

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I. INTRODUCTION

*“Nemo debet prodere se ipsum.”*¹

The right against self-incrimination finds its earliest embodiment in the medieval law of the Roman church in the Latin maxim ‘*Nemon tenetur seipsum accusare*’ which means that ‘No man is obliged to accuse himself’. The right gradually evolved in common law through protests against the inquisitorial and manifestly unjust methods of interrogation of accused persons, back in the middle ages in England.²

The provision is one of the fundamental canons of common law criminal jurisprudence which has been incorporated in the Constitution of the United States under the Fifth Amendment³ which reads that ‘No person...shall be compelled in any criminal case, to be a witness against himself,’ and thereafter in the Indian Constitution.⁴ The Indian Constitution provides for protection to an accused against self-incrimination under compulsion through Article 20(3) – ‘No person accused of an offence shall be compelled to be a witness against himself.’⁵ Its first appearance has been considered a landmark event in the history of common law.⁶ In 1978, under the 44th Amendment,⁷ the Article 20 of the Constitution of India was granted a non-derogable status i.e. the state has no legal basis, even in a state of emergency, to refuse to honour this right. This is a testimony to the importance it has been accorded in our Constitution.

From the very first years of our Constitution, a certain ambiguity on the question of what evidence was accorded protection, and apparent conflicts between Article 20(3) and provisions of the Indian Evidence Act, 1872 have prevailed.⁸ This resulted in judgements with apparent imbalance between the right against self-incrimination in Article 20(3) and the necessity to facilitate collection of evidence by investigating trial agencies. These judgements were referred to the Apex Court, which clubbed them and referred them to an eleven-judge

¹ Translated from Latin maxim “No man is bound to betray himself”.

² 180th Report of the Law Commission of India, Article 20(3) the Constitution of India and the Right to Silence, 3, (2002).

³ Fifth Amendment, THE CONSTITUTION OF THE UNITED STATES OF AMERICA, 1789.

⁴ M.P. Jain, INDIAN CONSTITUTIONAL LAW, 1064-1065 (5th edn, 2008).

⁵ Article 20(3), THE CONSTITUTION OF INDIA, 1950.

⁶ John H. Langbein, *The Historical Origins of the Privilege against Self-Incrimination at Common Law*, Vol. 92(5), MICHIGAN LAW REVIEW 1047, (1994).

⁷ Sec. 40, The Constitution (Forty-fourth Amendment) Act, 1978.

⁸ *State of Uttar Pradesh v. Deomen Upadhyaya*, AIR 1960 SC 1125 (Supreme Court of India).

bench. The resultant judgement is the landmark judgment of *State of Bombay v. Kathi Kalu Oghad*⁹ which has made a defining contribution to the case law on the matter as it stands today.

*M.P. Sharma v. Satish Chandra*¹⁰ was the last significant ruling on the interpretation of Part III of the Constitution soon after independence. Following *M.P. Sharma*, several cases were referred to the Apex Court. Questions addressed were essentially of interpretation of what constitutes ‘to be a witness against himself’ with respect to the circumstances defining compulsion. Among the several cases bunched together, the leading case was of that of *Oghad*.

A murder accused was identified by the Trial Court and convicted based upon handwriting samples taken at three different times, under police custody. The convict appealed to the High Court which held that the evidence of specimen handwriting was tantamount to compulsion, as it was obtained under police custody, thereby making the evidence inadmissible. Holding that the identity of the respondent was not established beyond a reasonable doubt under other available evidence, the accused was acquitted. The State of Bombay then appealed to the Apex Court which led to the judgement under review.

The two issues contended were that of the admissibility of handwriting specimens as evidence in the light of Article 20(3) and whether compulsion was imputed in the taking of such specimens in police custody. The Apex Court held that handwriting exemplars, fingerprints, thumbprints, palm prints, footprints or signatures were considered to be outside the scope of Article 20(3). It was also held that the giving of a statement by an accused in police custody gave the Court no reason to believe that coercion had been used in the procurement of the same.¹¹

This paper reviews the case law on Art. 20(3) as established by the Supreme Court in the landmark judgement of *Oghad*. The judgement has been reviewed for its impact on the development of case law on the subject, particularly on the issues of how the nature of evidence protected under Article 20(3) was altered, the strengths and vulnerabilities of the judgement and its perceived robustness in addressing the emerging issue of the technological phenomenon of social media as a rich source of personal information of an accused.

⁹ *State of Bombay v. Kathi Kalu Oghad*, AIR 1961 SC 1808 (Supreme Court of India). [“*Oghad*”]

¹⁰ *M.P. Sharma v. Satish Chandra*, AIR 1954 SC 300 (Supreme Court of India). [“*M.P Sharma*”]

¹¹ *Oghad*, AIR 1961 SC 1808.

