

BURNISHED LAW JOURNAL**Protection against Self Incrimination: A True Right?**By- Vishnu Mangalvedkar¹3rd Year

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ABSTRACT

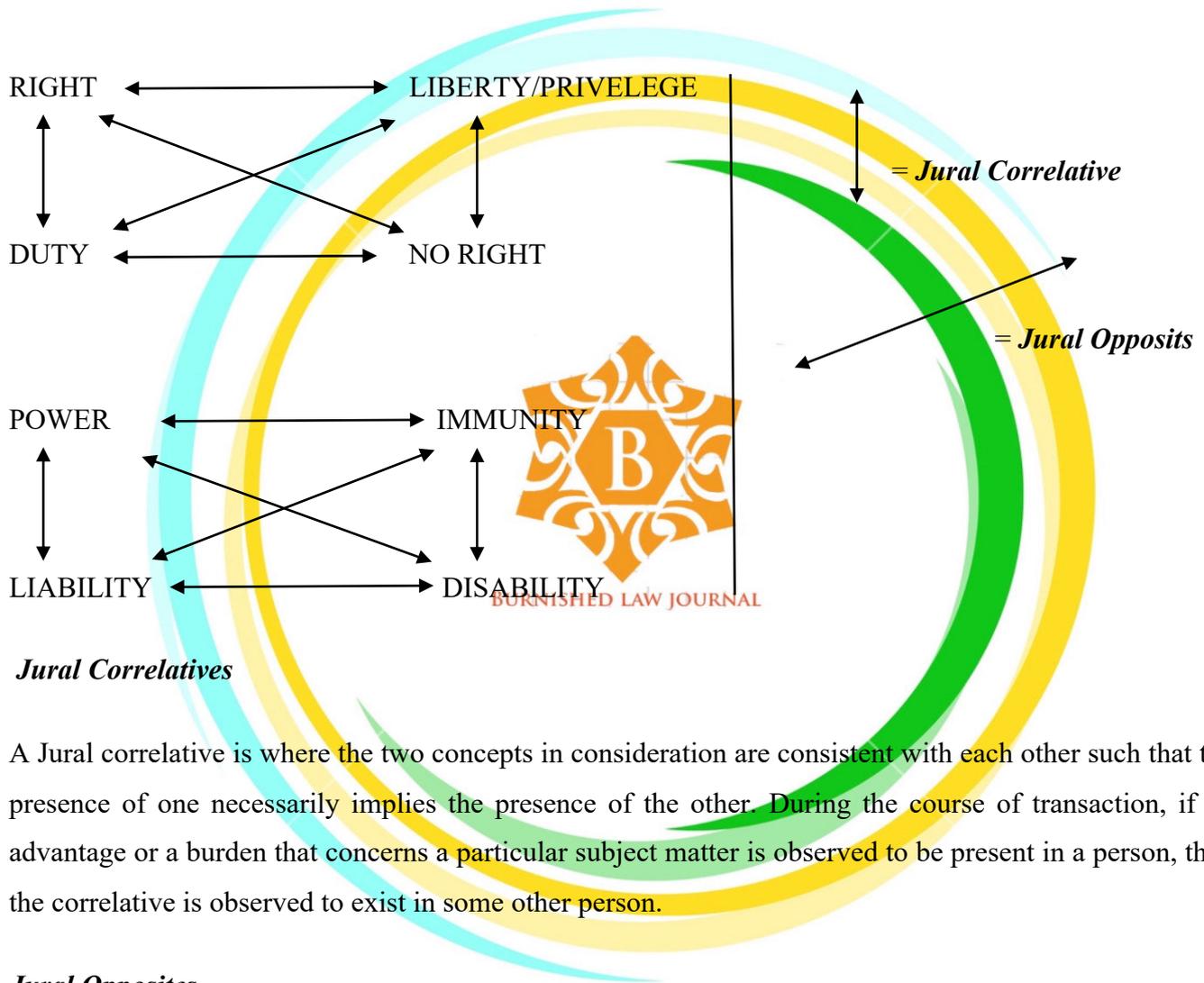
The concepts of rights and liberties are often misconstrued as the same thing by untrained eyes. The distinction between the two however is extremely crucial for interpretation of laws. It is essential for the purpose of jurisprudential understanding to compare the differences between elements such as right, duty, privilege, no right, power, liability, immunity and disability. This differentiation shall help a law student understand the true nature of limitation on the law and its range of applicability. This short article attempts to highlight the difference in interpretation when such words of legal gravities are misinterpreted. The author takes the example of the Hohfeldian concept of rights and liberties and analysis the same with the constitutional theme of "Right against Self-incrimination". Here, the author engages the readers with the critical difference between "Rights" and "Liberties". An analysis regarding the nature of laws pertaining to self-incrimination, whether it is a right or a liberty needs to be focused during the course of this article. Further, the author attempts to understand the scope of self-incrimination and whether or not it extends to involuntary administrations of scientific tests such as narco-analysis, polygraph examination, etc. for the specific purpose of enhancing criminal investigation. The merits and de merits of such a law will be analysed keeping in mind the case of *Selvi v. State of Karnataka*.

