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CRITICAL ANALYSIS OF THE JUDICIAL TREND OF RIGHT AGAINST SELF-INCRIMINATION IN INDIA

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Abstract

It has been rightly observed that the investigation of crime involves dual conflicting interests, wherein, the state being the upholder of law and order in society is expected to bring the culprit to justice; on the other hand, the state is constitutionally bound to respect the fundamental rights of its subjects. The State is expected to investigate the crime efficiently, however at the same time it is also expected to encourage civilized standards of enforcing criminal justice that are the precondition for maintaining and respecting the fundamental right to privacy of the person accused of having committed a crime. Thus, how these conflicting interests should be harmonized is still remaining a million-dollar question. In this article, attempts have been made to critically analyze the fundamental right against self-incrimination in light of landmark judicial pronouncement.

1. Introduction

In India, right against self-incrimination is a fundamental right and the same has been enshrined under article 20(3)[2] of part III of the Constitution of India. Article 20(3) of the Constitution of India symbolizes the already established rule of common law jurisprudence in US and UK, according to which, a person can't be compelled to be a witness against himself or to testify against his wishes which may incriminate him in criminal trial. The fundamental cannon of English jurisprudence assume that the accused must be presumed innocent unless the contrary is proved. The principle of 'presumption of innocence' in favor of the accused is a cardinal principle of fair trial rights of the accused and the same has been recognized in India through substantive and procedural laws since the commencement of the Constitution. The Indian Evidence Act provides that burden of proving guilt of the accused lies on the prosecution and

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[2] See footnote number 15.

it never shifts.[3] And, the prosecution is required to prove the guilt of the accused beyond reasonable doubt.

Though in India, privilege against self-incrimination is inspired from US but such a privilege is available only in restricted manner. The courts had literally interpreted article 20(3) in number of cases. Article 20(3) states that, no person 'accused of any offence' shall be 'compelled to be a witness' 'against himself', which makes it clear that rights under article 20(3) are available only to person who is accused of having committed an offence. Thus, privilege against self-incrimination in India 'literally' do not extend to protect 'witnesses of offence'; hence, they could be compelled to be a witness against themselves. In ***MP Sharma v Satish Chandra***[4], the Supreme Court of India had discussed the scope and applicability of article 20(3) of the Constitution. The Court held that the right under article 20(3) represents following essential ingredients;

1. Right under article 20(3) is available to 'accused of an offence'
2. Right under article 20(3) is a protection against 'compulsion to be a witness'.
3. Right under article 20(3) is a protection against compulsion to be a witness 'against himself'.[5]

Whereas, in United States Fifth Amendment provides that, **'no person'** shall be compelled '**in any criminal case**' to be a witness against himself. The expression 'no person' under Fifth Amendment is very broad in nature accommodating in itself the accused, suspects and witnesses. Thus, in U.S. privilege against self-incrimination is available to accused as well as witness.

2. Right available to a person accused of an offence

In this part I shall be discussing 'who is accused' according to the judicial interpretation and then the scope of right against self-incrimination under article 20(3).

[3] Section 101 of the Indian Evidence Act states, 'Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist. When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.'
[4] AIR 1954 SC 300.
[5] See also Narain Lal v M.P. Mistry, AIR 1961 SC 29.

In the case of ***R.K. Dalmia v Delhi Administration***[6] and ***K. Joseph v Narayana***[7] the Supreme Court defined 'accused of an offence' as; 'A person in ordinary course of nature is said to be an accused against whom formal accusation of charges relating to the commission of offence has been made by the law enforcement agencies which might ultimately result in his prosecution and conviction in trial before judge.' In ***M.P. Sharma v Shatish Chandra***[8], the Court held that the actual commencement of trial or inquiry before the court is not necessary to level a person as accused of having committed an offence.[9] However the Court held that a person whose name appears in the First Information Report[10] or against whom investigation has been ordered by magistrate can claim privilege against self-incrimination.[11]

The expression 'accused of an offence' appended to article 20(3), when interpreted literally, makes it explicitly clear that the right under article 20(3) is available only to accused and witnesses are not entitled to this right.[12] In ***Vera Ibrahim v State of Maharshtra***,[13] the Supreme Court made it clear that the suspects of criminal offences who were arrested by police at the relevant time of crime, on the basis of credible suspicion of having involved in the commission of an offence under the Bombay Police Act and against whom panchanama was prepared but the FIR was not lodged, were not entitled to privilege against self-incrimination.