II. THE PILLARS OF ARTICLE 20(3)

*“The exercise of the power to extract answers begets a forgetfulness of the just limitations of that power.”*¹²

The right against self-incrimination was afforded by the courts in consonance with the principles of an adversarial system of jurisprudence. The mid-18th and mid-19th centuries’ criminal trials saw the origins of this privilege and other tools to the accused such as the ‘beyond-reasonable-doubt’ and ‘burden of proof on the prosecution’ doctrines which equipped him with political liberties that could be used to defend himself in trial against the State, in a way minimizing the relative disadvantage which the individual defendants would face, as compared to the vast trial resources of the State.¹³ The rationale underlying the judicial provision against testimonial compulsion was well recognized long before our Constitution came into existence. The cornerstone of the protection against self-incrimination is best stated by the Court in *Saunders v. United Kingdom*.¹⁴ This case explained that the right lies for the protection of the accused by the improper compulsion of the authorities, thereby contributing to the avoidance of the miscarriages of justice.¹⁵ According to the author, ethics and reliability are the two pillars of the right against self-incrimination. The ethical rationale for voluntariness addresses the need to protect the accused from brutalization and torture by investigation agencies; the rationale is that if involuntary statements were readily given weightage during trial, the investigators would have a strong incentive to compel such statements, often through methods involving coercion, threats, inducement or deception.¹⁶ Even if such involuntary statements are proved to be true, the law should not incentivise the use of interrogation tactics that violate the dignity and bodily integrity of the person being examined.¹⁷ This situation is considered as a violation of basic human rights of life and limb. Hence, the right against self-incrimination serves as a vital

¹² Wigmore, EVIDENCE, 2264 (2nd edn, 1923) as cited in Fred Inbau, *Self-Incrimination: what can a Accused Person be compelled to do?*, 28(2) JOURNAL OF CRIMINAL LAW AND CRIMINOLOGY 261, 264 (1937).

¹³ Gautam Swarup, *Narco Analysis and Article 20(3) of the Constitution of India: Blending the Much Awaited*, (2009), available at: http://works.bepress.com/gautam_swarup/2 (Last visited on October 12, 2013).

¹⁴ *Saunders v. United Kingdom*, (1997) 23 EHRR 313.

¹⁵ *Saunders v. United Kingdom*, (1997) 23 EHRR 313 as cited in Mike Redmayne, *Rethinking the Privilege against Self-Incrimination*, 27(2) OXFORD JOURNAL OF LEGAL STUDIES 209, 212 (2007).

¹⁶ Albert W. Alschuler, *A Peculiar Privilege in Historical Perspective: The Right to remain silent*, 94(8) MICHIGAN LAW REVIEW 2625, 2627 (1995).

¹⁷ *Smt. Selvi v. State of Karnataka*, 2010 7 SCC 263 (Supreme Court of India). [“Selvi”]

safeguard against torture and other ‘third-degree methods’ that could be used to elicit information. It serves as a check on police behaviour during the course of investigation. The exclusion of compelled testimony is important or investigators will be more inclined to extract information through such compulsion routinely rather than through the more difficult path of collecting independent evidence.¹⁸ In the view of this researcher, another concern behind the right against self-incrimination seems to be protecting a wholly or partially innocent person from making a false statement under stress and thereby needlessly reinforcing the needle of suspicion upon him or her. Similarly for the guilty, the protection affords a shield from aggravating his or her offense by misrepresentation or concealment of evidence. The accused is also shielded from reading of motives into what evidence he or she might give.

There were several contrary views among the makers of the Constitution, but it was widely accepted by those who devoted serious thought to it, that the easy path of procuring evidence, oral or documentary, by compulsion from an accused would do more harm than good to the administration of justice; it was felt that existence of this path would tend to discourage investigators or prosecution to indulge in a diligent search for reliable independent evidence and also dissuade them to exercise care while sifting through available evidence for the ascertainment of truth.¹⁹ If law permitted evidence to be obtained by coercion, investigators would never take up the onus of partaking in laborious investigation and prolonged examination of other associated persons, material and documents. It has been rightly said that the absence of the privilege against self-incrimination would incentivize those in charge of the enforcement of the law ‘to sit comfortable in the shade rubbing red pepper into the devil’s eye rather than go about in the sun hunting up evidence.’²⁰

The privilege also serves the goal of reliability.²¹ When a person suspected or accused of a crime is compelled to testify on his/ her own behalf through methods involving coercion, threats or inducements during the investigative stage, there is a higher likelihood of

¹⁸ *Sehvi*, 2010 7 SCC 263.

¹⁹ *Oghad*, AIR 1961 SC 1808 ¶ 34.

²⁰ James F. Stephen, HISTORY OF CRIMINAL LAW, Vol. 1, 442, (1883) as cited in *Oghad*, AIR 1961 SC 1808.

²¹ *Michigan v. Tucker*, 417 US 433 (1974) as cited in Akhil Reed Amar and Renee B Lettow, *Fifth Amendment First Principles: the Self-Incrimination Clause*, 93(5) MICHIGAN LAW REVIEW 857, 895 (1995).

such testimony being false or distorted out of sheer despair, anxiety and fear.²² Their mental status may serve as an impetus to offer evidence in order to avoid the unpleasantness of the current situation and complications that follow. Thus, involuntary statements from the accused may amount to false testimony which is likely to mislead the judge and the prosecutor, thereby impeding and vitiating the process of trial, and potentially leading to a miscarriage of justice with erroneous and unjust convictions. Even during the investigative stage, false statements are likely to cause delays and obstructions in the investigative efforts. Therefore, the privilege ensures that investigation agencies do not take the easy path of 'involuntary confessions' to supplant the diligent route of meaningful investigations and that the reliability of the testimony presented for trial is of a high order.

