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# THE PRIVILEGE AGAINST SELF-INCRIMINATION UNDER FOREIGN LAW

## A. Canada

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### INTRODUCTION

Under the British North America Act of 1867,<sup>1</sup> which united the various British Colonies in North America in a federal union, legislative power was divided between the central authority, the Parliament of Canada, and the legislatures of the component provinces. The residual legislative authority to make laws "for the peace order and good government of Canada" is vested in Parliament but, in addition, the B.N.A. Act grants exclusive legislative jurisdiction to Parliament to legislate in relation to matters coming within certain enumerated classes of subjects. By section 91, clause 27, the Parliament of Canada is given exclusive legislative jurisdiction in relation to the "Criminal Law, except the constitution of the courts of criminal jurisdiction, but including the procedure in criminal matters." By section 92 of the B.N.A. Act, each of the provinces is given legislative jurisdiction in relation to matters coming within a number of specified classes of subjects including "(13) Property and Civil Rights in the Province" and "(16) Generally all matters of a merely local or private nature." Among the enumerated classes of subjects assigned to the provincial legislature is "(15) The imposition of punishment by fine, penalty, or imprisonment for enforcing any law of the province made in relation to any matter coming within any of the classes of subjects enumerated in this section."

In *Proprietary Articles Trade Association v. A. G. Can.*<sup>2</sup> Lord Atkin, speaking for the Judicial Committee of the Privy Council, in discussing the power of Parliament to create new crimes said:—

"In their Lordships' opinion s.498 of the Criminal Code and the greater part of the

provisions of the Combines Investigation Act fall within the power of the Dominion Parliament to legislate as to matters falling within the class of subjects, 'the criminal law including the procedure in criminal matters' (s.91, head 27). The substance of the Act is by s.2 to define, and by s.32 to make criminal, combines which the legislature in the public interest intends to prohibit. The definition is wide, and may cover activities which have not hitherto been considered to be criminal. But only those combines are affected 'which have operated or are likely to operate to the detriment or against the interest of the public, whether consumers, producers or others'; and if Parliament genuinely determines that commercial activities which can be so described are to be suppressed in the public interest, their Lordships see no reason why Parliament should not make them crimes. 'Criminal law' means 'the criminal law in its widest sense': *Attorney-General for Ontario v. Hamilton Street Ry. Co.*, [1930] A.C. 524. It certainly is not confined to what was criminal by the law of England or of any Province in 1867. The power must extend to legislation to make new crimes. Criminal law connotes only the quality of such acts or omissions as are prohibited under appropriate penal provisions by authority of the State. The Criminal quality of an act cannot be discerned by intuition; nor can it be discovered by reference to any standard but one: Is the act prohibited with penal consequences? Morality and criminality are far from co-extensive; nor is the sphere of criminality necessarily part of a more extensive field covered by morality—unless the moral code necessarily disapproves all acts prohibited by the State, in which case the argument moves in a circle. It appears to their Lordships to be of little

<sup>1</sup> 30 & 31 VICT., c.3 (U.K.).

<sup>2</sup> [1931] A.C. 310, 323-4.

value to seek to confine crimes to a category of acts which by their very nature belong to the domain of 'criminal jurisprudence'; for the domain of criminal jurisprudence can only be ascertained by examining what acts at any particular period are declared by the State to be crimes, and the only common nature they will be found to possess is that they are prohibited by the State and that those who commit them are punished."

On the other hand, the provinces have the legislative jurisdiction by virtue of section 92(15) to affix penalties to their own competently enacted legislation in order to enforce it. The power of the provinces to impose penalties to enforce their legislation with respect to matters committed to them has resulted in the development of a body of law which is sometimes called "Provincial Criminal Law."<sup>3</sup> In *R. v. Yolles*,<sup>4</sup> Porter, C.J.O., said:

"It is, however, one of the powers exclusive to the Province, to impose penalties for the enforcement of its own statutes. Such penal statutes of the Province have been variously designated as 'provincial criminal law,' 'quasi-crimes' or offences of a civil nature. They undoubtedly have the essential characteristic of criminal law in that they are penal."

Where the constitutional validity of such enactments is brought into question the courts must examine the legislation to ascertain its true purpose. The provinces cannot under the guise of inflicting a penalty for the violation of an enactment of a regulatory nature prohibit conduct as *contra bonos mores* and thereby encroach upon the exclusive jurisdiction of Parliament to create crimes.<sup>5</sup>

The courts will examine "the pith and substance" of the legislation no matter what form it may take. There may be an area in which the jurisdiction of Parliament and that of the provinces may overlap, that is to say, a province may validly legislate in relation to a matter in its provincial aspect notwithstanding that Parliament might properly legislate in relation to the same matter from a federal aspect. In this situation the provincial legislation remains valid unless and until it is superseded by federal legislation *in pari materia*. If the Provincial and Dominion enact-

ments come into conflict the Provincial legislation is superseded or abrogated to the extent that it conflicts with the Dominion legislation.<sup>6</sup>

An excellent illustration of the division of legislative jurisdiction between the Dominion and the Provinces is afforded by the judgment of the Ontario Court of Appeal in *R. v. Yolles*. The regulation of Highway Traffic is within the legislative jurisdiction of the provinces.<sup>7</sup>

Section 29(1) of the Ontario Highway Traffic Act,<sup>8</sup> provides that:

"Every person is guilty of the offence of driving carelessly who drives a motor vehicle on a highway without due care and attention or without reasonable consideration for other persons using the highway."

The Dominion Criminal Code<sup>9</sup> by section 221(1) provides that everyone who is criminally negligent in the operation of a motor vehicle is guilty of an indictable offence.

The definition of criminal negligence contained in section 191 of the Criminal Code requires the *showing* of a wanton or reckless disregard for the lives or safety of other persons.<sup>10</sup>

The Ontario Court of Appeal held that section 29(1) was valid provincial legislation in relation to the control of traffic on highways in the province and that it was not "in pith and substance" legislation in relation to criminal law. Moreover, there was no conflict between the provincial legislation and section 221 of the Criminal Code which made the criminally negligent operation of a motor vehicle a crime since by definition criminal negligence requires "recklessness," a different mental attitude to the one required to constitute the offence of driving carelessly.<sup>11</sup>

<sup>6</sup> "There can be a domain in which provincial legislation may overlap in which case neither legislation will be ultra vires if the field is clear, but if the field is not clear and the two legislations meet the Dominion legislation must prevail: see *G.T.R. v. A.G. Can.*, [1907] A.C. 65." Lord Tomlin in *A.G. Can. v. A.G. B. C.*, [1930] A.C. 111, 118.

<sup>7</sup> *Provincial Secretary of P.E.I. v. Egan*, [1941] S.C.R. 396, 76 Can. C.C. 227.

<sup>8</sup> R.S.O., c. 167 (1950), as reenacted by 1955 (ONT.) c.29, §4.

<sup>9</sup> 1953-54 (CAN.) c.51.

<sup>10</sup> "191(1) Every one is criminally negligent who (a) in doing anything, or (b) in omitting to do anything that it is his duty to do shows wanton or reckless disregard for the lives or safety of other persons."

<sup>11</sup> *Cf.*, *Re Dodd*, [1957] O.R. 5, 116 Can. C.C. 337, where the same court held that §48(1) of the Ontario Highway Traffic Act was in conflict with §285(2) (now §221(3)) which creates the offence of leaving the scene of an accident with intent to escape liability, civil or criminal, and hence was superseded thereby.

<sup>3</sup> *Re McNutt*, 47 S.C.R. 259, 21 Can. C.C. 157 (1912); *Saumur v. Recorder's Court*, [1947] S.C.R. 492, 494.

<sup>4</sup> 123 Can. C.C. 305, 318 (1959).

<sup>5</sup> *R. v. Hayduk*, [1938] O.R. 653, 71 Can. C.C. 134.

This brief description of the provincial power to create "offences" and the power of parliament to create "crimes" is of necessity fragmentary but some description of the Canadian federal system is necessary in order to understand, in the discussion which follows, the enactments with respect to the abolition of the privilege against self incrimination in its federal and provincial aspects.

#### SELF-INCRIMINATION IN CANADA

It is necessary to distinguish between the position of an *accused* person at his trial on a criminal charge and the position of a mere *witness*. The *accused* at his trial on a criminal charge is not a compellable witness, and no questions can be put to him by the court or the prosecutor unless he chooses to become a witness in his own behalf.<sup>12</sup> Section 4 the Canada Evidence Act<sup>13</sup> provides as follows:

"(1) every person charged with an offence and, except as in this section otherwise provided, the wife or husband, as the case may be of the person so charged, is a competent witness for the defence, whether the person so charged is charged solely or jointly with any other person."

"(5) the failure of the person charged, or of the wife or husband of such person, to testify, shall not be made the subject of comment by the judge, or by the counsel for the prosecution."

Where the accused does testify on his own behalf he may of course by cross-examination be required to incriminate himself in respect of the offence charged, and since he puts himself forward as a credible person he may therefore be questioned as to whether he has been previously convicted.<sup>14</sup> He may not, however, be cross-examined as to previous misconduct which has not led to conviction unless such acts are relevant to the charge against him, as they may be if they are relevant to the issue of identity or to negative accident or innocent intent.<sup>15</sup>

Parliament has, however, with respect to offences created under federal statutes, occasionally made

<sup>12</sup> "Such person is not a compellable witness and therefore cannot be directly called upon to testify by or on behalf of the Crown." Osler, J.A., in *R. v. D'Aoust*, 5 Can. C.C. 407, 3 O.L.R. 653 (1902). 8 WIGMORE, EVIDENCE §2268(2) (3d ed. 1940).

<sup>13</sup> R.S.C., c.307 (1952).

<sup>14</sup> *Id.*, §12; *R. v. D'Aoust*, *supra* note 12; *R. v. Dorland*, [1948] O.R. 913, 92 Can. C.C. 274, *leave to app. ref'd*, 93 Can. C.C. 135.

<sup>15</sup> *Koufis v. The King*, [1941] S.C.R. 481, 76 Can. C.C. 161.

the accused a compellable witness at the instance of the prosecution.<sup>16</sup> Moreover, in respect of prosecutions for provincial offences in Ontario, the accused is a compellable witness for the prosecution. The Ontario Evidence Act by Section 1(a) defines "action" as including "a prosecution for an offence committed against a statute of Ontario or against a by-law or regulation made under any such statute" and section 5 provides:

"The parties to an action, and the persons on whose behalf the same is brought, instituted, opposed or defended shall, except as hereinafter otherwise provided, be competent and compellable to give evidence on behalf of themselves or of any of the parties and the husbands and wives of such parties and persons shall except as hereinafter otherwise provided, be competent and compellable to give evidence on behalf of any of the parties."<sup>17</sup>

The common law privilege protecting a *witness* from answering questions which may tend to incriminate him has been abolished in respect of proceedings over which the Parliament of Canada has legislative jurisdiction by the Canada Evidence Act subject to the protection afforded by section 5 thereof whereby if the witness objects to answering the answer cannot be used in subsequent proceedings. Section 5 reads as follows:

"(1) No witness shall be excused from answering any question upon the ground that the answer to such question may tend to criminate him, or may tend to establish his liability to a civil proceeding at the instance of the Crown or of any person.

(2) Where with respect to any question a witness objects to answer upon the ground that his answer may tend to criminate him, or may tend to establish his liability to a civil proceeding at the instance of the Crown or of any person, and if but for this Act, or the Act of any provincial legislature, the witness would therefore have been excused from answering such question, then although the witness is by reason of this Act, or by reason of such provincial Act, compelled to answer, the answer so given shall not be used or receivable in evidence against him in

<sup>16</sup> See, for example, *R. v. Fee*, 13 O.R. 590 (1887), where under a provision in the Canada Temperance Act the accused was compelled to testify at the instance of the prosecution. See also *R. v. Pantelidis*, 79 Can. C.C. 46 (1942).

<sup>17</sup> The Ontario Evidence Act, R.S.O., c.119 (1950). In practice, this right does not appear to be used by the prosecution.

any criminal trial, or other criminal proceeding against him thereafter taking place, other than a prosecution for perjury in the giving of such evidence."

A similar provision exists in the Ontario Evidence Act dealing with matters over which the Province has legislative jurisdiction. Section 7 provides as follows:

"(1) A witness shall not be excused from answering any question upon the ground that the answer may tend to criminate him, or may tend to establish his liability to a civil proceeding at the instance of the Crown or of any person or to a prosecution under any Act of the Legislature.

(2) If, with respect to any question, a witness objects to answer upon any of the grounds mentioned in subsection 1, and if, but for this section or any Act of the Parliament of Canada, he would therefore have been excused from answering such question, then, although the witness is by reason of this section or by reason of any Act of the Parliament of Canada compelled to answer, the answer so given shall not be used or receivable in evidence against him in any civil proceeding or in any proceeding under any Act of the Legislature."<sup>18</sup>

The other provincial legislatures have enacted similar statutes;<sup>19</sup> however, the common law privilege of refusing to answer questions which may tend to criminate the witness seems to have been retained in Newfoundland and Prince Edward Island with respect to proceedings over which the provinces have jurisdiction.<sup>20</sup>

It is quite clear from the terms of the Canada Evidence Act that a witness who is compelled to answer questions in a provincial proceeding by virtue of a provincial enactment is protected in

respect of his answers in relation to a subsequent criminal prosecution for a crime under a federal statute.<sup>21</sup> Under the Ontario Evidence Act the witness who is compelled to answer in a proceeding over which the province has jurisdiction is protected in respect of his answer in relation to a subsequent prosecution for the violation of a provincial enactment. Similarly, by virtue of the Act, if in any proceeding over which the Parliament of Canada has jurisdiction the witness is compelled to answer over his objection, the witness is protected in respect of that answer in relation to a subsequent prosecution for a violation of a provincial enactment. The witness is thus protected in respect of his answer whether the answer is made in a proceeding over which Parliament has jurisdiction or whether the proceeding is one over which the province has jurisdiction, and he is protected against its use both in respect of a subsequent prosecution for the violation of a provincial enactment or a federal statute.