In another case, it was held that where a person had been arrested by custom officials for the violation of provisions of Sea Custom Act and inquiry was issued against him, was not entitled to protection under article 20(3) as there was no formal accusation of offence against him.

Moreover, in the landmark case of ***Delhi Judicial Service Association v State of Gujarat***[14], it was held by the court that in contempt cases, mere pendency of contempt proceedings or issue of process against the accused does not make him entitled to right under article 20(3) as the contemnors are not to be considered as 'accused of having committed an offence'. Also, it was held that proceedings of the Court in contempt cases are substantially different from criminal proceedings in ordinary offences, and because contempt proceedings are not criminal

[6] AIR 1962 SC 1821 .
[7] AIR 1964 SC 1552.
[8] AIR 1954 SC 300
[9] AIR 1954 SC 300.
[10] See section 154 of Cr.P.C.
[11] Supra
[12] Supra
[13] 1976 AIR 1167, 1976 SCR (3) 672.
[14] Delhi Judicial Service Association v State of Gujarat, (1991) 4 SCC 406.

proceedings for an offence, therefore mere pendency of contempt proceeding shall not be regarded as criminal proceedings only due to the fact that the consequences of contempt proceeding may impose punishment on contemnor. Furthermore, the court held that the position of contemnor is vitally different from that of an accused of an offence under the provisions of IPC etc., reason being, even if the contemnor is found to be guilty of having committed contempt of Court, he may be ordered by the Court to tender a written apology and the Court may, on its own motion, discharge him of contempt charges. But the same is not possible in the trial of other offences.[15]

On the basis of abovementioned observations, it can be stated that the scope of privilege against self-incrimination is much narrower in India. Needless to say, that before the judgment of the Supreme Court in ***Selvi v State of Karnataka***[16], we were lagging way behind in respect of availability of privilege against self-incrimination in comparison to U.S. and UK. Initially in India, privilege against self-incrimination could be claimed as a fundamental right only by the accused. Suspects and witnesses were out of the scope of article 20(3) which was not so in the case of U.S. and UK. But after Selvi's judgment privilege against self-incrimination has been extended to cover witnesses and suspects of crime.

3. Compulsion to be a witness

This constitutes the second ingredient of article 20(3) according to which the protection under article 20(3) is against compulsion to be a witness. The Supreme Court in ***M.P Sharma v Shatish Chandra***[17] interpreted the expression 'compulsion to be a witness' in a incredibly broad manner and held that the expression 'compulsion to be a witness' would cover oral, documentary and testimonial evidences i.e. the accused can't be legally compelled to give either oral or documentary or testimonial evidences which may have tendency to incriminate him in trial before the Court. Also, it was held by the court that the prosecution is barred from compelling accused to testify not only in a court premise but also any statement obtained previously by compelling the accused for the purpose that it may likely to support the case of prosecution against accused in the court in his trial. Thus, privilege against self-incrimination is available to the accused during his trial as well as before police during investigation. 'Interestingly the court held that accused can't only be compelled to give oral evidences but

[15] Supra
[16] AIR 2010 SC 1974
[17] M.P Sharma v Shatish Chandra, AIR 1954 SC 300.

also any compulsion to produce documents or compulsory intelligible gestures by accused would also be considered as 'compulsion to be a witness' against his/her wishes'. ***The interpretation which was adopted by the supreme court in this case of the expression 'compulsion to be a witness' indicated that compulsorily extracting fingerprints, signature and handwriting specimen of the accused against his wishes offend his fundamental right guaranteed under article 20(3) of the constitution.*** At one hand the judgment in this case by the Supreme Court being pro fair trial rights of accused was applauded by human right activists but on the other hand this judgment was criticized by law enforcement agencies as it created some serious practical problems for investigative agencies that are responsible for effective and efficient investigation.

In ***State of Bombay v Kathi Kalu Oghad***[18] the Supreme Court overruled its previous ruling in MP Sharma's case of the phrase 'compulsion to be a witness' by holding that the Court in that case the Court provided very wide interpretation of the expression 'compulsion to be a witness' and the same required to be narrowed down. First of all, the court held that 'to be a witness' is substantially different from 'furnishing evidence'. Self-incrimination is only when the accused is being compelled to testify/furnish information based upon his 'personal knowledge'. What is prohibited under article 20(3) is compelling a person to testify against his own wishes on something based upon his personal knowledge. But, merely a mechanical process through which evidence is being produced before court for the purpose of making any material issue pertaining to a case in question unambiguous, without being based upon his personal knowledge, must not be qualified as self-incriminating evidence. Consequently, furnishing of oral or written evidences or production of documentary evidences or testimonial evidences that are relevant in the case in question to determine the guilt or innocence of the accused must not be considered as violation of article 20(3). Thus, furnishing 'finger impression', 'signature' and 'handwriting specimen' though they seem to be amounting to 'furnishing evidence' however they are not included within the expression 'to be a witness' as in all of these cases the testimony is not personal in nature as well as these evidences are relevant to determine the guilt or innocence of the accused in the case. The Court also held that search or seizure warrant, compulsory taking of photograph of accused would also be out of the purview of the expression 'to be a witness'.

