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# **"PRESERVING INDIVIDUAL LIBERTIES: EXPLORING THE NATURE AND SCOPE OF THE RIGHT AGAINST SELF-INCRIMINATION IN THE DIGITAL AGE"**

AUTHORED BY - AYUSH RAI

## **ABSTRACT**

The privilege against self-incrimination, protected in Article 20(3), is one of the most compelling rights in Part III of the Constitution. The founders of the Constitution considered it to be sacred, and its significance has been emphasised in several legal rulings worldwide. The right in question is widely recognised as the ability of the accused to legally choose not to answer incriminating questions.

The law changes with the times so that it can stay connected to the changing social order. Because the court is in charge of interpreting the law, it is important that they stay up to date on all the changes happening in society. Thieves no longer lack access to technology. Today, thieves are the ones who use high-tech tools to commit crimes. The constitutionality of science tests like narco analysis, P-300, and polygraph is in question because courts have recently started to accept these tests, which they didn't get before.<sup>1</sup> So now there is an urgent need to seriously think about whether it is constitutional from the point of view of human rights.

## **RESEARCH QUESTIONS**

How do judicial interpretations of the right against self-incrimination in India, as reflected in Supreme Court judgments, balance the need for effective law enforcement with the protection of individual rights in the context of technological advancements?

To what extent does the evolving landscape of technology challenge the traditional boundaries of the right against self-incrimination in legal systems?

What are the practical implications and limitations of technologies such as Narcoanalysis or P300

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<sup>1</sup> Bhat Waseem Ahmad, 'Dilemma Created by the Privilege Against Self Incrimination' (2019) 9 GJLDP (April) 30

Test/Brain Mapping on the right against self-incrimination, and how should their use be regulated to ensure a fair legal process?

## **RESEARCH GAP**

The efficacy of existing legal safeguards in mitigating potential abuses or violations of the right against self-incrimination during technological interventions requires more scrutiny. An assessment of the practical effectiveness of these safeguards will contribute valuable insights to discussions on maintaining a fair and just legal system. The paper is a sincere attempt to fill this gap.

## **SCOPE AND LIMITATION**

This project meticulously explores the intricacies of the right against self-incrimination, emphasizing its significance in the context of emerging technologies, with a particular focus on the judicial interpretation by the Supreme Court of India. While the study offers a comprehensive analysis of specific technologies like narcoanalysis and P300 Test/brain mapping, it is confined to the Indian legal framework, limiting its scope to a specific jurisdiction. While advocating for the judicious use of technology, the study refrains from prescribing explicit policy recommendations, leaving room for further research and nuanced considerations in this evolving legal landscape.

## **METHODOLOGY**

This project employs a multi-faceted research methodology to comprehensively investigate the interplay between the right against self-incrimination and technological advancements. The study primarily relies on a thorough review of legal literature, statutes, and landmark judgments, with a particular emphasis on decisions rendered by various courts of India. A qualitative content analysis approach is employed to extract nuanced insights and patterns from these legal sources.

To address gaps in empirical research, the study integrates case studies and examples to illustrate practical implications. Furthermore, a critical analysis framework is applied to assess the effectiveness of the right against self-incrimination and the impact of specific technologies, such as narcoanalysis and P300 Test/brain mapping.

## HYPOTHESIS

This project posits that the evolution of technology poses challenges to the traditional contours of the right against self-incrimination within the legal framework. It is hypothesized that advancements in interrogation technologies may introduce complexities in the delicate balance between individual rights and effective law enforcement. The judicial interpretation by the Supreme Court of India is expected to play a pivotal role in defining the parameters of this right in the digital age. The study anticipates that while technology offers enhanced investigative tools, there exists a delicate equilibrium between the protection of individual liberties and the imperative of gathering evidence.

## INTRODUCTION

The right to remain silent, also known as the right against self-incrimination, is seen as a manifestation of a core principle and honorable aspiration that a person accused of a crime should not be exposed to the distressing experience of self-accusation, lying under oath, or disrespect. The preference for the accusatorial system of criminal justice administration over the inquisitorial system is because the latter may use brutal tactics of questioning, torture, and abuse to collect self-incriminating evidence.

