

## Identification of Self-Incriminating Evidence

Self-Incriminating evidence applied to method of identification in the course of criminal investigations and criminal prosecution, frequently becomes important as it aids in acquiring the accused to perform some deeds which might be termed as a self- criminating act.

In such instances, to what extent does the constitutional privilege against self-incrimination afford protection to accused persons? A discussion in this aspect concerning the scope and limitations of the privilege against self-incrimination will involve a consideration of its history which justifies its existence.

The emergence of these innovative scientific techniques in the scope of the criminal justice system has bolstered the efforts of criminal investigative agencies, which has resulted in the need to review such contemporary techniques in the light of our enshrined constitutional tenets. The constitutionality of these invasive investigative procedures such as narcoanalysis, polygraph test and the Brain Electrical Application Profile (BEAP) have been a much debated issue, especially in the two past decades, keeping in mind the several highly publicized cases such as the Aarushi Talwar murder case, and the Nithari killings.

In **Ramchandra Ram Reddy vs. State of Maharashtra**, the Bombay High Court in 2004, sought to address the issue of whether requiring the accused to undergo the narco-analysis tests against his will “would amount to compelling him to be a witness against himself. The Court came to the conclusion that "such statement will attract the bar of Article 20(3) only if it is inculpatory or incriminating to the person making it. Whether it is so or not can be ascertained only after the test is administered and not before."<sup>1</sup> The Court also held that there are sufficient safeguards under the CrPC, and the Constitution to prevent any incriminating statement from being from being submitted to a court if such a statement has been induced out of a narco-analytic interrogation.

Yet the Supreme Court, in **Selvi v. State of Karnataka (2010) 7 SCC 263**<sup>2</sup>, in what is clearly a ground-breaking judgment, has been able to appreciate the ostensible tension between the civil rights of accused and internal security considerations in light of these tests and has declared what seems a victory for human rights in India. The Court gave a restrained interpretation, with a contextual understanding of the Constitution. The relevance of this judgment is more pronounced when the threat to internal security is at its greatest.

The polygraph test more commonly known as the ‘lie detector test’ which involves the measurement of physiological responses like, respiration, blood pressure, pulse rate, galvanic resistance of the subject with the assistance of instruments like cardio-cuffs, pneumographs, and electrodes attached to his body. The accused is then asked several questions including relevant

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<sup>1</sup> Ramchandra Ram Reddy

<sup>2</sup> (2010) 7 SCC 263

and irrelevant (control questions) ones, and the responses are recorded are then examined by a qualified analyst. The test does have a margin of error due the fact that physiological responses are not necessarily triggered by lies and deception. In case of Selvi, the court stated the **Daubert v. Merrell Dow Pharmaceuticals**<sup>3</sup> principle wherein the court specified that the relevance and the reliability of the scientific technique is in question. The Supreme Court in Selvi's case reiterated that the results of such results were indeed unreliable and no decision to uphold their validity could be obtained.

In narcoanalysis, colloquially known as the 'truth serum test' an intravenous injection of sodium pentothal in a minimal dosage can be used for the purpose of anesthesia in which state the subject enters the stage of trance. In such a scenario the subject may be asked several questions relevant to the investigation, which the accused may answer, in spite of the fact that it could incriminate the accused.

In the BEAP test, the electrical waves emitted from the subject's brain are recorded by attaching electrodes to his scalp. While the subject is exposed to auditory or visual stimuli that will be relevant to the facts of the case being investigated along with relevant probes. The analysis behind the test is if the accused is guilty the exposure to material probes will lead to the emission of P300 waves.

In Selvi, the court explained the rationale behind the concept of the right against self-incrimination using the **two-pronged test** of **voluntariness** and **reliability** with respect to the accused's statements. The court further explained that the when statement are made under compulsion, there is a probability that they are coerced and hence false, these false statements impede the integrity of the trial and may cause obstructions in the investigative process; they may result in the miscarriage of justice.