[18] State of Bombay v Kathi Kalu Oghad, AIR 1961 SC 1808.

Furthermore, in ***State v M. Krishna Mohan***[19], the constitutional validity of Kathi Kalu Oghad's[20] judgment was unanimously upheld by the Supreme Court. Thus, furnishing 'finger impression', 'signature' and 'handwriting specimen' were declared not be offending article 20(3).

In this case, no formal accusation of charge was made against the accused rather he was treated as witness initially in the police case and his statements were recorded by police under section 161 of Criminal Procedure Code but at later point of time, he was made accused in the complaint filed before magistrate in the same case. The appellant contended that as he was made accused in the complaint filed before magistrate, the statements obtained by police previously from him must be considered as violative of article 20(3). The Court, however, held that the appellant was not entitled to privilege against self-incrimination under article 20(3) as no formal accusation of charge was made against him at the time of statement under 161[21] Cr.P.C. by police. Thus, the court in this case again made it clear that the protection under article 20(3) is available only to a person against whom formal accusation of charge has been made i.e., the accused.

Also, it was held by the court that the information furnished through statements under 161[22] of Cr.P.C. by accused which had enabled police authorities to the discovery of facts relevant for the case in question under section 27[23] of the Indian Evidence Act is admissible in evidence before court and not offending article 20(3).

4. Compulsion to be a witness against himself

The privilege against self-incrimination enshrined under article 20(3) comes in picture where the accused person has been compelled to make involuntary statements that may have tendency of incriminating him in criminal trial. Here compulsion means anything stated to be involuntary including torture, beating, threatening, and threatening family members including wife, parents, and children. It is to be noted here that only involuntary and compelled confession is

[19] AIR 2008 SC 368.
[20] AIR 1961 SC 1808.
[21] Section 161 of Cr.P.C talks about examination of witness by police.
[22] *Supra*
[23] Section 27 of the India Evidence Act talks about 'how much of information received from accused may be proved'. 'When any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved.'

prohibited, however a confession voluntarily made without any inducement of fear or torture is admissible. As has already been discussed above, protection under article 20(3) is available only to the accused of an offence i.e., a person who is accused of having committed an offence shall not be compelled to be witness against himself. Nevertheless, a person who is accused of an offence may voluntarily confess on request by investigative authorities. Also, the accused may waive the privilege against self-incrimination by voluntarily entering into witness box in court for the purpose of making confession on request.

In the landmark case of ***Nandini Satpathy v P.L. Dani***[24] the Supreme Court has substantially widened the scope of privilege against self-incrimination in India. In this case the accused/appellant was former Chief Minister of state of Odisha. After her term of Chief Minister certain charges of corruption were made against her and it was alleged that during the tenure as a Chief Minister she was actively involved in corruption. Pending the investigation, she was called upon by the authorities in police station wherein she was required to answer certain written questions. She refused to answer any of the written questions and claimed protection of article 20(3) i.e., privilege against self-incrimination. Consequently, she was also prosecuted under section 179[25] of the Indian Penal Code for refusing to answer questions put to her by responsible authority.

The Supreme Court held that the accused is entitled to privilege against self-incrimination right from the stage of police interrogation, therefore, bar enshrined in article 20(3) does not commence in court only. The court also held that the privilege under article 20(3) extends to other offences thus the accused is entitled to right to remain silent where voluntary disclosure by accused is likely to incriminate him of other offences pending or imminent. *"The phrase 'compelled to be a witness against himself' must be construed as evidences procured not merely by means of physical torture, threats and inducements but it also extends to evidences procured by mental torture, atmospheric pressure (indirect torture), environmental coercion, tiring interrogative process, proximity, overbearing and the like intimidatory methods."*[26] Thus, compulsion under article 20(3) includes both physical as well as mental torture.[27]