Key Words: Hohfeld, Right, Liberty, Self-Incrimination

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INTRODUCTION TO BASIC CONCEPTS

Wesley Newcombe Hohfeld explained the concepts of rights in an elaborate manner with the help of ideas such as -right, duty, privilege, no right, power, liability, immunity, disability where he explains how these concepts are logically correlated to one another through what he called as Jural Correlatives and Jural Opposites. The following table shall illustrate the same:



Jural Correlatives

A Jural correlative is where the two concepts in consideration are consistent with each other such that the presence of one necessarily implies the presence of the other. During the course of transaction, if an advantage or a burden that concerns a particular subject matter is observed to be present in a person, then the correlative is observed to exist in some other person.

Jural Opposites

A Jural opposite is where two concepts cannot be held by one person at the same time, it conveys the fact that a person must have either one or the other but cannot possess both of the two opposites at the same time

PRIVILEGE AND NO-RIGHT

According to Hohfeld, “*privilege is the opposite of duty and the correlative of a no-right*”.² A privilege exists when considering the legal relation of A and B, where A with respect to B is at a liberty or is free to conduct himself in a certain manner as he pleases. When the conduct of A is not regulated for the benefit of B by the command of the society and where he is not threatened by any penalty for disobedience. A ‘no right’ legal relationship exists where a person on whose behalf society is not commanding some particular conduct of another.

In a legal relation between ‘A’ and ‘B’, a person ‘A’ has a ‘privilege’ of doing an act or abstain from doing an act. The Jural opposite of ‘privilege’ being ‘duty’, the concept of ‘duty’ to act in a manner cannot reside in A at the same time he holds the ‘privilege’. The Jural correlative of ‘privilege’ being no right, as ‘A’ possesses a privilege, ‘B’ has ‘no right’ that ‘A’ should or abstain acting in a particular manner, it is completely the liberty of ‘A’ to act in the manner he wishes.

“RIGHT” AGAINST SELF INCRIMINATION AS PER PROVISIONS

In the Constitution of India, Fundamental Rights are enshrined under Part- III of the Constitution. According to Hohfeld, if a person possesses a right, as the jural correlative of a right is duty, there is a duty in the form of a legal obligation where he ought to do ought not to do, on another person so that the primary person can fulfil his right. Article 20 of the Constitution of India is a Fundamental right guaranteed to a person. Article 20(3) of the Constitution of India states that “*no person accused of any offence shall be compelled to be a witness against himself.*” In the Jurisprudence of Constitutional Law, article 20(3) gives a protection against a testimonial compulsion. Such a protection is given to an accused only and not a witness.³ The fact that an accused is protected from incriminating himself stems from the Latin Maxim ‘*Nemon tenetur seipsum accusare*’ which translates to the fact that ‘*No man is obliged to accuse himself*’.⁴

The cornerstone principle of protection against self-incrimination was elucidated in the case of **Saunders v. United Kingdom**⁵ where it was stated that the protection is given to the accused so that miscarriage of justice should be prevented if the statement is given by the accused due to improper compulsion by the authorities. Further, in the case of **Nandini Satpathy v. P. L. Dani**,⁶ it was held that the expression ‘accused of any offence’ means accused at the present time and not necessarily the future and it applies at

² Hohfeld, Wesley Newcomb. “Some Fundamental Legal Conceptions as Applied in Judicial Reasoning.” *The Yale Law Journal*, vol. 23, no. 1, 1913, p. 32. *JSTOR*, JSTOR, www.jstor.org/stable/785533.

³ S. M. H. “The Privilege Protecting One Accused of Crime from Being Compelled to Testify against Himself.” *University of Pennsylvania Law Review and American Law Register*, vol. 71, no. 1, 1922, pp. 69–73. *JSTOR*, www.jstor.org/stable/3314291..

⁴ Alschuler, Albert W. “A Peculiar Privilege in Historical Perspective: The Right to Remain Silent.” *Michigan Law Review*, vol. 94, no. 8, 1996, pp. 2625–2672. *JSTOR*, www.jstor.org/stable/1289835..

⁵ (1997) 23 EHRR 313

⁶ AIR 1978 SC 1025

every stage, where collection of materials and furnishing of information takes place. The reason why a person has a privilege against self-incrimination is because of the fact that, primarily in a criminal case, the burden to prove beyond all reasonable doubts of the commission of a crime is on the prosecution, there is a presumption of innocence and the fact that a person need not make a statement against his will.⁷

When a person is in custody of the police and is accused of an offence, the confession statement if made by him to the police officer unless in presence of a Magistrate shall not be proved against him. The reason is that there is always a question whether the accused may have been induced or an element of improper compulsion is present in order to give the confession.⁸ The person however, when he is taken before a Magistrate, the Magistrate shall before recording the confession state that the person is not bound by any law in force to make such a confession and the fact that if he makes a confession, it can be used as evidence against him. The Magistrate further, shall not record such a confession unless he is satisfied that the confession has been made voluntarily. Further, if a person who has appeared before the Magistrate refuses to make a confession, the Magistrate cannot detain him in the custody. From the reading of the above provisions in the CrPC it is clear that, the choice whether to make a confession or not is voluntary in nature and that the accused cannot be compelled to make a confession statement, it is purely his liberty whether to give that statement or not.