The right against self-incrimination, according to Justice Iyer, is a compassionate provision. It ensures the credibility, honesty, and immutability of the individual under suspicion. Converting an adversary system to an inquisitorial system within the hostile antechamber of a police station constitutes a denial. It is critical that investigative agencies refrain from employing minimally invasive methods in order to circumvent the just and equitable investigative process. Respect is due to the investigating officer whose agitation causes his fists and intellect to spin.<sup>2</sup>

Law enforcement sometimes employs aggressive tactics during investigations to extract information from suspects. India, as a civilized society governed by the principles of rule of law, cannot allow such methods. India has consistently adhered to the principle that evil cannot be eradicated by resorting to more evil. Thus, it is crucial for the police to ensure that their interrogation methods adhere to the legal frameworks and stay within the permissible limits. Therefore, modern investigators now rely on scientific evidence, which combines the principles of

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<sup>2</sup> *Nandini Satpathy v P.L. Dani* (1978) 2 SCC 424

science and law. They utilize various scientific techniques such as narco analysis, brain mapping, and polygraph to uncover the truth from criminals in exceptional cases. It is important for all investigators and forensic experts to adhere to the principles of fair play and unbiased approach when applying scientific methods. These scientific evidences should be used in a responsible manner.

The aim of this research article is to analyze the accused's entitlement to refrain from speaking in three different scenarios, namely, whether this entitlement may be regarded as a basic right; the extent to which it has safeguarded the accused's interests against coerced confessions and testimony; and the limitations that have been established regarding this right and lastly, the paper critically analyses the various scientific tests prevalent in the country, their validity and evidentiary value.

## NATURE AND SCOPE OF THE PRIVILEGE

The Right to Silence and Article 20(3) of the Indian Constitution is discussed in the 180th Report of the Law Commission of India.<sup>3</sup> The research states that one of the most basic principles of common law is the freedom to keep quiet. The basic premise is that parties and prosecutors shouldn't be able to convince courts or tribunals to presume guilt only because an accused individual chooses not to answer questions. One of the cornerstones of the right to stay quiet is the protection against self-incrimination.

A person's right to stay quiet is as firmly embedded in American law as the presumption of innocence. Moreover, according to the rule of common law, no one may be forced to testify against him in any way, either before or during the trial.<sup>4</sup> A defendant has the right to a fair trial, which incorporates the following: the right to a presumption of innocence; the right to be silent; the right to decline to testify; and the right to not be compelled to produce evidence that would incriminate oneself. Evidence collected in an equitable way and about the consequences of expressing one's opinions.<sup>5</sup>

Therefore, the right against self-incrimination is a perplexing provision in criminal process.

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<sup>3</sup> Law Commission of India, *Proposals for Constitution of Hi-Tech Fast-Track Commercial Divisions in High Courts* (Law Com No 180, 2003)

<sup>4</sup> *R v Camane and others* 1925 AD 570, 575

<sup>5</sup> *R v Kuzwayo* 1949 3 SA 761 (A) 767

Essentially, the privilege refers to the right of a suspect to refuse to divulge incriminating information to the police, which may be used as evidence against them in a criminal prosecution.<sup>6</sup> It is crucial to first explore the essential aspect of privilege, focusing on its least contentious implementation. Non-defendants may be compelled to testify during a trial, and failure to answer questions may result in being held in contempt of court or other legal consequences.<sup>7</sup>

The law does not hesitate to employ strict measures in order to get witnesses to collaborate, with a few exceptions like spousal privilege. However, defendants provide a whole other set of challenges. A defendant is protected from having to testify due to the privilege against self-incrimination. The fundamental right of a defendant is the right to remain silent if he desires.<sup>8</sup> A defendant's refusal to testify is often seen as incorrect, at least at trial, according to this concept, which seems to function in some form or another in different countries. The challenge, however, is in providing an explanation for why this is considered incorrect.

The common arguments include "safeguarding individual privacy," "+preserving personal autonomy (Fox Hunt Theory)," and "preventing the imposition of cruel choices on alleged offenders."<sup>9</sup> However, there are other issues that need to be addressed, such as ensuring the preservation of victims' rights, providing witness protection, and conducting thorough and efficient investigations, among others.