[24] AIR 1977 SC 1025.
[25] Section 179 of the Indian Penal Code talks about 'Refusing to answer public servant authorized to question'. Section 179 prescribes six months simple imprisonment or fine which may extend to one thousand rupees or with both.
[26] Supra
[27] Supra

Moreover, the Court opined that self-incrimination or compelled testimony is almost every time less than relevant and more than confessional. Irrelevance is impermissible, relevant is licit, and however when relevant questions are encumbered with guilty inferences in the event of an answer being supplied, incriminating tendencies of accused flourishes in consequence.[28]

Furthermore the court held that the accused person can't be compelled to make confessional statements merely because the confession by accused is not leading to his conviction (implicative) when looked upon in isolation, rather, the accused is entitled under article 20(3) to remain silent if the answer to the questions posed by investigating agencies having tendency of exposing him to guilt in some other accusation and whether the accusation is imminent or actual is not relevant in the case in question. This invariably means that the privilege against self-incrimination is available to accused when he is being examined by police under section 161 of Cr. P.C.

In ***Amrit Singh v State of Punjab***[29] it was held that the accused can't be compelled to give specimen of his hair for the purpose of identification as the same would certainly amounts to testimonial compulsion. In such a case accused has right to refuse as according to article 20(3) the accused cannot be made a witness against himself.

In ***Mohd. Dastgir v State of Madras***[30] the accused went to the bungalow of the Deputy Superintendent of Police (DSP) with a closed envelope containing currency notes for the purpose of offering him bribe. The police officer when opened the envelope and found currency notes straightaway refused to take it and threw it on the face of the appellant who took it back. Thereafter, the appellant was told to hand over the envelope containing currency notes to the police officer. The appellant took some currency notes from the envelope and placed them on the table which was seized by the police officer. The appellant thereafter was prosecuted for offering bribe to public servant.

The trial court found him guilty of offering bribe to public servant and was convicted accordingly. The High Court upheld the judgment of trial court.

In appeal before the Supreme Court the appellant contended that the currency notes seized by the police officer should not be produced in evidence as he was compelled to handover currency

[28] supra
[29] AIR 2007 SC 132
[30] AIR 1960 SC 756

notes. Also, it was contended by the appellant that if the currency notes were treated as evidence, then it would amount to violation of his right under article 20(3).

The Supreme Court discussed all the three ingredients of article 20(3) and held that the appellant went to the bungalow of DSP and offered him bribe voluntarily. The police officer not only refused to took bribe but also told the appellant to hand over the currency notes to him to which the appellant voluntarily handed over. Therefore, the appellant afterwards can't contend that the currency notes were involuntarily handed over by him. Also, it was held by the court that the appellant was not subjected to threat, inducement or torture and he was not compelled to by the police officer therefore he can't claim protection of article 20(3).

In ***Yusufali v State of Maharashtra***[31] an important observation was made by the Supreme Court that a tape-recorded statements made by the accused though the recording was made without the knowledge of the accused was admissible in evidence if the accused was not subjected to inducement, threat, torture or unnecessary force. In my opinion this case was wrongly decided by the court as the recording of statements was done without the consent of accused and the same should have been considered as involuntary whether or not he was subjected to inducement or force.

Likewise, in ***V.S. Kutta Pillai v Ram Krishna***[32] it was held by the court that search made in the premises occupied or possessed by the person accused of having committed an offence or seizure of anything from that premises was not inconsistent of privilege against self-incrimination. Moreover, the documents obtained in course of search and seizure can also be produced in court in evidence and the same was not violative of article 20(3). The Court reasoned that, since the accused was not subjected to compulsion therefore the search and seizure as well as documents obtained during search and seizure must not be considered as 'compulsion to be the witness against himself. In my opinion this case was also wrongly decided as the element of consent by accused is missing hence involuntary.

5. Narcoanalysis, Polygraph & BEAP

Brief About Tests-

[31] AIR 1968 SC 147.
[32] AIR 1980 SC 185.

Narcoanalysis[33]

The underlying theory behind this test is that a person is able to lie by using his imagination. In Narcoanalysis test, not only the subject's imagination is neutralized to the great extent but also his/her reasoning faculty affected by making him semi-conscious for the purposes of obtaining necessary information. Consequently, the subject would not be in a position to speak up on his own rather he would only answer specific and simple questions. ***The Narcoanalysis test is conducted by mixing 3 grams of Sodium Pentothal or Sodium Amytal dissolved in 3000 ml of distilled water***. ***Depending on the person's sex, age, health and physical condition, this mixture is administered intravenously along with 10% of dextrose over a period of 3 hours with the help of an experienced anesthetist***. It is to be noted here that the Wrong dose can send the subject to coma or even result in death in certain cases.

