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Right of an Accused to be Protected Against Self-Incrimination — Its Availability and Emerging Judicial Dimensions under Criminal Law

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I. Genesis of the Right of an Accused to be Protected against Self-incrimination:

The Constitution of India enshrines in Clause (3) of Article 20 an injunction that "No person accused of any offence shall be compelled to be a witness against himself". This doctrine is known as the doctrine against 'self-incrimination' which has been designed to protect an accused from being compelled by hope or fear to admit facts or deny them. The immunity from self incrimination is based on the 'presumption of innocence' and so long as the presumption of innocence remains as one of the fundamental canons of criminal jurisprudence, evidence against the accused should come from sources other than the accused. The doctrine had its origin in the 16th century in England in protest against the inquisitorial methods of the Ecclesiastical courts. The *English Criminal Evidence Act*, 1898, provided that though the accused is a competent witness on his own behalf, he cannot be compelled to give evidence against himself and his failure to give evidence in defence cannot be commented upon. There the protection was also, extended to a witness other than the accused. In the United State of America, the 5th Amendment of the Constitution provides that "no..... person...shall be compelled in any criminal case to be a witness against himself...the accused may voluntarily elect to give evidence but if he elects not to give evidence in defence, this fact cannot be considered to his prejudice"[2]. Prior to the adoption of the Constitution, this right was recognized in India in section 342 of the *Criminal Procedure Code*, 1898 and presently it exists in sections 313 & 315 of the *Criminal Procedure Code*, 1973, and in sections 24, 25 and 26 of the *Indian Evidence Act*, 1872. But, prior to the Constitutional provision, is was followed within the limitation of court premises only; later on, when it became the fundamental right in the constitution, its dimensions became wide spread.

In common law countries, the development of the rule against self-incrimination has been impressive. The protection is extended to cover all persons who have been accused in trial or those giving evidence. The privilege has been enlarged to include oral as well as documentary evidence in criminal as well as civil proceedings; and it traverse beyond the confines of the court to the legislative committees and other tribunals. As was pointed out earlier, due to the doctrine of

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2 Chaturvedi A.N., Right of accused under Indian Constitution' Deep & Deep, New Delhi, p. 161.

the presumption of innocence of the accused, the burden of proof is placed on the prosecution to prove a person guilty and the accused is allowed to stand by and watch prosecution failing in establishing the charge "conclusively" and "beyond all reasonable doubts". This presumption was impliedly recognized by section 101 of the *Indian Evidence Act*, 1872 which provides that 'whosoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, he must prove that those facts exist'. This presumption of innocence also gave birth to the rule of immunity from self-incrimination embodied in Article 20 (3) of the Constitution.

II. Statutory Provisions Related to the Right of an Accused to be Protected against Self-Incrimination:

Following the common law, sections 203 and 204 of the *Criminal Procedure Code* of 1861, provided that 'no oath could be administered to an accused' and the Magistrate was invested with discretion to examine an accused. Section 250 of the *Criminal Procedure Code*, 1872, compulsorily provided for a general questioning of the accused after the prosecution witness had been examined and section 345 of this Code prohibited the administration of oath to a person accused of an offence. These provisions were later on introduced in section 342 of the *Criminal Procedure Code*, 1898, and are now retained in section 313 of the *Criminal Procedure Code*, 1973, which provides thus:

II. I. In every enquiry or trial, for the purpose of enabling the accused personally to explain any circumstances appearing in the evidence against him, the court—

(a) may at any stage, without previously warning the accused put such questions to him as the Court considers necessary;

(b) shall after the witnesses for the prosecution have been examined and before he is called on for his defense, question him generally on the case; provided that in a summons-case, where the Court has dispensed with the personal attendance of the accused, it may also dispense with his examination under clause (b).

II. II. No oath shall be administered to the accused when he is examined under sub-section (1).

II. III. The accused shall not render himself liable to punishment by refusing to answer such question, or by giving false answers to them.

Further, section 315(1) of the *Criminal Procedure Code*, 1973, reproducing the provisions of section 342-A of *Criminal Procedure Code*, 1898, provides that:

> "Any person accused of an offence before a Criminal Court shall be a competent witness for the defense and may give evidence on oath in disproof of the charges made against him or any person charged together with him at the same trial:

> provided that (a) he shall not be called as a witness except on his own request in witness; (b) his failure to give evidence shall not be made the subject of any comment by any of the parties or the Court or give rise to any presumption against himself or any person charged together with him at the same trial".

Similarly, an accused person cannot be convicted on the basis of a coerced confession of the accused. Section 164 (2) of the *Criminal Procedure Code*, 1973, narrates this right of the accused in the following words:

> "The Magistrate shall, before recording any such confession, explain to the person making it that he is not bound to make a confession and that, if he does so, it may be used as evidence against him; and the Magistrate shall not record any such confession unless, upon questioning the person making it, he has reason to believe that it is being made voluntarily".

