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Indian Supreme Court in Smt. Selvi v State of Karnataka: Is a confusing judiciary worse than a confusing legislation?

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The confused court: an introduction

This note is an analysis of the issue of constitutionality of administration of scientific tests during investigation in criminal cases. In an attempt to re-assess the Indian laws prohibiting "self – incrimination" in a criminal case, this note highlights the patent flaws in the reasoning given by the Indian Supreme Court in *Smt. Selvi v State of Karnataka*[1] on the issue of administration of scientific tests by investigation agencies. In other words, this note addresses the fundamental question: whether the court was correct in holding that "involuntary" administration of scientific tests is not only inadmissible under the criminal legislative framework but is also unconstitutional. Observing that any person "supposed to be acquainted with the facts and circumstances" in a criminal case has the right against "torture" and also the right to "mental privacy"[2], Judge Balakrishnan (speaking for the majority) reiterated the proposition laid down in an earlier decision[3] that the use of certain scientific tests during investigation or trial stage results into the "dilution of constitutional rights" and at the same time "comes into conflict with the right to fair trial"[4]. To arrive at this conclusion, the Judge drew comfort from the rights enumerated or otherwise implicit in the Indian Constitution and also the procedural laws which form the basis of criminal justice system. The Judge also *suo moto* questioned and eventually dismissed the validity,

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1 AIR 2010 SC 1974

2 Article 21 – "No person shall be deprived of his life or personal liberty except according to procedure established by law". "Right to privacy" as a component of art. 21 has been debated in *Kharak Singh v State of Uttar Pradesh* AIR 1963 SC 1295 [minority opinion delivered by Judge Subba Rao]; judicially recognized in *Gobind v State of Madhya Pradesh* (1975) 2 SCC 148 ["right to privacy" although fundamental can be subject to restrictions in "compelling state interest"]; and re-enforced in *People's Union for Civil Liberties v Union of India* AIR 1997 SC 568 [where unauthorized tapping of telephones by police personnel was held to be in violation of the "right to privacy" contemplated in art.21].

3 *Nandini Satpathy v P. L. Dani* (1978) 2 SCC 424

4 n.1 above at para.222

reliability, and usefulness of certain scientific tests stating that they are susceptible to the discovery of "false" and "misleading information"[5]. However, the Judge has categorically held that evidence subsequently discovered on the basis of information obtained from "voluntary" administered tests, is admissible in a court of law[6].

In this note, I will argue that, Judge Balakrishnan has not only disputed his own reasoning and argumentation but has also further confused the citizens who were previously uncertain about the import of laws they were subject to. In contrast to the judicial task of constructive interpretation, the conclusions arrived at by the Judge are devoid of any logic, and raise more questions than he has answered or sought to do so. The failure to acknowledge the obvious distinction between "statutory" and "fundamental" rights coupled with non – observance to the fundamentals of constitutional adjudication best demonstrate one aspect of this judicial confusion. It seems that the same Judge who had set on the constructive task to analyze confusing laws has now become the greatest source of confusion. But this was expected because the legal materials that the Judge had used to address the confusions are no less confusing themselves. But there arises a question: is a confusing judiciary worse than a confusing legislation?

In an attempt to extricate the confusions created by this "historic" judgment, this note is divided into five small sections. Section two introduces the constitutional – legislative framework to readers of non – Indian jurisdiction for their greater appreciation of the domestic laws that regulate admissibility of "incriminating" evidence in a court of law and then attempts to rectify the critical errors made by the Judge in their interpretation. Section three puts the legal position in perspective and is a critique of the methods employed by the Judge in concluding that administration of "involuntary" scientific tests will necessarily violate the concomitant rights guaranteed under the Indian Constitution. Section four addresses this issue from a "victim – centered approach" and argues that since the Judge has overlooked a particular aspect of constitutional adjudication, the judgment is bad in law. The final segment of this note concludes with a discussion on the judicial reluctance to incorporate later social, economic and political developments as a powerful interpretive tool, which should inform the contents of judicial law making.