Polygraph

In this test the subject is administered narcotic drugs and under its influence questioning of the subject is done by the experts on behalf of investigating agencies. ***The most striking feature of this test is that the subject cannot create a lie by his own as under the influence of the drug, he'll either have no reasoning power or his reasoning faculty will be neutralized to the great extent***.[34] Under the influence of such drugs if the subject is asked any information, then he simply cannot innovate and he would be speaking only the truth.

Brain Electrical Activation Profile (BEAP)

In this technique the accused is first interviewed and interrogated to find out whether he is concealing any information. Then sensors are attached to the subject's head and the person is seated before a computer monitor. He is then shown certain images or made to hear certain sounds. ***The sensors monitor electrical activity in the brain and register 'P300 waves'[35], which are generated only if the subject has connection with the stimulus i.e., picture or sound***. The subject is not asked any questions.

It has been a fundamental principle of common law jurisprudence that a person is presumed to be innocent until he is proven guilty, that no one shall be physically or mentally compelled to

[33] The term Narcoanalysis was coined by Horseley.
[34] Polygraph test is also known as the Lie Detector Test.
[35] P 300 wave is another name of Brain Electrical Activation Profile (BEAP).

testify against himself and that a person who is accused of an offence is entitled to privilege against self-incrimination and right to remain silent when questioned by police. ***Dr. P Chandra Shekharan*** who was the former director of Forensic Science Department and considered to be highly respectable authority in this behalf, opined those Scientific techniques like Narconanlysis, Polygraph and BEAP violate these fundamental principles of common law jurisprudence and highly unscientific and third-degree methods of investigation. It has been time and again asserted that correct dose of drugs administered under Narcoanalysis etc. depends upon the physical and mental state of the subject; therefore, it is very difficult to ascertain the exact amount of dose that is required to be administered. At the same time wrong dose may cause the death of the subject or may put him in coma.

In India Narcoanalysis was for the first time administered to the suspects of ***'Godhara Massacre' in 2002.***[36] Since then many countries have acknowledged that subjecting suspects of crime to Narcoanalysis is inhuman but in India it has been administered quite frequently till 2010. In December 2003 Abdul Karim Telgi who was involved in ***Telgi Stamp Paper Scam***[37] was also subjected to Narcoanalysis. Later in this case the Court declared that subjecting the accused to such scientific techniques does not violate his fundamental rights under article 14[38] and 20(3). Though results of Narcoanalysis are not admissible in court as confession, still recoveries made due to such statements are admissible under section 27 of Indian Evidence Act. ***Further instances are Nithari Serial Killing case***[39]***, Mumbai Serial Blasting Case***[40]***, Bakery Blasting case, Jessica Lal Murder case***[41] ***and Malegaon Blast case***[42] wherein the accused persons were subjected to such scientific techniques.

5.1 Evidentiary value of Polygraph, Narcoanalysis and BEAP test

In ***State of Bombay V kathi Kalu Oghad***[43] which was also followed in ***Nandini Satpathy V PL Dani &Anr***[44], it was held that compulsion is a physical objective act and not the state of

[36] See the report of Nanavati-Mehta Commission which was appointed by the Government of Gujarat to probe Godhra Train Burning Incident that happened in 27 February 2002.
[37] See Abdul Karim Telgi @ Lala @ Karim v State on 17 September, 2007
[38] Article 14 of the Constitution of India talks about 'equality before law' and 'equal protection of law'.
[39] See Surendra Kohli v State of U.P. CRIMINAL APPEAL NO(s). 2227 OF 2010.

[40] Mohd.Jalees Ansari & Ors vs Central Bureau of Investigation on 11 May, 2016.
[41] Sidhartha Vashisht @ Manu Sharma v State (N.C.T of Delhi) on 19 April, 2010.
[42] Pragya Singh Chandrapal Singh v The State Of Maharashtra on 25 April, 2017
[43] 1961 AIR 1808, 1962 SCR (3) 10.
[44] 1978 AIR 1025, 1978 SCR (3) 608.

mind of a person making the statements, '*except when the mind has been so conditioned by some extraneous processes as to render the making of the statements involuntary and therefore extorted.'*[45] Put it simply, the judges held that article 20(3) does not only bars physical compulsion but also mental compulsion in the form of rendering subject's reasoning faculty nil by some extraneous processes.