Additional protections have been provided by the *Indian Evidence Act*, 1872. According to section 24 of the said Act, 'any confession made by an accused is irrelevant if it has been caused by inducement, threat or promise'. Section 25 of the said Act provides that 'a confession made by an accused person to a police officer cannot be proved'. Similarly, according to section 26 of the said Act, 'a confession by an accused person while in custody cannot be proved'. After the incorporation of the protection against self-incrimination as a Constitutional Right in 1950, the vistas of the rule have become more wide open. The Indian Courts have looked into other system of jurisprudence to ascertain the scope of the rule; particularly the precedents from the United States[3]. While the American Courts, in the interpretation and extension of the Constitutional Right of the accused, have taken a very liberal view of the doctrine of self-incrimination by enlarging its scope to the extent of the "mischief against which it seeks to guard", the various dimensions of this right are still in the process of being determined by the Indian courts by way of interpretation.

III. Constitutional Right of an Accused to be Protected against Self-incrimination and its Dimensions:

The right of an accused to be protected against self-incrimination has been guaranteed under clause (3) of Article 20 of the Constitution which comprehends the application of several rules of evidence and procedure and also confers a privilege to remain silent in matters of incrimination against the accused. Article 20 (3), thus, consists of the following main components:

(a) a right pertaining to a person "accused of an offence"

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3 See R. Berger Congress v. The Supreme Court (1969), p. 16; Wright, "The role of the Supreme Court in a democratic society-Judicial activism or restraint", 54 Cornell L.R.1 (1968).

(b) a protection against "compulsion to be witness", and
(c) a protection against such compulsion resulting in his giving evidence "against himself".

Physical and mental tormentations and tortures are implicit in a compulsive testimony aimed primarily at getting an easy way to prove the guilt of an accused. Therefore, the Constitution of India expressly forbids the use of evidence tendered by a person who is compelled to be witness against himself. Accordingly, the guarantee against testimonial compulsion incorporated in Article 20 (3) can be claimed by a person establishing that if a statement is sought to be tendered in evidence against him, it is liable to expose him to an accusation. The availability of this right and its various dimensions have been discussed in various judgments of Supreme Court and High Courts which are briefly examined below.

III. I. Meaning and Scope of The Right of an Accused to be Protected against Self-Incrimination:

The main principles of law related to the constitutional right of an accused to be protected against self-incrimination based on various judicial decisions may be outlined as under.

(1) In order to avail himself to the protection it is necessary that the person must have stood in the character of an accused at the time when he made the statement. It is not enough that he should become an accused, any time after the statement has been made[4].
(2) The right protected by Article 20(3) was held available to the petitioner against whom a First Information Report had been lodged and, therein, he had been recorded as an accused[5].
(3) "To be a witness" is not equivalent to "furnishing evidence" in its widest significance; that is to say, as including not merely making of oral or written statements but also production of documents or giving materials which may be relevant at a trial to determine the guilt or innocence of the accused[6].
(4) The inherent logic of the doctrine has led the courts to extend protection of Article 20(3) to that kind of documentary evidence, which, if it were oral evidence, would be protected[7].
(5) Every positive volitional act which furnishes evidence is testimony, and testimonial compulsion connotes coercion which procures the positive volitional evidentiary acts of the person, as opposed to the

4 Per majority judgement in State of Bombay v. Kathi Kalu Oghad 1961(2) Cri L.J. 856 (S.C.) at 864.
5 *Ibid.*
6 *Ibid.*
7 *Ibid.*

negative attitude of silence or submission on his part[8].

(6) The phrase used in Article 20(3) is 'to be a witness' and 'not to appear as a witness': It follows that the protection afforded to an accused, so far as it is related to the phrase to be witness, is not merely in respect of testimonial compulsion in the court room but may well extend to compelled testimony previously obtained from him. It is available, therefore, to a person against whom a formal accusation relating to the commission of an offence has been levelled which in the normal course may result in prosecution[9].

(7) A person could "be a witness" not merely by giving oral evidence, but also by producing documents or by making intelligible gesture in the case of dumb witness[10] or the like according to the expression "to be a witness" used in Article 20(3)

III. II. Extension of the Scope of the Protection/ Immunity of an Accused against Self-incrimination – Judicial Dimensions:

To what extent the scope of the protection/immunity of an accused against self incrimination can be extended to cover those cases which are not direct testimony of the accused has been a debatable issue amongst the different High Courts and the Supreme Court. In this context, the following situations have evoked judicial interpretation:

(1) Utilisation of tape recorded statements obtained by deception and without the knowledge of an accused;

(2) Utilisation of specimen writings, finger prints, etc. of an accused;

(3) Production of documents through the legal process of 'search and seizure' from the custody of an accused;

(4) Utilisation of statements voluntarily made by an accused; and

(5) Utilisation of statements of an accused obtained by the use of new scientific techniques like – Narco analysis, Polygraph examination and Brain Electrical Activation Profile test.

(1) Utilisation of Tape Recorded Statements Obtained by Deception and Without the Knowledge of an Accused and the Protection / Immunity of an Accused Against Self-Incrimination.