It is quite clear that the witness is protected in respect of the subsequent use of his answers only if he objects, and the court or other tribunal is not required to advise the witness of his rights. In *R. v. Tass*<sup>22</sup> Kerwin, J., (now C.J.C.) said: "[T]he matter seems quite clear that if the person testifying does not claim the exemption, the evidence so given may be later used against him, and this notwithstanding the fact that he may not know of his rights." Moreover, the Canada Evidence Act applies to all proceedings where a witness may be lawfully examined under oath and is not restricted to judicial proceedings. In *R. v. Mazerall*<sup>23</sup> the accused was charged with the offence of conspiring to violate the Official Secrets Act, and evidence was admitted of answers given by the accused in reply to questions put to him before a Royal Commission consisting of the Honourable Mr. Justice Kellock and the Honourable Mr. Justice Taschereau constituted by an Order in Council under the provisions of the Inquiries Act<sup>24</sup> with power to require witnesses to give evidence under oath. Prior to being examined before the Royal Commission, Mazerall had been taken into custody by an officer of the Royal Canadian

<sup>18</sup> It will be noted that the Canada Evidence Act provides that if the witness objects to answer his answer shall not be receivable in evidence against him in any proceeding *thereafter* taking place. The Ontario Evidence Act merely states that the answer if objected to shall not be receivable in evidence against him in *any* proceeding. It might therefore be arguable that although an accused is a compellable witness for the prosecution in a provincial prosecution nevertheless if he objected to answer on the ground that his answer would tend to criminate him that answer is protected and is not receivable in evidence against him in the very proceeding before the court.

<sup>19</sup> R.S. NOVA SCOTIA, c.88, §55 (1954); R.S. NEW BRUNSWICK, c.74, §7 (1952); R.S. MANITOBA, c.75, §7 (1954); R.S. ALBERTA, c.102, §8 (1955); R.S. BRITISH COLUMBIA, c.113, §5 (1948).

<sup>20</sup> R.S. NEWFOUNDLAND, c.120, §3 (1952); R.S. PRINCE EDWARD ISLAND, c.52, §6 (1951).

<sup>21</sup> *R. v. Harcourt*, 53 Can. C.C. 156 (1929); *R. v. Simpson & Simmons*, 79 Can. C.C. 344 (1943), *leave to app. to Sup. Ct. of Can. ref'd*, 80 Can. C.C. 78. *A fortiori* if the answer is compelled under a federal statute.

<sup>22</sup> 87 Can. C.C. 97, 99 (1946).

<sup>23</sup> 86 Can. C.C. 137, *id.* 321 (C.A.) (1946).

<sup>24</sup> R.S.C., c.99 (1927).

Mounted Police and was detained in custody in the police barracks in Ottawa under the authority of an Order in Council purporting to be made under powers conferred upon the Governor General in Council by the War Measures Act.<sup>25</sup> The Order in Council empowered the Minister of Justice, if satisfied that, with a view to preventing any particular person from communicating secret and confidential information to an agent of a foreign power or otherwise acting in a manner prejudicial to public safety, it was necessary so to do to make an order that such person be interrogated and detained. While still in custody under the order the accused was brought before the Royal Commission and was examined on oath. Both the trial court and the Court of Appeal held that the accused's answers under oath given without objection before the Royal Commission were admissible on his trial for conspiracy. The court clearly recognized the distinction between the so called confession rule and the privilege of a witness against self-incrimination. With respect to evidence given under oath by a witness it was not necessary for the prosecution to establish that the answers were freely and voluntarily made, nor would their admissibility be affected, as would statements made to the police by inducements or threats held out or exercised by the police while in their custody.

It is quite clear that documents which are produced under the compulsion of a statute are not protected by section 5 of The Canada Evidence Act even though their production is objected to.<sup>26</sup> But while the documents are not protected against use by the prosecution in a subsequent criminal proceeding against the witness, they must be proved independently of the evidence of the witness as to which objection was taken.<sup>27</sup>

<sup>25</sup> R.S.C., c.206 (1927).

<sup>26</sup> *R. v. Simpson & Simmons*, 79 Can. C.C. 344 (B.C.C.A.) (1943), *leave to app. to the Sup. Ct. of Can. ref'd*, 80 Can. C.C. 78. ("That section is limited by its express terms to an answer by a witness to a question and says nothing whatever about the use of incriminating documents produced by a witness under compulsion and after objection. This section therefore can have no application to the facts of this case and could not and cannot be invoked by Simpson to protect him from the use of those documents against him at his trial." Sloan, J.A., 79 Can. C.C. 344, 353.)

<sup>27</sup> "I am satisfied with the admissibility of the books and documents in question at the trial but yet another aspect of the matter remains to be dealt with *i.e.* the method of proof of these documents. No difficulty is found on this score with relation to the books of account of James Maynard Ltd. They were admittedly proved

Under both Dominion and Provincial legislation there are many statutes which create administrative tribunals with all the powers of a court to summon witnesses and to require them to give evidence under oath with respect to the matter under investigation.<sup>28</sup> These investigations are frequently followed by prosecutions for serious crimes such as conspiracy to defraud, arson, theft of securities, combinations in restraint of trade and other offences. The abolition of the privilege of a witness to refuse to answer incriminating questions enables these tribunals to subject a person suspected of illegal acts to a most searching examination which often enables a case to be built up against him. In *R. v. Barnes*<sup>29</sup> the accused after his committal for trial on a charge of manslaughter was served with a subpoena requiring him to give evidence before the coroner.<sup>30</sup> The Ontario Court

*abunde* by the evidence of the witness 'Worsley.' Sloan, J.A., in *R. v. Simpson & Simmons*, 79 Can. C.C. 344, 357 (1943).

<sup>28</sup> Some examples of this type of legislation may be found in the following statutes: The Ontario Securities Act, R.S.O., c.351, §§21, 23 (1950); this statute authorizes the appointment of a person or persons to make investigation into the affairs of companies trading in securities and other matters. The Fire Marshal's Act, R.S.O., c.140 (1950), authorizes the Fire Marshal to conduct an investigation into the cause, origin or circumstances of any fire for the purpose of determining whether it was the result of carelessness or design and to report to the Crown Attorney the result of his findings and for this purpose he has the right to summon witnesses to give evidence under oath. The Combines Investigation Act, R.S.C., c.314 (1952), authorizes the Director of Investigation or a member of the Restrictive Trade Practices Commission appointed under the Act to order that any person present in Canada be examined on oath where a breach of the Act is suspected. The Excise Act, R.S.C., c.99 (1952), empowers certain officers to conduct inquiries into matters relating to the excise and to summon witnesses and require them to give evidence under oath. *R. v. Denmark*, 72 Can. C.C. 9 (1939).

<sup>29</sup> 36 Can. C.C. 40 (1921).

<sup>30</sup> The Coroners Act, R.S.O., c.70, §18(1) (1950), provides that where a person has been charged with a criminal offence arising out of a death, an inquest touching the death shall be held only upon the direction of the Attorney-General. Under §25(1) the Coroner has the same power to summon witnesses and to punish for refusing to give evidence as a court. Section 25(4) provides that a witness shall be deemed to have objected to answer any question upon the ground that his answer may tend to criminate him and the answer so given shall not be used or be receivable in evidence against him in any trial or other proceeding against him thereafter taking place other than a prosecution for perjury. The effect of §25(4) is of doubtful validity in so far as it purports to affect the admissibility of answers in subsequent criminal proceedings. Section 5 of The Canada Evidence Act applies thereto, and that Act requires the witness to take objection. *R. v. Mottola & Vallee*, 124 Can. C.C. 288 (1959).

of Appeal held that the accused was a compellable witness. The Court held that the fact that Barnes was a defendant in criminal proceedings in which he was not a compellable witness did not entitle him to exemption in other proceedings. The judges, however, were widely separated in their views as to the propriety of such action on the part of the authorities. Meredith, C.J.C.P., said:

"If the proceedings in the Coroner's Court are now carried on for the purpose only of extracting from the appellant a confession or information such as would lead to his conviction of the crime he is charged with, they would be not only illegal but also inexcusable."

On the other hand Riddell, J., said:

"Much has been said as to the alleged hardship upon Barnes in being compelled to give evidence—it is, however, to be hoped that we have not yet arrived at the point that one accused of

crime has so many and so high rights that the people have none. The administration of our law is not a game in which the cleverer and more astute is to win, but a serious proceeding by a people in earnest to discover the actual facts for the sake of public safety, the interest of the public generally."

The result of the abolition of the privilege against self incrimination when used as a means of obtaining evidence upon which to base a criminal charge has been to impair substantially the traditional concept that a person suspected of a crime has the right to refuse to furnish evidence against himself through his own testimonial utterances. It would seem, in the interest of fairness, that in all cases a witness subject to interrogation under oath ought at the very least to be advised of his right to object and the exemption flowing therefrom.

## B. England

### GLANVILLE L. WILLIAMS

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#### THE WITNESS'S PRIVILEGE

As an English lawyer I think of the privilege against self-incrimination as the privilege of a witness to refuse to answer a question which may incriminate him. In England, this privilege has not caused anything like the difficulty it has in the United States, largely perhaps because we do not have anti-communist laws and investigations—we have Communists, but think they are best left alone. If a question were ever to arise in the course of a public investigation whether a witness were a Communist, he could not refuse to answer on the ground of self-incrimination, since the profession of Communism is not a crime.

Subsidiary reasons why we hardly ever hear of the privilege against self-incrimination in England are the following. We do not have grand juries trying to build up evidence by inquisitorial procedure. The police get their evidence by voluntary statements, and they prefer it this way. Public life is relatively honest, so that there is not much corruption to investigate. We do not have the

difficulty arising from the federal structure. We do not have the waiver rule, so that the witness can make his claim to privilege whenever he wishes. Finally, the judge will disallow the claim unless there is a substantial danger of prosecution.

#### THE DEFENDANT'S PRIVILEGE

The title of the present symposium refers to a principle which has been subsumed in American legal thought under the same name as the witness's privilege. This is the privilege of an accused person not to be questioned in court without his offering himself for the purpose. In my opinion, it is not aptly called a privilege against self-incrimination, since it is both more and less than that. On the one hand, a defendant who does not offer himself for questioning cannot be questioned at all—he has a privilege not only to refrain from incriminating himself by specific answers but to avoid being asked the questions. On the other hand, a defendant who does offer himself for questioning no longer has any privilege against self-incrimina-

tion in respect of the crime with which he is charged.

The present rule in England on the subject of questioning the defendant to a criminal charge remains the compromise settled by the Criminal Evidence Act, 1898. The defendant may elect to give evidence, and if he does so, he is sworn and liable to cross-examination like an ordinary witness, except that he cannot generally be cross-examined upon his previous convictions. Counsel for the Crown may not comment upon the defendant's failure to give evidence, but the judge may. Although at first judges were chary of commenting, they have come more and more to do so, and the result is that the privilege to testify conferred upon defendants by the Act of 1898 has considerably increased the chance of convicting the guilty.

It still occasionally happens that a judge takes the traditional view that the defendant to a criminal charge is entitled to maintain silence and, accordingly, either fails to draw the jury's attention to the fact that the accused has not given evidence or even directs the jury not to take that fact against the accused. A striking illustration was the direction of Devlin, J., in the trial of Dr. Adams in 1957. Counsel elected not to call the defendant, and the judge directed the jury strongly against attaching any significance to the defendant's silence, maintaining that such reticence should never be thrown into the scales on the side of the prosecution. This certainly does not represent the ordinary judicial view. It should also be noticed that there was much evidence before the court as to what had happened on the occasions in question: it was perhaps not a case where vital information was evidently in the possession of the defendant which he was withholding from the court.

The decision whether to call the accused places a heavy burden of responsibility upon counsel for the defence. By hypothesis, it has been held that there is a case to answer, so that the accused is involved in considerable suspicion. If the accused gives evidence, his answers or demeanour may tell heavily against him. If he keeps out of the witness box, the judge may make this a matter of adverse comment. Occasionally, however, the strategy of keeping the defendant out of the witness box is brilliantly successful, if the defending counsel can think of a plausible excuse for doing so. At the trial of Merrett for murdering

his mother, counsel for the defence explained the accused's silence by thanking God that "there are people who would rather go to their death with their lips sealed than that they should speak a single word that would reflect on the name of a mother." The Scottish jury, deprived of the opportunity of hearing Merrett and not liking to condemn the reason for it, brought in a verdict of "not proven." The sequel was unfortunate, for Merrett later murdered both his wife and his mother-in-law.<sup>1</sup>

A defendant who elects to give evidence and who then lies is technically subject to prosecution for perjury, but it is not the ordinary practice to prosecute for this. It seems, however, that occasionally prosecutions take place.<sup>2</sup>

#### *The submission of "no case"*

A defending counsel who is in a dilemma whether to call his client or not can sometimes save himself a difficult decision by making a successful submission of "no case to answer" (in effect a motion for directed verdict or dismissal). The submission is made at the close of the prosecution's case and must be immediately ruled upon by the judge or magistrate, as the case may be. If the ruling is in favour of the submission, the case will immediately come to an end—if the trial is on indictment, a formal acquittal will be taken from the jury upon the judge's direction. Thus the accused will be saved from making any answer.

The question to be considered upon the submission of "no case" is whether it would be proper, on the evidence already heard, to convict the accused if he makes no answer. In other words the question is whether the prosecution has given reasonable evidence of the matters in respect of which it has the burden of proof. As the rule was judicially expressed, no case appears unless there is "such evidence that if the jury found in favour of the party for whom it was offered, the court would not upset the verdict."<sup>3</sup>

The rule serves two principal purposes. In the first place, it operates to control the jury, reducing the possibility of capricious verdicts. It is true that a capricious verdict may be upset on appeal, but a defendant is better off to have the charge dismissed at the trial. In the second place, the rule gives effect to the principle that a man is

<sup>1</sup> See T. B. Smith in [1954] CRIM. L.R. 500.