Article 20(3) of the Indian Constitution guarantees the right to remain silent. In order to prevent oneself from being implicated, the accused has the basic right to be protected, as guaranteed in this article. A person is not being coerced into becoming a witness against himself if he willingly answers the questions as a witness and thus gives up his right to stay quiet. Article 20(3) does not apply in cases when the accused's bodily parts are exposed for identification reasons, such as where a thumb, palm, foot, or finger imprint, or specimen of handwriting is involved, as stated in the case of *State of Uttar Pradesh v Boota Singh*.<sup>10</sup>

Subsection (2) of section 161 of the Code of Criminal Procedure grants an individual the right to

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<sup>6</sup> Mike Redmayne, *Rethinking the Privilege against Self-Incrimination* (vol. 27, Oxford Journal of Legal Studies, no. 2 2007) 209-232

<sup>7</sup> The Indian Penal Code 1860, s 179

<sup>8</sup> *Supra* Note, 6

<sup>9</sup> William J. Stuntz, 'Self-Incrimination and Excuse' [2016] Columbia Law Review, vol. 88, 1227-1296

<sup>10</sup> *State of Uttar Pradesh v Boota Singh* 1978 AIR 1770

remain silent during police interrogation if they believe that doing so “would have tendency to expose him to a criminal charge or to a penalty or forfeiture,” which is an exception to the right to remain silent guaranteed by the Indian Constitution. In addition, no party to the case may remark on the accused’s inability to provide evidence under Section 315(1)(b). Based on the following provisions, it can be concluded that they establish a presumption of innocence and a presumption of guilt, provide a right to silence during investigation and trial, and prohibit court or any investigating officer from violating the right to silence of the accused or witness.

From what we can see, the Constitution and the CrPC’s respective sections are easy to understand and apply, that the right to remain silent is a prerequisite for the constitutional right to do so as outlined in article 20(3). The former is crucial in order to comprehend and interpret the latter. Thus, the freedom to remain silent can be considered a fundamental privilege. Moreover, the aforementioned reasons and explanations are founded upon the assumption that a suspect’s decision to decline answering self-incriminating inquiries is not only allowed, but also ethically and socially acceptable behaviour.

## JUDICIAL INTERPRETATION

The comprehensive extent of the protection against self-incrimination cannot be fully understood without acknowledging the significance of the historic ruling by the U.S. Supreme Court in *Miranda v. State of Arizona*.<sup>11</sup> The Chief Justice of the Supreme Court, Earl Warren, gave the majority decision. He explained the rights and privileges that a person accused of a crime has under the Fifth and Sixth Amendments of the U.S. Constitution. These rights are commonly referred to as Miranda Warnings or Miranda Rights. According to these warnings, they must be given to a person accused of a crime in the following manner:

- “You have right to be silent.
- If you say anything, it can be used as incriminating evidence in the court of law.
- You have the right to have a counsel present during any interrogation.
- If you cannot afford a counsel, one will be appointed for you if you so desire.
- Do you understand the rights which just read to you? With these rights, do you wish to speak to me?”<sup>12</sup>

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<sup>11</sup> *Miranda v State of Arizona* 1966 SCC OnLine US SC 112

<sup>12</sup> *Ibid*

In India, the extent of the privilege was brought into question before the Supreme Court in 1954 in the case of *M.P. Sharma v. Satish Chandra*.<sup>13</sup> In this case, a 5-judge bench discussed the interpretation of the term 'to be a witness' for the first time. The main concern brought up in this case was the interpretation of the phrase "to be a witness." Does it encompass providing any kind of evidence, or is it limited to only giving oral testimony? The Supreme Court expanded the proposition to encompass not just written and oral statements, but also any documentary evidence that may be required to be presented. The Court said "to be a witness" in Article 20(3) means nothing more than 'to furnish evidence'. Bare literal interpretation Article 20(3) would be to rob the guarantee of its substantial purpose and to miss the substance".

The expansive depiction of the privilege was significantly restricted in a later eleven-judge panel of the Supreme Court of India. The majority ruling in the case of *State of Bombay v. Kathi Kalu Oghad*<sup>14</sup> established that the phrase "to be a witness" refers to the act of providing information that is derived from the personal knowledge of the one providing the information. This definition encompasses only the act of delivering personal testimony, which is contingent upon the individual's own will. "To be a witness may be equivalent to furnish evidence in the sense of making oral or written statement based on personal knowledge and nothing more than that, hence it does not include signatures, fingerprints, footprints, blood samples, thumb impressions, hair samples etc."