III. OGHAD: REDEFINING THE SCOPE OF EVIDENCE PROTECTED

The case law on Article 20(3) has been through an interesting journey: from a very broad interpretation in *M.P. Sharma* leading to contradictory conclusions to a much chiselled interpretation in *Oghad*. This chapter will trace how *Oghad* impacted the prevalent case law on Article 20(3), how it brought clarity and reduced anomalies in its subsequent administration, and, at the same time, how it may also have narrowed the scope of Article 20(3) vis-à-vis the general intention of the makers of the constitution rendering it incapable in meeting the perceived legislative intention.

Oghad was a landmark judgment of eleven judges, one of the largest benches in the history of Indian judiciary. It made a very significant contribution in evolving the case law on Article 20(3) by its interpretation of the right against self-incrimination by redefining what constituted 'being a witness against himself' taking *M.P. Sharma* as precedent. The constitutionality of a search or seizure of documents from a person against whom an FIR had been lodged with the police was questioned in *M.P. Sharma*; this case, taking a broad view of Article 20(3) held that the protection applied primarily to 'testimonial compulsion'.²³ It therefore extrapolated protection from oral evidence as applicable till then, to written statements as well, so as not to 'limit Article 20(3) and rob it of its substantial purpose or to miss the substance for the sound'.²⁴ Justice Jagannadhadas held that 'to be a witness' was

²² Stephen J. Schulhofer, *Some Kind Words for the Privilege against Self-Incrimination*, 26(1) VALPARAISO UNIVERSITY LAW REVIEW 311, 318 (1991).

²³ *M.P. Sharma*, AIR 1954 SC 300 ¶ 11.

²⁴ *M.P. Sharma*, AIR 1954 SC 300 ¶ 11.

equivalent to furnishing evidence which not only constituted oral testimony but also non-verbal forms of conduct such as production of documents or of a thing or in other modes.²⁵

The judgment in *M.P. Sharma*, however, failed to settle the scope of Article 20(3) especially with respect to the scope of 'non-verbal' evidence to which the protection was extended. As a result, the cases that followed *M.P. Sharma* and preceded *Oghad* had a sharp difference of judicial opinion.²⁶ In a case,²⁷ it was held, that an involuntary handwriting sample amounted to compelling to be a witness violating Article 20(3), prima facie rendering Section 73 of the Indian Evidence Act void. On the other hand, it was held in another case,²⁸ that taking of handwriting specimen or thumb impression under a court order did not violate Article 20(3). The propositions laid down in *M.P. Sharma* were considered to be too widely stated and *Oghad* made an attempt to re-interpret the same with more clarity.²⁹ It essentially examined the compatibility between Article 20(3), Section 73 of the Indian Evidence Act, and Sections 5 and 6 of the Identification of Prisoner's Act, as the case law on Article 20(3) prevalent since *M.P. Sharma* was seen to nullify the other statutes, creating a judicial gridlock. The liberality in that case may have gone beyond the original intent and purpose of Article 20(3).

While upholding *M.P. Sharma* on inclusion of written testimony, in addition to oral for protection, the instant case made an important departure from the former. The judgment in the instant case approached the matter by first examining the definition of the expression 'to be a witness' in Article 20(3). It sought to establish a distinction between testimonial and physical evidence, and held that the act of providing testimonial evidence alone constitutes 'to be a witness'. Justice B.P. Sinha opined that the phrase 'to be a witness' must be restricted to mean 'imparting knowledge in respect of relevant facts by means of oral statements or statements in writing by a person who has personal knowledge of the facts to be communicated to a court or to a person holding an enquiry or investigation on matters relevant to the subject under inquiry.'³⁰ Self-incrimination was declared as the conveying of information that was based upon the personal knowledge of a person giving that information. It was ruled that 'personal testimony' was to depend upon volition. An accused

²⁵ *M.P. Sharma*, AIR 1954 SC 300 ¶ 11.

²⁶ H.M. Seervai, CONSTITUTIONAL LAW OF INDIA, Vol. 2, 1063-1064 (4thedn, 1996).

²⁷ *Farid Ahmed v. State*, AIR 1960 Cal 32 (Calcutta High Court).

²⁸ *Re: Sheik Mohd. Hussain*, AIR 1957 Mad 47 (Madras High Court).

²⁹ *Oghad*, AIR 1961 SC 1808.

³⁰ *Oghad*, AIR 1961 SC 1808 ¶ 12.

had the choice of making the statement or refusing to make the same.³¹ So, by limiting the scope of evidence qualifying the definition of ‘to be a witness’, *Oghad* brought much clarity on the interpretation of Article 20(3).