<sup>2</sup> WILLIAMS, *THE PROOF OF GUILT* 67 n. (2d ed. 1958).

<sup>3</sup> *Parratt v. Blunt*, 2 Cox C.C. 242 (1847).



not compelled to answer a charge unless he is involved in a degree of suspicion. It is an important adjunct to the defendant's privilege of silence during the trial; indeed, it is only where the defendant succeeds on a submission of "no case" that he is perfectly safe in exercising his privilege of silence.

An illustration of the conditions in which the submission may be successful is supplied by the case of *Atter*.<sup>4</sup> The facts given in evidence by the prosecution were that a prostitute was found murdered; the accused admitted he had been with her shortly before her death, and a magazine was found in his room which told a story of a motiveless murder remarkably similar to the killing of the prostitute. On a submission made by counsel for the defence, Devlin, J., directed the jury to return a verdict of Not Guilty. The learned judge explained to the jury that an accused person had a right to demand that the prosecution's case against him should be proved before he went into the witness box. The evidence here was mere suspicion, and "you cannot put a multitude of suspicions together and make proof out of it."

Formerly, the right to submit no case was qualified in the case of joint trials. It was held that one of two or more persons jointly tried could not claim to be released from the proceedings for insufficiency of evidence against him until all the evidence for the other defendants was finished.<sup>5</sup> But these rulings, which never had much sense in them, have been forgotten and departed from.<sup>6</sup> The position now is that one of co-defendants can submit "no case" as if he were indicted alone.

There is at least one respect in which the law is in an unsatisfactory state. If counsel for the defence makes a submission of "no case," the theory is that the judge is bound to rule upon it and to rule in the defendant's favour if there is no case to answer. However, there is some danger for counsel in making the submission, because if it is overruled the jury may misunderstand what has passed and think that the judge is convinced of the guilt of the accused. Thus the submission is not generally made unless it has a good chance of success. Another reason why the submission might not be made in the past was that the accused might not be represented, and although this is now unlikely in a trial on indictment, it may happen in sum-

mary trials. One might think that a defendant should not be the worse off if no submission is made on his behalf, for this is a situation where the judge should look after the interest of the defendant and take the point himself if he thinks that the prosecution have not produced sufficient evidence to be answered. This opinion is, indeed, accepted to the extent that a judge is allowed to take the point of his own motion.<sup>7</sup> But he is not regarded as bound to do so, and no criticism is made of his conduct if he allows the trial to take its course.

This distinction has an important consequence if the case goes up on appeal. If a submission of "no case" has been made and wrongly rejected by the presiding judge, the judge is regarded as having erred in point of law, and accordingly the defendant may appeal to the Court of Criminal Appeal on this ground. Now the rule with regard to appeals on questions of law is that the appeal must be allowed unless the case can be brought within the proviso to section 4(1) of the Criminal Appeal Act, 1907. The usual statement of the effect of the proviso is that the Crown has to show that, on a right direction, the jury *must* have come to the same conclusion—a rule which in this context means that the appeal must succeed, since on a right direction, namely a direction to the jury to return a verdict of Not Guilty, the jury must have come to the opposite conclusion from the one it did.<sup>8</sup>

Contrast the situation where there is no submission. Here the judge does not make an error of law in allowing the trial to proceed, and an appeal against conviction cannot adopt the same argument as where there has been a submission. An appeal may be taken on the ground that there was a "miscarriage of justice," an expression which includes cases where the verdict was unreasonable having regard to the evidence. However, in deciding this question the Court of Criminal Appeal will look at the whole evidence, including the evidence given by the defence in chief and elicited from the witnesses for the defence on cross-examination.<sup>9</sup> It may be that a defective case for the prosecution will thus be aided by admissions made by the accused on cross-examination or by evidence given against him by his co-defendant.

<sup>4</sup> *The Times*, March 22, 1956; [1956] Crim. L.R. 289.

<sup>5</sup> *Carpenter v. Jones* (1828) M. & M. 198 n.; 173 E. R. 1130 n.; Martin, 17 Cox C.C. 36 (1889).

<sup>6</sup> Abbott, [1955] 2 Q.B. 497 (C.C.A.).

<sup>7</sup> *George*, 1 C.A.R. 168 (1908), 25 T.L.R. 66, 73 J.P. 11.

<sup>8</sup> See the judgment of Lord Goddard, C.J., in Abbott, *supra* note 6.

<sup>9</sup> *Jackson*, 5 C.A.R. 22 (1910).

At one time it was clearly settled that this liberty to look at the evidence as a whole applied only where there had been no submission. If there were a submission of "no case" which was wrongly rejected, the Court of Criminal Appeal regarded itself as not entitled to look at evidence subsequently received. This was laid down in *Joiner*.<sup>10</sup> In a number of subsequent cases the distinction has been blurred, the Court saying that it is always entitled to look at the evidence as a whole. However, in all the cases in which this dictum occurs, the point seems to have been obiter.<sup>11</sup> Accordingly, it is still open to the Court of Criminal Appeal to follow the explicit authority of *Joiner*. The decision in *Joiner* seems, indeed, to be logically necessary if the law is not to be at odds with itself. If the trial judge is under a duty to accept a submission and stop the case, it ought not to affect the rights of the accused if the case is improperly allowed to continue. Nor is it only a matter of logic, for a denial of the principle of *Joiner* would put an undesirable responsibility on counsel for the defence. Suppose that his submission that there is no case to answer is overruled by the trial court. He may go on with the case by calling evidence for the defence, but, if *Joiner* is wrong, will take the risk that this further evidence may complete the prosecution's case. The alternative is for him to take no further part in the proceedings and to appeal against conviction. But the risk here is that the appeal court may uphold the decision that there was a case to answer and may therefore affirm the con-

viction, the defendant having in fact been convicted without being heard. It is unlikely that a defending counsel would be prepared to take this second risk, so that he is almost compelled to proceed with the case. And the effect of this may be that the accused is dislodged from his position of silence.

It would be satisfactory in point of legal principle if the decision in *Joiner* were re-established; but, in addition, it may be suggested that there should be no legal distinction between cases where a submission is made and where it is not. The duty of the presiding judge is to see that justice is done, whether application is made by counsel for the defendant or not.

#### *Searching the body of the accused*

In American legal writing, the concept of the privilege against self-incrimination has been applied to medical examinations of accused persons by police surgeons, the use of stomach-pumps, and such like. In England we should not think of these problems as raising an issue of self-incrimination; they relate merely to the limits on the powers of the police in relation to detained persons. Although there is little authority, it can be said with some confidence that the use of force against the body of a detained person for the purpose of obtaining evidence is an illegal battery. There is, however, a common-law power to search arrested persons (the police have not tried to assert that this extends to a search of the body, as distinct from a search of the clothes or exterior); and magistrates have a statutory power to authorise the taking of fingerprints.

<sup>10</sup> 4 C.A.R. 64 (1910).

<sup>11</sup> See *H. Calvert* in 1958 C.R.M. L.R. 232.

### C. France

#### ROBERT VOUIN

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A fundamental general rule of French penal procedure is that nobody is bound to accuse himself, that no one is obliged to give evidence against himself. Although it may be necessary to denounce crimes committed by someone else, according to the Penal Code, the guilty person's confession can

never be legally demanded.<sup>1</sup> All the more, this confession can never be extorted through torture or any kind of violence. Nor can it be obtained, according to the French jurisprudence, by surprise or

<sup>1</sup> C.P.P., art. 62.

by trickery or through some stratagems incompatible with the right to a fair trial.

However, to understand the true state of the law, one must consider its application in several concrete settings.

Whenever, in the course of a judicial investigation, it becomes necessary to establish or to check on the identity of a person, the person is bound to lend himself to whatever operations are demanded by the investigation or checking.<sup>2</sup> Thus, it is certain that the judicial police officer may take a picture of the person involved and may take his fingerprints as well.

Since 1954, French legislation has authorized, when it is a matter of verification for a crime, a delict, or a traffic accident, blood tests to determine whether the act was committed "under the influence of a state of intoxication." Such tests, in any case where they may be useful, also may be carried out on the victim (who may be the guilty person). Of course, the question is whether a person has to lend himself to the checking necessary to determine how much alcohol is in his blood. According to the law, "these verifications are compulsory in any case of crime, delict or accident followed by a death."<sup>3</sup> However, it does not seem admissible that blood testing should be imposed upon a person who refuses it absolutely. However, a person, by his refusal, sets against himself a presumption which may be retained among all the other data of proof.

Several years ago, the question was raised in France whether an interrogatory under narcotics (narcoanalysis or narcodiagnosis) may be used in the judicial procedure. It is quite certain that this method cannot be used by the judicial police in order to obtain confessions or accusations. But it can be used by psychiatrists in carrying out a mental examination of the accused person. The best solution is to decide that the doctor may use all the means of his art, and consequently have recourse to psychoanalysis under narcotics, when he wants to have a diagnosis either to try to cure a sick person or to answer a question asked by the judge concerning penal responsibility. However, in either situation, the examination should be conducted under the condition that the physician must never, because of medical secrecy, convey to the judge any confessions or accusations he might

have obtained while examining the person.<sup>4</sup> However, this opinion is not admitted by everybody, and the problem, which is not linked solely to the use of narcotics but is raised by every mental testing, has not yet received a solution which would be certain or final in the French legislation or jurisprudence.

It was provided by the "Code d'Investigation Criminelle" (Criminal Investigation Code), and it has just been confirmed by the Penal Procedure Code, that the accused person can never be a witness in his own trial, and, if he makes some statements in front of his judges, he does not have to do it under oath. Otherwise, he might have to choose between perjuring himself or accusing himself. The French law saves him from the necessity of this choice by excusing him from the oath and, in so doing, sets aside the possibility of an accused person getting a penal sentence for false testimony.

The French law does punish the person who, possessing proof of the innocence of a person prosecuted for a crime or delict, does not produce spontaneously his testimony to the justice. However, the person responsible for a prosecution, as well as his collaborators and accomplices, is not subject to this obligation of testifying in behalf of the innocent person. To provide otherwise would require the person responsible for a false prosecution to accuse himself of a crime.<sup>5</sup>

By the same decree, a similar exemption is granted to the parents and relatives—up to the fourth degree of relationship—of accused persons, their collaborators and accomplices. In addition, the decrees which mention the obligation of reporting crimes and attempted crimes do not punish any refusal to report them when it is the doing of the perpetrator's parents or relatives.<sup>6</sup> And, in the same way, the accused person's close relatives do not speak under oath when they have to appear in the trial.<sup>7</sup>

On the other hand, witnesses who testify under oath cannot be excused for any personal reasons from fulfilling the obligations imposed upon them by the oath. Thus, the witness will bring upon himself punishment for false testimony in case he violates his oath, even if he lies only to protect him-

<sup>4</sup> Cf., H. Donnedieu de Vabres, 29 *REVUE INTERNATIONALE DE POLICE CRIMINELLE* 25 (1949) and Vouin, *Rec. Dalloz, Chronique*, 101 (1949).

<sup>5</sup> C.P.P., art. 63.

<sup>6</sup> C.P.P., art. 62.

<sup>7</sup> C.P.P., arts. 335 and 448.

<sup>2</sup> C.P.P., art. 61.

<sup>3</sup> *CODE DES DEBITS DE BOISSONS ET DES MESURES CONTRE L'ALCOOLISME*, art. 1, §88.

self from possible prosecutions.<sup>8</sup> Should this witness be allowed to refuse his testimony under the excuse that he should not be put under the obligation of accusing himself? That remedy, in the French opinion, would be worse than the evil.

According to the Criminal Investigation Code of 1808, a full account of the charge had to be made by the "ministère Public" at the beginning of the trial in the Assize Court and the president was allowed to interrogate the accused person only after each witness's testimony and on the ground of this testimony. However, a different practice actually was established. In fact, the account of the charge was never made, and the president would interrogate the accused, in front of the jury, about the facts with which he was being charged.<sup>9</sup> Actually, this interrogatory was a cause of abuses. Most certainly, the accused person had the possibility of not answering, but in this case, the president alone was speaking, and too often he had the appearance of a prosecutor. The jurisprudence slowly reacted, deciding that a sentence was invalid when it had been pronounced by an Assize Court the president of which, in the process of the trial, had before the proper time spoken out concerning his feelings with respect to the guilt of the accused.<sup>10</sup>

This solution is quite justified, because the president of the French Assize Court and his two assessors, since 1941, participate in the jury's deliberation on the guilt of the accused person. So it has been maintained by the Penal Procedure Code of 1958, according to which the president interrogates the accused and gets his statements, that, under penalty of invalidity, the president "has the duty not to show his opinion on guilt."<sup>11</sup> One may object that it would have been better to omit completely the accused person interrogatory by the

president and reinforce the account of the charge by the "ministère public."

Under the authority of the Code of 1808, the judicial procedure for the preliminary investigation, the purpose of which was to determine whether sufficient evidence existed to justify a trial of the accused person, was consonant with the old inquisitorial type of procedure, that is, it was a written, secret, and "non contradictoire" procedure. This system was greatly modified by the law of December 8, 1897. Under this law, the accused person, if he so desires, may be helped during the investigation period by a barrister who is invited to each interrogatory and who is allowed to study beforehand the dossier of the procedure. Moreover, the barrister is permitted to communicate freely, at any time, with his client.