Examinations of Scientific tests are within ambit of explanation (a) of Section 53, 53-A, 54 of Code of Criminal Procedure which provides that, *'examination' shall include the examination of blood, blood stains, semen, swabs in case of sexual offences, sputum and sweat, hair samples and finger nail clippings by the use of modern and scientific techniques including DNA profiling and* ***"such other tests"*** *which the registered medical practioner thinks necessary in a particular case.* Here a question arises whether the scientific techniques like Narcoanalysis, BEAP and Polygraph should be covered under 'such other tests' under section 53 & 53A of Cr.P.C.

In a landmark case of ***Selvi v State of Karnataka***[46] constitutional validity of certain scientific tests for the purpose of investigation of crime i.e., Narcoanalysis, Polygraph and BEAP was challenged by the accused. It was contended by accused that these tests are conducted without the consent/permission of subject and are thus violative of privilege against self-incrimination enshrined in article 20(3). Further it was brought into the notice of the court that these scientific techniques were softer alternative to the unfortunate use of third-degree methods of torture by investigative agencies and violated privilege against self-incrimination.

The respondent on the other hand contended that it is in the interest of the state that the investigation of crime should be accomplished efficiently so that the culprit can be punished. It was also brought to the notice of the Court that investigation particularly of sex related crimes based upon ordinary methods was not helpful and in such cases adoption of scientific techniques for investigation was very much desired by the State.

There were two issues that were majorly involved in this case that is;

1. Whether the scientific techniques like Narcoanalysis, BEAP and Polygraph form part of 'such other tests' under section 53 Cr.P.C.?

[45] 1978 AIR 1025, 1978 SCR (3) 608.
[46] AIR 2010 SC 1974.

2. Whether 'efficient investigation' should be given primacy over 'preservation of individual liberty'?

A three-judge bench was constituted to hear the matter which unanimously held that scientific techniques like Narcoanalysis, BEAP and Polygraph were testimonial compulsions and softer alternatives to regrettable use of third-degree torture thus prohibited by article 20(3) of the Constitution of India. The court held that these scientific techniques are not covered within the scope of the expression 'such other test' enshrined in the explanation of section 53 of Criminal Procedure Code. Most importantly this happened to be the first case in which privilege against self-incrimination was extended to cover also the witnesses in the case in question. Moreover, it was held that the protection against self-incrimination is available to witnesses as well as accused at the stage of investigation itself thus such protection is available during statements to police under section 161 of Criminal Procedure Code.

It was observed that compulsory administration of drugs to the subject in Narcoanalysis and Polygraph tests constitutes cruel, inhuman and degrading treatment and the same offends article 21[47] of the Constitution. Article 21[48] which is the heart of the constitution does not approve testimonial compulsion irrespective of the seriousness of threat, inducement or torture that has been applied to the subject to elicit the evidence.

The court held that article 21[49] does not only prohibit physical compulsion but it also prohibits mental compulsion to the same extent as a forcible invasion to a person's mental process is also an attack on person's dignity and liberty quite often with grave and large consequences. Though India has not signed and ratified the United Nation Convention against Torture and other Cruel, Inhuman or degrading Treatment or Punishment but it has persuasive value since it represents an involving international consensus on the issue.[50]

Responding the contention raised by respondent that compelling interest demands use of such scientific techniques for efficient investigation of crime in future, the court held that it is the function of legislature to consider the present context and legislate according to the needs of society. But while doing so the Constitutional values can't be compromised with and if such

[47] Article 21 of the Constitution of India guarantee's right to life and personal liberty to all person.
[48] *Supra*
[49] Supra
[50] Supra footnote number 84.

matter comes before the Court, it shall interpret the mandate of the provisions of Constitution available to the citizen and apply in their favor.

Lastly the Supreme Court held that, Narcoanalysis, Polygraph & BEAP tests are not included in 'and such other tests. Therefore, registered medical practitioner cannot conduct or prescribe to conduct these tests involuntarily. No individual should be forcibly subjected to any of the techniques in question, whether in the context of investigation in criminal cases or otherwise. Doing so would amount to an unwarranted intrusion into personal liberty. However, The Court allowed voluntary administration of the impugned techniques in the context of criminal justice, provided that certain safeguards are in place. But in such cases also the test results by themselves cannot be admitted as evidence because the subject does not exercise conscious control over the responses during the administration of the test. However, any information or material that is subsequently discovered with the help of voluntary administered test results can be admitted, in accordance with Section 27 of the Evidence Act, 1872.