Common confusions in the law

Section 161 of the Code of Criminal Procedure (CrPC) is titled "Examination of witnesses by police"[7] and clause (2) provides that any person "supposed to be acquainted with the facts and circumstances of the case" shall be bound to "answer truly all questions put to

5 *ibid*. at para.74

6 *ibid*. at para.223

7 The text in full reads: "Any police officer making an investigation…may examine orally any person supposed to be acquainted with the fact and circumstances of the case".

him" other than questions which would "expose him to a criminal charge"[8]. On the other hand, art.20(3) of the Indian Constitution provides that "no person accused of an offence shall be compelled to be a witness against himself". The rule therefore, is to "answer truly all questions" with only one exception: the questions put should not have a tendency to "self – incriminate". In contrast, under s.27 of the Indian Evidence Act (IEA)[9], if any information revealed by an "accused" in police custody whether as a "confession"[10] or otherwise, subsequently leads to the discovery of a relevant fact or facts in issue, the fact so discovered will be admissible as evidence in the court. It is imperative to examine the meaning of "accused" in the present context. Does "accused" in art.20(3) and s.27 of the IEA restrictively mean persons facing "formal accusation" or extend also to potential candidates who are likely to get "exposed" to a criminal accusation? This was answered in *Romesh Chandra Mehta v State of West Bengal*[11], where the court observed[12]:

> "Normally a person stands in the character of an accused when a First Information Report is lodged against him in respect of an offence before an officer competent to investigate it, or when a complaint is made relating to the commission of an offence before a Magistrate competent to try or send to another Magistrate for trial of the offence".

This observation was cited with approval in *Balkishan A Devidayal v State of Maharashtra*[13, 14]:

> "[O]nly a person against whom a formal accusation of the commission of an offence has been made can be a person "accused of an offence" within the meaning of art.20(3). Such formal accusation may be specifically made against him in an FIR or a formal complaint or any other formal document or notice served on that person, which ordinarily results in his prosecution in court".

It emerges from the above that the protection under art.20(3) cannot be extended to "suspects" and "witnesses" not facing any "formal accusation". In other words, the expression "accused of any offence" in art.20(3) must mean formally accused *in praesenti* and not in

8 The text in full reads: "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".

9 The text in full reads: "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". ("emphasis in the original")

10 Confession is nowhere defined in the IEA but includes "statements made by an accused confessing his guilt". See *Pakala Narayana Swami v Emperor* AIR 1939 PC 47 ("confession is a statement made by an accused which must either admit in terms the offence or at any rate substantially all the facts which constitute the offence").

11 [1969] 2 SCR 461

12 *ibid.* at 472

13 (1980) 4 SCC 600

14 *ibid.* at 623

future[15]. It follows that "suspects" and "witnesses" who are not otherwise "accused" do not have a fundamental right against "self-incrimination" guaranteed in art.20(3). The right guaranteed is a statutory right flowing from s.161(2) of the CrPC which is broader in ambit and includes not only the "accused" but also persons who are likely to "expose" themselves to a criminal accusation. In other words, persons claiming under s.161(2) of the CrPC need not be "formally accused" at the time of making "self – incriminating" statements but can also be "potential" candidates for "criminal accusation"[16]. This view is also endorsed by noted Judge Krishna Iyer[17]:

> "Section 161(2) of the Code might cover not merely accusations already registered in police stations but those which are likely to be the basis for exposing a person to a criminal charge….A 'criminal charge' covers any criminal charge then under investigation or trial or which imminently threatens the accused".