In this paper I would like to talk about the Court's interpretation of Article 20 (3) and Article 21 of the Constitution read with Code of Criminal Procedure and Evidence Act (hereinafter referred to as the 'Act') in light with these impugned tests.

In order to determine who is protected under Article 20 (3)<sup>4</sup> extends of the investigative stage itself. It cannot be discerned at the investigative stage whether statements made by the subject would be inculpatory or exculpatory in nature, it was elucidated in **M.P. Sharma v. Satish Chandra**<sup>5</sup>, Article 20 (3) extends to testimonial compulsion which would refer to any coercion in procuring the positive volitional evidentiary acts of the person. Since the language of the provision is 'to be a witness' and not to 'appear as a witness', it follows that the accused would be protected beyond the courtroom as well.

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<sup>3</sup> 125<sup>L</sup>Ed. 2<sup>nd</sup> 469: 509 US 579 (1993)

<sup>4</sup> Article 20(3): No person accused of any offence shall be compelled to be a witness against himself  
[http://india.gov.in/sites/upload\\_files/npi/files/coi\\_part\\_full.pdf](http://india.gov.in/sites/upload_files/npi/files/coi_part_full.pdf)

<sup>5</sup> AIR 1954 SC 300

The analysis of the impugned tests in light of Article 20(3), the Court certainly held that involuntary undertaking of the impugned tests violates Article 20(3) of the Constitution with regard to incriminating statements. The Court went on to hold that the impugned tests were invasive and inhumane, attracting the right against cruel, inhuman and degrading treatment as specified in the Universal Declaration of Human Rights.

The legal validity of the self-incriminating tests is subject to Article 20(3) of the Indian Constitution which protects the accused from the compulsion of having to testify against himself by providing that "no person accused of an offence shall be compelled to be a witness against himself". This provision of the Constitution can be seen in consonance with Section 161(2) of the Code of Criminal Procedure, 1973 which provides similar protection to the accused who is "bound to answer truly all questions" except for those questions that "would have a tendency to expose him to a criminal charge or to a penalty or forfeiture". Together, Article 20(3) and Section 161(2) create a safeguard against self-incrimination. Section 161(2) further bestows the right to silence in the favour of the accused.

The Court in **Maneka Gandhi v. Union of India** has intricately woven the considerations of substantive due process into its reading of Article 20(3). In which 'due process' was rejected by the Constitutional framers for the more subdued 'procedure established by law' and found a backdoor entry in the case of Maneka Gandhi where Justice Bhagwati stated that the Constitution mandates 'fair, just and reasonable' procedure and cleverly read 'due process' into it. The Court has stated that given the interrelationship of Article 20(3) and 21, as decided in Maneka Gandhi's case, any voluntary undertaking of such tests, and in cases where no inculpatory statements are made, would be protected by Article 21 and seen in the light of substantive due process. Keeping this in mind, the Court went on to hold that the impugned tests were invasive and inhumane, attracting the right against cruel, inhuman and degrading treatment as specified in the Universal Declaration of Human Rights.

Even then Article 20(3) of the Constitution read with Section 161(2) of the CrPC in congruence with the legal maxim, '*nemo tenetur se ipsum accusare*' meaning that no man is bound to accuse himself, this principle/maxim has been operative in common law court.

In conclusion, the debate on these self-incriminating evidentiary test is a viable form of interrogation is fairly one sided. The test's results are highly unreliable due to the tendency for the subject to slip into a state of make-believe and delusion. The various shortfalls of the test with respect to its results and its breach of the subject's personal liberties and freedoms far outweigh the possible advantages it purports to provide. Its forceful implementation is even seen as a violation of various constitutional provisions and a breach of many principles of criminal law jurisprudence. The science of these advanced neurological tests has not progressed enough in the past century for it to become a serious interrogative instrument. Further scientific research will have to be done to find a more effective and reliable drug before these self-incriminating test

and practices can find a commonplace in contemporary procedural criminal law and investigation.