Narco-Analysis and the Shifting Paradigms of Article 20(3): A Comment on Selvi v. State of Karnataka

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I. INTRODUCTION

Across the globe, methods of law enforcement are witnessing colossal changes with progress in science and technology. Methods of investigation are witnessing rapid shifts with the amalgamation of scientific techniques and criminal procedure. In the contemporary scenario, the most potent tool at the disposal of the investigators is narco-analysis i.e. injecting truth serum (Sodium Pentothal) in the body of the accused, in order to compel utterance of the truth. The judiciary, while deeming this practice unethical and inhuman, had never progressed to examine its constitutionality prior to the decision under scrutiny.

In Selvi v. State of Karnataka1, a 3-judge bench of the Supreme Court delved into the constitutional dimensions of narco-analysis. In a voluminous treatise, the Court declared narco-analysis to be anathema to Article 20(3), and went ahead to find it a violation of rights that find genesis in the 'substantive due process' guarantee emanating from Article 21.

This paper aims to scrutinize the judgment at two levels: the right against self-incrimination and the right to life and personal liberty. The author shall argue, and propose cogent reasons, for the fact that while the right against self incrimination has been correctly upheld in the judgment, the reliance on 'substantive due process' in relation to Article 21 is flawed.

II. HISTORY OF NARCO-ANALYSIS IN INDIA

Narco-analysis has witnessed a mixed response from the judiciary, ranging from outright disapproval to reluctant and latent encouragement. For instance, in M.C. Sekharan v. State of Kerala2, the Kerala High Court took an acerbic approach towards the process, declaring unequivocally that it is against the fundamental human rights of an accused. However, during 2004-2009, various High Courts have been lackadaisical in commenting on the civil liberties' aspects of narco-analysis while some have decreed it a permissible practice, in conformity with Part III of the Constitution.3 Thus, the judicial tryst with narco-analysis in the previous

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1 2010 (4) SCALE 690
2 1980 CriLJ 31
decade had been one of ambivalence or approval. The judiciary possibly viewed this practice to be a solution to match the threat to internal security faced by India during the aforementioned period.

III. SETTING THE STAGE: FACTS AND JUDGMENT
In the instant case, the appellant and her husband were accused of orchestrating the murder of their son-in-law, who had married their daughter against their wishes. In the course of investigation, they were subjected to polygraph tests and truth serum was administered on them. In opposition of it, they approached the High Court of Karnataka, pleading that the processes conducted on them were *ultra vires* the Constitution. The High Court ruled in favour of the government, saying that narco-analysis was not hit by the protection of Article 20(3). The appellant preferred an appeal to the Supreme Court through a Special Leave Petition.

The Supreme Court relied extensively on American Jurisprudence, and the American notion of substantive due process, to declare that the process was unconstitutional, and was hit by Article 20(3) and Article 21 of the Constitution. The Court held the right against self-incrimination ought to be examined in respect of its relationship with the multiple dimensions of `personal liberty' under Article 21, which is inclusive of guarantees such as the `right to fair trial' and `substantive due process'. It emphasized that Articles 20 and 21 have a non-derogable status within Part III of the Constitution. To summarize, the Court held that forcing an individual to undergo any of the impugned processes violates the standard of 'substantive due process'.

IV. A CRITICAL APPRAISAL OF THE JUDGMENT
A. RIGHT AGAINST SELF-INCrimINATION
In *State of Bombay v. Kathikalu Oghad*[^1^], the Court decreed that the right against self-incrimination was omnipresent i.e. it was not only restricted to examination in Court, but applied to the process of investigation as well. Similarly, in *Nandini Satpathy v. P.L. Dani*[^2^], the Supreme Court held that the right against self-incrimination was available to the accused from the commencement of the investigation. Furthermore, Section 161 of the Code of Criminal Procedure, 1973, that deals with the procedure pertaining to investigation of

[^1^]: AIR 1961 SC 1808: [1962] 3 SCR 10
accused and witnesses by the police, explicitly protects the right. Thus, the position in law pertaining to the right against self-incrimination is clear, in as much the duration is concerned.

The judicial opinion relating to self-incrimination, before the Selvi judgment, can best be summarized by the decision of the Bombay High Court in Ramchandra Reddy v. State of Maharashtra wherein the Court considered whether a statement can be forcibly taken from the accused by requiring him to undergo a narco test against his will. A strict reading of Article 20(3) suggested to the Court that it shall apply if the statement is incriminating or incriminating the person making it, which can only be ascertained after the test is administered. Thus, the Court held that there was no reason to prevent administration of this test because there were enough protections available under the Indian Evidence Act, Code of Criminal Procedure and under the Constitution to prevent inclusion of any incriminating statement made in the course of the administration of the test.

