AN OVERVIEW OF THE RIGHT AGAINST SELF-INCRIMINATION

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Abstract

Historians and scholars regard the birth of privilege against self-incrimination due to the constitutional conflict between the Roman Civil Law and the English Common Law, which led to abolishing the Ex-officio oath and the birth of the maxim “Nemo tenetur prodere seipsum.”

With the work of defense counsel, it entered the common law and then the American constitution, which they implemented in their Fifth amendment through ratifying the bill of rights in 1791. Taking inspiration from the American Constitution, India adopted this privilege under article 20(3). Adding the word ‘accused’ clarified that this immunity is only available to the person formally accused of an offense that can lead to criminal proceedings. Sec161 (2) extends this right to suspects, witnesses, and the person who has a reasonable apprehension of being declared as accused in the future.

The Indian Evidence Act recognizes three types of evidence: oral, documentary, and material evidence. The last form of evidence does not come under Article 20(3) protection because its character is of such a nature that it does not itself incriminate the person. This line of distinctions keeps changing and blurring over time with changes in technology and methods of collecting evidence. It then becomes imperative for the judiciary to draw the distinction again, which usually depends on the facts and circumstances of each case. This paper attempts to overview this principle by tracking its development from abolishing the ex-officio oath in England to adopting the right against self-incrimination under the Indian constitution.

Starting with the historical development of this privilege in England and the Common Law in Part I, Part II then walks through the growth in the American Constitution, which leads to its adoption in the Indian Constitution discussed under Part III. Part IV then analyses the development of this privilege in India through the lens of ‘two models of the criminal procedure.’ Part V covers the new technological advancements that now possess new challenges for the judiciary, with Part VI concluding the paper.

I. Origin of Right against Self-incrimination

The right against self-incrimination is one of the fundamental canons of roman law derived from the Latin maxim “Nemo tenetur prodere seipsum,” and its exact origin is still in dispute. However, historians have regarded the birth of this privilege as a direct result of the constitutional struggle between two rival systems of Criminal Procedure. i.e., English Common Law and Roman Civil Law, which led to abolishing the ex-officio oath in the 17th century of England.

The ex-officio oath was used by the English ecclesiastical courts and administered by the judge to the defendant at the start of the proceedings to answer truthfully any question.

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1 Translates into “No man can be compelled to incriminate himself.”
put to him. After taking the oath, the defendant could neither lie nor refuse to answer the questions without committing perjury.\textsuperscript{2} Since defendants in criminal cases did not necessarily know the exact questions when they took the oath, this common practice resulted in their swearing to give evidence against themselves.\textsuperscript{3} Though it was used to secure the punishment of various offenders of the church's law, the defendants most immediately caught by the procedure were conscientious dissenters—Puritans and Catholics, who objected to the form of religion established under Queen Elizabeth.

According to Leonard Levy,\textsuperscript{4} When these dissenters joined forces with the common lawyers, they were able to harness the common law's antagonism toward the courts of the Church and turn the maxim into a rule of law that ultimately became the privilege against self-incrimination. According to him, it was the English judges who issued writs of prohibition and habeas corpus against the High Commission and other ecclesiastical courts prohibiting them from proceeding based on the ex officio oath, ordering officials of high commission, not to compel them to give evidence against themselves and to respect their rights, that led to the abolishment of the ecclesiastical court and along with it ex-officio oath in the 1640s and when it was revived in 1660, it had an expressed clause forbidding such oaths.\textsuperscript{5}


Firstly, as demonstrated by R.H. Helmholtz in his influential paper, the principles deployed against self-incrimination and the Latin maxim used to express it was taken from the tradition of the European Ius Commune. One of the common objections to ex-officio oaths was that it violates the canon law itself. Even the arguments in the English ecclesiastical courts against the ex-officio oath derived from the sources of Ius Commune, not the English Common law. Common-law judges were only used to issue writs of prohibition when there were other substantial reasons for their issuance.\textsuperscript{6}

Secondly, from the middle of the 16th century to the late 18th century, the fundamental safeguard for the defendant in common law criminal procedure was not the right to remain silent but rather the opportunity to speak against allegations, a chance to reply in person to the charges against him.\textsuperscript{7} During that time, one of the fundamental characteristics of criminal trials was the prohibition on having a defense counsel. The defendant ought to defend himself by speaking for himself. There were two reasons for it; First, the court was supposed to act as a counsel for the prisoners, but this was hardly true, though, especially in trials of political nature. Until 1701, judges held offices at the pleasure of the crown and were reluctant to play the role of defense counsel and Second; there was the

\textsuperscript{6} supra note 4, at 967-969.
basic presumption that the defendant needs no counsel that if he is innocent, he should be able to prove it by himself.

The prohibition on defense counsel was first relaxed in the landmark Treason Act of 1696. The Act allowed the accused a copy of the indictment five days in advance of trial, right to advise with counsel not only to examine and cross-examine the witnesses but also, to sum up, and address the jury, but it was only limited to extremely rare treason trials. The restrictions on defense counsel in the 18th century suggest that the primary responsibility was to cross-examine the prosecution’s witness. Especially in cases involving reward seekers and crown witnesses, those shady figures whom the embattled London authorities sometimes employed to compensate for the English reluctance to institute professional policing, vigorous cross-examination often proved decisive. This shifted the burden of proof from the defendant to the prosecutor, casting doubts on the factual case of the prosecution; not only did he now have to present all its evidence. He was also subjected to the rebuttal from the defendant before the court announced its verdict.

Towards the end of the eighteenth century, the presumption of innocence, the beyond-reasonable-doubt standard of proof, was formulated, further incentivizing the defendant to remain silent. Putting pressure on the prosecutor to prove his case by other means, from the second half of the 18th century, ‘testing the prosecution’ trial took the hold replacing the ‘accused speaks’ trial, and it’s during this time the right against self-incrimination was formulated.