The judgment perceived a witness to be one who gave oral or written statements which by themselves had a tendency to incriminate the accused. All other kinds of physical, biometric, forensic and material evidence were not considered a ‘personal testimony’ and did not invoke the right against self-incrimination. Their purpose was seen as only to lend reliability to other evidence, and efforts to conceal their true nature would not change their ‘intrinsic character’. Consequently, handwriting samples, fingerprints, thumb-prints, palm-prints, footprints or signatures, were declared as material evidence, not incriminating the accused and falling outside the scope of Article 20(3), thereby subjecting them to compulsion in the due process of law.³² The position that a ‘witness’ must communicate facts with his personal knowledge echoes throughout the opinion on the controlling precedent *M.P. Sharma*. By establishing this benchmark for the distinction between testimonial and material/physical evidence, the judgment amended the interpretation given by its precedent.

Oghad was an extremely noteworthy judgment as it helped resolve conflicts among judgments with its interpretation. The court could now direct an accused to produce or give his handwriting exemplar, under Section 73,³³ without invoking Article 20(3).³⁴ Several subsequent cases were facilitated by the case law thus established by *Oghad* which helped resolve apparent conflict among different statutes and interpretations. A case in point is *Smt. Selvi v. State of Karnataka*³⁵ which involved the use of advanced scientific methods for collection of evidence for criminal investigations. It heavily drew upon *Oghad*, adding another new dimension to its interpretation. In *Selvi*, the constitutionality of narco-analysis, lie-detector test and analysis of brain waves (Brain Electrical Activated Profiling (BEAP) test) was questioned. The three judge bench ruled that the compulsory administration of such tests should be banned as forcible intrusion into the mind of the accused not only violated Article 20(3) but also intruded on the privacy and liberty of an individual, thus violating Article 21 of the Indian Constitution.³⁶ *Oghad* seems to have foreseen such a situation when

³¹ *Oghad*, AIR 1961 SC 1808 ¶ 11.

³² *Oghad*, AIR 1961 SC 1808 ¶ 11,12.

³³ Section 73, Indian Evidence Act, 1872.

³⁴ *State of Delhi v. Pali Ram*, AIR 1979 SC 14 (Supreme Court of India).

³⁵ *Selvi*, 2010 7 SCC 263.

³⁶ *Selvi*, 2010 7 SCC 263.

Justice Sinha stated that if the mind of the subject had been conditioned such that a confession was involuntary, it would be considered coercion, and hence in violation of Article 20(3).³⁷ At the same time it is perceived by the author that *Oghad*, in its re-interpretation, may not have sufficiently addressed all situations thrown up by technology driven social change.

While *Oghad* rightly disallowed protection to material evidence which in itself did not incriminate the accused in itself such as fingerprints, handwriting samples etc., it actively excluded a large space of evidence, much of what could potentially be self-incriminatory and could have been considered to be worthy of protection under the original spirit of Article 20(3). This is perceived by the author as its principle vulnerability especially in view of the changing nature of self-incriminatory evidence in the face of technological advancement.

Another vulnerable area is the ruling that a statement by an accused would not be considered as having been extracted under compulsion just for the fact that it was made under police custody, unless additional circumstances suggested to the contrary.³⁸

A. VULNERABILITY IN DILUTION OF PROTECTION TO DOCUMENTARY EVIDENCE

In *M.P. Sharma*, Justice Jagannadhadas had said that, ‘the right against self-incrimination would extend to any compelled production of evidentiary documents which are ‘reasonably’ likely to support a prosecution against the accused.’³⁹ *Oghad* diluted this protection considerably by distinguishing ‘production of document’ from the phrase ‘to be a witness’.⁴⁰ It implied that production of any document except those which formed a written testimony originating from personal knowledge was not protected against compulsion under Article 20(3) even if it threw light on the matter at hand and by implication incriminated the accused. Among other things, it took recourse to Section 139 of the Indian Evidence Act which provides that ‘a person summoned to produce a document does not become a witness by the mere fact that he produces it and cannot be cross-examined unless and until he is called as a witness.’ The impact of this position in the author's view tends to restrict the legislative intention behind Article 20(3) considerably.

First is the question of several documents which, while not having their origin in personal knowledge, might still incriminate the accused. Another question that remains

³⁷ *Oghad*, AIR 1961 SC 1808 ¶ 15.

³⁸ *Oghad*, AIR 1961 SC 1808 ¶ 15.

³⁹ *M.P. Sharma*, AIR 1954 SC 300 ¶ 12.

⁴⁰ Seervai, *supra* note 26, at 27.

unanswered is the issue of the same person subsequently becoming either a witness or an accused. The latter has been extensively dealt with in *Nandini Satpathy v. P.L. Dani*.⁴¹ The issue of how the authorities would decipher whether a document is based on the personal knowledge of the accused is yet another question. The answer to this typical question is simple. The authorities will firstly call upon the accused with the documents, after which they will decide whether the document is incriminating, strictly according to the majority ruling. This has created a situation where both the heads and the tails are in the hand of authorities.