This procedure is unanimously viewed, in France, as an elementary guarantee of the rights of the defense. Consequently, it has been retained without discussion by the Code of 1958.<sup>12</sup> However, one may ask himself very seriously whether the principle of the "instruction contradictoire" is really justified. In fact, to the extent that the accused person participates in the preliminary examination, he may, later on, feel embarrassed to question its results before the jurisdiction of judgment. During the preparation of the new Code, it had been offered to make "contradictory" the expert's report carried out in the process of the preliminary investigation.<sup>13</sup> However, this provision was not incorporated because the barristers very clearly stated that they would rather not have the defense participate in the expert's report in order to be able later on to criticize freely the expert's conclusions. The objection seems right. But, if it is accurate, it should be put forward as well against the very principle of the "instruction contradictoire."

<sup>8</sup> Cass. Crim., Rec. Dalloz 1918.1.36 (1914).

<sup>9</sup> Cf., Vouin, *REVUE DE SCIENCE CRIMINELLE* 43 (1955).

<sup>10</sup> Cass. crim., Bull. Crim. No. 476 (1956).

<sup>11</sup> C.P.P., art. 328.

<sup>12</sup> C.P.P., arts. 114 and 118.

<sup>13</sup> Cf., Vouin, *REVUE DE SCIENCE CRIMINELLE* 243 (1956).

## D. Germany

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In the German law of procedure—not only civil and criminal, but also administrative, labour, social, etc.—the rule “*nemo tenetur se ipsum accusare*” has been generally accepted for well over one century. It is based on the ethical concept that the procedural interest in the exploration of the truth must stand back behind the higher valued interest of the individual to be protected from any coercion to self-incrimination. It is the purpose of this report to show how this principle is legally ruled in the field of criminal procedure.

## THE PRIVILEGE OF THE DEFENDANT

*Privilege of silence*

This subject matter is covered by section 136 of the German Code of Criminal Procedure (hereinafter called CCP). This section deals only with the interrogation of the defendant by the judge. As the expression of a general principle, though, it is held to apply also to his interrogation by the public prosecutor and the police.<sup>1</sup> It reads:

(i) At the beginning of the first interrogation the defendant shall be informed about the nature of the charge. He shall be asked if he wants to reply to the charge.

(ii) The interrogation shall give the defendant an opportunity to remove the grounds for suspicion prevailing against him and to put forward the facts which speak in his favor.

(iii) During the first interrogation of the suspect an inquiry shall also be made into his personal status.

(a) *Privilege of silence ad rem*

Section 136(i), CCP, points out quite clearly that the defendant—who incidentally cannot be heard as a witness under German law, and hence cannot make a sworn statement in a case against himself—is under no obligation to answer the

<sup>1</sup> See EBERHARD SCHMIDT, *LEHRKOMMENTAR ZUR STRAFPROZESSORDNUNG* (1957), Vorbemerkung 6 vor §133, Teil II (Instructional Commentary of Criminal Procedure, part II, preliminary note no. 6, §133, 1957).

charge, i.e., to make a statement *ad rem*. Rather, he is entitled to refuse to answer the charge or keep silent from the beginning.

It is a contested question whether the defendant who does not take advantage of his privilege of silence is under procedural law obligated to tell the truth. The predominant and correct opinion of the law teachers<sup>2</sup> answers this question in the negative. However, the discussion about the defendant's duty to tell the truth appears to be useless anyway, because the CCP provides for no means of forcing him into telling the truth or changing an untrue statement.

And at any time he is allowed to revoke both his preparedness and his refusal to make a statement, as well as a former statement, especially a confession.

(b) *Privilege of silence ad personam*

It appears to be uncontested that under procedural law the defendant is not obligated to give particulars, let alone correct particulars, pertaining to his personal status. The former Reichsgericht,<sup>3</sup> however, and some legal theorists<sup>4</sup> take the view that such obligation can be deduced from the substantive law, namely section 360(8) of the German Criminal Code (hereinafter called CC). This provision penalizes him who before a competent authority or a competent official makes an incorrect declaration or refuses a declaration with regard to his name, his status, his calling, his business, his residence or his nationality. The question whether this provision is applicable to the defendant who has violated it in the course of a procedure against himself, should—contrary to the Reichsgericht—be answered in the negative.

This follows from the generally accepted legal

<sup>2</sup> See EBERHARD SCHMIDT, *op. cit. supra* note 1, §136 n.11–13.

<sup>3</sup> 72 Entscheidungen des Reichsgerichts in Strafsachen 30 (decisions of the Reichsgericht in Criminal Matters).

<sup>4</sup> See KLEINKNECHT-MÜLLER, *KOMMENTAR ZUR STRAFPROZESSORDNUNG*, 4 Auflage, Anmerkung 2a zu §136 (Commentary of Criminal Procedure, §136 n.2a, 4th ed.).

concept of the "collision of interests" which says that a less valuable interest must stand back when it comes into conflict with a higher-valued interest. Beyond dispute, the privilege of silence *ad rem* as laid down in section 136(i), CCP, is higher in value than the average person's duty to give true particulars *ad personam*, established in section 360(8), CC, which penalizes the offender only with a fine up to 150 Deutsche Marks or with detention up to six weeks. Now in practice the enforcement of a true statement *ad personam* will in many cases violate and even defeat the higher-valued privilege of silence *ad rem*, because true particulars often throw light upon the identity of the offender and hence incriminate him *ad rem* and contrary to the statute. The predominant opinion<sup>5</sup> is therefore that the defendant has no duty—neither under procedural nor under substantive law—to answer or to answer correctly in regard to his particulars, and is not punishable under section 360(8), CC, if he refuses a declaration *ad personam* or gives false particulars.

(c) *Consequences of refusal to answer or of false statements.*

As mentioned, the CCP does not attach detrimental consequences to the silence or deliberate falsehood *ad rem* or *ad personam* of the defendant. This is not to say, however, that such demeanor should be always irrelevant in the sphere of substantive law. Adverse consequences of such nature are for example the following:

(i) Stubborn or insolent denials of the defendant can influence sentence, as is justly held by the Federal Supreme Court, especially in several decisions rendered in 1951.<sup>6</sup> In view of the fact that the defendant is not obligated under the law to make a confession, and any pressure used in this connection is prohibited, the Federal Supreme Court rules it to be inadmissible to assess a more lenient punishment only on account of a confession, and a more severe punishment only on account of a denial. Yet it justly takes the view that the court in considering the stubborn denial of a defendant is free to draw its conclusions as to the degree of his personal guilt, especially as to his lack of re-

pentance and dangerous criminal character. For this reason, the Federal Court goes on to say, the judge may deny mitigating circumstances or may make no allowance for the period of custody undergone awaiting trial or may impose a stiffer sentence.

(ii) The Federal Supreme Court<sup>7</sup> further holds that the silence or denial of a defendant may constitute or increase the danger of collusion and so may be relevant to the grant of a warrant of arrest.

(iii) Finally, the willingly false statement of the accused may constitute another criminal offense.<sup>8</sup> For instance if he in his defense declares the sworn incriminating statement of a witness to be a lie, this may incur punishment under section 164, CC (false accusation), or section 185 and following of the Criminal Code (defamation, slander, etc.).

*Other aspects of the privilege*

In the absence of a clear legal ruling criminal courts and law teachers have stretched the protection of the suspect from self-incrimination beyond his privilege of silence, and have developed the principle that the suspect is under no obligation to make an *active* contribution<sup>9</sup> to his conviction. In application of this principle the Reichsgericht<sup>10</sup> does not think it the suspect's duty to furnish a specimen of writing for the purpose of contriving a comparison of writings within the meaning of section 93, CCP, and it is generally accepted<sup>11</sup> that the suspect is not under the obligation, laid down generally in section 94, CCP, to surrender objects which might be of importance as evidence or are subject to confiscation.

While not being under an obligation to make an *active* contribution to his conviction, as was said above, yet the suspect is under an obligation to maintain a *passive* attitude in regard to measures which are instrumental in his conviction, i.e., he must tolerate them. His consent is not necessary. This applies in particular to his bodily examination as provided in section 81a, CCP, and to the taking of a blood-test (with the restriction that detri-

<sup>7</sup> MONATSSCHRIFT FÜR DEUTSCHES RECHT 532 (1952).

<sup>8</sup> See KLEINKNECHT-MÜLLER, *op. cit. supra* note 4, §136 n.3.

<sup>9</sup> See BELING, DIE BEWEISVERBOTE ALS GRENZEN DER WAHRHEITSERFORSCHUNG IM STRAFPROZESS (The Evidential Prohibitions in Criminal Proceedings as Limits to the Search for Truth) 11 (1903).

<sup>10</sup> 15 Entscheidungen des Reichsgerichts in Strafsachen 320.

<sup>11</sup> See BELING, *op. cit. supra* note 9, and EBERHARD SCHMIDT, *op. cit. supra* note 1, §94 n.17.

<sup>5</sup> See EBERHARD SCHMIDT, *op. cit. supra* note 1, §136 n.9, and HENKEL, STRAFVERFAHRENSRECHT (Law of Criminal Procedure) 223-24.

<sup>6</sup> 1. Entscheidungen des Bundesgerichtshofs in Strafsachen 103, 105 (Decisions of the Federal Supreme Court in Criminal Matters), and MONATSSCHRIFT FÜR DEUTSCHES RECHT (German Law Monthly) 440 (1951).

ments to his health shall not ensue), and further to the taking of pictures and finger-prints, measurements and other modes of action under section 81c, CCP, as well as the seizure of letters and telegrams written by him or addressed to him under section 99, CCP, the search of his dwelling under section 102, CCP, etc.

#### THE PRIVILEGE OF THE WITNESS

##### *The privilege of silence*

Section 55, CCP, provides:

(i) Every witness can refuse information as to all questions the answer to which might incur prosecution for himself. . . .

(ii) The witness shall be advised on his privilege to decline to answer questions.<sup>12</sup>

The question whether this provision applies also to the interrogation of the witness by the district attorney or the police is generally answered in the affirmative as far as paragraph (i) is concerned. It is, however, generally answered in the negative respecting paragraph (ii),<sup>13</sup> which appears unfortunate but cannot be helped *de lege lata*.

Section 55(i) establishes—other than section 136(i) for the defendant—no general right of the witness to decline to answer, but only the limited right to refuse information on any facts the description of which might incur punishment against himself. Section 55(i) is the outcome of the already mentioned basic principle that nobody is obligated to incriminate himself. The provision serves to protect the witness only, not the defendant, so that—according to the opinion of the Federal Supreme Court,<sup>14</sup> which, however, is not uncontested—a review on law does not lie on the defendant's behalf if the court has failed to advise the witness on his privilege of silence according to section 55(ii) CCP.

The declaration of the witness that he would take advantage of his privilege of silence is just as revocable as his declaration that he would make a statement.<sup>15</sup> If it is only at the trial that a witness

who prior to it had been heard by the district attorney or the police refuses to give evidence, then the court is, under section 252, CCP, prohibited from using his former statements. This applies also to the evidence of a witness who, contrary to section 55(ii), CCP, was not advised properly.<sup>16</sup>

Section 55(i) does not permit the witness to conceal from the court a fact endangering himself if he has not taken advantage of his privilege of silence. Rather is he in such case bound—this is, in contrast to the defendant—to tell the whole truth; and he will, under the CC, incur punishment by giving false evidence.

##### *Other aspects of the privilege*

The witness can refuse his consent to a bodily examination and the taking of blood for the same reasons as he can under section 55(i), CCP, refuse his testimony. This is provided for in section 81c(i), CCP. He is also not under the obligation to surrender objects which might have evidential value or are subject to confiscation (section 95(ii), CCP). However, the CCP does not go as far as to spare the witness such search or confiscation as might result in his criminal prosecution. Such action he is bound to tolerate, just like the suspect.

#### THE PRIVILEGE OF THE EXPERT

Under section 76(i), CCP, the expert is entitled to refuse to give his opinion for the same reasons as entitle a witness to refuse to make a statement, especially under section 55(i), CCP. So, all that in this connection was said about the witness will apply here correspondingly. A farther-reaching protection of the expert is not provided for by the CCP.

#### PRIVILEGES OF OTHER PERSONS

On behalf of persons other than the suspect, the witness, and the expert, a protection, within the scope of criminal proceedings, from self-discrimination is out of the question and therefore not provided for by the CCP. It is true that this statute does grant some other privileges of silence. These rights, however, have no bearing on the concept of the privilege against *self*-incrimination, because their objective is not to afford the privileged persons protection from self-incrimination, but protection from the incrimination of others, especially near relations, from conflicts of conscience, etc.

<sup>16</sup> 20 Entscheidungen des Reichsgerichts in Strafsachen 186.

<sup>12</sup> An important supplementing provision to §55 is §56, CCP. It says that the facts on which the witness grounds his privilege must be supported by evidence to the satisfaction of the court, and that the solemn declaration of the witness on oath is sufficient for that purpose.

<sup>13</sup> As to details, see EBERHARDT SCHMIDT, *op. cit. supra* note 1, §52 n.15.

<sup>14</sup> 1 Entscheidungen des Bundesgerichtshofs in Strafsachen 39.

<sup>15</sup> 63 Entscheidungen des Reichsgerichts in Strafsachen 302 and EBERHARD SCHMIDT, *op. cit. supra* note 1, §52 prelim. n.9.

It is for this reason that the near relations of the suspect have under section 52, CCP, in principle been conceded the privilege of silence. Again, under section 55(i), CCP the witness is entitled to refuse to answer if, otherwise, a near relation would be jeopardized with criminal prosecution. And under section 53 certain persons who are under the pledge of secrecy, e.g., clergymen, defense counsel, lawyers, doctors, etc., have also been granted the privilege of silence, unless they have been released from their duty to professional discretion.

#### SUMMARY

In the light of the foregoing observations, the following summary of the German law can be made:

The CCP affords the defendant, the witness, and the expert a very extensive protection from

self-incrimination. This protection is founded on a basic principle which has been generally acknowledged for more than a century and has in the Federal Republic become an integral part of the general sense of justice. Therefore it must be maintained unrestrictedly, all the more so since nobody, as far as is known, has demanded to narrow or repeal the relevant provisions after the breakdown of the Nazi-regime.