II. America and the Fifth Amendment

America constitutionalized this Common law principle through the ratification of the bill of rights in 1791 under the fifth amendment along with other rights as “No person....shall be compelled to be a witness against himself”.

The noticeable difference between them was how this privilege developed from there. In common law, the English right developed from criminal cases. In contrast, because most early cases in America after the fifth amendment were civil, modern American privilege developed differently. For the first ninety years, courts interpreted the constitutional right to pertain only to defendants at their criminal trial.

During this time, the expression ‘privilege against self-incrimination’ most often referred to the witness privilege or the common law right of a witness to refuse to answer incriminating questions in a civil suit. This privilege was not a part of the constitution, and congress had the power to repeal it or change it, as it did through various legislations, First through the 1857 act, then the amendment of it in 1862, and then through two statues of 1868 and 1874. This legislation was only concerned with the witness privilege, which they altered to compel them to incriminate themselves while providing an immunity of some degrees until the Supreme Court in 1886 declared the

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8 Id. at 1067.
9 Id. at 1069.
10 U.S. CONST. amend. V, –“No person shall be compelled in any criminal case to be a witness against himself”.
12 Id. at 238.
witness privilege as a part of the fifth amendment.

The 1868 statute was the first legislation regarding the witness privilege after more than 70 years of adoption of the Fifth Amendment.\textsuperscript{13} 1857\textsuperscript{14} though, had the expressed provision of absolute testimonial immunity, which can’t be used against him in any criminal case on matters he had given testimony. Still, that immunity was only limited before the congressional committee. After five years of abuse with an amendment in 1862\textsuperscript{15}, it was changed into transactional immunity meaning only the testimony given by the witness will not be used against him as evidence in a subsequent criminal trial. He can still be prosecuted based on the other evidence collected. In 1868\textsuperscript{16} Congress passed a crucial immunity statute providing that the testimony of a witness, or the disclosure of a party, in any judicial proceeding would not be used against that person in a criminal case, except for a prosecution for perjury or false swearing.\textsuperscript{17}

The Supreme Court's first opportunity to pass upon these immunity statutes came in 1892, in the case of Counselman v. Hitchcock\textsuperscript{18}. The Court held that the type of immunity provided by the 1868 Act was ineffective in removing the protection of the privilege against self-incrimination. Since compelled testimony could lead to evidence that would be admissible in a criminal trial, the Act did not entirely remove the incriminating effect of the testimony, and the privilege, therefore, still applied.\textsuperscript{19} Thus, The protection afforded by the immunity statute was therefore not coexistence with that provided by the privilege. The Court further held that no statute that fails to secure the witness from being prosecuted criminally for any matters his immunized testimony may relate would provide the requisite protection.\textsuperscript{20}

In 1874\textsuperscript{21} congress passed another statute, and it gave government attorneys, in all proceedings other than criminal that arose under the revenue laws, the ability to obtain writs for the production of any relevant book, invoice, or paper, failure to comply with the order, the contents of the document as alleged by the government was to be deemed proved. The statute provided no expressed immunity to exclude such documents from admission against the witness in a subsequent criminal proceeding.\textsuperscript{22}

The three cases that arise from it just after the statute’s enactment held them valid, out of two reasoned not being a criminal case. It was then again challenged in Boyd v. United States\textsuperscript{23}. The case was regarding an allegation that E. A. Boyd & Sons had imported plate glass without paying the duty required by the 1874 customs act, pursuant to that several cases of plate glass were confiscated from the defendants by federal customs and obtained a court order that the Boyd’s produce their

\textsuperscript{13} Id. at 245.
\textsuperscript{14} 11 Stat. 155 (1857) (US).
\textsuperscript{15} 12 Stat. 333 (1862) (US).
\textsuperscript{16} 15 Stat. 37 (1868) (US).
\textsuperscript{17} John August Staas, Fifth Amendment. Statutory Dilation of the Privilege against Self-Incrimination, 71 J CRM LAW CRIMINOL 610, (1980).
\textsuperscript{18} Counselman v. Hitchcock, 142 U.S. 547 (1892).
\textsuperscript{20} supra note 18, at 611.
\textsuperscript{21} 18 Stat. 186 (1874) (US).
\textsuperscript{23} Boyd v. United States, 116 U.S. 616 (1886).
invoice for the glass. The trial court ordered the production of the invoices and found Boyd guilty of violating the revenue laws. The case finally reached the gates of the supreme court. Reading the fifth amendment’s self-incrimination with the fourth amendment’s protection declared the 1874 act “void and unconstitutional.” It held that seizing private documents that would be used against him as evidence is not different from compelling a person to be a witness against himself. The search was an unreasonable search and seizure within the meaning of the Fourth and Fifth Amendments.

III. Development in India

1. Colonial India

Before the first war of independence of 1857, also known as Sepoy Mutiny, the British East India Company supplemented by the Indian Police Act passed in 1861 that had administrative and regulatory control over police forces in Colonial India. During this time, police officers were notorious for using violent methods like torture to extract confessions in criminal investigations to resolve matters quickly.

Various legislation was enacted to curb this menace, including the Indian Police Act and Code of Criminal Procedure. In them, it introduced some critical changes like limited based for possible arrest without the judicial warrant, presence of accused before the magistrate without any unnecessary delay, which could not go beyond 24 hours and ban of recording of a confession or statements made by a person accused of an offense and inadmissibility of it if made to a police officer. Unless it’s made in the immediate presence of a magistrate or leads to a discovery of subsequent facts or material, but there was a lot of ambiguity while lifting this ban. While many courts did lift the ban, a few saw “no reason why the general rule that a confession should be voluntary should not apply to a confessional statement.”