Not surprisingly, Judge Balakrishnan himself concedes to this argument[18]:

> "Section 161(2) of the CrPC casts a wider net to protect the formally accused persons as well as suspects and witnesses during the investigative stage…"

In this sense, s.27 of the IEA will also have no application qua "suspects" and "witnesses" who although may or may not "expose" themselves to a "criminal charge", are certainly not "formally accused" at the time of making any statement in police custody. Having said that, what is the relationship between s.27 of the IEA and art.20(3): could a person "accused of an offence" who is "supposed to be acquainted with the facts and circumstances of the case" be otherwise protected from the vices of s.27 of the IEA? In other words, is art.20(3) a provision *in itself*, or does it impliedly take into consideration limitations of s.27 of the IEA such that an "accused" making any statement in a police custody whether as a "confession" or otherwise, could be admissible to the extent that it can be proved by the subsequent discovery of facts? To this question, Judge Balakrishnan responded thus: s.161(2) of the CrPC and art.20(3) share the common purpose which is to prevent "forcible conveyance of personal knowledge that is relevant to the facts in issue"[19]. "Reading conjunctively" s.27 of the IEA and art.20(3) the Judge added: "we have already explained…that if the fact of compulsion is proved, the test results will not be admissible as evidence"[20]. The Judge has

15 *Nandini Satpathy v P. L. Dani* (1978) 2 SCC 424; *Raja Narayanlal Bansilal v Maneck Phiroz Mistry* AIR 1961 SC 29

16 See generally *Nandini Satpathy v P. L. Dani* (1978) 2 SCC 424; *State of Bombay v Kathi Kalu Oghad* [1962] 3 SCR 10

17 n.3 above at 435

18 n.1 above at para.110

19 *ibid*. at para.221

20 *ibid*. at para.207

"already explained" this conceptual distinction by reproducing an earlier precedent where it was observed thus[21]:

> "If the self – incriminatory information has been given by an accused person without any threat that will be admissible in evidence and that will not be hit by the provisions of cl. (3) of Article 20 of the Constitution for the reason that there has been no compulsion. It must, therefore, be held that the provisions of s.27 of the IEA are not within the prohibition aforesaid, unless compulsion has been used in obtaining information".

Does this imply that s.27 of the IEA will have no force with respect to "self – incriminatory" information obtained as a result of "involuntary" tests conducted on "accused" persons against the mandate of art.20(3)? The answer is in the affirmative. But what about a situation when an "accused" is compelled to reveal information which in his personal knowledge although not "self – incriminatory" has a tendency to expose "any other person" to a criminal charge? In this light, let us revisit s.161(2) of the CrPC which has similar legal implications. Can a person seek protection under this section against "forceful" questions put to him which tend to incriminate "any other person" who in his personal knowledge is willfully evading criminal accusation in that case? These are confusing issues for which Judge Balakrishnan has no "elaboration". In his attempt to "gather some insights about the admissibility of scientific evidence"[22], the Judge overlooked an important commonality shared by art.20(3) and 161(2) of the CrPC: protection ensured is against "involuntary" "self – incrimination" and not "involuntary" incrimination of "any other person". In other words, the right guaranteed is only against forceful "self – incrimination" and not forceful "incrimination" *per se*. The use of words "witness against himself" and "expose him [self] to a criminal charge" occurring in art.20(3) and s.161(2) of the CrPC respectively, signify that the protection guaranteed is only against making a statement which is "self – incriminatory" and not a statement which incriminates "any other person"[23]. This is because s.161(2) read with s.161(1)[24] of the CrPC casts an obligation on a person "acquainted with the facts of the case" to "answer truly all questions relating to such case put to him". Another important provision, s.179 of the Indian Penal Code (IPC) may be mentioned here. This section criminalizes refusal to answer questions "demanded" by a public servant and provides for punishment which may extend to six months[25]. The use of word "demanded"

21 *State of Bombay v Kathi Kalu Oghad* [1962] 3 SCR 10 at para.32

22 n.1 above at para.7

23 n. 21 above

24 Section 161(1) – "Any police officer making an investigation…may examine orally any person supposed to be acquainted with the facts and circumstances of the case".