The Supreme Court in the case of *Usufalli* v. *State of Maharashtra*[11],

8 M.P Sharma v. Satish Chandra, 1954 SCR 1077 at p. 1088 (1955) Cr. L.J. 865 (S.C)

9 *Ibid.*

10 Sec 119, Evidence Act, 1872,- "A witness who is unable to speak may give his evidence in any other manner in which he can make it intelligible, as by writing or by signs, but such writing must be written and the signs made in open court. Evidence so given shall be deemed to be oral evidence", (1954) SCR 1077 at p.1088.

11 AIR 1968 S.C. 1479 : 1968 Cri L.J. 103.

has held that 'tape recorded statement even obtained by deception and without the knowledge of an accused are not the testimonial compulsion.' The facts of this case were briefly thus: a trap was arranged by the police officials by setting the tape recorder in the inner room and fitting the microphone in outer room where the appellant and Sheikh had conversation. *Justice Bachawat* held that 'the protection of Article 20(3) was not available to the appellant; in spite of the fact that the tape recording was done without the appellant's knowledge and in a deceptive manner, nevertheless the accused was not compelled; for he was free to speak or not to speak. Therefore, as the testimony was not compelled, Article 20(3) did not apply'[12]. The Supreme Court reiterated the same view in *R.M. Malkani* v. *State of Maharashtra*[13] that 'tape recorded conversation was held admissible and in no way it infringed protection against self-incrimination, for the simple reason that the accused was not compelled to make the statement.' In *N. Sri Ramma Reddy* v. *Sri V.V. Giri*[14], the Supreme Court has held that 'the tape recorded statement become admissible if (a) the conversation is relevant to the matter in issue, (b) the voice is clearly identified, and (c) the accuracy of the tape recorded conversation is proved by eliminating the possibility of erasing the tape recording. A contemporaneous tape recording of a relevant conversation is a relevant fact and is admissible under section 8 of the *Indian Evidence Act*, 1872. It is *'res gestae'*. Just as a photograph taken without the knowledge of the person photographed can become relevant and admissible so does a tape record of a conversation unnoticed by the talkers is relevant and admissible.

(2) Utilisation of Specimen Writings, Finger Prints, etc., of an Accused and the Protection/Immunity of an Accused against Self-Incrimination

Taking of 'specimen writings', 'finger prints', etc., and utilization of the same have been held not to be included under Article 20(3) of the Constitution. In *Ram Swaroop* v. *State*[15] the accused was directed by the Sessions Judge to give his specimen writing under Section 73 of the *Indian Evidence Act*, 1872, for being compared by an expert. This order was challenged on the plea that the direction of the Session Judge to furnish the specimen writing amounted to compelling to furnish evidence against the accused and, therefore, was hit by Article 20(3) of the Constitution. The Supreme Court held that 'the direction given by the Sessions Judge under section 73 of the *Indian Evidence Act*, 1872, was not hit by the provisions of Article 20(3) of the Constitutions and, therefore, the accused could not refuse to give his specimen writing when ordered by the court to give it'. The court noted the observation of the full bench decision of the

12 *Ibid.*, at 150.

13 AIR 1973 S.C. 157 : 1973 Cri L.J. 228.

14 AIR 1971 S.C. 1162.

15 AIR 1958 All. 191 : 1958 Cri L.J. 134.

Rangoon High Court given in *Emperor* v. *Nga Tum Hlaing*[16] that 'the ridges of his thumb are not provided by him any more than the feature of his countenance are provided by him; all that he is asked to do is to display these ridges; for better scrutiny the ridges are linked over and an impression is made on a piece of paper'.

(3) Utilisation of Documents Obtained through the Legal Process of 'Search and Seizure' from the Custody of the Accused and the Protection/ Immunity of an Accused against Self-Incrimination.

There is a distinction between an order of the court by which the accused himself is directed to produce the documents and the order of the court by which the police is directed to search and seize the documents in the possession of the accused. Whereas the former amounts of testimonial compulsion under Article 20(3) of the Constitution, the latter does not amount to be so because neither search nor seizure are the acts of occupier of the searched property – they are the acts of the other, i.e., police, to whom he is obliged to submit. As to whether the production of documents through the legal process of search and seizure from the custody of an accused does hit the constitutional privilege was initially discussed in *M.P. Sharma* v. *Satish Chandra*[17]. In this case, on the application of the Registrar of Joint Stock Companies, Delhi, an investigation into the affairs of Messers Dalmia Jain Airways Ltd., which went into liquidation on 13-6-1952 with an intention to defraud its shareholders within a short span of six years of its incorporation with an authorised share capital of Rs. 10 crores, revealed the commission of various offences punishable under the *Indian Penal Code*, 1860. After lodging the First Information Report, a search warrant was issued by the District Magistrate. During the search, a number of incriminating documents were seized. The petitioner moved under Article 32 of the Constitution for quashing the search warrant and the return of the documents as the search warrant was in violation of Article 19(1) (f) and Article 20(3) of the Constitution. It was further urged that Article 20(3) not only applied to oral testimony given by an accused in a criminal case pending against him in a court, but also applied to evidence of whatever character if compelled out of a person who was likely to become incriminated thereby as an accused. The arguments were negatived and the Supreme Court held that 'a search and seizure of documents from the possession of the accused made in pursuance of warrants issued under Section 96 of the *Code of Criminal Procedure*, 1898 (now section 93 of the *Code of Criminal Procedure*., 1973), was legal and constitutional. There was no invasion of the fundamental right of the petitioner guaranteed by Article 20(3) of the Constitution consequent upon a legal search and seizure made under Section 96 of that Code