Privy council in Pakala Narayan Swami v. King Emperor suggested that all defendants’ statements were inadmissible, including confessions made by defendants to police. This was later reaffirmed by the full bench of Lahore High court. It agreed that the subsequent discovery of facts could not lift this ban. Within the year, the law was enacted to nullify the Lahore decision and permitted statements made to police that led to the discovery of facts to come in as evidence. The privy council finally accepted this problem and brought the provision in 1946 that excluded the confessional parts of statements made to police while retaining only that much of the statement, which led to the discovery of facts.

2. Independent India

India adopted its constitution on 26th January 1950, which took inspiration from the American Constitution, and chiefly from the fourth, fifth, and sixth amendments. The Draft Constitution also included protections against double jeopardy, ex post facto laws,
along with self-incrimination, and it became part of Article 20.

(A). Search and Seizure of Documents

In 1954, the supreme court was called upon to decide its first case dealing with the scope of right against self-incrimination. In M.P. Sharma v. Satish Chandra, the Government of India had ordered an investigation into the affairs of a company allegedly misappropriating and embezzling the funds, according to which an FIR was registered under various sections of the Indian Penal Code, 1860. A search was held simultaneously at 34 places, and many documents were seized. The petitioner, who held various positions in the companies, challenged the search warrant in the supreme court and prayed that the search warrant to be declared unconstitutional, violating his fundamental right under Article 20(3), and demanded seized documents to be returned. The defendant relied heavily on the Boyd case, where the court declared the seized documents violative of the fifth amendment and equated it with compelling a person to be a witness against himself.

The Court first indulged in whether Article 20(3) includes documentary evidence, affirming it as positive. It held that ‘to be a witness’ is nothing more than ‘to furnish evidence.’ Such evidence can be furnished by giving oral testimony or written statements and making gestures like nodding or producing documents that are likely to incriminate him or support the prosecution against him.

This protection is available beyond the trial room in the court. It extends to compelled testimony previously obtained from him, including during the police investigation. Still, there must be a formal accusation relating to the commission of an offense that may result in prosecution in the ordinary course. It is not necessary that a trial or inquiry has been started if the name is mentioned as an accused in an FIR, the person can claim the protection. What matters is the formal accusation related to the commission of an offense.

Section 161(2) of CrPC extends this protection to witnesses and suspects, and during the police examination, they can decline to answer questions that tend to expose them to a criminal charge. Otherwise, they are bound to answer any question truthfully. It also applies to the person not declared as an accused, but there is a reasonable apprehension of accusation actual or imminent, after taking all the circumstances into account. Section 132 of the Evidence Act limits the applicability of such case put to him by such officer, other than questions the answers to which would have a tendency to expose him to a criminal charge or to a penalty or forfeiture.”

Pakala Narayan Swami v. King Emperor, AIR 1939 PC 47.

INDIA CONST. art. 20, cl. 3. – “Protection in respect of conviction for offences: (3) No person accused of any offence shall be compelled to be a witness against himself”.

M.P. Sharma, AIR 1954 SC 300.


The Indian Evidence Act, No. 1, Acts of Parliament, 1872 (India), § 132. – “Witness not excused from answering on ground that answer will criminate. — A witness shall not be excused from answering any question as to any matter relevant to the matter in issue in any suit or in any civil or criminal proceeding, upon the
this protection to witnesses during the trial stage. He cannot refuse to answer any question on the ground that the answer will incriminate him. Still, proviso grants him immunity, and the answer he gives cannot be used to prosecute or arrest him in any criminal proceedings except for providing false evidence.

Once the person is pardoned, he ceases to be an accused and turns witness for the prosecution. He is legally bound to fully and accurately disclose the circumstances in his knowledge, even if it’s incriminatory. Such an answer will not subject him to any arrest or prosecution, and he can’t claim the protection of Article 20(3).³⁶

Court also rejected the argument that a search and seizure of documents have the same effect as compelling a person to be a witness against himself. It held that the documents searched and seized were the act of a police officer performing his duty. It didn’t compel the person to give documents, and since it was not his act, it was not his testimonial act either in any sense. Article 20(3) will be violated if the person was forced or compelled to produce such documents but not when the documents were recovered in a police raid. The power of search and seizure in any system of jurisprudence is an overriding power of the state for the protection of social security, and that power is necessarily regulated by law.³⁷ Even if the premises are occupied by the accused during the recovery of documents would not amount to compulsion on him to give evidence against himself and does not violate Article 20(3).³⁸

The court didn’t answer one question: Does the accused person include a corporation? In America, this right is only available to a natural person because the resources and positions a company enjoys are much more significant than a natural person’s.³⁹

(B). On Finger-prints, Hand-writing and DNA Samples

The judgment given in M.P. Sharma’s case was relevant when it was given, but after it, a new form of techniques developed to collect and analyze data like fingerprints and DNA samples. Because of the reliability and efficiency they offered, it soon became a popular way to collect evidence.

In M.P. Sharma court failed to state the scope of non-verbal evidence obtained under those techniques, and as a result, soon enough, cases challenging the validity of these techniques started to pour into the courts. The common argument in most cases was that if ‘to be a witness’ is nothing more than “to furnish evidence,” and such evidence can be furnished by any means, including by production of documents or gestures like

40 M.P. Sharma, AIR 1954 SC 300.
nocking. Then the techniques should also come under this definition since there are also a mean to furnish evidence; thus, using the techniques violates their right against self-incrimination under Article 20(3).  

Different courts started interpreting it differently, and many cases gave completely contradicting views to each other. For example:- In one case, it was held that compelling an accused person to furnish a handwriting sample violates the fundamental right guaranteed under Article 20(3). Section 73 of evidence does not authorize a court to compel an accused person to furnish specimen writings prima facie, rendering the section void. Still, in another case, it was held that taking of handwriting specimen or thumb impression under a court order did not violate Article 20(3).

