

Determining the Legal Validity of Forensic Investigation in Light of Right against Self-Incrimination under the Indian Constitution

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Abstract: The crux of this research paper is to determine the scope of right against self-incrimination which is guaranteed under the Indian constitution. To prevent the police or investigators from misusing their power, it is important to protect an accused person from being forced into making self-incriminating statements. This includes cases where confessions are obtained under pressure or through neuroscientific techniques that could violate their right to privacy. Furthermore, the researcher will lay emphasis upon the various landmark judgements which have been passed by the Hon'ble judiciary over the past many decades, for deciding the very scope of this right in context of right to privacy as guaranteed by the Indian constitution under the ambit of right to life.

Keywords: Right against Self-Incrimination, Right to privacy, Article 21, Rights of an Accuse, Narco Analysis

I. Introduction

The Black's dictionary of law describes self-incrimination as:

"Any act or declaration that takes place during an investigation wherein a person or a witness tends to incriminate himself either expressly or implicitly then the same shall be referred to as self-incrimination."¹

which can also be referred to as the act through which a person exposes or reveals facts which will subject him to criminal prosecution. When it comes to the Indian legal system, then, the right against incrimination of self is not just a legal right but it is also a constitutional right that is assured under the 'Article 20(3) of the Indian Constitution'.² Furthermore, it shall be considered that the forefathers of the Indian Constitution borrowed this concept from the legal maxim "Nemo Tenetur Seipsum Accusare" that can be interpreted in English as:

"No man, not even the accused himself can be compelled to answer any question that may tend to prove him guilty of a crime, he has been alleged against" or, "No one is bound to incriminate or accuse himself."

It shall be considered that since the right against self-incrimination is also an inherent part of the American constitution and the British System of Criminal Jurisprudence,

India followed the footsteps of both countries and subsequently recognized this fundamental right in the Indian Constitution as Article 20 (3).

1. Scope of Right against Self-Incrimination under Article 20(3) of the Indian constitution:

To invoke this fundamental right against self-incrimination, it becomes absolutely necessary for an individual to fulfil certain essentials that were placed by the Hon'ble Supreme Court of India. Therefore, below are the three key essentials that shall be fulfilled by an individual so as to invoke his or her right for protection against self-incrimination under the Article 20 (3):

1.1 Person must be an Accused:

Primarily, an individual who wishes to invoke this fundamental right shall first be categorized as an offender i.e. the nature of their wrongdoing should be considered as an offence under the Indian Penal Code or any other such special laws which may extend a penalty or punishment against him, upon being held guilty within that particular case. Different kinds of acquisition which will be included under this essential have been defined by the Hon'ble apex court of India in the following cases:

- **Accusation which leads to Prosecution** -- in *K. Joseph Augusthi & Two Ors v. M. A. Narayanan*³ it was held that above all, any such acquisition which further leads to the prosecution of the accused in a particular case will be covered as part of the first essential under Article 20 (3).
- **Framing of Formal Accusation** -- In *Veera Ibrahim v. State of Maharashtra*⁴, it was also held that the right against incrimination of self does not extend to an individual unless a formal FIR has been filed against them or if the Panchnama lacks information regarding the acquisition. Consequently, a formal¹ accusation is essential for invoking the benefits of the article, and without it, a person is not entitled² to its protection until they have been formally accused.
- **Contemnors no "accused"** -- in *Delhi Judicial Service Association v. State of Gujarat*⁵, it was held that any such person who has committed contempt of court would also not be entitled to the benefits which are envisaged under Article 20(3) and so in such a case the benefits of this article will not extend to a criminal proceeding when a person has been convicted of contempt of court.
- **Invoking Benefits at the Stage of Accusation** -- in the case of *Ramanlal Bogilal Shah. v. D. K. Guha And Others*⁶, it was held by the Hon'ble court that at that point at which the person's name who is an accused in an offence is entered within the FIR, leading to an order from the Magistrate for investigating further, is when an individual can invoke the benefits of protection which is guaranteed to an individual under this Article.
- **Accused who is Also a Witness** -- in *Balasaheb v. State of Maharashtra*⁷, It was recognized by the Hon'ble court that an individual who is a witness in one case, will

not be entitled to absolute immunity under this article. However, such a person can deny from responding to certain questions, which may seem incriminating to him.