16 AIR 1924 Rangoon 115 (F.B).
17 1954 Cri L.J. 865 (S.C)

of 1898.[18]; *Justice Bala Krishna Ayyar* quoted *in extenso* the following observation which was made by *Justice Somasundaram* in a Madras High Court Judgment[19]:

> "No Article of the Constitution prohibits either a search under Section 165 of *Criminal Procedure Code* by the police of premises involved in cognizable offence or the issue of search warrants by a Magistrate whether the offence involved is cognizable or non-cognizable. It is easy to see where a different view would lead us. A person may commit a burglary and keep the loot in an almirah inside his house or he may commit cheating and keep the proceeds thereof in a drawer of his writing desk, and they would all be as safe as if they had been lodged in the Bank of England. The Constitution is not intended to be a charter for the lawless and there is nothing in Article 20 of the Constitution or in any of its other Articles to prohibit the police from searching either the person of the accused or the premises in the manner laid down by Criminal Procedure Code. Nor have the power of the Magistrate to issue a search warrant in the circumstances set out in the Code been abrogated by the Constitution".

There are conflicting decisions on the point whether 'compelled production of documents' under section 94 of the *Criminal Procedure* Code, 1898, (section 91 of the *Criminal Procedure Code*,1973) was hit by Article 20(3) of the Constitution. The answer of this question by the *High Courts of Kerala*[20], *Gujarat*[21] and *Allahabad*[22] had been affirmative that the 'constitutional guarantee under Article 20(3) is not only confined to oral testimony but also extends to any compulsory process for production of evidentiary documents which are likely to support the prosecution against the accused'. On the other hand, the *High Courts of Madhya Bharat*[23] and *Jammu and Kashmir*[24] had been negative that 'searches conducted under the orders of the courts do not tantamount to testimonial compulsion to the accused person so as to amount to an invasion of the guarantee of immunity from self-incrimination contained in Article 20(3) of the Constitution;

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18 *Ibid.*, at p.867.

19 AIR 1955 Mad. 685.

20 Krishan Keshvan v. State, 1957, Cr. L.J. 755 at p. 757 (Ker), See also R.C. Gupta v. State, AIR 1954 All. 219; Rahman Kunhappu v. Ali Ahmad, AIR 1957 Ker. 80 (it was held that the legal process to produce the document was in violation of Article 20(3)

21 R.K. Ashere v. Tempton Jahangir, AIR 1961 Guj. 137: 1961 (2) Cri L.J. 338.

22 Babu Ram v. State, 1961 (2) Cri L.J. 55 (All).

23 Mohammad Hussain v. Provident Funds Inspector, AIR 1957 M.B. 58: 1957 Cri L.J. 195 (M.B.)

24 Gurupurb Singh v. Autar Singh, AIR 1960 J & K 55: 1960 Cri L.J. 470.

as neither the search nor the seizure is such an act of the other person to which the occupier is obliged to submit, the legal searches and seizure cannot said to be testimonial compulsion within the meaning of the prohibition contained in Article 20(3). The Division Bench of the Punjab High Court in *State* v. *Prabhu Singh*[25] has tried to strike a balance between the two conflicting views by holding that 'an order of the Magistrate requiring the accused to produce a document is hit or not hit by the prohibition would always depend upon the nature of that document; if the document is such, as is not hit by his statement conveying his personal knowledge relating to the charges against him, he may be called upon by the court to produce that document; but if the order relates to a document which contains any statement of the accused based on his personal knowledge, the order for its production will attract the Constitutional bar against his testimonial compulsion'.

The contention that the production of documents at the instance of the court to the party hit the constitutional protection against self-incrimination can be sustained on the basis of the use of 'compulsion by the court' on the accused of an offence. The criterion of using the search procedure as laid down in *Gurpurb Singh* v. *Autar Singh*[26] seems to be the valid criterion because the use of search of documents through the agency of the police is in no way a testimonial compulsion. The conflicting views on the subject has been resolved by the Supreme Court in *State of Gujarat* v. *Shyamlal*[27] when the Court by a majority of 4 to 1 held that section 94 (1) of the *Code of Criminal Procedure*, 1898 (now 91 of the *Code of Criminal Procedure,* 1973) did not apply to an accused. *Justice Sikri*, speaking for the majority after citing *in extenso* a few early English cases viewed that the Magistrate's order was violative of Article 20(3) of the Constitution, while *Justice Shah*, dissenting, held otherwise when he observed thus:

> "Testimonial compulsion as guaranteed by Article 20(3) relates to the proceeding pending in the court and does not relate to an order of the police officer made during the investigation and, therefore, he erroneously held that the court would not consider an action of a police officer calling upon a person charged with the commission of an offence to produce a document or thing in his possession as an act which infringes the guarantee under Article 20(3) of the Constitution. The references made by the Sessions Judge should have been accepted".