Within the Federal Republic of Germany, the Law of Criminal Procedure is exhaustively covered in the CCP, that is on a federal basis. As a result the German Länder, according to the provisions of the Basic Law, have no right to enact law pertaining to this matter. Thus, in the absence of a competitive sphere of legislative jurisdiction between the Bund (Federation) and the Länder, no problems of dual sovereignty can arise in this area in the Federal Republic of Germany.

#### E. Israel

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In his classic outline of the history and policy of the privilege against self-incrimination, Wigmore categorically states that the origin of the privilege was purely local (17th century—England) and that "in the other legal systems of the world it had no original place."<sup>1</sup> It is not so much in order to disprove that statement, nor to suggest that the Anglo-American concept of the privilege against self-incrimination may have been influenced by ancient Middle Eastern institutions, but rather in order to show how deeply this concept is entrenched in Israeli legal consciousness, that a short account is given of its origins in the law of ancient Israel.

The rule that no man may incriminate himself was first distinctly enunciated by Rava, who lived in exile in Babylon in the 4th century A.D.,<sup>2</sup> in the following terms: "a man is nearest to himself, and no man calls himself a wrongdoer."<sup>3</sup> Later

jurists have separated the two component parts of this rule from each other and have laid down the second part of the rule as a general prohibition of self-incrimination;<sup>4</sup> but the two parts of the rule have to be read together for a proper understanding of its origin.

Both near relatives and wrongdoers are incompetent witnesses. The incompetency of near relatives was based on an interpretation of the scripture<sup>5</sup> to the effect that a man may not be put to death either for the sins of his parents or of his children or because of, that is, on the testimony of, his parents or children.<sup>6</sup> The incompetency of wrongdoers was derived from the scripture, "put not thine hand with the wicked to be an unrighteous witness,"<sup>7</sup> which was read to mean that the wicked are bound to be unrighteous witnesses and therefore are incompetent.<sup>8</sup> It appears that incompetency to testify was not generally re-

<sup>1</sup> 8 WIGMORE, EVIDENCE §2251 at 304 (3d ed. 1940).

<sup>2</sup> At exactly the same time, Roman law provided specifically for judicial examination of accused persons under torture: THEODOSIAN CODE BOOK IX Title 35 (De Quaestionibus) at 250 (Pharr Trans.).

<sup>3</sup> Talmud Sanhedrin 9, 1.

<sup>4</sup> See, e.g., Rashi (Shlomo Yitzhaki) in his Commentary to Talmud Yebamot 25, 2.

<sup>5</sup> Deuteronomy 24, 16.

<sup>6</sup> Talmud Sanhedrin 27, 2.

<sup>7</sup> Exodus 23, 1.

<sup>8</sup> Talmud Sanhedrin 25, 1; Baba Kama 72, 2.



garded as a disqualification which one should do one's best to remedy, but rather as a welcome cause to evade the onerous duty of testifying. Not only was the punishment for false testimony very severe (namely the same punishment to which the accused had been liable, had he been convicted<sup>9</sup>), but if the accused was convicted of a capital offence, "the hands of the witnesses shall be first upon him to put him to death."<sup>10</sup> In addition, there may have prevailed then, as there prevails today, very good reasons for a potential witness not to get implicated in judicial proceedings. There cannot, at any rate, be any doubt that potential witnesses tried to disqualify themselves from testifying by asserting that they had committed this or the other offence or that they were leading dissolute lives, so as to bring themselves within the category of the "wicked" who had to be presumed to be "unrighteous" witnesses. It was in order to cure this mischief that Rava laid down his rule: as far as the incompetency of near relatives was concerned, none is nearer to a man than he himself, and if his near relatives are incompetent to testify against (or for) him, *a fortiori* must he be incompetent to testify against (or for) himself; but as far as the incompetency of wrongdoers is concerned, no man may be heard to assert that he is a wrongdoer *so as to disqualify himself as a witness*.

The incompetency to testify in one's own favour dates from a period earlier by at least two centuries than Rava's time. There is, for instance, a Mishnaic<sup>11</sup> text to the effect that the presumption that a woman is violated by the enemy while held as a prisoner cannot be rebutted by the solemn oath of her husband that "her hand did not move out of my hand from the day the enemy entered Jerusalem until he left," because nobody is a witness in his own cause.<sup>12</sup> (It was, on the other hand, always recognized that a man must be heard in his own defence, albeit not as a witness; and the Mishnaic law was that even after sentence had been pronounced, proceedings had to be reopened up to five times if the accused wished to argue something in his favour, provided it was an argument of substance.<sup>13</sup>) There was, thus, nothing revolutionary in Rava's ruling that a man is not competent to disqualify himself as a witness by

his own testimony: although self-incriminating, this testimony was in his own favour, because its purpose was to be released from the duty of testifying in another cause. In a different context, the same Rava even reduced the *ratio* of the prohibition of bribery to the formula, "no man will convict himself"—meaning that, having received a bribe, the judge might identify himself with the donor and thus become a judge in his own cause.<sup>14</sup>

Nor was there anything surprising in the subsequent evolution of Rava's rule into a general prohibition of self-incrimination. Indeed, the prior existence of a rule against self-incrimination, although not yet expressly formulated, may be deduced from several Mishnaic texts. Thus, a biblical instance of questioning a person accused of crime and obtaining his confession ("And Joshua said unto Achan: make confession and tell me now what thou hast done; hide it not from me. And Achan answered Joshua and said: indeed I have sinned... and thus and thus have I done"<sup>15</sup>) was interpreted in the Mishna as if the confession had been asked for and made only after trial and conviction and not before, and then only for the purpose of expiating the sin before God so as not to be revisited again after death.<sup>16</sup> Later jurists dismissed this and similar biblical stories simply as exceptions to the general rule,<sup>17</sup> although not a single instance of the application of any such rule occurs in the Bible.<sup>18</sup>

Or, where witnesses to a deed testified that at the time they had witnessed the deed they were incompetent for reason of their sinfulness, their evidence as to their witnessing the deed was held admissible and that as to their incompetency was held inadmissible.<sup>19</sup> Or, where a man came forward

<sup>14</sup> Talmud Shabbat 119, 1; Ketubot 105, 2.

<sup>15</sup> Joshua 7, 19–20.

<sup>16</sup> Talmun Sanhedrin 43, 2.

The confession of sin in repentance before God is, of course, always encouraged and at certain times (the day of atonement) even prescribed. But these confessions have no legal significance and are not admissible in evidence against the confessor or at all; it is a sin even to remind a man who has confessed before God of the misdeeds he had confessed to: Maimonides, Teshuva, 7, 8. (For a similar rule, cf. Canons 1755, 1757, Corpus Juris Canonici.)

<sup>17</sup> Maimonides, Sanhedrin, 18, 6.

<sup>18</sup> It is worthy of note that Lilburn, defending himself against the claim by the judges that he was, although an accused, under obligation to be examined, relied on the law of God for his refusal to answer (3 HOWARD'S STATE TRIALS 1315); but he gave no particular text in the scriptures as authority for his proposition, except Christ's trial by Pilate, and there stood at once corrected by the judges (See 8 WIGMORE, EVIDENCE §2250 n.103.)

<sup>19</sup> Talmud Ketubot 18, 2.

<sup>9</sup> Deuteronomy, 19, 19.

<sup>10</sup> Deuteronomy, 17, 7.

<sup>11</sup> The Mishna is the earliest part of the Talmud and was finally completed about 200 A.D.

<sup>12</sup> Talmud Ketubot, 27, 2.

<sup>13</sup> Talmud Sanhedrin 42, 2.

and said that he had killed a woman's husband, that woman could not, on the strength of such evidence, be allowed to remarry.<sup>20</sup>

The question thus arose whether a man's statement may be divided so that only the self-incriminating part would be inadmissible, whereas the neutral part would be admissible in evidence. In the case of the self-confessed murderer of the woman's husband, for instance, one school held that the confession would be admissible as evidence of the husband's death, but not of his murder by the confessor; another school held that the confession was indivisible and inadmissible for any purpose.<sup>21</sup> There finally emerged a rule that the neutral part of a confession is admissible only for the purpose of corroborating other independent evidence: thus, where the issue requiring proof is the death of a man, the evidence of a witness to the death may be corroborated by that part of the confession of the killer which testifies to the death having occurred; but the killing can never be proved by the confession of the killer even where corroborated by the evidence of one independent witness, because at least two witnesses are required, and the confessor is not a witness against himself.<sup>22</sup>

At about the time of the Mishna another rule had been laid down to the effect that the admission by a party to a suit that a debt was owed by him was tantamount to the evidence of a hundred witnesses.<sup>23</sup> This was well established law when Rava first enunciated his rule; and the fact that the concept of the prohibition of self-incrimination had existed and been recognized before Rava formulated the rule with regard to the competency of witnesses is also apparent from the way in which the conflicts between valid admissions and invalid confessions had been solved. Thus, where a man admitted to have raped or seduced a woman, or to have stolen a chattel, he could not on the strength of such admission be adjudged to pay a fine or otherwise be punished but would be held liable to pay damages to the injured party.<sup>24</sup> Or, where a man said to two others, I have stolen a sum of money from either the one or the other of you, but do not know from whom, he was held to be liable to both; another school held that where a man had admitted to have stolen money, and several persons came forward, each claiming that the money had been stolen from him, the stolen money was to be

deposited in court, and the thief would not have to pay more than once.<sup>25</sup>

In later times, the rule that the confession to a criminal act would serve as a civil cause of action, but would not be admitted as evidence in criminal proceedings, was applied to confessions of arson,<sup>26</sup> embezzlement,<sup>27</sup> the taking of usurious interest,<sup>28</sup> and, by analogy, of adultery—the confessing wife losing her claim to maintenance and other monetary benefits, but not her status as a married woman, and incurring no liability to be divorced or punished on the strength of her confession only.<sup>29</sup>

An early authority poses the question whether the injunction of the scripture, "Ye shall have one manner of law,"<sup>30</sup> should not be read to prohibit any distinction between civil and criminal law with regard to admissions and confessions; the question is answered in the negative, because the scripture itself says in civil causes, He shall pay, but in criminal causes, He shall die.<sup>31</sup>

The reasons underlying the rule against self-incrimination were at various periods differently expounded. The earliest version appears to be that as the scripture expressly commands, "at the mouth of two witnesses, or three witnesses, shall he that is worthy of death be put to death, but at the mouth of one witness he shall not be put to death"<sup>32</sup>—no one may be condemned otherwise than on the evidence of witnesses, as distinguished from the evidence of himself.<sup>33</sup> Maimonides adds a reason of his own, holding that a court may not inflict punishment on a man only because of his having confessed to a crime: "maybe his mind is disturbed in this matter, or maybe he is one of those melancholy and depressed persons who look forward to dying and are apt to run a sword through their bodies or throw themselves from a roof, and maybe such a person comes forward and confesses to a crime which he did not commit, so as to be put to death."<sup>34</sup> Another reason given was based on the words of the prophet that all souls are the Lord God's,<sup>35</sup> hence no admission by which a man may forfeit his life can be of any effect, his life being not

<sup>25</sup> Talmud Baba Metzia 37, 1.

<sup>26</sup> Rashba (Shlomo ben Aderet), 13th century.

<sup>27</sup> Mordechai (Mordechai ben Hillel Ashkenazi), 13th century.

<sup>28</sup> Ritba (Yomtov ben Avraham of Sevilla), 14th century.

<sup>29</sup> Maimonides, *Ishut*, 24, 18, (12th century).

<sup>30</sup> Leviticus 24, 22.

<sup>31</sup> *Tossefta Shevuot* 3, 7 (completed about 600 A.D.)

<sup>32</sup> Deuteronomy 17, 6.

<sup>33</sup> *Tossefta Sanhedrin* 11, 3.

<sup>34</sup> Maimonides, *Sanhedrin* 18, 6.

<sup>35</sup> Ezekiel 18, 4.

<sup>20</sup> Talmud *Yebamot* 25, 1.

<sup>21</sup> Talmud *Yebamot* 25, 2.

<sup>22</sup> *Hameiri on Sanhedrin* 1, 1 (13th century).

<sup>23</sup> Talmud *Gittin* 40, 2; *Kiddushin* 65, 20 *et aliunde*.

<sup>24</sup> Talmud *Ketubot* 41, 1.

his own but God's to dispose of, whereas his property is his own, and he may dispose thereof in any way he likes, including by the admission of debts.<sup>36</sup> Still another theory propounded was that if confessions were accorded any probative value in criminal proceedings, courts might be inclined to overvalue them, as King David did,<sup>37</sup> and thus be guilty of a dereliction of their own fact-finding duty.<sup>38</sup> Later jurists pointed out the real difference between civil admissions and criminal confessions to be that by an admission, an obligation was created which had only to be enforced by the court; whereas the conviction of a criminal offence was not in the nature of the enforcement by the court of an obligation voluntarily undertaken by a party but of a creation by the court of the party's liability.<sup>39</sup>

<sup>36</sup> Radbaz (David ben Zimra), 16th century.

<sup>37</sup> 2 Samuel 1, 16: "And David said unto him, Thy blood be upon thy head; for thy mouth hath testified against thee, saying I have slain the Lord's anointed."

<sup>38</sup> Joseph Ibn Migash (11th century).

<sup>39</sup> Levush Mordehai (Mordehai Epstein), 19th century.