The matter finally reached the apex court from an appeal made by the State of Bombay. The case was regarding an acquittal of a convicted person, made by the High Court for not having enough evidence to establish an identity beyond a reasonable doubt. It held that the sole evidence of a handwriting sample obtained under police custody is equivalent to compulsion and hence inadmissible in the court. Meanwhile, two more appeals came to the apex court concerning the validity of finger impressions and handwriting samples. All three appeals then were bunched together, leading to the case of Oghad, and a bench of eleven judges was constituted to re-examine the propositions laid down in M.P. Sharma vs. Satish Chandra.

It held that ‘to be a witness’ means something narrower. It may mean ‘to furnish evidence’ in the sense of oral or written statements. It could not mean taking finger impressions, handwriting samples, or DNA testing because the constitution-makers may have intended to protect the accused person from the hazards of self-incrimination. Still, they could not have intended to obstruct the way of efficient and effective investigation. Very often, it becomes necessary to take finger impressions or specimens to help the investigation and as much necessary as to protect the rights of an accused. It also must be assumed that Constitution-makers were aware of the existing law authorizing a magistrate or the court to direct any person to allow his measurements or specimens to be taken.

‘To be a witness’ means imparting knowledge about a relevant fact which the person has knowledge about, by means of an oral or written statement, it does not include mere mechanism of producing documents which may shed some light on the controversy in issue but does not convey any personal information, for example, to compare handwriting or a signature. When an accused gives such specimens, he does not provide testimony of the nature of personal testimony. Giving personal testimony must depend upon his positive violation act. A Positive volitional act means something a person can change, alter, or control. When the person gives a statement, he can make it or refuse to do so. Still, since the intrinsic character of those specimens can’t be changed, it may amount to furnishing evidence in the larger sense. It is not included

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41 Supra note 31.
42 The Indian Evidence Act, 1872, § 73, No. 1, Acts of Parliament, 1872 (India).
43 Sheik Mohd. Hussain, AIR 1957 Mad 47.
45 Id. (majority opinion).
46 Id.
within the expression of to be a witness. For a testimony to be qualified as a testimony and to come under the protection of Article 20(3), it should be of such a nature that by itself tend to incriminate the maker or at least make the case probable against him, but imparting finger impressions or handwriting samples does not itself incriminate the person they are not testimony. Still, their intrinsic nature can’t be changed or altered except in a rare case. They are only used for comparison with other evidence to ensure their reliability. They belong to the third category of evidence of material evidence, which is outside the scope of Article 20(3).

The minority opinion was authored by Das Gupta, J while agreeing with the majority’s opinion but gave different reasoning.

First, it found the definition of ‘to be a witness’ unduly narrow and held that while they agree, the constitution maker could not have intended to stifle the legitimate modes of investigation. They were clear on the things that should not be allowed during the investigation or trial, however helpful they might seem to be to the unfolding of truth and an unnecessary apprehension of disaster to the police system. The administration of justice should not deter us from giving the words their proper meaning.47 Allowing the narrower interpretation of ‘to be a witness’ will result in the procurement of a large number of documents from the accused, which sometimes have even more evidentiary value than any oral or written statements.

While they agreed with the definition given in M.P.Sharma’s case that ‘to be a witness’ is nothing more than ‘to furnish evidence.’ It held that giving finger impressions or handwriting samples does not incriminate the accused. It’s when the identity between the specimen is established with another specimen it becomes incriminating, and since Article 20(3) does not say that an accused person shall not be compelled to be a witness, but a person shall not be compelled to a witness against himself. Thus, he is a witness by giving those specimens but not a witness against himself.

On statements obtained under police custody or during the police investigation, which either incriminate themselves or lead to a discovery of fact or material under Section 27 of Evidence act,48 a unanimous decision came and held that just because a person making a statement is in police custody, does not implies that compulsion was used. The burden of proof will be on the accused to show that while he was treated in a way, under such circumstances that lend him to incriminate himself. If the self-incriminatory information is given by an accused without any threat, then it will be admissible in evidence, the reason being the missing element of compulsion.

**C. On Narco-analysis, Polygraph and BEAP Tests**

It is a well-established fact that an accused or a suspect will rarely incriminate himself voluntarily or will furnish information that can be proved helpful in the case. It is

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47 *Id.* (minority opinion).

48 The Indian Evidence Act, 1872, No. 1, Acts of Parliament, 1872, § 27. – “How much of information received from accused may be proved. – Provided that, 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.”
especially true if he is the actual criminal. No matter what investigation agencies do, the time and effort they put in, it still won’t be as effective as a true testimony or evidence given by the person suspected of a crime. To enter into a suspect’s mind and read his secrets has always been the desire of investigation agencies and three techniques that developed that they believed brought closure to this possibility. These three techniques were narco-analysis, polygraph examination, and Brain electrical activation (BEAP).

A. In a polygraph test, a device or procedure measures the blood pressure and pulse to assess the honesty of persons suspected of criminal conduct. The theory behind polygraph tests is that when a subject is lying in response to a question, they will produce physiological responses that are different from those that arise in the normal course.

B. In the Narco-analysis test involves the intravenous administration of a drug that causes the subject to enter into a hypnotic trance and become less inhibited. The theory is that the subject is more likely to disclose the information under the drug-induced hypnotic stage.

C. Lastly, In is the ‘Brain Electrical Activation Profile test,’ also known as the ‘P300 Waves test’. Electrical waves emitted from the test subject’s brain are recorded through electrodes attached to the scalp. The subject is then exposed to external stimuli like sound and visuals relevant to the facts being investigated. The theory behind it appears that when exposed to material stimuli, the suspect emits P-300 waves based on which the expert can draw inferences.