Finally, the Court held that Polygraph, Narcoanalysis and BEAP test if administered involuntarily would be violative of article 20(3) and 21 thus unconstitutional.

The ruling of the Supreme Court in ***Selvi v State of Karnataka***[51] has been cited in series of recent cases such as, in ***State of U.P. v Sunil***[52] where the Supreme Court held that compulsory administration of Narcoanalysis technique to the accused amounts to testimonial compulsion and the same attracts protection against self-incrimination.

In ***Rajesh Talwar & Anr V CBI & Anr***[53], Krishna, Raj Kumara and Vijay Mandal who were the suspected persons and were interrogated by police, were, latter subjected to Narcoanalysis test. The petitioners were the parents and also the accused wanted to rely upon the testimony of Krishna, Raj Kumara and Vijay Mandal obtained through Narcoanalysis test. The petitioner prayed before the Delhi High Court that the results of the test were important evidence in favor of defense because they belonged to the persons earlier suspected of having committed offences and contained exculpatory statements favoring the petitioners. However, the High Court rejected the petition as being vexatious.

[51] Supra footnote number 84.
[52] State of U.P. v Sunil on 2 May, 2017.
[53] Rajesh Talwar & Anr V CBI & Anr on 8 October 2013.

The petitioner appealed to the Supreme Court and contended that the reports of Narcoanalysis test must be admitted as evidence because those persons who were subjected to Narcoanalysis test were not the accused anymore in this case thus there was no point of article 20 and 21 being coming into picture.

The Supreme Court again relied to the judgment in Selvi v State of Karnataka[54] and held that protection against self-incrimination under article 20(3) is available to accused as well as witnesses of the case in question. Thus, the reports of Narcoanalysis test administered to suspects could not be relied upon.

5.2 Evidentiary value of Polygraph, Narcoanalysis and BEAP when conducted with consent of the subject

In Selvi v State of Karnataka[55] the Supreme Court held that a person shall not be compulsorily subjected to any of the scientific techniques in question either in context of investigation in criminal case or otherwise, as doing so would certainly amount to unnecessary intrusion into personal liberty of the person. At the same time the Court allowed voluntary administration of abovementioned scientific techniques to subject if while doing so certain safeguards were in place.

Even when any of the abovementioned scientific techniques have been administered with the consent of the subject, the result of the process can't be admitted as evidence against the subject because the subject does not exercise conscious control over the responses during the administration of the tests in question by experts. The Court did not emphasize only upon the aspect of voluntariness on the part of the subject because once he consented for the administration of the test in question, he/she becomes unconscious and loses control over the responses. However, any pertinent information or material that is subsequently discovered/revealed with the help of the test, to which the subject has consented, can be admitted in evidence in accordance with the provisions of section 27 of Evidence Act.

In ***Natvarlal Amarshibhai Devani Vs. State of Gujarat and Ors***[56], the Gujarat High Court relying on Selvi's case, opined that reliance on the contents of compelled testimony comes

[54] Supra footnote number 84.
[55] Supra footnote number 84.
[56] C/SCA/3747/2016.

within the prohibition of Article 20(3) but its use for the purpose of identification or corroboration with facts already known to the investigators is not barred.

5.3 Power of the Court to order Narcoanalysis etc.

Investigation of crime is basically done for the purpose of finding out truth, and law enforcement agencies are expected to make all possible effort to find out the real culprit behind of crime. It is a well settled principle in criminal law that a guilty man should not be allowed to run away from the liability of his guilt and he must be brought to justice by the state. Initially the High Courts of various states were of the view that if the scientific techniques in question were helpful in finding out the truth behind the crime, then it must be utilized by the Courts and Courts should not become hinder the process of subjecting the suspects to the tests.[57]

However, in Selvi's judgment the Supreme Court rejected earlier view expressed by the High Courts and considered the probabilities of accused/suspects being compelled to undergo any of these scientific techniques in the name of investigation. The judges opined that we understand the need of expedient investigation but settled constitutional principles can't be compromised in the name of efficient investigation and irrespective of any urgency, no person who is accused of having committed any offence shall be forcibly subjected to any of the scientific techniques like Narcoanalysis etc as such compulsion is unnecessary intrusion into persons privacy and liberty.