As a result of the emergence of sophisticated technologies and the implementation of diverse methodologies in criminal investigation, this privilege was once more challenged in a number of appeals before the Supreme Court of India. A few cases deviate from the norm as well. The taking of a suspect's likeness, audio recordings, blood samples, hair samples, etc., may be requested as a condition of cooperation with an investigation.<sup>15</sup> In the case of *Selvi v. State of Karnataka*<sup>16</sup>, the Five judge Bench of the Supreme Court of India strongly opposed the use of any of the techniques mentioned above. They believed that using these techniques would violate the right against self-incrimination. However, the court permitted the implementation of these techniques through voluntary administration.

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<sup>13</sup> *M.P. Sharma v Satish Chandra*, 1954 AIR 300

<sup>14</sup> *State of Bombay v Kathi Kalu Oghad* 1961 AIR 1808

<sup>15</sup> *V. S. Kuttan Pillai v Ramakrishnan & Anr* AIR 1980 SC 185

<sup>16</sup> *Selvi v State of Karnataka*, AIR 2010 SC 1974

## EFFECTIVENESS OF THIS RIGHT IN PROTECTING THE RIGHTS OF ACCUSED

To comprehend the advantages of exercising the right to remain silent for the accused, one might refer to the research undertaken by Shmuel Leshem. “In his study, Leshem examined the works of H. Mialon,<sup>17</sup> as well as the work of D. Siedmann and A. Steinx.”<sup>18</sup> Leshem argues that the right to silence serves as a limitation placed on a jury to prevent the accused from being deemed guilty only due to their refusal to speak, especially when there is a lack of evidence that incriminates them.

In his study, Leshem carefully examined the various outcomes that could arise from an accused person exercising their right to remain silent. His findings indicate that the introduction of this right does not impact the decision of innocent suspects to refrain from confessing. However, it challenges the notion that innocent suspects remain silent due to false concessions. However, when an innocent suspect chooses to speak, whether they have the right to remain silent or not, it can work in their favour. This is because if the right to remain silent does exist, it can cause a guilty suspect to change their strategy from confessing to remaining silent. Based on the sequence of events, it appears that the likelihood of the guilty suspect choosing to remain silent is higher compared to the likelihood of confessing when the right to silence is not present. Thus, in cases where individuals have the right to remain silent, juries are less likely to convict if the evidence contradicts the suspect's statements.

Therefore, in the absence of incriminating evidence, if an innocent suspect exercised his right to remain silent and did so voluntarily, the advantage of this application would be a jury restriction that forbids the conviction of a suspect who remains quiet, instead of claiming that the privilege motivates the culpable suspect to go from admitting guilt to remaining silent. The research conducted by Leshem demonstrates that the right to remain silent safeguards innocent individuals, irrespective of their decision to stay silent, so ensuring their protection.

The right to silence serves as a significant protection for the accused, as demonstrated in the case

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<sup>17</sup> D. Seidmann, & A. Stein, ‘The Right to Silence Helps the Innocent: A Game-Theoretic Analysis of the Fifth Amendment Privilege’ [2000] Harv. L. Rev, vol. 114, 430-510

<sup>18</sup> Shmuel Leshem, ‘The Benefits of a Right to Silence for the Innocent’ [2009] USC Center in Law, Economics and Organisation, Research Paper Series and Legal Series Research Paper Series, Research Paper no. C11 - 19

of *R. B. Shah v D. K. Guha*<sup>19</sup>, where it was determined that this right can be exercised immediately after a FIR has been filed against the accused. Additionally, the Nandini Satpathy case established that the right to silence also shields the accused from psychological pressure. However, these benefits can only be obtained if the locations and reasons for which protection can be granted are understood. Moreover, in the well-known *Selvi v. State of Karnataka*<sup>20</sup> case, it was effectively decided that, in light of recent national and international developments pertaining to an individual's right to life and liberty (as protected by article 21 of the Indian Constitution), polygraph examinations and narco-analytic tests are obviously in violation of the right against self-incrimination under article 20(3) of the constitution.<sup>21</sup> Given the close connection this article has to the right to silence, using lie-detector tests to extract forced testimony or obtain forced evidence is clearly an infringement on the accused's right to exercise his right to silence. In other words, a different set of circumstances may have allowed the accused to opt out of speaking during the inquiry.