The apex court was finally moved after a bunch of appeals reached its gates, primarily concerned with the validity of these techniques. It was demanded that these techniques violate their right against self-incrimination under Article 20(3) and their right to personal liberty under Article 21 and should be declared unconstitutional.

These concerned tests are administered to the accused, suspects, or witnesses in an investigation without their consent. One key argument put forward is that administering these techniques does not cause any bodily harm. The test results will not be admitted as evidence during the trial stage, except the subsequently discovered material, which should be admissible. It was also argued that these tests are not like oral or written statements and are outside the scope of Article 20(3).

The Court broadly framed three questions to check the validity of the impugned tests

1. Whether the involuntary administration of the impugned techniques violates the right against self-incrimination enumerated in Article 20(3) of the Constitution?

In narco-analysis, the subject, when he speaks, is under a drug-induced state. There is no reason why it should not be his oral testimony obtained by compelling him to go through the test, and hence it violates Article 20(3).

50 Supra note 31.
51 INDIA CONST. Art. 21.
In the case of polygraph and BEAP, the inferences are drawn from the subject’s physiological responses. No reliance is placed on the verbal responses that conflict with Oghad’s definition of ‘to be a witness,’ which means imparting knowledge about a relevant fact that the person has knowledge about through an oral or written statement. These elements are absent in those impugned tests. The court then acknowledges that the judgment was given in M.P. Sharma’s case that personal knowledge can also be communicated through other means than oral or written statements, for example, by producing a thing or document or making gestures like nodding. However, results of the use of impugned tests are not verbal responses conveying personal knowledge about a relevant fact and exposing him to a criminal charge.

The court then acknowledged that when the judgment in Oghad’s case was given, it was not aware of these techniques and were developed years after the judgment was given. They are bound to re-examine these techniques with a progressive lens, and even though the person is not making any oral or written statements by undergoing these tests, the consequences are the same. By making inferences from his psychological response, the examiner can derive knowledge from the subject’s mind, which otherwise would not have become available to the investigators, which can become the source of information for the investigation agencies. It can aid them in an ongoing investigation or lead them to a discovery of fresh evidence that could then be used to prosecute the subject. In any case, the compulsory administration of the impugned tests impedes the subject's right to choose between remaining silent and offering substantive information. The requirement of a ‘positive volitional act’ becomes irrelevant since the subject is compelled to convey personal knowledge irrespective of his own volition. Hence these two tests also violate Article 20(3). The only exception is when the person undergoes any of these tests voluntarily and gives his free consent. The information obtained or the discovered material will be admissible in court. Another exception is when the person is compelled to undergo the test in administrative proceedings or any other proceedings that may result in civil liability.

2. Whether the involuntary administration of the impugned techniques is a reasonable restriction on ‘personal liberty’ as understood in the context of Article 21 of the Constitution, which includes:
   A. The Right to privacy.
   B. The Right to a fair trial.

The court also interpreted Article 20(3) by examining the use of all three impugned tests with the multiple dimensions of personal liberty, which falls under Article 21 of the constitution. Judicial precedents have expanded the scope to include various other rights like substantive due process, right to privacy, and right to a fair trial. This due regard for the inter-relationship between rights has already been recognized in Maneka Gandhi’s case.

The administering of all three impugned tests entails the physical confinement of the subject. So, it is essential to consider whether there is any existing statutory provision allowing the use of impugned tests. The

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52 Kathi Kalu Oghad, AIR 1961 SC 1808.
54 Id.
argument is that the use of impugned tests could be read with Sections 53, 53-A, and 54 of the CrPC \(^{55}\), which contemplate medical examination of an arrested person, either at the request of the investigating officer or the arrested person himself. Emphasis was placed on the phrase ‘and such other tests’ of explanation in Section 53 and that all the three tests should be read under it as the list is not exhaustive but only illustrative.

The court used the principle of ‘ejusdem generis’ to interpret statutes. This rule entails that the meaning of general words which follow specific words in a statutory provision should be construed in light of the commonality between those particular words. It found a clear distinction between the medical examination and the impugned tests, while the explicit references made in the ‘medical examination’ are related to an examination of bodily substance. All three impugned tests involve testimonial responses to some degree and can’t be read under the phrase of ‘and such other tests.’ It was also presumed that the parliament was very well aware of these impugned tests and deliberately chose not to include them in the list of ‘medical examinations.’

**2A. Right to Privacy**

Indeed, the right to privacy is not an explicit right under the Indian constitution. Still, this right flows from various other rights, including the right of personal liberty enshrined under Article 21 of the Constitution. This inter-connection between rights was first recognized in Kharak Singh v. State of Uttar Pradesh, \(^{56}\) while the majority held that “the right of privacy is not a guaranteed right under our Constitution.” In his minority judgment, Justice Subba Rao held that ‘It is true our Constitution does not expressly declare a right to privacy as a fundamental right but is an essential ingredient of personal liberty.’ It then compared this right with the analogy of ‘a man’s home is his castle.’ This view was then endorsed in Maneka Gandhi’s Case \(^{57}\) by recognizing its inter-relationship with other rights. However, this right is not absolute, and reasonable restrictions can be placed on compelling public interest. The apex court has endorsed this view many times through judicial precedents.

While this is true for the physical aspect of privacy, restrictions such as arresting or compelling a person to undergo a medical examination even by using some degrees of reasonable force are acceptable in the interest of public interest. The same can’t be said for the mental aspect of privacy. These restrictions can’t be used to extract a testimonial response, this is what the involuntary administration of impugned tests does.