With the emancipation of the Jewish communities and the loss of domestic criminal jurisdiction, the rule prohibiting all self-incrimination has become obsolete. In the new State of Israel, the English common law privilege has replaced the ancient Jewish law prohibition: self-incrimination is no longer regarded as unlawful *per se*, but is now left to the free choice of the individual concerned. But any suggestion that even the privilege should now be abolished and a person be made compellable to give evidence incriminating himself, would—whatever the weight and substance of the reasons prompting such reform—find no countenance in Israel. Although no part of a formal constitution, the principle is, in the words of Cardozo, "so rooted in the traditions and conscience of our people as to be ranked as fundamental"; and any attempt to further restrict its scope and application would be denounced as incompatible with democracy and the rule of law.

## F. Japan\*

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### HISTORICAL BACKGROUND<sup>1</sup>

It is not easy to realize the true picture of the Japanese system designed for protecting human rights against illegal or unfair exercise of investigating authority without having some preliminary knowledge about the historical background of the Japanese legal system. This is particularly true for an accurate understanding of the concept of the privilege against self-incrimination in Japan.

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<sup>1</sup> See also Abe, *Self-Incrimination—Japan and the United States*, 46 J. CRIM. L., C. & P.S. 613 (1956).

Therefore, a brief account of the democratizing process of the Japanese system is given.

### *Historical Sketch up to 1889*

From the 8th century down to the 1860's criminal justice in Japan was profoundly influenced by Chinese legal tradition. Ancient Chinese laws had been adopted and modified by feudal precedents and ordinances. The thought and philosophy basic to the administration of criminal justice were the result of a mixture of traditional Japanese morals under feudalism and the Japanese interpretation of Confucian ethics.

Since the 1860's the Japanese system of criminal justice has experienced two revolutionary changes. The first one occurred in the 1870's, following the

Meiji Restoration, under the influence of European legal culture, and the second one started in 1946 following the termination of World War II, under the influence of Anglo-American legal tradition.

In 1868 the Tokugawa Shogunate's Government collapsed and was succeeded by the more enlightened government of the Emperor Meiji. However, it took time for the new government to sweep away all the feudalistic remnants. For example, it was not until 1879 that legalized torture was entirely abolished. Beating and "Stone Holding" were common techniques employed to extort confessions from prisoners.<sup>2</sup> In the "Stone Holding" torture the prisoner was forced to sit upon a corrugated wooden seat, holding heavy flat stones of about 100 pounds each in his lap. Astonishingly enough, the criminal statutes of the 1870's retained the provisions for torture devices. Moreover, Article 318 of the Revised Criminal Code of 1873 provided that "the accused shall be found guilty by the conviction of the court based upon his confession." This provision, which declared the principle of "no conviction without confession," helped to enthrone confession as "the queen of evidence."

In 1876, being urged by Professor Boissonade, who had been invited from France by the Japanese Government to codify and modernize the legal systems of Japan, the government changed the wording of Article 318 of the Revised Criminal Code to provide that "the accused shall be found guilty by evidence."<sup>3</sup> This was the first step toward reformation. In 1879 the age-old torture system was statutorily abolished. In 1880 the Criminal Procedure Law drafted by Professor Boissonade after the model of French law was enacted. Thus, under the influence of the European culture of the 19th century, the new Japan gradually paved its way to the modernization of its legal system.

#### *Development under the Old Japanese Constitution*

Even prior to World War II Japan had a constitutional law which was to some extent based upon the principles of the rule of law and representative government. The Imperial Constitution of 1889 provided for the separation of powers and con-

tained a limited bill of rights. Under the Imperial Constitution criminal justice was administered under the law as enacted by the national legislature. However, Japan was far from being a modern democratic country in that she was reigned over and ruled by the Emperor, who was regarded as an incarnate deity and the ultimate source of sovereign power. The principal characteristic of this old regime was its compromise between the ideal of modern constitutionalism and the traditional principle of government by the Emperor. Under such constitutional monarchy the principle of the rule of law could not command its full implementation. The civil rights of the subjects were sometimes restricted by the administrative superiority of the Emperor's Government. It should be noted also that leading politicians and jurists in those days could not realize fully the significance of the rôle of the bill of rights.

Under the Imperial Constitution of 1889, the Penal Code of 1907 and the Code of Criminal Procedure of 1890 were enacted. The latter was replaced by the Code of Criminal Procedure of 1922. Judging from the wording of the new statutes, there seemed to be no substantial difference between the modernized criminal justice of Japan and that of a European country. Criminal justice based on these new laws was strongly influenced by German legal theories and considerably colored by the liberalism of the 19th century. For instance, the new system adopted the accusatorial system and the principle of trial on evidence. Thus, although the blueprint of the machinery of criminal justice under the new system was not too unsatisfactory, the practice went along in a direction divergent from that originally expected. The practice of coercing confession became rather common among the police; prisoners were kept "incommunicado" quite often; and the preliminary examination, which was kept secret from the public, became a sort of "Star Chamber" affair.

#### *Reform under the new Constitution of 1947*

The governmental system of Japan underwent a fundamental change when the "Constitution of Japan" came into force in 1947. This occurred during the occupation of the Allied Powers following the termination of World War II. Under the new Constitution, with the adoption of a revised parliamentary system, the establishment of the principle of a parliamentary cabinet and the securing of the complete independence of the judiciary, a

<sup>2</sup> For the details of the torture techniques employed in the feudal ages and prewar days in Japan see Abe, *op. cit. supra* note 1, at 613-619.

<sup>3</sup> For the event which moved Prof. Boissonade toward such action see Abe, *op. cit. supra* note 1 at 616 n.14.

democratic government has been established. The Emperor has descended from the position of incarnate god and has lost his political power. He is now nothing but "the symbol of the State and the unity of the people." Under the new regime the principle of the rule of law in its pure and perfect form has been embodied in the existing legal system through the constitutional guarantee of fundamental human rights and the creation of a system of judicial review over administrative and legislative action. With the establishment of the revised governmental system under this new Constitution, Japan has achieved the appearance of a modern democratic state at least from the legal aspect. It was against this historical background that the present code, the Code of Criminal Procedure of 1948,<sup>4</sup> was enacted. The functions of the reformed machinery of criminal justice in Japan can be appreciated only in the new light of the postwar regime.

As was mentioned before, the former Code of Criminal Procedure of 1922 was based in its entirety on European (particularly German) law, whereas the present Code of Criminal Procedure of 1948, which was enacted under the new Constitution of 1947, has largely adopted Anglo-American devices to protect human rights. The new Code is still based, however, on the Continental tradition of law in its general scheme. Thus, it may be said that the present system of criminal justice in Japan is a mixture of Continental (especially German) and Anglo-American traditions of law.

#### PARTICULAR PROBLEMS CONCERNING THE PRIVILEGE AGAINST SELF-INCRIMINATION IN JAPAN

##### *Is the Privilege Worthy of Retention?*

Is the privilege against self-incrimination worthy of retention? Despite the strong antagonism of Japanese criminal investigators toward the privilege, most Japanese lawyers seem to agree that the privilege is worthy of retention with or without qualifications. Article 38 of the Japanese Constitution proudly declares that "No person shall be compelled to testify against himself. . . ." Under the present criminal procedure, a suspect is entitled to be notified of the privilege against self-incrimination before being interrogated.<sup>5</sup> Thus, in starting interrogation most Japanese investigators reluctantly murmur the following prototype phrase: "You don't have to answer, if you don't want to." It is contended that such a me-

chanical warning does not help very much. The suspects may even take it as an ironical challenge. But there is no doubt that such a warning helps to remind the investigators themselves of their obligations to respect the privilege against self-incrimination.

In an article published a few years ago the author analyzed the concept of the privilege against self-incrimination in Japan from various angles and pointed out the high disciplinary effects of this constitutional device.<sup>6</sup> The author has no intention of reiterating all the discussions presented in the previous article. In this chapter, therefore, only highlights of the current issues in Japan will be given.

##### *The Privilege Against Self-Incrimination and the Right to Cross-Examination*

It is submitted that Japan was so hurried in adopting the concept of privilege against self-incrimination that she overlooked the possible unbalance between the privilege and the whole structure of traditional criminal justice.

Under Anglo-American law it has been well settled that once the accused has taken the witness stand he is assumed to have waived his privilege against self-incrimination and may be cross-examined by the prosecution with respect to what he stated in the direct examination. Strangely enough, Japanese law did not adopt this rule when it imported the concept of the privilege against self-incrimination. Under Japanese law a defendant is incompetent as a witness. This means that he cannot be sworn as a witness even though he may be willing. He may of course testify without taking an oath if he does so voluntarily; but since he is not sworn, he may conceal the truth or make a false statement without risking perjury.<sup>7</sup> Thus, he enjoys an absolute privilege even to refuse to answer the questions propounded by the prosecution or the judge with regard to the ambiguous points contained in his statement; the court is not allowed to consider the mere fact that the accused failed to answer by invoking his privilege. Such particular status of law strengthens the privilege against self-

<sup>4</sup>THE CODE OF CRIMINAL PROCEDURE (Law No. 131, July 10, 1948; enforced on January 1, 1949).

<sup>5</sup>THE CODE OF CRIMINAL PROCEDURE, art. 198, par. 2: "In the case of questioning mentioned in the preceding paragraph [*i.e.*, questioning of a suspect by a public prosecutor, public prosecutor's assistant officer or judicial police officer], the suspect shall, in advance, be notified that he is not required to make a statement against his will".

<sup>6</sup>See Abe, *op. cit.* *supra* note 1.

incrimination into a privilege of silence or even a privilege of false statement. Unquestionably this is impairing the spirit of even-handed justice.

### *The Privilege Not to Identify Oneself*

In interpreting the concept of the privilege against self-incrimination, most Japanese judges have been taking the position that the privilege should include the right to withhold one's own name and any other information which might identify oneself. Should the name of the accused be regarded as something which tends to incriminate him? Under Anglo-American law this question will generally be answered in the negative, except in particular cases where falsifying a name constitutes the essential part of a crime; in general, a name, although it is something of primary importance to investigators or the triers, is only a remote fact which rarely tends to incriminate a person. Under Japanese law, however, most judges and progressive scholars are prone to interpret this privilege as being in the accused's extreme favor. They adopt the concept in its logical pureness, eliminating or disregarding all the qualifications which have been imposed upon the concept in its long historical development under the Anglo-American system.

There have been many cases in which accused persons have not disclosed their names throughout the proceedings; most judges have taken such practice as a matter of course.

The first challenge to this practice was made in 1951 by the Sapporo High Court in the case of a communist appellant who, in filing the appeal, used the signature "Unknown X," which was not recognized as an ordinary signature required by the rules of criminal procedure. The court dismissed the appeal, holding that in filing an appeal the appellant was not entitled to use such a meaningless signature as a means of invoking the privilege against self-incrimination.<sup>7</sup> The reasoning was substantially based on the theory that because he actively asked the appellate court for a judicial

remedy, he, as the moving party, should reveal his name. However, the opinion of the court was criticized as conservative even by the judiciary on the theory that it required the appellant to make an unnecessary feudalistic courtesy in exercising his own right to appeal.

The second challenge was made in 1952 by the same high court in a case where the counsel filed an appeal in the names of three communist appellants "Unknowns X, Y and Z". The court dismissed the appeal as against procedure, holding in substance (a) that the privilege against self-incrimination might be invoked only at the stage of the main proceedings and with respect to the facts concerning crimes; (b) that the privilege did not authorize the appellants to conceal their names at the stage of preparing the main proceedings; (c) that the notification of appointment of the counsel made in the names of "Unknowns X, Y and Z" was illegal; (d) and that the appeal filed by the counsel illegally appointed was null and void.<sup>9</sup>

The theory proposed by the high court decision was confirmed by a recent Supreme Court decision. In 1957 the Supreme Court dismissed an appeal taken by communist defendants from a decision of the Tokyo High Court affirming a decision of the Chiba District Court which held that the notification of appointment of a counsel undersigned with defendants' jail numbers was null and void. In that case the court held that one's own name should not be regarded as a fact tending to incriminate oneself concerning which the accused had the constitutional privilege of non-disclosure.<sup>10</sup>

However, the view advocated by these judicial precedents has not been very popular among the majority of scholars and judges, although it has been enthusiastically accepted by practical-minded lawyers and investigators. It appears that in Japan the function of the privilege against self-incrimination is far-reaching, because most judges are (a) still giving the phrase "against himself" in Article 38 of the Constitution as broad an interpretation as "against his will on any ground" and (b) allowing the witness himself to judge the probability of self-incrimination.<sup>11</sup>

<sup>7</sup> Cf., THE PENAL CODE OF JAPAN, art. 169: "When a witness, who has been sworn in accordance with law, gives false testimony, imprisonment at forced labor for not less than three months nor more than 10 years shall be imposed." In this connection it may surprise Anglo-American lawyers to learn that in civil actions, while the parties can be sworn, should they give false testimony it would not constitute a crime of perjury since the provision concerning that crime applies only to witnesses, not to parties. Cf., THE JAPANESE CODE OF CIVIL PROCEDURE, arts. 336 *et seq.*, esp. arts. 338 and 339.

<sup>8</sup> Vol. 4, No. 5 High Courts Crim. Rep. 512 (Sapporo High Court 1951).

<sup>9</sup> Vol. 5, No. 10 High Courts Crim. Rep. 1653 (Sapporo High Court 1952).

<sup>10</sup> Vol. 11, No. 2 Sup. Ct. Crim. Rep. 804 (Grand Bench 1957).

<sup>11</sup> Vol. 6, No. 8 Sup. Ct. Crim. Rep. 975 (Grand Bench 1952).

*The Statutory Duty of Disclosure in the Quasi-Public Relationship*

Does the privilege against self-incrimination excuse the statutory duty of disclosure in the quasi-public relationship? This problem appears to have been of vital importance under American law.<sup>12</sup> It is becoming important also in Japan, where there are "a great number of administrative statutes which comprise specific provisions imposing upon citizens the duty to file reports, to keep records, to disclose records for official inspection, and to answer questions asked by administrative officials with respect to matters of quasi-public importance."<sup>13</sup> It is obvious that the draftsmen of these statutes were aware of the problem regarding the relationship between the privilege of non-disclosure and the statutory duty of disclosure, because some of those provisions requiring administrative reports or records contain a precautionary proviso that "the prescribed authority of questioning and inspection should not be interpreted as granted for criminal investigation."<sup>14</sup> However, because as a matter of fact in most cases an administrative investigation may reveal the facts tending to incriminate the subject person, this proviso has only abstract meaning.