In this matter, the minority judgment appears to have taken a view closer to the perceived legislative intent behind Article 20(3). It took a wider definition of what constituted 'to be a witness' wherein it construed the expression to mean the 'furnishing of evidence'.⁴² The majority's suggestion that to be a witness must be limited to an oral or written statement of an accused person imparting personal knowledge of relevant facts, was considered to be a rather narrow elucidation. It was also proposed that the usage of 'to be a witness' as suggested by the majority would result in procurement of a large number of documents which may be of greater evidentiary value when contrasted with oral statements.⁴³ Concurring with *M.P. Sharma*, it said that- '... "to be a witness" is nothing more than "to furnish evidence" and such evidence can be furnished through the lips or by production of a thing or of a document or in other modes.'⁴⁴

To this may be added several others modes of information as evidence wherein, even though the actual process of producing the information may not be the same as that of making an oral or written statement, the consequences are similar i.e. self-incrimination. This includes a letter written by a co-conspirator to the accused with reference to the conspiracy and a plan of the burgled house.⁴⁵ Such incriminating documents could also include records of travel and expense.

Strength of jurisprudence is best judged by how well it accommodates technology driven social change, represented, in the present case, by social media such as email-accounts, social networking sites and blogs, to name a few. Given the restricted meaning assigned to 'to be a witness' in *Oghad*, it is perceived by the author that it is not sufficiently robust to address issues arising out of technology driven social change such as the increasing role of

⁴¹ *Nandini Satpathy v. P.L. Dani*, 1978 2 SCC 424 (Supreme Court of India).

⁴² *Oghad*, AIR 1961 SC 1808 ¶ 24.

⁴³ *Oghad*, AIR 1961 SC 1808 ¶ 23.

⁴⁴ *M.P. Sharma*, AIR 1954 SC 300 ¶ 11.

⁴⁵ *Oghad*, AIR 1961 SC 1808 ¶ 27.

social media as an alter ego and its implications on the right against self-incrimination. This issue has been examined at some length in Part IV.

B. VULNERABILITY IN ACCEPTANCE OF EVIDENCE IN POLICE CUSTODY

Unlike in *M.P. Sharma*, the instant case has laid the law that there is no presumption that custodial statements have been extracted through compulsion. It says that:⁴⁶

“The mere asking by a police officer investigating a crime against a certain individual to do a certain thing is not compulsion within the meaning of Article 20(3). Hence, the mere fact that the accused person, when he made the statement in question was in police custody would not, by itself, be the foundation for an inference of law that the accused was compelled to make the statement.”

A provision was, however, made for the accused person to show that while in police custody he was subjected to treatment that would lend itself to the inference of compulsion.⁴⁷ This provision is seen as not entirely mindful of the socio-political realities prevailing in India where the police and other investigating agencies have no independence from the executive. There is apparently no safeguard from a police state, and with the onus of proving compulsion on the accused person, *Oghad* may have taken a step back from the established case law till then. It is also seen to fly in the face of the historical and ethical rationale behind the right against self-incrimination which was to safeguard a citizen against the state's might. A comparison with the law in the United States of America on the subject is relevant.

After *Miranda v. Arizona*,⁴⁸ a safeguard was introduced in the US, creating a blanket prohibition on the admissibility of confessions without a knowing and voluntary waiver of the right against self-incrimination. A compulsory administration of a warning about a person's right to silence during custodial interrogations as well as obtaining a voluntary waiver of the prescribed rights, has become a pervasive feature in the U.S. criminal justice system.⁴⁹ The absence of such a warning and voluntary waiver leads to the presumption of compulsion with regard to the custodial statements, thereby rendering them inadmissible as evidence. This is in stark contrast with the position in India where there is no presumption of compulsion in respect of custodial statement except when proved by the accused.

⁴⁶ *Oghad*, AIR 1961 SC 1808 ¶ 15.

⁴⁷ *Oghad*, AIR 1961 SC 1808 ¶ 15.

⁴⁸ *Miranda v. Arizona*, 384 U.S. 436 (1966). [“*Miranda*”]

⁴⁹ *Miranda*, 384 U.S. 436 (1966).

IV. THE CHANGING FACE OF SELF-INCRIMINATORY EVIDENCE: OGHAD AND SOCIAL MEDIA

This Part shall cover *Oghad* in the light of techno-sociological phenomena. The author shall juxtapose the majority and the minority judgments in *Oghad* to explain their positions while addressing the emerging issue of the role played by social media as a rich source of personal testimony by an accused.