### IS THIS AN ABSOLUTE RIGHT?

According to the seventh chapter of the examination conducted by the Scrutiny of Acts and Regulations Committee (Parliament of Victoria - The Right to Silence: An Examination of the Issues), there can be challenges that arise when individuals choose to exercise their right to remain silent. Here are some of the claims:<sup>22</sup>

- 'Professional' or 'hardened' criminals exploit this privilege to remain silent.
- The right to remain silent can also impede police investigations; an evaluation must be conducted regarding the reduction in the likelihood of charges being filed.
- The prosecution may encounter challenges during a trial due to the right to remain silent, specifically when confronted with an "ambush" defence. In addition to a heightened probability of unwarranted acquittals, this issue may also result in protracted trials as the prosecution would be required to present evidence to refute the entire spectrum of possible defences.
- This privilege may also result in a substantial quantity of acquittals.

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<sup>19</sup> *R. B. Shah v D. K. Guha* 1973 AIR 1196

<sup>20</sup> *Supra* Note, 16

<sup>21</sup> V.N. Shukla, *Constitution of India* (EBC Explorer, 13th edition 2019)

<sup>22</sup> Satadru Goswami and Ranjini Das, 'Article 20(3) : A Constitutional Mandate or A Prisoner's Dilemma?' (2009) 2.1 GNLU L. Rev. 189

Indeed, the right to remain silent as stated in article 20(3) is not unrestricted. An examination of the verdicts rendered in specific instances might enhance our comprehension of this stance.

Firstly, the case of *Prahlad v State of Rajasthan*<sup>23</sup>, which was determined on November 14, 2018, might be cited. An eight-year-old girl was raped and murdered. In this case the accused was proclaimed a person who had purchased sweets for her from a sweet shop. After which the victim was not seen. The victim's father filed a formal complaint (FIR) against the defendants. The latter subsequently filed appeals in an attempt to be exonerated of the conviction orders and verdicts. Regarding the appeal, the court found the accused guilty of murder under Section 302 IPC but granted him a benefit of doubt for the crime covered by Section 4 of the POSCO Act. The most notable aspect of this case was that the accused did not address the section 313 CrPC accusation about when he parted ways with the victim. Concerning the topic of what transpired after the accused bought chocolates for the victim, no answer was given either. A negative conclusion is drawn about the accused as a result of his silence in a situation when he is expected to provide an explanation. The Court drew an adverse conclusion from the convict's silence and found him guilty of the eight-year-old victim's murder because this man was the last person anybody saw the youngster with, and he wouldn't explain what happened after that and instead chose to remain silent. Therefore, in this instance, the accused's silence worked against him.

The case of *Ramnaresh & Ors v State of Chattisgarh*<sup>24</sup> also exemplifies a scenario that demonstrates the right to silence as a right that is not absolute. The appellate Court emphasized that "the Court would be entitled to draw an inference, including adverse inference, as may be acceptable to it in accordance with law".

Therefore, it can be inferred that the accused's right to remain silent does not necessarily put the prosecution at a significant disadvantage during the interrogation process. It has been demonstrated in various court rulings that the right of an accused person is not without limitations. There have been instances where the accused's decision to remain silent and not provide any explanation has resulted in the court making unfavorable inferences against their interests.

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<sup>23</sup> *Prahlad v State of Rajasthan* SCC Online SC 2548 (2018)

<sup>24</sup> *Ramnaresh & Ors v State of Chattisgarh* (2012) 4 SCC 257

## SCIENTIFIC TESTS AND THEIR VALIDITY

### NARCOANALYSIS

The semantic construction of narcoanalysis asserts that it is a kind of psychoanalysis that utilizes medicines to create a sleep-like condition.<sup>25</sup> The first examples of the recognition that drugs may potentially be used to enhance contact with the suspect during questioning can be traced back to 1916. Arthur S. Lovenhart<sup>26</sup> stumbled onto the creation of barbiturate while doing experiments with respiratory stimulants, just by chance.<sup>27</sup> When the medications stated above are injected into the patient's body, it induces a condition of comatose ness in the individual. The individual seems to be in a state of slumber.<sup>28</sup>

The aim of this programme is to help individuals express and explore their suppressed emotions, thoughts, and memories that they may not typically feel comfortable sharing.<sup>29</sup> It is commonly thought that individuals may sometimes be untruthful in order to avoid recalling certain memories, and this is typically done by relying on their own imagination.