Recently the problem of the constitutionality of the provisions requiring incriminating disclosure has been discussed in several cases. In 1948, a licensed custodian of narcotics, was prosecuted under the Narcotics Control Law for his failure to record an unlawful delivery of narcotics. The Niigata District Court and the Tokyo High Court held that the defendant was not guilty because, owing to the privilege against self-incrimination, he should not be compelled to record the unlawful delivery of narcotics. The prosecution appealed from the decision of the high court. In 1954 the Supreme Court reversed the decision of high court, holding that, despite the privilege against self-incrimination, the defendant had the duty of recording the illegal delivery of narcotics because he had consented to be controlled by the Narcotics Control Law when he applied for a position as a

licensed narcotics custodian.<sup>15</sup> This decision appears to have relied on the so-called "waiver by consent" theory.

Two years later the Supreme Court again held that the provision of the Narcotics Control Law requiring the recording of illegally handled narcotics was constitutional despite Article 38, Par. 1, of the Constitution.<sup>16</sup> In this case the Court relied upon the reasoning that the law imposing the duty of recording was constitutional because such control was required from the standpoint of public health. The theoretical basis of this reasoning appears to be (a) the consideration of the quasi-public relationship between the custodian of narcotics and the state and (b) the so-called the "generic class of acts" theory as proposed by Wigmore.<sup>17</sup>

Some other precedents also were based substantially upon the "generic class of acts" theory. For example, in a case where the issue was the constitutionality of the Alien Registration Law requiring the alien who had illegally entered Japan to apply for registration, the Supreme Court held that the law imposing the duty did not infringe upon the privilege against self-incrimination because the law imposed only the duty to apply for registration, not the duty to disclose incriminating facts.<sup>18</sup>

There are also a few high court decisions which are based substantially on the same theory and support the constitutionality of tax law provisions which required incidentally self-incriminating facts. For example, in a tax law violation case the Nagoya High Court held that the provision of the Corporation Tax Law, which punished the maker of a falsified income report, did not infringe upon the privilege against self-incrimination although the income had been illegally obtained by black marketing, because the provision required the report on the income itself, not the report on the illegal source of the income.<sup>19</sup>

Recently the dilemma between the privilege against self-incrimination and the quasi-official

<sup>15</sup> Vol. 8, No. 7 Sup. Ct. Crim. Rep. 1151 (2d Petty Bench 1954).

<sup>16</sup> Vol. 10, No. 7 Sup. Ct. Crim. Rep. 1173 (Grand Bench 1956).

<sup>17</sup> 8 WIGMORE, EVIDENCE §2259(c) (3d ed. 1940).

<sup>18</sup> Vol. 10, No. 12 Sup. Ct. Crim. Rep. (Grand Bench 1956). Also see Vol. 12, No. 1 Sup. Ct. Crim. Rep. 1 (1st Petty Bench 1958) holding that to request under the threat of punishment the presentation of an alien registration certificate does not violate art. 38, par. 1 of the Constitution, even if the request were made by the public officer for the purpose of criminal investigation of the name and residence of the alien.

<sup>19</sup> Vol. 4, No. 7 High Courts Crim. Rep. 704 (Nagoya High Court 1951); see also Vol. 5, No. 2 High Courts Crim. Rep. 160 (Tokyo High Court 1952).

<sup>12</sup> See, for example, Note, *Quasi-Public Records and Self-Incrimination*, 47 COLUM. L. REV. 838 (1947); Strasheim, *Agreements and Obligation to Waive the Right Against Self-Incrimination*, 32 NEB. L. REV. 577 (1953).

<sup>13</sup> E.g., THE INCOME TAX LAW, arts. 63, 64, 70; THE CORPORATION LAW, arts. 48, 49; THE NARCOTICS CONTROL LAW, arts. 37-50, 53, 72; THE GAS SUPPLY ENTERPRISE LAW, arts. 21-29, 46, 47, 58, 59.

<sup>14</sup> See, e.g., THE INHERITANCE TAX LAW, art. 60, par. 4.

duty of disclosure has been highlighted by a series of inferior court decisions concerning the constitutionality of a sort of "hit and run" provision in Article 67, Par. 2, of the Road Traffic Control Law Enforcement Ordinance.<sup>20</sup>

The Road Traffic Control Law, Article 24, Par. 1, provides: "In case where death or injury of a person or destruction of property has been caused by the traffic of a vehicle, horse or tram-car, the driver, crew or other worker thereof shall aid the victim and take other necessary measures in accordance with the provisions of ordinance." In amplifying this provision of law the Road Traffic Control Law Enforcement Ordinance, Article 67, Par. 2, further provides: "In the event that the driver of the vehicle, horse or tram-car mentioned in the preceding paragraph (or the crew or other workers thereof in case of an accident of the driver) has taken the measures prescribed by the preceding paragraph and does not find a police officer on the scene of accident, he shall immediately inform a police officer of the police station exercising jurisdiction over the place of the accident about the substance of the accident and the measures taken according to the same paragraph and shall receive directions from the officer as to whether he may continue to drive or leave the scene of accident." The first challenge to the constitutionality of Article 67, Par. 2, of the Ordinance was made in 1949 by the Kobe District Court, Amagasaki Branch. In a "hit and run" case, where the defendant left an injured pedestrian helpless, the court held that Article 67, Par. 2, of the Ordinance was unconstitutional, because it required the defendant to disclose the details of the accident, thereby possibly leading to his incrimination for negligent homicide.<sup>21</sup> In the same year, however, an opposing view was expressed by the Kobe District Court<sup>22</sup> and the Kagoshima Summary Court.<sup>23</sup> The former ruled that the provisions were constitutional on the ground that they were administrative provisions aimed at the maintenance of public welfare and had nothing directly to do with Article 38 of the

Constitution. The latter supported the constitutionality of the provisions on the theory that the necessity of the public welfare might restrain the constitutional privilege against self-incrimination. Both of these appear to depend upon the theory that even a constitutional right may be restrained by the necessity of public welfare, and the former has a slight implication of the "generic class of acts" theory.

One month later the holdings for constitutionality were rebutted by another decision rendered by the Akita District Court, Yuzawa Branch.<sup>24</sup> This court emphasized the short linkage between the required disclosure and the possible prosecution which may result from the data disclosed and declared the unconstitutionality of Article 67, Par. 2, because of its substantial compulsion to self-incriminating statement.

Recently, however, an eclectic view for constitutionality was propounded by the Utsunomiya District Court. In a "hit and run" case where the defendant, after giving emergency aid to two persons he injured, drove away without reporting to the police, the court held that Article 67, Par. 2 was constitutional insofar as it could be interpreted to require the defendant to inform the police of such facts as do not directly tend to incriminate him.<sup>25</sup> Under this theory it is enough for a driver hitting a person to inform the police of the fact of the accident without disclosing his name by personally reporting or anonymously telephoning or sending a message to the police. It should be noted also that in the course of reasoning the court made the following criticism of the traditional justification of "hit and run" statutes: It is improper to restrict the privilege of non-disclosure in the name of public welfare; if so, one might totally deny the privilege in criminal procedure because of the public nature of the criminal procedure which is designed to maintain welfare and security of the community. Thus, until the Supreme Court says its last word

<sup>24</sup> Decision of the Akita District Court, Yuzawa Branch, Aug. 19, 1959, 198 HANREI JIHO (Law Reports Times) 20 (1959).

<sup>25</sup> Decision of the Utsunomiya District Court, Oct. 17, 1959 (not yet published). Also see Decision of the Tokyo District Court (the 17th Division), Dec. 14, 1959, which expressed another eclectic view for the constitutionality of article 67, par. 2, on the theory that under the provisions a person may be punished for his failure to make a required report, but that such a report is inadmissible as evidence against him if the incriminating disclosure is made under the threat of punishment. However, this qualification does not satisfactorily function as a guaranty in cases where the disclosure is used as a clue.

<sup>20</sup> THE LAW FOR THE ENFORCEMENT OF THE ROAD TRAFFIC CONTROL LAW (Cabinet Ordinance No. 261 of 1953 with the latest amendment by Cabinet Ordinance No. 254 of 1958).

<sup>21</sup> Decision of the Kobe District Court, Amagasaki Branch, May 28, 1959, 189 HANREI JIHO (Law Reports Times) 6 (1959).

<sup>22</sup> Decision of the Kobe District Court, June 22, 1959, 195 HANREI JIHO (Law Reports Times) 8 (1959).

<sup>23</sup> Decision of the Kagoshima Summary Court, July 7, 1959, 195 HANREI JIHO (Law Reports Times) 9 (1959).



on this complicated problem, the ado over the constitutionality of "hit and run" provisions will continue.<sup>26</sup>

#### MAJOR DIFFERENCES BETWEEN AMERICAN AND JAPANESE CONCEPTS OF THE PRIVILEGE AGAINST SELF-INCRIMINATION

##### *Immunity Statutes and the Privilege Against Self-Incrimination*

In the United States "Immunity Statutes" seem to have been one of the most effective weapons of investigating authorities in their fight against organized crime that is guarded with the privilege against self-incrimination.<sup>27</sup>

In Japan there have been no remarkable movements toward enactment of such immunity statutes. Since the enactment of the Federal Compulsory Testimony Act of 1954, Japanese lawyers have been aware of the practical significance of the device. However, it is generally with academic interest that most Japanese lawyers regard it. The reason why the Japanese draftsmen are rather apathetic to this seemingly attractive device to control unbridled use of the privilege against self-

incrimination is psychological rather than logical. The wisdom on which "immunity statutes" are based is very simple. A child who has broken a window in conspiracy with his friends may say to the angry mother: "I will tell you who did it if you don't punish me, Mommy." And if the mother is very anxious to know, she may give immunity to her child and say: "O.K. Johnny, I won't punish you. Then tell me honestly who did it." This is the psychology of the immunity system. Perhaps Japanese government lawyers are too austere to relinquish their prosecuting authority in such a psychological game of give and take.

##### *Denial of the Privilege Against Self-Incrimination to Public Officials*

Although Japanese law expects public officials to cooperate with criminal investigations,<sup>28</sup> it does not go so far as to require public officers to waive their privilege against self-incrimination. Ethically, doubt has been expressed as to the propriety of permitting a witness to refuse to give testimony tending to subject him to subsequent prosecution, especially where a public officer as a witness invokes the privilege to cloak alleged malfeasance in office. Legally, however, public officials fully enjoy the privilege against self-incrimination, even when they are prosecuted for crimes closely related to their official duties. Strangely enough, there have been no movements toward legislation designed to restrict the privilege of government officials. Since there is no particular psychological factor hampering such legislation the reason for this legislative hesitance may be attributed to the fact that Japanese lawyers have been unfamiliar with this type of legislation. Very few lawyers in Japan have been aware of the fact that in some states of the United States there are statutes and precedents which, under the threat of dismissal, compel government officials to waive their immunity with regard to matters within the scope of their duties.<sup>29</sup>

<sup>28</sup> Cf., THE CODE OF CRIMINAL PROCEDURE, art. 239, par. 2, which provides: "When a government or public official in exercise of his function believes that an offense has been committed, he must lodge an accusation."

<sup>29</sup> See, e.g., Note, 64 HARV. L. REV. 987 (1951); Note, Claim of Immunity from Self-Incrimination by Public Officers, 64 U.S.L. REV. 561 (1950); NEW YORK CONSTITUTION, art. 1, §6 (as amended and effective Jan. 1, 1939); Cantelino v. McClellan, 282 N.Y. 166, 25 N.E.2d 972 (1940); Christal v. Police Comm'n 33 Cal. App. 2d 564, 92 P.2d 416 (1939); Goldway v. Board of Higher Educ., 37 N.Y.S.2d 34 (1942); Drury v. Hurley, 339 Ill. App. 33, 88 N.E.2d 728 (1949); LA REV. STAT., tit.3, §2426 (1950).

<sup>26</sup> Thus far no Supreme Court decision on this issue has been handed down. However, it should be noted that recently the Osaka High Court (Decision of Osaka High Court, Dec. 22, 1959) reversed the Kobe District Court decision, note 21 *supra*, and held the provisions to be constitutional on the theory that the provision should be interpreted to require the report which helps to identify the accident (e.g., date, place, and an outline of the accident and the name of the victim) but not to require the report concerning the circumstances which tend to show negligence on the part of a driver. The reasoning of the court complies by and large with the view of Assistant Professor Fujiki of Tokyo University as expressed in his recent article *Dorokotsu Torishimari Ho Shiko Rei 67-Jo 2-Ko to Mokuhiiken* (Art. 67, Par. 2 of the Road Traffic Control Law Enforcement Ordinance and the Right to Non-Disclosure) Vol. 12, No. 8 KEISATSU GAKU RONSHU (Police Science Review) 12 (1959). Judge Urabe expressed an opposing view to Mr. Fujiki's in his article *Jiko o okoshita Jidosha Untenshu no "Jiko no Naiyo" Hokoku Gimu to Mokuhiiken* (Duty of Reporting the "Substance of an Accident" by the Driver who Caused the Accident and the Right to Non-Disclosure), 20 HANREI HYORON (Law Reports Review) 3 (1959). He maintained that the broad wording ("Substance of the Accident") does not permit the limited interpretation as suggested by Mr. Fujiki and suggested a legislative specification of the wording. It should be noted that a legislative change is contemplated in accordance with the view of Judge Urabe. See also Tamiya, *Jidosha Jiko no Hokoku Gimu to Mokuhiiken* (Duty of Reporting an Auto Accident and the Right to Non-Disclosure), 189 JURIST 24 (1959), a useful comment on the recent decisions on this subject with specific reference to American cases on "hit and run" statutes.