Social media are web-based and mobile technologies that turn communication into an interactive dialogue in a variety of online fora, allowing the creation and exchange of user-generated content.⁵⁰ Social networking websites are the next generation in communications technology, providing a platform for multi-faceted communication between participating users. Social networking sites and email accounts form an integral part of the way the world communicates today. Facebook posts, comments, and photographs are a potentially rich source of evidence in criminal cases, as they offer a window into a suspect's thoughts that is rare outside of the pages of a diary.⁵¹

Facebook has said that it had 46 million monthly active users in India at the end of 2011, up by 132% from a year earlier.⁵² This number is expected to rise exponentially as access to the Internet rises in the country. In the past few years (in the West), Facebook has emerged as a fertile source of incriminating information from boastful or careless defendants who find in Facebook a great way to project their outlaw persona to the world.⁵³ An online account on a social networking website is a tempting source of evidence and it can provide prosecutors with a treasure trove of incriminating evidence.⁵⁴ In the Geetika Sharma murder case, the victim's brother said that the victim's Facebook account has been deactivated and alleged that the prime accused was behind it.⁵⁵ The day is not too far when Facebook will

⁵⁰ Andreas Kaplan and Michael Haenlein, *Users of the world, unite! The challenges and opportunities of Social Media*, 53(1) BUSINESS HORIZONS 53, 59 (2010).

⁵¹ Caren Myers Morrison, *Passwords, Profiles and the Privilege against Self-Incrimination: Facebook and the Fifth Amendment*, 26 (Legal Studies Paper No. 2012-05), Georgia State University of Law, (2012).

⁵² Amol Sharma, *Facebook, Google to Stand Trial in India*, THE WALL STREET JOURNAL (March 13, 2012), available at <http://online.wsj.com/article/SB10001424052702304537904577277263704300998.html> (Last visited on October 14, 2013).

⁵³ Morrison, *supra* note 51, at 2.

⁵⁴ *Id.*, at 1.

⁵⁵ *Kanda had enough time to destroy evidence: Geetika's brother*, DECCAN HERALD (Aug. 18, 2012), available at: <http://www.deccanherald.com/content/272452/geetika-case-former-haryana-minister.html> (Last visited on Oct. 15, 2013).

become a significant source of testimony in law in India too. This chapter is only covers the situation where the law enforcement officials, in the absence of a 'friend' of an accused or sufficient information to subpoena the company directly, cannot have access to the online profile of the accused without the cooperation of the accused himself.

An investigating agency does not look at a controversy in isolation. The agency not only seeks to establish the facts of the case but also any information related to the accused in any fashion whatsoever. The advent of social media has led to the creation of a pool of personal information which for the accused can become self-incriminatory, if revealed. A Facebook user, through the means of his 'wall' and profile, tries to create his own world. He makes regular, entries just as in a journal or diary, along with images, video cum audio links and links to other web-pages. Over a period of time, the user's profile begins to reflect his thinking patterns, lifestyle choices, interests, places frequented, philosophical, religious and cultural leanings, network of friends and personality traits.

An example can help clarify the relation between the privilege against self-incrimination and Facebook evidence. An accused X could have been the last person to have been sighted on the murder site. If X's Facebook page reveals that he was in fact present at the murder site or close to the murder site, at the time of murder, this information could incriminate him. It is here where the nature of information available on Facebook becomes a bone of contention. When faced with something other than a declarative oral or written statement, the U.S. Supreme Court has defined a compelled act as 'testimonial,' if it 'explicitly or implicitly relates a factual assertion or discloses information.'⁵⁶ The Supreme Court has accepted 'physical or real evidence'⁵⁷ as long as it does not 'disclose the contents of his own mind'.⁵⁸

The author believes that the substantive information available on the Facebook page of an accused is akin to a snapshot of his mind. Allowing access to it is analogous to 'disclosing the contents of one's mind'.⁵⁹ By making inferences through social media accounts, investigators are able to derive knowledge through the mind of the accused, which otherwise is not available to the former. An individual who is compelled to give law enforcement access to her Facebook page is forced to engage in cognition for the benefit of

⁵⁶ Doe v. United States, 487 U.S. 201 (1988) as cited in Morrison, *supra* note 51, at 11.

⁵⁷ Schmerber v. California, 384 U.S. (1966) as cited in Morrison, *supra* note 51, at 11.

⁵⁸ Doe v. United States, 487 U.S. 201 (1988) as cited in Morrison, *supra* note 51, at 11.

⁵⁹ Doe v. United States, 487 U.S. 201 (1988) as cited in Morrison, *supra* note 51, at 11.

the state and to turn over the results of that mental process.⁶⁰ In addition, the accused does implicitly relate the factual assertions, 'I do have a Facebook page' and 'Here is how to access that Facebook page'; these admissions play a major role in the light of the controversies regarding the authenticity of Facebook profiles.⁶¹ One of the arguments behind the privilege against self-incrimination centers upon the supposed cruelty of subjecting the accused to the 'trilemma of perjury, self-accusation or contempt'.⁶² A subpoena to give access to Facebook content places the accused in such a 'cruel trilemma' as the accused is placed in a position of disclosing the access to the content on his Facebook page, denying that he has a Facebook page, or refusing to answer.⁶³

According to the author, if *Oghad* were to address the interaction between information available on social media accounts and what constitutes 'testimony', content such as that available on Facebook would be dislodged from the protection of Article 20(3) in the assessment of the narrow judgment given by the majority judgment. Under the majority judgment, it can be easily argued that social media accounts of an accused do not enjoy protection under Article 20(3). It is based on the majority view that 'The giving of personal testimony must depend upon his volition.'⁶⁴ Facebook content will be read as neither oral nor written testimony as it cannot be placed under the volitional deposition of the accused to speak or write. It was also held that, 'The accused can make any statement ... an accused may have documentary evidence in his possession which may throw some light on the controversy ... if it is a document which is not his statement conveying his personal knowledge relating to the charge against him ... which may throw light on any of the points in controversy, he may be called upon by the court to produce that document...'⁶⁵ Any document that meets the aforementioned criterion can be asked to be produced before the Court. Facebook content shall fall under the production of such a document that does not impart personal knowledge in respect of relevant facts.