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25 AIR 1964 Punj. 325 : 1964(2) Cri L.J. 199(Punj.).

26 AIR 1960 J & K 55.

27 AIR 1965 S.C. 1215 :1965 (2) Cri L.J.256 (S.C) But a general search warrant under Sections 96 (2) and (3) of Cr.P.C 1898 (now section 93 of the Cr.P.C. 1973) could be issued to a police officer for search and the production of a thing if it was not known to be in the possession of the accused.

(4) Utilisation of Statements Made by an Accused Voluntarily and the Protection/Immunity of the Accused Against Self-Incrimination

It has been held by the Supreme Court in *Mohamed Dastagir* v. *State of Madras*[28], that 'there was no accusation of an offence against the accused at the time when he was asked to produce the currency notes meant to be offered as bribe; therefore, he could not avail himself of the right protected by Article 20(3). No doubt he was asked but he could have very well refused to do so'. It is submitted that the court erred in appreciating the circumstances which had subdued the appellant to a state of fear when he had reproduced the currency notes. Likewise, the seizure of incriminating articles from a person voluntarily surrendering to a magistrate's court is not an act of compulsion[29]. Where a person is found by the police in suspicious possession of some article and he is asked to explain the possession under section 124 of the *Bombay Police Act*, 1955, as there was reason to believe that the property was stolen, there could not be any question of the accused being compelled to incriminate himself[30]. The position is precisely the same when an accused is asked to explain the circumstances appearing in evidence against him under section 342 of the *Code of Criminal Procedure*, 1898 (now section 313 of the *Code of Criminal Procedure,* 1973) at any stage of proceeding. It is pertinent to note that voluntary confession does not attract the constitutional guarantee; only testimony obtained by 'compulsion' would invite the attention of Article 20(3) of the Constitution and 'compulsion' means 'duress' which includes 'threatening', 'beating' or 'imprisoning of the wife, parent or child of a person'. Thus, where the accused makes a confession without any inducement, threat or promise, Article 20(3) does not apply.

(5) Utilisation of Statements of an Accused Obtained by the Use of New Scientific Techniques - Like Narco analysis, Polygraph Examination and the Brain Electrical Activation Profile (BEAP) Test - and the Protection/Immunity of an Accused Against Self-Incrimination

During the last two decades, investigating agencies have taken assistance of new scientific techniques - known as *Narco analysis, Polygraph examination and the Brain Electrical Activation Profile (BEAP) test* – for extracting the truth from the accused particularly in the cases of hardened criminals or terrorists. It has been a matter of debate whether compulsory administration of these techniques violates the 'right against self-incrimination' and whether the results obtained by such tests can be admitted in evidence. This matter had been challenged in the Supreme Court through several criminal appeals and ultimately

28 AIR 1960 S.C. 756: 1960 Cri. L.J. 1159 (S.C)

29 Ine re Palani Moogan, AIR 1955 Mad 495: 1955 Cri L.J. 1197 (Mad) (Seizure of blood stained cloth from the court room).

30 State v. Gundan Lakhanmal, AIR 1960 Bom. 377.

on 05-05-2010, the Full Bench of the Supreme Court (consisting of Chief Justice K.G. Balkrishnan, *Justice R. V. Raveendran and Justice J.M.Pancha)* in the case of *Smt. Selvi & Others* v. *State of Karnataka*[31], had finally declared that 'the compulsory administration of the impugned techniques violates the 'right against self-incrimination'. As the honourable Supreme Court has decided a very relevant issue and laid down an important law, it requires detailed examination.

IV. Constitutionality of the Involuntary Administration of Certain Scientific Techniques during Investigation and Right of an Accused to be Protected against Self-incrimination – The Supreme Court's Interpretation:

The learned *Chief Justice of India, Mr. K.G. Balkrishnan,* delivering the judgement in the recently decided case of *Smt. Selvi & Others* v. *State of Karnataka*[32] (referred above) had expressed that the issue of involuntary administration of certain scientific techniques, namely Narcoanalysis, Polygraph examination and the Brain Electrical Activation Profile (BEAP) test for the purpose of improving investigation efforts in criminal cases, has received considerable attention since it involves tensions between the desirability of efficient investigation and the preservation of individual liberties. The learned Chief Justice has said that 'ordinarily the judicial task is that of evaluating the rival contentions in order to arrive at a sound conclusion but the present case was not an ordinary dispute between private parties, it raised pertinent questions about the meaning and scope of fundamental rights which are available to all citizens'. Therefore, the Full Bench of the Supreme Court examined the implications of permitting the use of the impugned techniques in a variety of settings and finally held that the *"the compulsory administration of the impugned techniques violates the 'right against self-incrimination'*[33]". (Emphasis added) It has been observed by the learned *Chief Justice K.G. Balkrishnan* that "the underlying rationale of the said right (right against self-incrimination) is to ensure the reliability as well as voluntariness of statements that are admitted as evidence. This Court has recognised that the protective scope of Article 20(3) extends to the investigative stage in criminal cases and when read with Section 161(2) of the *Code of Criminal Procedure*, 1973, it protects accused persons, suspects as well as witnesses who are examined during an investigation. The test results cannot be admitted in evidence if they have been obtained through the use of compulsion". It was observed by the apex court that "Article 20(3) of the Constitution protects

31 (2010) 7 S.C.C.263 : J.T.2010 (5) S C 11 — Criminal Appeal No. 1267 of 2004 with Criminal Appeal Nos. 54 of 2005, 55 of 2005, 56-57 of 2005, 58-59 of 2005, 1199 of 2006, 1471 of 2007, and Nos. 987 &990 of 2010 (Arising out of SLP (Crl.) Nos. 10 of 2006 and 711 of 2007) – judgement delivered on 5-5-2010.

32 *Ibid.*, para 221.

33 *Ibid.*

an individual's choice between speaking and remaining silent, irrespective of whether the subsequent testimony proves to be inculpatory or exculpatory'. Article 20(3) aims to prevent the forcible 'conveyance of personal knowledge that is relevant to the facts in issue'. The results obtained from each of the impugned tests bear a 'testimonial' character and they cannot be categorized as 'material evidence'[34]".

The learned judges of the Supreme Court has also expressed that "*forcing an individual to undergo any of the impugned techniques violates the standard of 'substantive due process' which is required for restraining personal liberty*"[35]. (Emphasis added). It was observed in this connection that 'such a violation will occur irrespective of whether these techniques are forcibly administered during the course of an investigation or for any other purpose since the test results could also expose a person to adverse consequences of a non-penal nature.' And, therefore, even 'the impugned techniques cannot be read into the statutory provisions which enable medical examination during investigation in criminal cases, i.e., the Explanation to Sections 53, 53-A and 54 of the *Code of Criminal Procedure*, 1973. Such an expansive interpretation is not feasible in the light of the rule of '*ejusdem generis*' and the considerations which govern the interpretation of statutes in relation to scientific advancements'[36].

The Supreme Court has also held that "*the compulsory administration of any of these techniques is an unjustified intrusion into the mental privacy of an individual. It would also amount to 'cruel, inhuman or degrading treatment' with regard to the language of evolving international human rights norms.* Furthermore, *placing reliance on the results gathered from these techniques comes into conflict with the 'right to fair trial'*[37]". Deliberating upon the choice between public interest and the constitutional right, the Supreme Court has observed that "Invocations of a compelling public interest cannot justify the dilution of constitutional rights such as the 'right against self-incrimination'[38]".

In the light of the above observations, the Supreme Court has held that:

> "*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*"[39]. (Emphasis added)

It may be pointed out here that the compulsory administration of the impugned techniques has been declared violative of the constitutional right. A

34 *Ibid.*
35 *Ibid.*, para 222.
36 *Ibid.*
37 *Ibid.*
38 *Ibid.*
39 *Ibid.*, para 223.

question was raised regarding the voluntary administration of the impugned techniques. In this context, it was observed by the Supreme Court that "However, we do leave room for the voluntary administration of the impugned techniques in the context of criminal justice, provided that certain safeguards are in place. Even when the subject has given consent to undergo any of these tests, 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"[40].

The National Human Rights Commission in 2000 had published *'Guidelines for the Administration of Polygraph Test (Lie Detector Test) on an Accused'* which are as under:

(i) No Lie Detector Tests should be administered except on the basis of consent of the accused. An option should be given to the accused whether he wishes to avail such test.

(ii) If the accused volunteers for a Lie Detector Test, he should be given access to a lawyer and the physical, emotional and legal implication of such a test should be explained to him by the police and his lawyer.

(iii) The consent should be recorded before a Judicial Magistrate.

(iv) During the hearing before the Magistrate, the person alleged to have agreed should be duly represented by a lawyer.

(v) At the hearing, the person in question should also be told in clear terms that the statement that is made shall not be a 'confessional' statement to the Magistrate but will have the status of a statement made to the police.

(vi) The Magistrate shall consider all factors relating to the detention including the length of detention and the nature of the interrogation.

(vii) The actual recording of the Lie Detector Test shall be done by an independent agency (such as a hospital) and conducted in the presence of a lawyer

(viii) A full medical and factual narration of the manner of the information received must be taken on record.

The Supreme Court, reproducing the above-stated guidelines, had explicitly declared that "These guidelines should be strictly adhered to and similar safeguards should be adopted for conducting the 'Narcoanalysis technique' and the 'Brain Electrical Activation Profile' test"[41].