Therefore, when these specific medicines are administered, the subject's imagination is suppressed, preventing the reflexes or impulses to lie from functioning as they would in normal circumstances. At this juncture, individuals struggle to differentiate between their limitations and their actions.<sup>30</sup> The medicine inevitably induces garrulousness, hence promoting unconstrained speaking.<sup>31</sup>

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<sup>25</sup> *Supra* Note, 13

<sup>26</sup> B. Yamuna Saraswathy and R.B. Rishabh, 'India's Call on Scientific Criminal Investigations' 2.1 VSLR (2020)54

<sup>27</sup> Anupama Katakam, 'The Truth Serum Trial', (*Frontline*, 12 March, 2004) <<https://www.google.co.in/amp/s/frontline.thehindu.com/the-nation/article30221420.ece/amp/>> accessed 8 January 2024

<sup>28</sup> Shrabasti Sarkar, 'Right to Silence in India- An Analysis of its Scope, Use and Efficacy' (2022) Volume 8 Issue 2 *Journal of Legal Studies and Journal* <<https://thelawbrigade.com/wp-content/uploads/2022/04/Shrabasti-Sarkar-JLSR.pdf>> accessed 8 January 2024

<sup>29</sup> Macdonald John, 'Narcoanalysis and Criminal Law' [1954] 111 *Am J Psychiatry*, 283, 288

<sup>30</sup> Jenika Binotto, Sukhman Chahal, Shahbaz Khan, Banji Li and Amanda Risle, 'A General Review of the Chemisfry and Utility of Scopolamine' <<http://www.ucalgaiy.ca/~bali/chem353/article/oofinal/oofmal.htm>> accessed 8 January 2024

<sup>31</sup> Grof Stanislav, 'The Discovery of LSD And Its Psychedelic Effect' [2001] *Multidisciplinary Association for Psychedelic Studies*

## **P300 TEST/BRAIN MAPPING**

Dr. Lawrence A. Farewell patented the P300, also known as the brain mapping test, in 1995<sup>32</sup> after its development began in the mid-1990s.<sup>33</sup> One such technique is “brain wave fingerprinting,” which entails subjecting the suspect to a series of inquiries designed to elicit information specific to the incident. As a result, the individual wears sensory pads on both sides of their head and has an image-generating LCD installed over their eyes.<sup>34</sup> Here, detectives will show the subject photographs that they believe may be connected to the crime or that they believe the subject is exaggerating. The brain cells are activated by specific electrical impulses when any of these pictures are recognized remotely.<sup>35</sup>

## **THE POLYGRAPH/THE LIE DETECTOR TEST**

The basic idea behind this forensic technique is that when certain questions are posed to an accused person, they respond with a mix of thoughts and physical actions. Some people’s bodily responses might reveal whether they are lying or trying to avoid answering a question directly, according to popular psychological theories. Such behaviours are clinically symptomatic of stress on the individual, and stress is always accompanied by elevated heart rate, high blood pressure, and a rapid pulse rate. The polygraph machine, which has sensors connected to the patient, accurately measures this.

The interrogators build a meticulously constructed questionnaire that begins with questions for which the answers are already known. As a result, after the baseline has been established, any deviation in the participants' physical parameters is believed to be a lie.

## **CONSTITUTIONAL VALIDITY**

In the past few years, the way crimes are investigated has also seen the use of scientific interrogation methods with the traditional third-degree interrogation. These scientific techniques are used specially in those cases where police is not able to find any relevant information regarding the case in hand through physical interrogation. But the question is: Won’t it be the same as self-incrimination if the subject agrees to say it with the help of scientific research?