The majority faction in *Oghad* also held that 'In order that a testimony by an accused person may be said to have been self-incriminatory, the compulsion of which comes within

⁶⁰ Ronald J. Allen and M. Kristin Mace, *The Self-Incrimination Clause explained and its future predicted*, 94(1) JOURNAL OF CRIMINAL LAW AND CRIMINOLOGY 243, 267-68, 272 (2004).

⁶¹ Morrison, *supra* note 51, at 4.

⁶² Amar and Lettow, *supra* note 21, at 311.

⁶³ Morrison, *supra* note 51, at 13.

⁶⁴ *Oghad*, AIR 1961 SC 1808 ¶ 11.

⁶⁵ *Oghad*, AIR 1961 SC 1808 ¶ 10.

the prohibition of the constitutional provision, it must be of such a character that by itself, it should have the tendency of incriminating the accused, if not of actually doing so.⁶⁶ The web presence of accused can be ruled out of the scope of Article 20(3) as by itself, such information does have the tendency to incriminate the accused.

However, as seen according to the minority judgment, complete protection would be accorded to the web presence of an accused. The minority understood ‘to be a witness’ as ‘to furnish evidence’, when it stated that ‘There can be no doubt that the ordinary user of English words, the word “witness” is always associated with the evidence, so that to say that to be a witness is to furnish evidence is really to keep to the natural meaning of the words’.⁶⁷ The minority delved into the purpose of evidence to establish that ‘to be evidence, the oral statement or a statement contained in a document, shall have the tendency to prove a fact—whether it is a fact in issue or a relevant fact.’⁶⁸ By understanding the expression ‘to be a witness’ in its natural sense, the minority helped establish how documents, though not transmitting the accused’s personal knowledge could, in fact, have a tendency to make probable the existence of a fact in issue or a relevant fact, thereby furnishing evidence against himself.

Section 11 of the Indian Evidence Act embodies the facts which otherwise irrelevant become relevant. It states:

“Facts not otherwise relevant are relevant:

- 1. if they are inconsistent with any fact in issue or relevant fact;*
- 2. if, by themselves or in connection with other facts they make the existence or non-existence of any fact in issue or relevant fact highly probable or improbable.”*

As stated earlier, X’s Facebook page may reveal that he was present at the murder site at the time of murder. The fact that he was at the murder site, at the time of murder, makes it highly probable he could have, in fact, committed the crime. Thus, this irrelevant fact becomes a relevant one as it has by itself made the existence of a fact in issue highly probable. Therefore, by allowing the trial agency access to one’s Facebook page, the accused is in fact furnishing evidence against himself.

The minority is closer to the spirit and intent of Article 20(3) as it comprehensively explains that the dangers that abound in the absence of the privilege against self-

⁶⁶ *Oghad*, AIR 1961 SC 1808 ¶ 12.

⁶⁷ *Oghad*, AIR 1961 SC 1808 ¶ 25.

⁶⁸ *Oghad*, AIR 1961 SC 1808 ¶ 28.

incrimination exist 'whether the evidence which the accused is compelled to furnish is in the form of oral or written statements about his own knowledge or in the shape of documents or things which though not transmitting his knowledge of the accused person directly helps the court to come to a conclusion against him.'⁶⁹ The minority states that the production of such documents or things does amount to 'being a witness' as the giving of the same amounts to furnishing evidence and hence, the person producing of the same is being a witness. The advent of social media and web presence is thrown into sharp relief by the depth of the minority judgment due to the intricate and intimate personal information available which acts as rich source of testimony and can incriminate a person falsely. Thus, giving access to one 'social media accounts does amount to 'being a witness'.

Facebook content, under the minority judgement, will make Article 20(3) spring into action as Facebook content is of the nature of a document that may not provide personal knowledge with respect to the facts in question but help make probable a fact in issue or a relevant fact, thereby furnishing evidence against the accused and making him a 'witness'. A subpoena to access the Facebook page of the accused necessarily means compulsion.⁷⁰ As all three ingredients of Article 20(3) co-exist, protection of Article 20(3) can be claimed. In the author's opinion, Facebook content closes gaps between other kinds of evidence. Information on social media accounts 'furnish a new link in the chain of evidence'⁷¹ and help the investigators discover fresh facts or materials that could be relevant to the on-going investigation.⁷²

The author's position is that the minority undoubtedly protects the substantive information available on social media accounts. The majority judgment has circumscribed the scope of Article 20(3) whereas the minority has taken a deeper view behind the jurisprudence underlying Article 20(3). The principles upheld by the minority decision which go into great detail are sound. It is a far-reaching judgment as it caters for new developments like social media and techno-sociological developments and perhaps even more developments in the future. The majority seems to have taken a minimalistic stance where the accused has been accorded adequate protection, yet the emphasis has been laid on ensuring that the investigation process is not unduly hampered. The minority, on the

⁶⁹ *Oghad*, AIR 1961 SC 1808 ¶ 30.