25 The text in full reads: "Whoever, being legally bound to state the truth on any subject to any public servant, refuses to answer any question *demanded* of him touching that subject by such public servant in the exercise of the legal powers of such public servant, shall be punished with simple imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both". ("emphasis in the original")

as opposed to "requested" suggests that a public servant can even go the extent of "compelling" a person to state relevant information that is known to him. In other words, while s.179 "should not be unsheated too promiscuously and teasingly to tense law people into, vague consternation and covert compulsion"; it is otherwise "perfectly within the constitutional limits of art.20(3)[26]. Section 179 of the IPC when read with art.20(3) and s.161(2) of the CrPC gives only one conclusion: a public servant can "compel" any person to state information relevant to a particular case in order to "expose" all persons of criminal worthiness save only his accomplice, if any. And if such information is revealed in police custody by an "accused", s.27 of the IEA will be attracted. It follows that "compulsion" is justified to extract information, in or outside police custody, which incriminates "any other person" not being the subject himself or his accomplice. In this sense, Judge Balakrishnan failed to observe that "compulsion" in the form of "involuntary" administration of tests to be a witness in a criminal case is not *always* against art.20(3) and s.161(2) of the CrPC. "Involuntary" administration of such tests can be lawful if administered to extract information from persons who are "supposed to be acquainted with the facts and circumstances" of the case but are not "exposing" themselves or their accomplices, if any, to a "criminal charge" by such revelation.

So what do we carry forward from here? Two propositions can be posited: firstly, any person "acquainted" with the facts of a case can be "compelled" to be a witness in that case. But such "compulsion" shall not be to "expose" him or his accomplices to a criminal charge, whether directly or indirectly. In other words, any person can be "compelled" to be a witness against "any other person" save his accomplice, if any. Secondly, any person other than a person facing "formal accusation" does not have a fundamental right against "self – incrimination" but only a statutory right against "involuntary" "self – incrimination" flowing from s.161(2) of the CrPC. That the right originates from a statute, it has to be read in conformity with the underlying scheme of the enactment with the help of statutes in *pari materia*.

Judges "sharing" the confusion

In the backdrop of these propositions, I turn to a particularly sensitive issue: whether the Judge was correct to invoke the non – enumerated rights in declaring "involuntary" tests unconstitutional? Unlike the Fourth Amendment to the US Constitution[27], in India there is no enumerated right in the Constitution preserving "privacy" of persons[28]. Right to privacy

26 *Tapati Sengupta v Enforcement Officer, Enforcement Directorate* (FERA) 1998 (60) ECC 48

27 The text in full reads: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized".

28 *Kharak Singh v State of Uttar Pradesh* AIR 1963 SC 1295

is not a "guaranteed right" under our Constitution[29]. But "even assuming that right to personal liberty" guaranteed under art.21 of the Constitution "creates an independent right of privacy as an emanation", privacy cannot be an "absolute" right[30]. Right to privacy therefore, is subject to reasonable restrictions "on the basis of compelling public interest"[31]. Such "compelling interest" can also be identified with "the need to prevent crimes and expedite investigations"[32]. In other words, right to privacy can be justifiably curtailed if "it was done in light of competing interests"[33]. In *Selvi*, this Indian judicial understanding of the right to privacy was sought to be "conceptualized". Judge Balakrishnan distinguished between privacy in a "physical" sense and the privacy of one's "mental" processes and explained thus[34]:

> "So far, the judicial understanding of privacy in our country has mostly stressed on the protection of the body and physical spaces from intrusive actions by the State". While the scheme of criminal procedure as well as evidence law mandates interference with physical privacy through statutory provisions…the same cannot be the basis for compelling a person 'to impart personal knowledge about a relevant fact'."

He added[35]:

> "An individual's decision to make a statement is the product of a private choice and there should be no scope for any other individual to interfere with such autonomy, especially in circumstances where the person faces exposure to criminal charges or penalties."