In favour of the administration of these techniques the three reasons

40 *Ibid.*

41 *Ibid.*

were floated before the Supreme Court:

(i) There may be sometimes compelling public interest like public safety for the use of these techniques;

(ii) The promotion of these techniques could reduce the regrettably high incidence of 'third degree methods' used by policemen; and

(iii) The use of these techniques would only be sought in cases involving heinous offences.

With regard to the first argument that in the public interest particularly to preserve public safety, exception should be made to the right against self-incrimination and the use of these techniques be permitted, the Supreme Court did not accept the argument and the following observations were made :

> "Ordinarily it is the task of the legislature to arrive at a pragmatic balance between the often competing interests of 'personal liberty' and public safety. As a constitutional court, this Court can only seek to preserve the balance between these competing interests as reflected in the text of the Constitution and its subsequent interpretation. There is absolutely no ambiguity on the status of principles such as the 'right against self-incrimination' and the various dimensions of 'personal liberty'. It has already been pointed out that *the rights guaranteed in Articles 20 and 21 of the Constitution of India have been given a non-derogable status and they are available to citizens as well as foreigners. It is not within the competence of the judiciary to create exceptions and limitations on the availability of these rights*"[42]. (Emphasis added)

With regard to the second argument that the promotion of these techniques could reduce the regrettably high incidence of 'third degree methods' that are being used by policemen all over the country the learned Judges, while rejecting the plea have opined the following :

> "If forcible administration of these techniques are permitted, it could be the first step on a very slippery-slope as far as the standards of police behaviour are concerned.... This is a circular line of reasoning since one form of improper behaviour is sought to be replaced by another. What this will result in is that investigators will increasingly seek reliance on the impugned techniques rather than engaging in a thorough investigation. The widespread use of 'third-degree' interrogation methods so as to speak is a separate problem and needs to be tackled through long-term solutions such as more emphasis on the protection of human rights during police training, providing adequate resources

42 *Ibid., para 216.*

for investigators and stronger accountability measures when such abuses do take place"[43].

With regard to the claim that the use of these techniques will only be sought in cases involving heinous offences, the following observations were made by the Supreme Court while rejecting the claim:

> "The claim . . . rings hollow since there will be no principled basis for restricting their use once the investigators are given the discretion to do so. From the statistics presented before this Court as well as the charges filed against the parties in the impugned judgments, *it is obvious that investigators have sought reliance on the impugned tests to expedite investigations, unmindful of the nature of offences involved. In this regard, this Court does not have the authority to permit the qualified use of these techniques by way of enumerating the offences which warrant their use. By itself, permitting such qualified use would amount to a law-making function which is clearly outside the judicial domain"*[44]. (Emphasis added)

In support of the findings that 'the compulsory administration of these scientific techniques during investigation is violative of the right of an accused against self-incrimination', it has been argued by the learned judges that: "One of the main functions of constitutionally prescribed rights is to safeguard the interests of citizens in their interactions with the Government. *As the guardians of these rights, this Court will be failing in its duty if this Court permits any citizen to be forcibly subjected to the tests in question. One could argue that some of the parties who will benefit from this decision are hardened criminals who have no regard for societal values. However, it must be borne in mind that in constitutional adjudication this Court's concerns are not confined to the facts at hand but extend to the implications of the decision for the whole population as well as the future generations.* Sometimes there are apprehensions about judges imposing their personal sensibilities through broadly worded terms such as `substantive due process', but in this case the inquiry has been based on a faithful understanding of principles entrenched in our Constitution[45]. (Emphasis added)

In order to strengthen its findings against the involuntary administration of the tests in question, the apex court also highlighted some practical concerns. Firstly, the claim that the results obtained from these techniques would help in extraordinary situations was considered questionable because all of the tests in

43 *Ibid., para 218.*
44 *Ibid., para 219.*
45 *Ibid., para 220.*

question are those which need to be patiently administered and the forensic psychologist or the examiner has to be very skilful and thorough while interpreting the results. It was argued by the Court that in a *narcoanalysis test* the 'subject is as likely to divulge a lot of irrelevant, incoherent and sometimes false information as he/she is likely to reveal useful facts. Sometimes the revelations may begin to make sense only when compared with the testimony of several other individuals or through the discovery of fresh materials.' Similarly, in a *polygraph test*, 'interpretation of the results is a complex process that involves accounting for distortions such as 'countermeasures' used by the subject and weather conditions among others.' In a *BEAP test*, also 'there is always the possibility of the subject having had prior exposure to the 'probes' that are used as *stimuli*.' On the basis of these practical concerns, the apex court has opined that "All of this is a gradually unfolding process and it is not appropriate to argue that the test results will always prove to be crucial in times of exigency. It is evident that both the tasks of preparing for these tests and interpreting their results need considerable time and expertise"[46]. (Emphasis added) ara 217] [588-F-H; 589-A-

In the light of the above stated arguments, the apex court categorically held that "*irrespective of the need to expedite investigations in such cases, no person who is a victim of an offence can be compelled to undergo any of the tests in question. Such a forcible administration would be an unjustified intrusion into mental privacy and could lead to further stigma for the victim*"[47]. (Emphasis added)

The Supreme Court's ruling that Narco, Polygraph or Brain- mapping tests cannot be conducted on anyone without their consent and even when consent has been given guidelins framed by the National Human Rights Commission have to be followed had been widely welcomed by the lawyers, rights activists throughout the country[48].