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<sup>32</sup> Director and Chief Scientist, Brain Wave Science, Iowa, USA

<sup>33</sup> Lawrence A. Farwell, ‘Brain Fingerprinting Brief Summary of the Technology <[http://www.forensic-evidence.com/site/Behv\\_Evid/Farwell\\_sum6\\_oo.html](http://www.forensic-evidence.com/site/Behv_Evid/Farwell_sum6_oo.html)> accessed 8 January 2024

<sup>34</sup> Liquid Crystal Display Screen

<sup>35</sup> *Supra* Note, 31

Article 20(3) of the Constitution of India says that this raises the question of whether it is legal. Therefore, any assertions produced through these scientific examinations shall be regarded as testimonials and shall not be admitted as evidence, as they violate Article 20 (3). Additionally, it is important to note that virtually every nation in the world grants its citizens the right to remain silent. In a similar fashion, the law protects both accused and witnesses from self-incrimination in India. This section evaluates the legal validity of the scientific experiments in question.

The correct position regarding constitutional validity of these techniques is widely discussed by Gautam Bhatia in his book<sup>36</sup> where he talks about “Two Models of the Criminal Process” given by US jurist Herbert Packer in 1964 which are: ‘crime control model’ and ‘due process model’. The crime control model primarily focuses on the end result of the criminal proceeding and for that it does not take into account how relevant information is extracted from the persons involved in that particular matter. Whether it is by interrogation or by unusual means like third degree etc., it does not matter in crime control model. On the contrary, the due process model focuses on how relevant information got extracted; if that information was extracted by force or coercion, the Court will not consider that information. In particular the due process model always takes the process of getting information into consideration.

The author also focused on the Selvi judgement and endorsed the judgement as it is the first judgement in India which is given on the lines of “due process model”. In this judgement the court not only talked about the preservation of the bodily privacy but also the mental privacy which subsequently got upheld in the case of K S Puttaswamy vs Union of India<sup>37</sup>. In Selvi case the Court ruled that the use of such neuroscientific investigative techniques constituted testimonial compulsion and it violates an accused person's right against self-incrimination under Article 20(3), and their right to life and personal liberty under Article 21 of the Constitution. The court held that Article 20(3) cannot be read into isolation instead it should be read in harmony with other fundamental rights by taking reference from the case of Maneka Gandhi vs Union of India<sup>38</sup>.

Both the polygraph and P-300 utilise probes and electrodes, without any form of direct invasion. The investigation relies solely on the analysis provided by doctors, who base their findings on the

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<sup>36</sup> Bhatia, Gautam, *The Transformative Constitution: A Radical Biography in Nine Acts*, 2019, Harper Collins, pg. 299-325.

<sup>37</sup> K.S. Puttaswamy and Anr. vs. Union of India ((2017) 10 SCC 1

<sup>38</sup> Maneka Gandhi v. Union of India, 1978 AIR 597

patient's psychological reports. During these tests, the subject does not provide any verbal responses while the investigation is conducted. However, it may not be compelling the accused but in a way, it is the breach of the mental privacy of the accused person. As of narcoanalysis, the practice remains contentious due to its execution via drug administration into the subject's body. The subject's mental state is altered during this examination through the administration of sedatives, as previously mentioned. Consent of the suspect is a critical factor that must be taken into account during narcoanalysis. Both are also breaching the Right to Privacy of accused which is now a fundamental right and using these techniques without the consent of the accused will lead to the breach of his mental privacy and if the accused got compelled for these tests, then it will lead to compulsion and directly violative of Article 20(3).

But in few cases<sup>39</sup>, Indian High Courts have affirmed the validity of scientific tests, such as narcoanalysis. In these instances, the constitutionality of the proceedings was upheld on the grounds that obtaining legal authorization prior to the administration of the test does not constitute self-incrimination. This also shows disparity among ruling of different high courts in India even after having the ruling of the Apex Court in Selvi judgement.

### **EVIDENTIARY VALUE**

The Evidence Act, 1872 governs the rules and procedures of the admission of confessions and evidence in a court of law.<sup>40</sup> In order for a material or confession to be considered as evidence, it must meet certain criteria. The court has the discretion to either accept or reject such evidence. Sections 24 to 30 of this legislation pertain to the courts' ability to accept confessions as evidence. The aforementioned regulations specifically state that any confession made while in a mentally disturbed state or under the influence of inducement or threats is not acceptable as evidence in court. Hence, it is evident that any statement provided by the defendant during a narco analysis test cannot be deemed admissible as evidence due to the influence of narcotic substances, which impairs the defendant's mental stability under such circumstances.<sup>41</sup>