The Supreme Court, on the other hand, held that this rule of exclusion of inculpatory evidence was not reasonable. It asserted that the distinction between the treatment of inculpatory and exculpatory evidence is made retrospectively at the trial stage and it cannot be extended back to the stage of investigation, if the High Courts' proposition was to be accepted. The situation would be thus that the Court shall permit the admission of an involuntary statement on the ground that at the time of asking it, it is not known whether the answer will be inculpatory or exculpatory, then the right against self-incrimination shall be rendered redundant and meaningless. The Court read Article 20(3) in a wider manner to assert that it confers on any person being examined a conscious and efficacious choice between speaking and remaining silent. This implies that it is for the person being examined to decide whether the answer to a particular question will eventually prove to be inculpatory or exculpatory.

In the United States, the Supreme Court declared in Townsend v. Sain that narco-analysis was unconstitutional, in violation of the due process of law and not having a 'compelling state interest' to justify it.

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6 § 161 (2), Code of Criminal Procedure, 1973: "Such person shall be bound to answer truly all questions relating to 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."

7 2004 Bom CR (Cri) 657

8 372 U.S. 293 (1963)

9 To reach this conclusion, the Court relied on Stroble v. California, 343 U. S. 181 and Blackburn v. Alabama, 361 U. S. 199.
The author agrees with the reasoning of the Supreme Court in the Selvi case. The right against self-incrimination is a right guaranteed to the individual facing investigation or trial, hence it ought to be his discretion as to whether he wishes to answer a particular question posed to him or not. The exclusionary rule, proposed by the High Courts, is completely antagonistic to Article 20(3) as it abridges the right of the individual to make a choice, instead awarding the right to the investigating officer. In such a framework, all the individual's human rights shall be sacrificed at the altar of 'law enforcement', as the investigating agencies shall be granted a subliminal license to employ any possible tactics to recover the truth from the witnesses. Thus, the Supreme Court's decision on this ground takes into account pragmatic circumstances, and is perfectly sound in law.

B. RIGHT TO LIFE AND PERSONAL LIBERTY AND 'SUBSTANTIVE DUE PROCESS'

The author disagrees with the reasoning of the Supreme Court relating to 'substantive due process'. The Supreme Court held that Article 21's protection is applicable to the instant case, as the right to privacy shall govern the process of investigation. In Article 21, the framers of the Indian Constitution substituted 'procedure established by law' in place of 'due process of law' to prevent the judiciary from becoming a harbinger of standards of individual liberties that may potentially threaten welfare measures of the state, as had been the American experience. However, subsequent to a trend begotten by Maneka Gandhi v. Union of India, the judicial perception and ambit of Article 21 have been fundamentally altered. If a contemporary exposition was to be proposed, it would be accurate to suggest that the restrictive guarantee of Article 21 has effectively morphed into a source of unenumerated rights, to be unearthed at the will of the judiciary. The right to privacy is one such unenumerated right which the Courts have found to be manifested in Article 21. This right protects various spheres of interaction, the latest of which is consensual homosexual conduct.

In the instant case, the Court again relied on the 'substantive due process' guarantee of Article 21 to give effect to its finding. However, while the notions of this doctrine have been firmly rooted in judicial thought, it still is an abrogation of the original Constitutional intention.

11 (1978) 1 SCC 248
Thus, the author opines that reliance on 'substantive due process' is fundamentally misplaced and the doctrine should not become a refuge for the free exercise of judicial thought. The judiciary is bound by the principles of Part III as well, and should not derogate to redefine Part III in a manner that suits its own interpretation. Hence, while the intention of the Court was *bona fide*, and the constitutional challenge to the process of narco-analysis was correctly accepted by the Court, the author does not agree with the application of due process of law as a justification for the Court's findings.

V. CONCLUSION

The practice of narco analysis was seen as unconstitutional in American jurisprudence half a century ago. With recognition of the same by the Indian Supreme Court, a new milestone in the civil liberties' movement in India has been achieved. However, abundant caution ought to be exercised by the judiciary in its application of substantive due process standards, and the doctrine should not concretize in a manner to give the judiciary license to deem it a source for any decision it may decree at its whims and fancies. In a nutshell, while the decision is a landmark in its own right and the nobility of the Court is undeniable, the application of Article 21 is not in conformance with the true principles of our Constitution.