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46 *Ibid., para 217.*

47 *Ibid., para 214.* The Supreme Court relied on D.K. Basu v. State of West Bengal, AIR 1997 SC 610 and referred to Armando Schmerber v. California, 384 US 757 (1966); R v. Beland, [1987] 36 C.C.C. (3d) 481 and United States v. Scheffer, 523 US 303 (1998).

48 *Deccan Herald,* newspaper 5-5-2010 – http/www.deccanherald.com – Lawyer Rebecca M John, counsel for Maoist leader Kobad Ghandy, said: "I am just overjoyed at the Supreme Court decision. I think this should have been done a long time back. Narco test is simply unconstitutional and the Supreme Court has upheld the rule of law" A city court had allowed a narco test to be conducted on Ghandy last year. The Delhi High Court stayed the order. "The narco test is misuse of the law. It's witchcraft in the garb of scientific test. It is not used in any civilised country," John added. Noted civil liberties lawyer Prashant Bhushan agreed and said it was a welcome judgement. "Quite apart from the fact that narco analysis is known to be a very imperfect, uncertain and hazardous procedure, (at times) it also gives you incorrect information." Mumbai-based senior lawyer Majid Memon described it as an important judgment. "No person can be compelled to be a witness against himself; they have the right to silence. (The

To conclude, it may be said that the principle of granting immunity to an accused from self-incrimination is the outcome of doctrine of presumption of innocence of the accused resulting from the adopted outrageous procedure of the court of Star Chamber and barbarous punishment awarded to an individual irrespective of the fact that he was guilty or innocent. This principle in India, though was not recognized in the present form in the very early of the second half of the 19th century, nevertheless, to some extent, received statutory sanction only when provisions were made in the Indian Evidence Act, 1872 and the Code of Criminal Procedure, 1898 and they were retained in the Code of Criminal Procedure, 1973. The immunity was further strengthened by the Constitutional provision contained in Article 20 (3) declaring it as a Fundamental Right of an accused to be protected against self-incrimination which included a right to be silent. While considering this important right, various situations have been examined by the judiciary like - utilisation of tape recorded statements obtained by deception and without the knowledge of an accused; utilisation of specimen writings, finger prints, etc. of an accused; utilisation of documents obtained through the legal process of 'search and seizure' from the custody of an accused; utilisation of statements voluntarily made by an accused; and very recently utilisation of statements of an accused obtained by the use of new scientific techniques like – Narco analysis, Polygraph examination and Brain Electrical Activation Profile test . Whereas in some of the cases, such utilization has not been held violative of Article 20(3), very recently the Supreme Court in a landmark judgment, reaffirming that the fundamental Right of an accused guaranteed by Article 20(3) of the Constitution includes right to be silent, has declared the involuntary use of polygraph tests, narco-analysis as well as brain mapping tests, as *'cruel, inhuman and degrading treatment'* and thus illegal and violative of the right against self-incrimination under Article 20(3) of the Constitution as well as against international conventions to which India is a party. *It has also been held that* placing reliance on the results gathered from these techniques, whose efficacy has not been proved scientifically, would come into conflict with the right to a fair trial and would result in the dilution of fundamental rights such as the right against self-incrimination . The Supreme Court had observed that giving credence to such tests would also give rise to unhealthy practices such as issuance of threats or inducements to accused, especially those from weaker sections of society. The bench has openly wondered whether there is a possibility that confessions so obtained would be sought to be made admissible under the garb of the scientific

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judgement) is important in the context of our country where many a times poor and innocent people are forced to speak against themselves." Rights activist Shravani Sharma, while agreeing with Memon, said: "It's definitely a welcome judgement. It's often seen that helpless poor people who are falsely implicated in cases are made to go through these tests and falsely implicated. Innocent people have suffered because of these tests".

validity of these tests. It was also observed that these tests involve not only pointed questions regarding the alleged offence but would also elicit other information which could result in a gross invasion of the right to privacy. It may be said that with the latest ban on the involuntary use of scientific techniques like Narco analysis, polygraph, and brain mapping tests during investigation, the investigating agencies may to some extent in exceptional cases suffer a blow in expeditiously reaching out to truth but , keeping in view the self-incriminating nature of this kind of evidence and consequences of employing these tools on an individual's liberty, the judgement of the Supreme Court would not only restore people's faith in the system but also enhance all right-thinking citizens' respect for human rights and values and convert the fundamental right of an accused guaranteed under Article 20(3) into a real and effective functional right in practice.