<sup>27</sup> See, e.g., Comment, *Immunity from Self-Incrimination Under the Federal Compulsory Testimony Act*, 46 J. CRIM. L., C. & P.S. 679 (1956).

However, it is foreseen that the day will come when the draftsmen of Japanese law will be fully aware of the possibility of this type of legislation and start to move toward it.

*Non-Testimonial Disclosures and the Privilege Against Self-Incrimination*<sup>30</sup>

Should the privilege against self-incrimination excuse a person from producing a writing in his possession? If so, to what extent? Anglo-American law has answered the question in the affirmative, although it has been making continuous efforts to limit the scope of the privilege, which has been improperly far-reaching. In the course of these efforts, official documents and corporation records have been removed from the protection of the privilege on the basis of the "personal nature doctrine" or "public or quasi-public record doctrine."

However, most Japanese lawyers will doubt the rationale of the Anglo-American rule that a person shall be protected from the compulsory production of writing just as a person shall be protected from the coercive taking of evidential utterance from his lips. Once an incriminating piece of information has been embodied voluntarily in documentary material, the compulsory production of the material will be far less painful to the person who has given the information than the compulsory taking of the information from his lips.

Under Japanese law, the scope of compulsory search and seizure is interpreted to cover "any articles" whatsoever which the court believes should be used as evidence or liable to confiscation.<sup>31</sup> The phrase "any articles" has been interpreted to comprise any sort of real or documentary evidence which will be relevant and admissible in a court. Japanese law has no rule excluding documentary evidence simply because of its self-incriminating nature. The requirement of a warrant or an order of the court is a guaranty against a possible misuse of the system of compulsory production of articles.

In the United States the problem of compulsory taking of physical evidence, such as blood tests, alcoholic intoxication tests, etc., has been much discussed also under the topic of self-incrimination.<sup>32</sup>

<sup>30</sup> The points made in this and the following chapter appeared in substantially the same form in Abe, *op. cit. supra* note 1, at 627-29.

<sup>31</sup> Cf., THE CODE OF CRIMINAL PROCEDURE, arts. 99, 102 and 218.

<sup>32</sup> It should be noted here that Professor Inbau concluded from his historical survey of the development of

However, most Japanese lawyers will doubt the reason why this type of disclosure should be covered by the privilege against self-incrimination. Experience shows that the admission of such type of physical evidence has the most pleasing effect of killing the need for confession and of stimulating scientific investigation. Again a more flexible approach under the Japanese law will be noted.<sup>33</sup>

REEXAMINATION OF DUALISM OF STATE AND  
FEDERAL JURISDICTIONS AFFECTING THE  
SCOPE OF THE PRIVILEGE

In the eyes of Japanese lawyers the rule of dualism of state and federal jurisdictions as affecting the privilege against self-incrimination appears to be somewhat strange. The American federal rule of "dualism" established by the *Murdock*<sup>34</sup> case and elaborated by the *Feldman*<sup>35</sup> case "cuts into the very substance of the Fifth Amendment"<sup>36</sup> and is "subversive of the spirit and letter of the Bill of Rights."<sup>37</sup>

Let us ask, "What is the rationale of the dualism in the privilege against self-incrimination?" Wigmore's view was that (a) the privilege is not substantially curtailed by the dualism because the danger of prosecution is remote and (b) the difficulty of ascertaining what is criminal in another jurisdiction should make a different rule impractical.<sup>38</sup> Are these two corner stones of the dualism still sound today? The world has become much narrower than in the days of Wigmore. Not only the world but also the universe is becoming

the privilege that it was originally designed to prohibit "the practice of extracting incriminating statements from accused persons." INBAU, SELF-INCRIMINATION: WHAT CAN AN ACCUSED PERSON BE COMPELLED TO DO? 5 (1950).

<sup>33</sup> Under the Japanese law the problem of the admissibility of physical evidence is answered expressly in the affirmative by the provisions concerning "evidence by inspection (*kensho*)" and "expert evidence (*kantei*)."<sup>34</sup> See THE JAPANESE CODE OF CRIMINAL PROCEDURE, arts. 128 *et seq.*, especially art. 218, par. 2, providing for the taking of finger prints, foot prints, or photographs of the accused, and art. 167 providing for the possibility of confining the accused in a certain place if necessary for an expert examination, *e.g.* for an insanity test. To prevent misuse, all these means of compulsory taking of physical evidence are subject to judicial control in the form of warrants or orders of the court. In the Japanese courts physical evidence taken by these means is evaluated as the most reliable and scientific basis of fact finding. The witnesses lie often, but the things and circumstances do not.

<sup>34</sup> *United States v. Murdock*, 284 U.S. 141 (1931).

<sup>35</sup> *Feldman v. United States*, 322 U.S. 487 (1944).

<sup>36</sup> *Id.* at 498 (dissenting opinion of Black, J.).

<sup>37</sup> *McAllister, J.*, in *In re Watson*, 293 Mich. 263, 284, 291 N.W. 652, 661 (1940).

<sup>38</sup> WIGMORE, EVIDENCE §2258 (3d ed. 1940).

smaller. The technique of communication has made remarkable progress. Testimony in a court may be communicated to every corner of the country in a few hours through a network of mass-media, such as radio, television and newspapers. The police network also will be quick enough to detect new pieces of evidence against the witness using his testimony in a court as a clue. On this new basis a state witness might be prosecuted in a federal court and *vice versa*. Under such circumstances, it is not practical to say that a state and a federal jurisdiction are foreign to each other, as much the same relation as between "China" or "Peru" and the United States<sup>39</sup>; nor is it proper for a federal court to pretend to be "blind" to the laws and facts of a state jurisdiction and *vice versa*. The development of legal publications and the possibility of using legal experts are enabling state courts to know the law of a federal jurisdiction and *vice versa*. Now

<sup>39</sup> *Id.*, §2258.

that the two cornerstones of the dualism have lost their significance, is there any other reason for insisting on dualism?

It was noteworthy that the *DiCarlo*<sup>40</sup> and the *Adams*<sup>41</sup> cases proceeded a few steps toward a realistic solution of this problem, but did not reach it.

A fallacy of dualism appears most clearly in the application of immunity statutes. It is extremely unreasonable that a witness should be compelled to testify under an immunity statute in one jurisdiction while risking prosecution in another jurisdiction. This means trapping a person with a seemingly lawful device. A practical and realistic step toward the elimination of this fallacy is urgently desired.

<sup>40</sup> *United States v. DiCarlo*, 102 F. Supp. 597 (N.D. Ohio 1952).

<sup>41</sup> *Adams v. Maryland*, 347 U.S. 179 (1954).

## G. Norway

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No precise doctrine regarding self-incrimination is to be found in Norwegian or Scandinavian law as is the case in Anglo-Saxon law, but certain of the principles which are derived from the Anglo-Saxon doctrine are applicable in the Scandinavian countries. Thus a person who is charged or accused has no duty to give a statement (apart from his name, position and address) to the police or to the court, and he can make a false statement without being liable to punishment.<sup>1</sup> He cannot confirm his statement by oath.

A witness, as a rule, has a duty to give a statement in court and to confirm his statement by oath. If the questioning implies that the witness is suspected of an offense, he can demand to be charged, and then he has no duty to answer. Nor has he a duty to answer if his answer will expose him to the danger of losing the respect of his fellow citizens.<sup>2</sup>

<sup>1</sup> *PENAL CODE OF 1902*, §167.

<sup>2</sup> *CRIMINAL PROCEDURE ACT OF 1887* (hereinafter called CPA), §177. See also *PENAL CODE*, §167.

When the question arises as to what extent the accused in other ways has a duty to cooperate with the solution of the case in view, the legal position in Norway (and in the other Scandinavian countries) is very dubious in many respects. Thus the extent to which an accused person may be subjected to various forms of frisking, tests, and so on, is somewhat vague.

According to the Norwegian Criminal Procedure Act it is permitted to search a person who on reasonable grounds is suspected of having committed an act for which the maximum statutory penalty is higher than a fine, if there is reason to believe that the search will lead to the discovery of evidence against him.<sup>3</sup>

Although the Criminal Procedure Act has no clear provisions on the point, it is assumed that the right to search also includes an examination of *the body* of the accused. The aim for such an examination may be to find scratches, bites, punctures caused by a hypodermic needle, and the like, on the

<sup>3</sup> CPA, §221.

body of the accused.<sup>4</sup> It is characteristic of this examination that it only has to do with the *external* condition of the body and that it does not exceed the process of observation.

The legal position is more doubtful when it comes to the question of the admissibility of performing an operation or the like on the accused, in order to obtain evidence against him. Examples of such actions are gynecological examinations, stomach pumping, blood tests, etc. As regards blood tests, there is a clear authority in the motoring laws permitting the testing of a person whom there is good reason to suspect of having driven a motor vehicle in an intoxicated condition.<sup>5</sup> (A person who has, when driving, more than 0.5 promille (per thousand) concentration of alcohol in the blood is considered as intoxicated<sup>6</sup> and is usually sentenced to at least 21 days imprisonment.) The general opinion in Norway is that the provision in respect of blood tests in the motoring laws is practical and important to the clearing up of the case, and that it does not constitute any unreasonable invasion of the rights of the person charged.

Corresponding provisions in respect of blood tests are found in Danish and Swedish law.

It is not clear to what extent the police have the right to take a blood test from persons other than those who are suspected of having driven a motor vehicle in an intoxicated condition. In practice, however, a blood test is sometimes taken in such a case, and there has been, as far as I know, no occasion when the person involved has opposed the test. At any rate, the courts have not been faced with the problem of the legality of such an examination undertaken against the wishes of the person tested.

Furthermore, it is doubtful how far an accused person may be subjected to similar forms of corporal examination or operation.

One might perhaps say that it is the current Norwegian law that operations or the like on an accused person, in order to obtain evidence against him, can only be undertaken against his will when authority for the procedure exists in the *written* law. In this connection it can be mentioned that some years ago the Supreme Court decided that a woman suspected of having undergone an illegal abortion

could not be compelled to submit to gynecological examination.<sup>7</sup>

Physical examination of the accused can involve a fourth type of evidence, the so-called evidence of identity (fingerprints, photographs, confronting with witnesses, handwriting tests, etc.). In this field, too, we have no clear legal provisions in Norway. However, the question whether an accused person is bound to give fingerprints did come before the Supreme Court in 1929 and 1935, and in both cases the court decided that the accused was so bound.<sup>8</sup> The court reached its decisions mainly by analogous reasoning, recalling the provision in the criminal law that an accused person is bound to give his name, position and address.<sup>9</sup>

With regard to the other forms of evidence of identity, there is no legal precedent, but it may surely be assumed that the accused is also bound to permit his photograph to be taken, submit to confrontation, etc.<sup>10</sup> In practice accused persons do not generally protest against partaking of such examinations.

Finally another type of investigation will be dealt with: The use of the lie-detector, narcoanalysis and similar chemical or technical media whose purpose is to solve the question of guilt. In Norway these measures have not hitherto been employed during investigations. Moreover, it is probably not permissible to employ them, even if the accused person consents to the measure.

In recent years the question of the permissibility of such measures has been discussed at some length by professional men in the Scandinavian countries,<sup>11</sup> and it seems to be the general view that the measures should be entirely excluded from the systems of criminal law, at any rate until they have reached a higher degree of reliability than is the case to day.

It must be added that narcoanalysis has been undertaken in a number of cases in Denmark and in Sweden in connection with psychiatric observation of the accused, but the purpose has not been to bring to light whether the accused has committed the crime he was suspected of but rather to gain information concerning his state of mind. The

<sup>7</sup> Norsk Retstidende (Nor. Law Rep.) 204 (1936).

<sup>8</sup> Norsk Retstidende (Nor. Law Rep.) 221 (1929) and 1088 (1935).

<sup>9</sup> PENAL CODE, §333.

<sup>10</sup> See BRATHOLM, PAAGRIPELSE OG VARETEKTSFENGSEL (Arrest and Detention Before Trial) 258 (Oslo 1957).

<sup>11</sup> See references in BRATHOLM, *op. cit. supra* note 10, at 258 n.39.

<sup>4</sup> It is generally held that CPA, §221, authorizes such an examination of the body of the accused.

<sup>5</sup> THE LAW OF MOTOR VEHICLES OF 1926, §17.

<sup>6</sup> *Ibid.*

accused has, of course, in all cases consented to the narcoanalysis.

It may be mentioned that in Norway there is no exclusionary rule, and there is reason to believe that evidence obtained by illegal means in most cases will be admitted.

In conclusion one may say that although in Norway—as in the other Scandinavian lands—there is no doctrine corresponding to that in Anglo-Saxon law on self-incrimination, there is in these countries a limit to what the accused may be subjected to. But at present it is far from clear in many types of cases where the line should be drawn. The absence of a fixed doctrine has brought it about that the accused—and in some cases counsel as well—are not aware of the possible rights of a charged person in this respect, and this again leads to the fact that problems seldom arise

in practice. Most persons, when charged, consent to the inquiry desired by the police, because they believe that it is their duty to cooperate. Many, too, are anxious to avoid the aggravation of suspicion that would be caused by refusal to submit to investigation. As contact with Anglo-Saxon law improves, there is good reason to believe that more and more persons will become aware of the problem of self-incrimination, and thus more attention will be devoted to it in theory and in legislation. In that connection it can be mentioned that a committee was appointed a couple of years ago with the responsibility of drafting a new criminal procedure act for Norway.<sup>12</sup>

<sup>12</sup> The chairman of the committee is Professor Johs. Andenaes, Director of the Institute of Criminology and Criminal Law, Oslo.