It shall be considered from the above analysis, that the very scope of right for protection against self-incrimination under the Constitution of India is significantly narrow and while in common law this right should also extend to the witnesses of a case, however as per the aforementioned judgments, a witness cannot claim immunity under the article. It is only an accused who can invoke the benefit of the provision to safeguard himself from the influential probing by the police authorities.

Right to privacy⁸ has been recognized by the Hon'ble judiciary as a part of the right to life and personal liberty as assured by the Indian Constitution under Article 21⁹. Therefore, right against self-incrimination also inculcates the right to remain silent, which further means that the right against harassment which may otherwise be inflicted by the police authorities against the accused through the use of 3rd degree torture or such similar methods of interrogation, as held in the *Nandini Satpathy v. P.N. Dani*.¹⁰

1.2 Compulsion to provide evidence--

"Witness" is a person who has personally seen or heard something related to an event and is competent to testify unless they are unable to understand the questions laid in front of them or give rational answers because of different reasons.¹¹ The Supreme Court case of *M.P. Sharma v. Satish Chandra*¹² establishes that a person required to produce documents can also be considered witness. This ruling expanded the protection against self-incrimination to include documentary evidence. However, later cases have narrowed this interpretation to maintain fair and effective justice.

- In *Pershad v. State of U.P.*¹³, The court ruled that if an accused person, after the arrest makes a statement that leads to the discovery of incriminating evidence, that statement can be used as evidence in court. This decision aligns with Section 27 of the Indian Evidence Act¹⁴, which states that statement made under the impression of information which lead to the relevant facts is admissible. This provision serves as an exception to the general rule that confessions made in police custody are inadmissible, ensuring that crucial evidence obtained through such disclosures can still be considered in legal proceedings.
- In *State of Bombay v. Kathi Kalu Oghad*,¹⁵ The court clarified that "self-incrimination" applies only to information that the accused personally knows and voluntarily discloses. It further held that merely producing documents does not amount to self-incrimination unless those documents contain statements made by the accused that are incriminating in nature.
- In *State v. M. Krishna Mohan*,¹⁶ the court held that mandatory collection of fingerprints, handwriting samples, or photographs does not fall under the protection

of Article 20(3), as these forms of evidence are considered non-testimonial and do not involve compelled personal testimony.

1.3 Self-incriminating nature of evidence-

The right for protection against self-incrimination under the Article 20(3) applies only when an accused person is compelled to make a statement. If the accused voluntarily provides a statement, even if it is self-incriminating, and does so with full awareness of its consequences, they effectively waive their right against self-incrimination. How court has defined "Compulsion" in different cases-

- **Involuntary Disclosures:** In the case of *Yusufali v. State of Maharashtra*,¹⁷ court mentioned that information collected without accused knowledge which seems to incriminate them or can be used as evidence as long as that is not obtained by coercion or force. Furthermore, Article 20(3) is not applicable on the documents obtained from the accused premise.
- **Psychological Coercion:** In *Nandani Satpadi v. P. L. Dani*,¹⁸ the Supreme Court broadened the interpretation of compulsion to include psychological pressure. The court held that factors such as prolonged questioning, environmental stress, and mental intimidation can also amount to compulsion, potentially leading to self-incriminating statements.
- **Compulsion Must Be Applied:** In *Mohd. Dastgir v. State of Madras*,¹⁹ Court mentions that protection under Article 20(3) is applicable only when the evidence is collected through coercion or force against their will.