The stance was established in the Selvi case, whereby the Supreme Court determined that narco

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<sup>39</sup> Ramchandra Reddy v State of Maharashtra 2004 ALL MR (Cri) 1704

<sup>40</sup> The Indian Evidence Act 1872, s 24

<sup>41</sup> Khagesh Gautam, 'The Right Against Self-Incrimination Under Indian Constitution & the Admissibility of Custodial Statements Under the Indian Evidence Act, 1872' (2021) Indiana University Maurer School of Law <<https://www.repository.law.indiana.edu/cgi/viewcontent.cgi?article=1090&context=etd>> accessed 8 January 2024

analysis is illegal and legally null, irrespective of whether the authorities have the individual's agreement prior to performing such a test. The narco analysis test is also subject to scrutiny under other criminal laws, such as the Penal Code, 1860, and the Criminal Procedural Code. According to the Penal Code, 1860, causing harm to force someone to reveal information or administer harmful drugs is a grave offence that can be punished by law. As a consequence, narcoanalysis is deemed an unethical scientific investigation technique in violation of all criminal legislation in the nation. However, in certain circumstances, Section 45 of the Evidence Act allows for the admission of expert opinions, which was used by some high courts to authenticate the findings of scientific inquiry methods like as polygraph testing and brain mapping. However, in such cases it should not be given blind importance as court is an expert's expert.<sup>42</sup>

## CONCLUSION

It is important to recognise that justice must be upheld without compromising fundamental rights. There would have been much more cases of prison abuse and forced testimony if the founders of the Constitution had omitted the right against self-incrimination. The legal system would have been compromised if evidence had been extracted by coercion. Therefore, finding a harmonious equilibrium between individual rights and the State's responsibility to administer justice is crucial. Nevertheless, it is apparent that India has a very low percentage of criminal convictions<sup>43</sup>, many a times, real accused gets acquitted due to lack of prima facie case against him and hence, this issue requires further scrutiny. The Supreme Court, in the case of D.K. Basu v. State of West Bengal<sup>44</sup>, recognised the pressing need to advance scientific techniques for investigations and interrogations where court also observed that resorting to the use of brutal ways to torture the accused, known as third degree methods, is a direct violation of the fundamental principles of the rule of law. Several high courts in India have also issued rulings in favour of these tests.

In my opinion these scientific methodologies may aid in eliciting the facts from the perpetrator, hence enhancing the rate of conviction. But my focus is more on the "due process model" and the credibility of these techniques is still questionable due to lack of transparency in the manner these techniques are used because these techniques are only understandable by the experts and the person

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<sup>42</sup> Sri Bachappa v Smt. Lakshamma @ Lakshamma Regular Second Appeal No. 1208 of 2021 (Par)

<sup>43</sup> Arun Bothra, 'Why is our conviction rate so low?', (The New Indian Express, 21 February 2019) <<https://www.newindianexpress.com/opinions/2019/feb/21/why-is-our-conviction-rate-so-low> 1941680.html> accessed 8 January 2024

<sup>44</sup> D.K. Basu Versus State of West Bengal (1997 (1) SCC 416)

on whom these tests are administered will have to rely only on the report of these tests. Especially in the case of narco analysis where the accused is not in conscious situation, and it is very easy for the police to get the report twisted according to his desired result of the case.

I also found out that many courts in India are giving the permission for these scientific tests without going into the details that the consent for these tests from the accused is derived in which manner, is it really voluntary or it is obtained from the accused through undue influence or coercion or by using third-degree on him. It is done especially in those cases where police is not able to get any information from the person in custody even after administering the third - degree. In such cases, also the court are not considering the due process model which clearly violates the rights of the accused.

In my opinion Selvi judgement is still not applied strictly in true sense throughout the country and the need of the hour is to adhere to it wholly. Also, the Government should make necessary changes in law as to clarify the position regarding the administration of these tests on the person in custody and must form guidelines like in which cases it can be done, the presence of persons while these tests are administered, authenticity of the report etc.

As in present world the technology is growing day by day it is also necessary to adopt for getting convictions in criminal cases but on the other hand, we must ensure that the use of technology must not in any manner violate the fundamental right of the accused and for that the “due process model” is the best suited model.

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