6. Guidelines issued by the National Human Rights Commission (NHRC)

The National Human Rights Commission (NHRC) had issued some binding 'Guidelines for the Administration of Polygraph Test (Lie Detector Test) on the subject'[58]. These guidelines should be strictly adhered to by the experts during administration of test. It was also clarified that the same safeguards should be adopted for conducting 'Narcoanalysis test' and 'Brain Electrical Activation Profile' test. The text of binding NHRC guidelines has been given below:

[57] See Abhay Singh vs. State of U.P., 2009 (65) ACC 507 (All) 15, Santokben vs. State of Gujarat, 2008 CrLJ 68 (Gujarat), Dinesh Dalmia vs. State, 2006 CrLJ 2401 (Madras).
[58] nhrc.nic.in/documents/sec-3.pdf, visited on 03/11/2018 at 05:49 PM.

- The polygraph test should not be administered to the accused without his/her active consent and all probable opportunities shall be afforded to the accused to express whether he/she is desirous to be subjected to the test.

- If the accused gives his consent to be subjected to Polygraph test, then he shall not be denied access to a lawyer of his choice. Moreover physical, emotional and legal implication of polygraph test must be properly explained to him by police as well as his lawyer.

- If the accused volunteers for the polygraph test, then his consent should be recorded by the judicial magistrate.

- During the hearing before the Judicial Magistrate regarding consent of the accused to be subjected to the test, the person alleged to have agreed should be duly represented by a lawyer of his choice.

- At the hearing, the person in question (accused) should also be told in unambiguous terms that the statement that is being made by the accused shall not be admitted as confessional statement before the Magistrate but will have the status of a statement made to the police under section 161 of Cr.P.C.

- During the hearing the Magistrate shall consider all factors relating to the detention including the length of detention and the nature of the interrogation by the investigating agencies.

- The actual recording of the Lie Detector Test/Polygraph Test shall be done by an independent medical agency (such as a hospital) and conducted in the presence of a lawyer chosen by the accused.

- A full medical and factual narration of the manner of the information received must be taken on record.[59]

It can be concluded that the protection against self-incrimination enshrined under article 20(3) was initially interpreted in a narrow manner by the Courts in India. In series of cases that I have already discussed above, the Supreme Court time and again held that the protection against

[59] nhrc.nic.in/documents/sec-3.pdf, visited on 03/11/2018 at 05:49 PM.

self-incrimination in India is available to a person who is accused of having committed an offence. But in Selvi v State of Karnataka[60] the situation was neutralized and the protection against self-incrimination was extended to cover also the suspects and witnesses. The judgment in Selvi's case has made article 20(3) at par with that of privilege against self-incrimination in US & UK.

The scope of the expression 'compulsion to be a witness' under article 20(3) was discussed in Kathi Kalu Oghad's in which the judges expressed displeasure with the earlier ruling in Subhash Chandra case and held that the protection under article 20(3) was available only when the accused is compelled to testify based upon his personal knowledge. Thus, merely a mechanical process through which evidence is being produced before court for the purpose of making any material issue pertaining to a case in question unambiguous, without being based upon his personal knowledge, must not be qualified as self-incriminating evidence. Hence furnishing of hand writing specimen, signatures and thumb impression were not included within the expression 'to be a witness' under article 20(3).

In Selvi v State of Karnataka it was held by the Supreme Court that scientific techniques like Narcoanalysis, Polygraph and BEAP can only be administered to the accused with his consent. Compulsory administration of any of techniques to accused was held to be against the spirit of article 20(3) as well as unnecessary interference with the personal liberty and dignity under article 21. The court also held that in the name of efficient investigation no one can be arbitrarily subjected to any of the abovementioned scientific techniques. Even the reports of the test cannot be per se admitted in evidence against the subject because the subject does not exercise conscious control over the responses during the administration of the tests in question by experts.

7. Conclusion

Though in India, privilege against self-incrimination is inspired from US but such a privilege is available only in restricted manner. The courts had literally interpreted article 20(3) in number of cases. Article 20(3) states that, no person 'accused of any offence' shall be 'compelled to be a witness' 'against himself', which makes it clear that rights under article 20(3) are available only to person who is accused of having committed an offence. Thus,

privilege against self-incrimination in India 'literally' do not extend to protect 'witnesses of offence'; hence, they could be compelled to be a witness against themselves.

It has been rightly said that the investigation of crime involves dual conflicting interest wherein the state being the upholder of law and order in society is expected to bring the culprit to justice; on the other hand, the state is constitutionally bound to respect the fundamental rights of its subjects. The State is expected to investigate the crime efficiently, however at the same time it is also expected to encourage civilized standards of enforcing criminal justice that are the precondition for maintaining and respecting the fundamental right to privacy of the person accused of having committed a crime. Thus, how these conflicting interests should be harmonized is still remaining a million-dollar question.