The courts have held that an accused person cannot be coerced to present evidence that goes against their own defense. For example, if an accused refuses to provide a hair sample for forensic analysis, they cannot be compelled to do so, as this would violate their rights under Article 20(3).

2. Use of Neuroscientific Investigative techniques: Against Right to Privacy?

Regarding neuroscientific techniques of investigation, over time, three scientific tests have become the most commonly used by investigative authorities in India. These include:

i. Polygraph Test: (lie detector)

The Polygraph test, which is popularly known as the lie detector test, the theory of polygraph test suggest that an individual while speaking about the facts which are related to the crime, will tend to lie and that is when he will go through a hyper-arousal state, that is then detected by an individual trained in understanding indicators as part of a polytrophic result including the heart rate, blood pressure, skin conductance, respiratory rate, and electromyography.

The fundamental principle of this test is that changes in physiological arousal are not solely linked to lying or deception. Instead, they can be influenced by various factors, such as fear, anxiety, nervousness, confusion, psychosis, hypoglycemia, depression, withdrawal states (e.g., alcohol withdrawal), substance use (e.g., nicotine, stimulants), or other emotional responses, all of which can affect blood pressure and heart rate.

ii. Brain Mapping:

In Brain Mapping, the investigative officer monitors changes in the electrical field by detecting key potentials generated from the cumulative neuronal activity in the brain. This is done using multiple electrodes placed on the skin's surface covering the head. Consequently, the changes which occur in the same are found to be related to certain perceptual events are called event-related potentials. Furthermore, in simple terms, the test detects the patterns which are generated within the brain of an individual when he or she see or experience a familiar stimulus. Brain mapping in India is also referred to as Brain Electrical Activation Profile test or 'P300 Waves test'.²⁰

iii. Narco Analysis (Truth serum):

In Narco Analysis, suspect doesn't remain conscious of his actions and that is done when a solution of sodium pentathlon and distilled water is injected in the veins of that individual by an anaesthetist. After the suspect becomes unconscious, he or she is then asked about the various scenarios which may have taken place when the crime was committed. Henceforth, during this questioning, the testifier is under the influence of the sodium pentathlon solution and so he or she is expected to give answers without fabricating the truth.²¹

One of the major issues which are faced during the Narco analysis is the fact that mostly, narcotics are administered in a very small quantity and at times the testifier can even fake scenarios and manipulate the answers, while resisting the process of disinhibition. In such cases administering high dosage of narcotics is not possible, since the same can risk the life of the subject and consequently, cause him or her to go into the state of coma. The test is not very reliable and in fact it can be very controversial, owing to the fact that its nature and the way it is conducted can very well be classified as an infringement to the right against incrimination of self and the privacy right.

3. Neuro-scientific Tests and Judicial Activism:

The Indian judiciary has transitioned from supporting brain mapping and such similar neuro-scientific means of investigation, to disregarding these for the sake of protecting the rights against incrimination of self, which is assured under Article 20(3) of part III of the Indian Constitution. Below is an analysis of the precedents which have over time defined the stance of the Indian judiciary towards brain mapping:

Backing Neuro-scientific Investigation:

In *Dinesh Dalmia v. State by Spe* (2006)²², the Hon'ble Court held that only in such a case wherein the accused does not cooperate during the investigation, then the investigating officers will have the full authority to opt for neuro-scientific methods of investigation to find out any missing leads, which can be significant for the case or its investigation .

In *Sh. Shailender Sharma v. State & other*, Hon'ble Court suggested, that narco-analysis and such similar methods of scientific tests definitely help in determining the evidence which may otherwise be unavailable within the case. It shall be considered that scientific tests do not violate the protection which is given under the Indian Constitution and the test of Narco-Analysis can be conducted; however, by the end of investigation, on such statement that is self-incriminatory in nature will be treated as evidence. But such a statement can be used to define the course of investigation, for finding new or relevant evidence within a particular case.