⁷⁰ *Morrison*, *supra* note 51, at 11.

⁷¹ *Selvi*, 2010 7 SCC 263.

⁷² *Selvi*, 2010 7 SCC 263.

contrary, zealously protects the spirit of Article 20(3) by analyzing the doctrine in much more profundity. It is well-recognized fact social media sites are a storehouse of personal information and inclinations. One's entire personality is etched across the pages of social networking sites. In their efforts to vet applicants, some companies and government agencies are going beyond merely glancing at a person's social networking profiles and instead asking to log in as the user to have a look around.⁷³ This speaks volumes about the notion prevalent amongst employers that one's social media accounts are a storehouse of sensitive and personal information which can be used to assess candidature.

Facebook is a tantalizing prize for prosecutors. It gives an insight, even if it is only in the form of the highly stylized, self-dramatizing Facebook persona, into the psyche of the defendant.⁷⁴ The substantive content available on social networking sites is a rich source of testimony that easily fits the purpose of Article 20(3) as meant by the makers of the constitution, which was not envisioned by the majority in *Oghad*. The minority, however recognized this principle in its true sense and hence, is better suited to deal with the changing nature of self-incriminatory evidence with changes in technology.

V. CONCLUSION

Oghad had a far reaching impact in evolving the case law on the right against self-incrimination as enshrined in Article 20(3) of the Indian constitution. It was made amidst a state of ambiguity in the existing case law laid down by *M.P. Sharma*. In the prevailing state, judgements under Article 20(3) tended to take a broad view of the evidence that was protected. As a result, physical evidence like handwriting samples, finger prints, foot prints, thumbprints and palm prints were also deemed protected. This unduly tilted the balance against the process of investigation. A second issue was whether custodial statements given by the accused imputed compulsion, plainly by the fact that they had been given under police custody. *Oghad* had a seminal impact on the evolution of the relevant case law. Much of it was positive, but in the view of the author, it did have a negative bearing as well.

The positive impact was in the laying down of the line between evidence that was protected under Article 20(3) and that which was not. It kept purely forensic evidence, which

⁷³ Manuel Valdes, *Job seekers getting asked for Facebook passwords*, ASSOCIATED PRESS (Mar 20, 2012), available at <http://finance.yahoo.com/news/job-seekers-getting-asked-facebook-080920368.html> (Last visited on Oct.15, 2013).

⁷⁴ Morrison, *supra* note 51, at 25.

is not in itself incriminatory, beyond the pale of protection. Only oral or written testimonial based on personal knowledge and communicated through a positive act of volition was accorded protection from compulsion. This settled the ambiguity visited upon in past cases. Its stress on 'act of volition' also helped developed case law in *Selvi* on evidence collection methods based on narco-analysis, polygraph tests and BEAP tests. In the view of the author, a significant negative impact lay in the holding that statements provided by an accused under police custody would not be considered as given under compulsion and therefore be admissible unless compulsion is proven by the accused. This has grave potential of abuse by the state machinery, something that Article 20(3) purports to provide a safeguard against. However, the primary negative consequence follows from the redefinition of the scope of the phrase 'to be a witness' in Article 20(3) so as to include only oral and written testimony based on the accused's personal knowledge. This is perceived to narrow the scope of the Article by excluding a range of evidence which meets the criteria of self-incrimination. Forensic and biometric evidence have been excluded from the scope of Article 20(3) as they are not intrinsically incriminatory. Certain documentary evidence also matches the aforementioned criterion but the author believes that rightly excluding such evidence unequivocally may be a case of throwing the baby out with the bathwater.

A sweeping impact of the restrictive definition of 'to be a witness' in *Oghad* is that the case law on self-incrimination as it stands today is not explicitly equipped to address issues arising out of technology driven social change such as the role of social media as a source of personal testimony. A case in point is Section 69 of the Information Technology Act, 2000, which allows the government to force a person to decrypt information, and is prima facie violative of Article 20(3) when applied to an accused.⁷⁵ The narrow definition of 'testimonial' in *Oghad*, however, renders the constitutional provision ill equipped to realise its ends. In conclusion, the author finds it apt to quote Justice Jagannadhadas in *M.P. Sharma*, "...it is a recognized doctrine that when appropriate a constitutional provision has to be liberally construed so as to advance the intendment thereof and to prevent its circumvention."⁷⁶

⁷⁵ Pranesh Prakash, *Practice what you preach*, INDIAN EXPRESS (Apr 26, 2012), available at <http://www.indianexpress.com/news/practise-what-you-preach/941491/> (Last visited on Oct.15, 2013).

⁷⁶ *M.P. Sharma*, AIR 1954 SC 300 ¶ 10.