A reading of Section 161(2) of the CrPC, 1973, signifies the fact that a person shall not be bound to truthfully answer the questions put to him by such an officer, such that it exposes the person to criminal charges or penalty or forfeiture, similarly Section 313(3) states the similar fact that a person shall not render himself to be punished if he refuses to answer or give false answer to questions which tend to expose him to criminal charges and 315(1)(b) precludes any comment by the parties to the suit or the court in regard to the accused failing to give evidence.

INVOLUNTARY ADMINISTRATION OF SCIENTIFIC TESTS

Having understood the basics regarding Right against self-incrimination as per provisions of various statutes, a more pressing issue arises in terms of involuntary administrations of scientific tests such as narco-analysis, polygraph examination, etc. for the specific purpose of enhancing criminal investigation. Here it is important to take into account the fact that the state has *no right* which ensures that they can forcefully administer scientific tests on the accused. Hence, the accused has a *privilege* to either choose to take the test or not to take the same. The debate as to whether or not administration of scientific tests falls

⁷ Gerstein, Robert S. "Privacy and Self-Incrimination." *Ethics*, vol. 80, no. 2, 1970, pp. 87–101. *JSTOR*, www.jstor.org/stable/2379873..

⁸ Bhatia, Gautam, "The Right against Self Incrimination and its Discontents", Legally India, <https://www.legallyindia.com/blogs/guest-post-the-right-against-self-incrimination-and-its-discontents>

under Art 20(3) of the Constitution of India were brought to the Supreme Court in the case of *Selvi v. State of Karnataka*.⁹

The facts of the case are as follows. Smt. Selvi and others filed a case as an objection which was raised with respect to instances wherein accused, suspects and witnesses were forcefully without their consent were being subjected to scientific tests for extraction of information. The acts were defended by the concerned authorities as acts committed to prevent criminal activities in the future wherein circumstances were so grave that extraction of information through ordinary measures were impossible. It was also urged that such admissions of tests for brain mapping which was done at the stage of facts finding were not in any ways injurious to the bodies of the personals.

The court however honoured the privileges against self-incrimination and held that the state did not have a *right* to extract information from the person. Further, though the person doesn't have a specific right due to the lack of duty on the latter, the privilege provided under Art 20 (3) is amongst the non-derogable privileges which cannot be suspended even during national emergency. This privilege as per the Honourable courts verdict extends not merely at the stage of trial but also at the stage of investigation. The court also held that, subjecting a person to polygraph test or narco-analysis test without his consent amounts to forcible interference with a person's mental processes and hence violates the right to privacy for which protection can be sought under Article 20(3) also courts cannot permit involuntary administration of narco-tests, unless it is necessary under public interest. The judgement though spoke about the privileges, did not explicitly give duties to the state to protect any of them. This further proves that "Right" against self-incrimination is a mere privilege.

CONCLUSION

Analysing Hohfeld's fundamental concepts, the protection against self-incrimination is a 'privilege' that a person has rather than a 'right' he possesses. A close reading of the various provisions of the CrPC and The Indian Evidence Act shows that these statues have a consonance with Article 20(3) of the Constitution of India, wherein an accused has a liberty to confess or not before a Magistrate, and also a liberty to state the truth or otherwise when a question is posed to him before the court. Though an admission can be used against the accused, a confession statement while being made has not been procedurally complied with according to Section 164 of the CrPC, 1973 or if the confession has been made extra judicially it does not hold as a strong piece of evidence.

An accused cannot be punished for stating the contrary of truth when a question is posed to him, which if answered can incriminate him. According to Hohfeld, if a person possesses a 'right', there must be a

⁹ AIR 2010 SC 1974

corresponding jural correlative, i.e., a 'duty' cast upon the other person, which is not the case while having a protection from self-incrimination. Rather, the person possesses the 'privilege' (liberty) to state the truth or otherwise. The jural opposite of 'privilege' being 'duty', no 'duty' can be cast upon the accused to admit to his guilt or confessing or stating the truth when being questioned about facts incriminating himself.¹⁰

The jural correlative of the privilege being 'no right', the State, i.e., the police, magistrate or the court or anyone else has no right that the accused has to confess or state the truth when being questioned about facts incriminating himself as the accused is under no duty to state the truth. Hence, the protection against self-incrimination and the act by the accused to state the truth or not according to his own liberty, is considered to be a 'privilege', and the jural correlative of 'no right' and jural opposite of 'duty' of the concept of 'privilege' fits into the concepts in a steady fashion. Hence, the protection against self-incrimination must be considered as a 'privilege' and not a 'right' possessed by a person.



¹⁰ Inbau, Fred E. "Should We Abolish the Constitutional Privilege against Self-Incrimination?" *The Journal of Criminal Law, Criminology, and Police Science*, vol. 45, no. 2, 1954, pp. 180–184. *JSTOR*, www.jstor.org/stable/1140130. Accessed 16 Jan. 2020.