Constitutionality of Neuro-Scientific Techniques: Violating Right to Privacy of the Accused?

The Hon'ble Supreme Court in this case has determined the constitutionality of various neuro-scientific techniques for obtaining statements from the accused including techniques such as microanalysis, BEAP (Brain Electrical Activation Profile) or 'brain mapping', and the polygraph using such techniques, clearly meant that there existed a testimonial compulsion which directly violated the rights of an accused which are right against incrimination of self, along with his right to life and personal liberty under the Article 21 of the Indian Constitution.

The Court further held that Article 20(3) of the Constitution has numerous dimensions of Article 21 (personal liberty) including:

- Right to a fair trial and
- Substantive due process.

It also held that this judgment shall apply to the accused, suspects and witnesses, and will not be limited to the courtroom, thus extending the applicability of this case to all cases where the charge will end in a prosecution.

After outlining the jurisprudence concerning the right to privacy in India, the judiciary also discussed the true significance of mental privacy and also the choice and will to stay silent, which also implies the presence of personal autonomy as an integral part of the right to privacy. The Court perceived that the right to privacy (as envisaged under Article 21) shall be interlined with Article 20(3), the right against self-incrimination, further stating that such facts, statements or revelations which are spoken by the accused under physiological responses will directly intrude into the mental privacy of the concerned person. This abstraction of testimonial using scientific methods is not

considered reasonable in terms of policing functions, further requiring the prohibition of such tests until and unless a valid consent is obtained from the accused as said in the case of *Selvi v. State of Karnataka*.²³

II. Conclusion

The analysis validates that both the Indian Constitution and the judiciary have consistently upheld the right against incrimination of self, as enshrined under the Article 20(3). The Supreme Court has strictly barred the usage of neuro-scientific procedures, such as the Narco-Analysis, Polygraph tests, and Brain Mapping, for obtaining self-incriminating statements. However, despite these legal safeguards, investigative authorities continue to employ such methods, raising concerns over possible breaches of constitutional protections and judicial directives.

While the results of narco-analysis, polygraph tests, or other neuro-scientific tools cannot be directly used as evidence in court, they may sometimes provide leads that assist in an investigation. This distinction ensures that the fundamental right against self-incrimination is preserved while allowing law enforcement to obtain evidence within the legal framework. However, it is critical that any use of such techniques is based on valid consent from the accused. The accused must be fully informed of the probable consequences of the test results before giving consent. If consent is attained through coercion, deception, or undue influence, the results should not be admissible in court.

The primary purpose of Article 20(3) is to protect individuals from psychological or physical coercion that may result in false confessions. For self-incrimination to be valid, certain conditions must be met:

- No psychological or physical coercion should be involved.
- The accused must not be compelled to serve as evidence against themselves.
- Voluntary statements made with full awareness of the consequences may be admissible.

On the other hand, self-incrimination protections do not extend to all types of evidence. For instance, while an accused cannot be forced to provide a confession, documents seized from their premises may still be accepted as valid evidence. This distinction ensures that while the law protects individuals from forced confessions, it does not shield them from the discovery of material evidence that can be lawfully obtained. Thus, Article 20(3) acts as an essential protection against the misuse of power by investigative agencies. However, certain exceptions exist, safeguarding a balance between protecting individual rights and enabling law enforcement to gather evidence and solve cases effectively. The judiciary plays a vital role in dissecting each case to ensure that fundamental rights are upheld while also allowing for the administration of apt justice.

Ultimately, the state endures the responsibility of protecting the fundamental rights of its citizens and guaranteeing that no individual is subjected to an unjust trial. While instances of state failure due to conflicts of interest at several levels have been observed, establishing a robust system of accountability remains crucial. The public's right to information plays an imperative role in upholding these rights, as individuals can only exercise their legal protections if they are fully aware of them. Furthermore, maintaining high standards of integrity, transparency, and procedural security within the legal system is essential to ensuring fair and effective administration of justice.

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