In narco-analysis, while speaking, the subject is in a drug-induced hypnotic stage and not aware of the nature of his revelations while disclosing information. In Polygraph, the subject may have to answer questions in yes or no format. Still, the inference is made from the psychological response, and the same is true for the BEAP test. There is one thing common in all these tests, which is the absence of the subject’s autonomy to choose between speaking or remaining silent.


\(^{57}\) Maneka Gandhi v. Union of India, AIR 1978 SC 597.
According to the court, this right of private choice is so sacrosanct that there should be no scope for any individual to interfere with it, especially in circumstances where the person faces exposure to criminal charges or penalties. It held that this interference with the individual’s choice of autonomy and mental process to choose violates the prescribed boundaries of privacy and his right against self-incrimination.

### 2B. Right to a Fair Trial

Even if the person consents to undergo any tests, it is still different from an ordinary interrogation. The investigator asks the questions, and the subject can choose between remaining silent or answering. This choice is available to him after each question. While administering the impugned test, the subject does not have the option to exercise this right continuously during the test once he undergoes the test, whether through compulsion or by giving his consent.

Thus it makes the legal advice ineffective, which is an essential safeguard for any individual in custody. This safeguard keeps the person informed and checks on the custodial abuses, but when there is no conscious control over the answers and the choice between answering or remaining silent. Even the best legal advice cannot prevent the extraction of information that may be proved to be incriminating in itself or lead to a discovery of incriminating material. Furthermore, the investigator may choose not to communicate the result and frame the charges without the knowledge of the subject. Reliance on the impugned test could curtail the opportunity of presenting a meaningful defense violating his right to a fair trial and frustrating the right of legal advice.

### 3. The evidentiary value of independent material, subsequently discovered with the help of the test result.

It already has been held that, under section 27, the information is only admissible, not given under compulsion. Which in the present case means administration of impugned tests without the subject’s consent. Suppose the person voluntarily takes these tests by giving his informed consent. In that case, the information and the subsequently discovered material will be admissible in the court and will not violate Article 20(3).

Finally, the court referred to the guideline published by the National Human Rights Commission, which should be strictly followed for administering the tests. This includes giving the person access to a lawyer during and before the test, informing him clearly about the full implications of the results physically, emotionally, and legally. Consent is to be recorded in the presence of a magistrate. After considering factors relating to detention, including the length of detention and nature of the interrogation.

### IV. The Two Models of the Criminal Procedure

There are many ways to interpret this development. Still, none came closer in terms of popularity and durability to Herbert Packer’s article, published in 1960, titled “two models of the criminal process.” In his article, Packer proposed two models of the criminal process to represent the two competing systems of values operating within criminal justice.

On the one hand, is the crime control model. The values which are primarily concerned with the repression of criminal conduct by emphasizing efficiency at every stage of the process, from the screening of suspects to
determining guilt and the sentencing of offenders and by incentivizing informal fact-finding procedure and unconstrained discretion to detain, search, and interrogation of suspects, while having least concerned about individual rights and values. The goal always will be to make the system as efficient and reliable as possible.

On the other end, is the due process model, which prioritizes the interests of the individual suspect who is confronted by the mighty power of the State. Such an individual is entitled to a presumption of innocence and should not be found guilty of an offense other than by way of clearly defined and formal decision-making processes. It accepts that some lines should not be crossed even at the expense of efficiency. In a democratic society, the balance between them keeps shifting from its equilibrium, tilted enough to let the enforcement agencies detect and punish the crime but not enough to destroy the fundamental individual rights.

Analyzing Colonial India’s time to Pre-Selvi’s case, it can be said that India is tilted towards the crime control model. During colonial India, there were many complaints regarding the police officers resorting to using torture to extract confessions and statements. Various legislation was introduced to curb this practice, including the rule of inadmissibility of confessions made to a police officer. Still, it also put some exceptions to this rule if it leads to a discovery of facts and materials or if it is made in the immediate presence of a magistrate, then the confession could be admitted in the court. How can it be that the confessions which were earlier inadmissible were now can be used as a piece of evidence? One of the primary reasons is the assumption of reliability. When a person is compelled to testify on their behalf, such testimony is more likely to be false. Such statements are more likely to mislead the judge and the prosecutor, resulting in miscarriage of justice and more likely to cause delays and obstructions during the investigative stage, overall causing inefficiency in the criminal process. But how can a statement be unreliable if it’s leading to discovery to something relevant to the case, or how there can be any threat, pressure, or coercion on the person accused of any offense if the magistrate was present during the accused making a confession or statement? This is the primary reason why the burden of proof came on the accused to show that while in custody, coercion indeed was used. Assuming otherwise, won’t it make the system inefficient or incentivize the accused to make such claims.

But after independence, when the choice came to India, why did it take a different route and again adopt the criminal procedure based on the crime control model, and most importantly, limited the scope of right against self-incrimination to the accused only. Even after taking inspiration from the American Constitution, especially their fourth, fifth and sixth amendment. When the constituent assembly was constituted, The right against self-incrimination was already developed there; landmark judgments like Boyd v. United States and Saunders v. United Kingdom had already expanded its scope,

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60 Saunders v. United Kingdom, 23 EHRR 313 (1997).
which essentially was the ‘due-process model.’

One reason for it could be the already familiar system of ‘crime control model’ which was already in place. Another reason could be that there was the need for a system to address the lawlessness and widespread chaos resulting from the partition and integration of the princely states. This responsibility fell on the shoulders of police forces, not just to enforce the law but also to curb the menace like black-marketing of goods when India faced an acute shortage of food supply. Faced with these difficulties, the provincial governments, which were in charge of police administration, considered it best to retain the colonial model of police administration with its strengths of maintaining control rather than introduce new systems that could worsen the prevailing chaos.

The same crime control model is adopted in various courts, including In M.P. Sharma, while rejecting the argument that ‘search and seizure’ of documents does not amount to ‘being compelled,’ gave two reasons. First, the person was not forced to produce the documents, hence, not compelled. Secondly, A power of search and seizure is in any system of jurisprudence an overriding power of the state for the protection of social security that power is necessarily regulated by law. It also heavily relied on colonial legislation and criticism of the fifth amendment, affecting the efficiency of the criminal process.

In Oghad’s case, the court again adopted the same ‘crime control model.’ While legitimizing the various methods of furnishing evidence, including finger impression and hand-writing samples, the reason it gave was interesting. First, it equates the meaning of personal testimony with a positive violation act, which means something a person can change, alter, or have control over. When called to give a statement, he can make it or refuse to. Still, the intrinsic character of finger impressions or handwriting samples can’t be altered and is arguably more reliable than any other evidence. Secondly is the acknowledgment that restricting such methods could hinder an efficient and effective investigation. It is very often necessary to take fingerprints or specimens to help the investigation and as much necessary as to protect the rights of an accused. Hence, fulfilling two essential ingredients of the crime control model: reliability and efficiency.

Arguably Selvi was the case, which again tilted the equilibrium towards the ‘Due-process model,’ declaring the three new investigation and interrogation techniques, namely, narco-analysis, polygraph, and BEAP, unconstitutional. It held that Article 20(3) must be constructed with the different facets of personal liberty and the inter-relation between them, including guarantees like the right to privacy and the right to a fair trial. At the heart of Selvi’s judgment is the recognition of an active choice between whether to impart relevant knowledge or to remain silent, or in simple words, whether to incriminate oneself or not.

61 supra note 17, at 38.
It is different from Oghad’s in the sense that the case was about whether any material or technique of collecting evidence itself tend to incriminate the person and then to equate it with the term positive volitional act, information that you had no control over or power to change and could not possibly be fabricated. While Selvi’s judgment is concerned with whether the person is making an autonomous choice of whether to impart that incriminating knowledge or not and then equating it with other rights like privacy and fair trial under Article 21 of the Constitution. This lack of choice violates the boundaries of mental privacy and makes the right to legal advice ineffective. The option to impart knowledge is absent during the test. Even after the consent has been given, the subject loses control over the information that itself can incriminate him.

But what connects Oghad’s and Selvi’s case is the differentiation of evidence like oral or documentary evidence and material evidence. One of the reasons why the impugned tests were not included in the ‘medical examination’ was that the incriminating nature of those tests was of such a character that they could have incriminated the maker. The same principle was used in Oghad’s while upholding the validity of techniques like Finger impressions, Handwriting, and a DNA sample. This choice of whether to impart knowledge or not is available to the person at every stage of an investigation, while the first two cases implicitly recognize this choice, that even though there is no implied compulsion during the police custody, the person still has the option to remain silent. Selvi’s case explicitly recognizes this choice.

This choice was then again been diluted in the Karnataka High Court Judgement, allowing police officers to compel a person to give up his biometrics or password for access to the device if the search and seizure warrant has been obtained under Section 93 or 94 of the CrPC with the exception of Section 165 of CrPC.

What’s more interesting is the reason the court gave. First, it compared the giving up of biometrics and passwords with the material evidence. It does not tend to incriminate the accused, and not allowing the otherwise would result in a chaotic situation, where no handwriting or DNA sample could be taken. No search of home or office could be undertaken. Offenses like child pornography could be investigated, or overall it will make the criminal investigation inefficient and ineffective, the reasoning based on a ‘crime control model.’

Encryption, Digital Data, and Self-Incrimination

Until then, technology took a new leap of advancements in storing, transferring, and analyzing data. The Supreme court declared privacy as a fundamental right. Crimes through the digital medium are continuously on the rise; stuck between all of these are the investigation agencies and the person suspected or accused of an offense or crime.

In 2018, just after the judgment Home Ministry has allowed ten intelligence and investigating agencies and the Delhi Police to intercept, monitor, and decrypt “any

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64 Mr. Virendra Khanna v. State Of Karnataka, WP No. 11759 of 2020.
66 Mr. Virendra Khanna, WP No. 11759 of 2020.
information” generated, transmitted, received, or stored in “any computer,” under Section 69 of the IT Act, 200067 and Rule 4 of the Information Technology Procedure and Safeguards for Interception, Monitoring, and Decryption of Information) Rules, 2009, includes any electronic device, including smartphones, laptops, and hard disks, and mean decryption of any data to phone taping of an individual authorized by the competent authority. The person will be bound to give technical assistance to the agencies, and failing to do so will lead to imprisonment, which may extend to seven years and a fine.68

What will happen when a person is compelled to give access to his smartphone?

An electronic device like a smartphone cannot be compared with a piece of physical evidence outside the scope of Article 20(3) because of its multiple functions. For example, access to the messages in the electronic form can be compared with the tapping and recording of a phone call, access to any digital media can be compared with an active act of surveillance, and other types of data can be compared with the documentary evidence.

It can be argued that giving fingerprints, face-scan, or passcode to access the electronic device is not incriminating and not a personal testimony, as held in Oghad’s case. Still, the subsequent material itself can incriminate the owner of the information or can lead to a discovery of new facts or material, in that case, it is indeed a testimonial act because instead of using the fingerprint or password for making a comparison or identification, it will be used to gain information based on an accused’s knowledge which was otherwise not available to the police officers.

In any of these two scenarios, can the accused person be saved through the Section 27 of the Evidence act69 will be an interesting question? There are two prerequisites in the section; first, the information must be given in police custody. The second is the compulsion used to extract the information. Compelling a person to access his smartphone fulfills the second prerequisite but not the first one. For the sake of argument, let us assume for a moment that the person when compelled was in police custody. Can the material obtained subsequently be held inadmissible in the court?

Not only that, one of the key arguments in Selvi’s case while declaring the use of impugned tests violative of Article 20(3) was the violation of the subject’s autonomy to choose between to speak or to remain silent and then equating it with the other right enshrined in Article 21, such as right to privacy and right to a free trial, as the inter-relationship between these rights recognized in the Maneka Gandhi’s case.

The choice of autonomy which the court recognized in all three cases, is about the effective control of the flow of information. The minute under compulsion, the person gives away access to his computer or smartphone. It takes away his control of whether to impart knowledge or not, owing to the vast amount of data it gives away. Not only does it then affect the physical and

69 supra note 49.
mental aspects of privacy by taking away the autonomy of choosing between to speak or to remain silent, since the person may not be aware of the incriminating nature of the data inhibiting his smartphone or computer. It can also expose him to possible criminal charges and frustrate the right to seek legal advice.

We also can’t overlook the minority view given by Das Gupta, J in Kathi Kalu’s case while agreeing with the judgment given in M.P. Sharma’s case, which is “To be a witness” is nothing more than to furnish evidence, and such evidence can be furnished through the lips or by the production of a thing or of a document or in other modes. By this definition, giving access to an electronic device can furnish evidence and be protected by A20(3).

Recently, another judgment came from Karnataka High Court, the case was about an arrest made in 2020 in connection to a case register in 2018. After arresting the person, a police officer seized his smartphone. The accused allegedly refused to give the password of his smartphone and his email accounts. Permission was sought to subject the petitioner to a polygraph test. After the special court granted the permission, it was subsequently challenged in Karnataka High Court.

The court held that compelling a person to give up a password or biometrics to unlock a digital device does not amount to a violation of the right against self-incrimination. Providing a password does not disclose anything incriminating, or it does not itself tend to incriminate the accused and thereby not a testimonial act. Still, it is equivalent to a direction to produce a document. The device can be accessed after obtaining the warrant of search and seizure under Section 93 and 94 of the CrPC, or in the case of emergent circumstances, they could dispense with this requirement act under section 165 of CrPC. Failing to co-operate even allowed the police officers to hack the device. In case of failure to hack the device or the essential information was destroyed during such procedure, the investigating officer may resort to the notice of adverse inference.

The court also acknowledged that once police gain access to a device, even if for a specific reason, the often enables full-blown access to all aspects of a person’s life. After heading in this direction, the High Court simply noted that the use of any such data during investigations would not amount to a violation of the right to privacy. At the same time, the High Court observed that unlawful disclosures of this material with third parties could certainly amount to an actionable wrong.

Just because it can help the investigating agencies to solve the crime, Is it enough reason to grant them access to any electronic device, Selvi’s judgment suggests otherwise while evaluating the validity of the use of three techniques it found to be violative of both Article 20(3) and Article 21, when and if the judgment challenged in the apex court or the order to intercept any computers, will the court make a judgment similar to Selvi’s or in Khanna’s case, only the time will tell. Compelling to access a smartphone can open the pandora box of troubles, with possibilities of abuse and threat to democratic values. Nonetheless, this issue will be at the forefront.

70 Mr. Virendra Khanna, WP No. 11759 of 2020.
73 Mr. Virendra Khanna, WP No. 11759 of 2020.
VI. Conclusion

The underlying principle behind self-incrimination is to achieve two objectives: ‘reliability’ and ‘voluntariness.’ It is a well-established fact that a statement made under compulsion is more likely to be false. Such statements are more likely to mislead the case. Thereby resulting in a miscarriage of justice, whereas the concern for the involuntary statements is that, if given weightage during the trial, it can incentivize the investigators to resort to methods involving coercion, threats, or torture to extract information, which can violate the dignity and bodily integrity of the person.

Law is a living process that changes according to the developments in society, technology, and associated moral values, sometimes liberal in its approach and sometimes conservative. It has to be flexible enough to accommodate necessary changes while rigid enough to avoid any abuse by government agencies.

The development of the right against self-incrimination can be seen as an idea, which simultaneously developed in many places, be it in Magna Carta or Roman Law. Just like any idea, it transcends any boundary or border and spreads, inspiring millions in its way. That’s how it developed in common law over the years. With the work of defense counsel, it made it possible, a privilege similar to the right against self-incrimination and transferred the ‘accused speak’ theory to ‘prove the prosecution’s case. That is when theories like ‘beyond-reasonable-doubt’ and ‘innocent till proven guilty’ formulated, which played a significant role in developing criminal jurisprudence.

America took this inspiration and implemented it in their constitution through the fifth amendment. After the Independence, India took inspiration from America and implemented it under Article 20(3) of the Constitution. In India, this principle is only available to an accused person, Sec 161(2) extends it to others like witnesses and suspects, and it is only available in a criminal proceeding. It can’t be claimed during the trial, as it grants some degree of immunity for it. But these rights are not in any way separate. After recognizing their inter-relationship between different rights, they can claim any of these rights. So even if the witness or suspect can’t claim this right under the constitution, he may claim the protection through various other rights like the right to privacy or free trial.

How would scholars from the 15th, 16th, or 17th centuries see this modern interpretation of rights? Will, they even be able to recognize at all, considering till the late 17th century, the right as fundamental as the right to a defense counsel was not even available to an ordinary citizen. When conscientious dissenter puritans and Catholics argued against the ex-officio oath, it was based not only on the law but also on religion. That it forces men to reveal their most secret and inward thoughts and that a man’s faults should remain personal to god and himself. Not only do these arguments represent the basic human desire for privacy and the inherent nature of it to make mistakes, but it also represents the struggle to maintain the

74 supra note 1, at 498.
balance between the over-reaching powers of state and individual rights.

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