These observations, I argue, reflect the Judge's partial understanding of judicial precedents on the subject and lack of reasoning power in "conceptualizing" issues of constitutional significance. Is the Judge trying to suggest that "private choice" is more important than "compelling state interest"? If yes, does "private choice" also extend to cases where the questions put do not have any "self – incriminating" force? If so, then can a person be given a "private choice" to entertain "non-incriminating" questions "demanded" by an authorized public servant under s.179 of the IPC? In short, is the Indian criminal justice system dependent on "private choices"? It is admitted that "involuntary" tests result into "forcible interference with a person's mental processes" and therefore, infringes "privacy" of that person[36]. But what has "privacy" got to do with authorized "demand" for "non – incriminating answers". In other words, only when questioning comes into conflict with the

29 *ibid.*

30 *Gobind v State of Madhya Pradesh* (1975) 2 SCC 148 at para.28

31 *ibid.* at para.31

32 *People's Union for Civil Liberties v Union of India* AIR 1997 SC 568

33 *Sharda v Dharampal* (2003) 4 SCC 493

34 n.1 above at para.192

35 *ibid.*

36 *ibid.* at para.193

"self – incrimination" clause in art.20 can the privilege of "privacy" be justified. Judge Balakrishnan reluctantly concedes[37]:

> "[T]his determination does not account for circumstances where a person could be subjected to any of the impugned tests but not exposed to criminal charges and the possibility of conviction…[T]o address such circumstances, it is important to examine some other dimensions of art.21".

This will imply that "suspects" and "witnesses" not facing any "formal accusation" cannot exercise the right to "privacy" when "demanded" information not "self – incriminatory". In this sense, even "accused" persons cannot exercise "privacy" if police interrogation does not adversely affect their case but has a tendency to "expose" "any other person" only. But this "conceptualization" then becomes unwarranted because "accused" persons already have an enumerated right against "self – incrimination" in art.20(3). The right against "self – incrimination" essentially entails sufficient "privacy" against forceful interrogation and the Judge's painful attempt to invoke "privacy" implicit under art.21 was meaningless. This addresses the confusion confronted by the Judge i.e. why has the judicial understanding of privacy in our country has "mostly stressed on the protection of body and physical spaces from intrusive actions by the states"[38]. This is primarily because, *firstly*, right against "self – incrimination" essentially means an implied privilege of "privacy" and *secondly*, "privacy" has never been a substantial consideration for previous Judges in adjudicating issues concerning the "self – incrimination" clause[39]. This discussion adds up to one proposition: "privacy" is not an excuse for refusing answers to questions put by an authorized public servant unless they are "self – incriminating". But at the same time privilege of "privacy" against forceful "self – incrimination" cannot be exercised unconditionally. This is because "privacy" like any other right, can be restricted or curtailed by the effect of a law[40]. Indian law books are replete with examples on restrictions to "privacy" in "compelling state interest". For instance, under the Immoral Traffic Prevention Act, the sex workers can be compelled to undergo HIV tests in order to segregate the ones suffering from venereal diseases[41]. Likewise, a person can be compelled to undergo medical tests if chares are framed

37 *ibid.*

38 n. 34 above

39 See generally *Ramchandra Reddy v State of Maharashtra* 2004 AII MR (Cri) 1704; *Dinesh Dalmia v State* 2006 Cri. L. J. 2401

40 See *Maneka Gandhi v Union of India* AIR 1978 SC 597 ("Courts must not interfere where the order is not perverse, unreasonable, mala fide or supported by no material")

41 Section 15(5A) reads thus: "Any person who is produced before a Magistrate…shall be examined by a registered medical practitioner for the purposes of determination of the age of such person, or for the detection of any injuries as a result of sexual abuse or for the presence of any sexually transmitted diseases".

against him for rape[42] and negligent act of spreading infectious diseases[43]. There are other such provisions also[44]. It is therefore settled that "privacy" of a person in India is not over and above the "compelling interest" of a State in crime prevention. In the present context, it becomes important to mention s.132 of the IEA[45]. That section restricts privacy of a "witness" and compels him to answer all questions during court trial regardless of their incriminating nature. Also, evidence collected through illegal search and seizure by the investigating officer does not affect its validity and is admissible in court[46]. This implies that privacy is not "absolute" and can be curtailed in order to enhance the constant search for truth in a criminal trial[47]. While Judge Balakrishnan accepted the limitations of "privacy" qua persons not facing any "formal accusation", he failed miserably in appreciating the legislative balance between "privacy" on one hand and the state's interest in crime prevention on the other. It is this failure that resulted in the judicial extension of the privilege of "privacy" to "accused" persons against all questions, whether incriminating or not. But if "privacy" according to the Judge is not guaranteed to "non – accused" persons, how can tests conducted on them be unconstitutional? This is because the Judge finally invoked the right against "torture"[48]:

42 Section 53A of CrPC: "When a person is arrested on a charge of committing an offence of rape or an attempt to commit rape and there are reasonable grounds for believing that an examination of his person will afford evidence as to the commission of such offence, it shall be lawful for a registered medical practitioner…acting at the request of a police officer…to make such an examination of the arrested person and to use such force as is reasonably necessary for that purpose".

43 Sections 269 of the IPC is titled 'Negligent act likely to spread infection of disease dangerous to life' and reads thus: "Whoever unlawfully or negligently does any act which is, and which he knows or has reason to believe to be, likely to spread the infection of any disease dangerous to life, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, or with both".

44 For instance, s. 5(2) of the Telegraph Act reads: "On the occurrence of any public emergency, or in the interest of public safety, the Central Government or a State Government…may, if satisfied that it is necessary or expedient to do so in the interests of the sovereignty, and integrity of India, the security of the State, friendly relations with Foreign States or public order or for preventing incitement to the commission of an offence…direct that any message or class of messages to or from any person or class of persons, or relating to any particular subject, brought for transmission by or transmitted or received by any telegraph, shall not be transmitted, or shall be intercepted or detained, or shall be disclosed to the Government…"

45 The text in full reads: "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 ground that the answer to such question will criminate, or may tend directly or indirectly to criminate, such witness, or that it will expose, or tend directly or indirectly to expose, such witness to a penalty or forfeiture of any kind".

46 *State of Maharashtra v Natwarlal Damodardas Soni* AIR 1980 SC 593; *Radha Krishna v State of Uttar Pradesh* AIR 1963 SC 8221

47 *Santokben Sharmanbhai Jadeja v State of Gujarat* 2008 Cri. L. J. 68

48 n. 1 above at para. 205

> "[T]he compulsory administration of the impugned techniques constitutes 'cruel, inhuman or degrading treatment' in the context of art.21. It must be remembered that the law disapproves of involuntary testimony, irrespective of the nature and degree of coercion, threats, fraud or inducement used to elicit the same".

This observation implies that "involuntary" tests constitute "torture" and hence should not be administered on any person. But right against "torture", like "privacy", is also not enumerated in the Indian Constitution[49]. Nor has it been protected by any domestic statute or legislation[50]. This is because India has not yet ratified the Convention against Torture and in the absence of domestic laws to that effect, "torture" is something not explicitly "guaranteed"[51]. After "surveying" international non – binding materials, the Judge cautioned[52]:

> "[I]t is necessary to clarify that we are not absolutely bound by the contents of the Convention…[T]his is so because even though India is a signatory to this Convention, it has not been ratified by Parliament…and neither do we have a national legislation which has provisions analogous to those of the Convention. However, these materials do hold significant persuasive value since they represent an evolving international consensus on the nature and specific contents of human rights norms".

But assuming that a judicially evolved right against "torture" exists under art.21 which guarantees right to "life" and "personal liberty"[53], how is "torture" relevant in the context of "involuntary" administration of scientific tests? Is the Court trying to suggest that "compelling" a person to part with relevant information in his personal knowledge with the investigating agencies is "torture"? Or is it that the scientific way through which the compulsion is done constitutes "torture"? If we go by the first suggestion, then s.161(2) of the CrPC will constitute "torture" because it obliges all persons to "answer truthfully" who are "supposed to be acquainted with the facts and circumstances of a case". So will s.132 of the IEA, which "compels" a "witness" to answer questions posed during a trial, whether incriminating or not. Turning to the second suggestion, is protection against "torture" an

49 *D K Basu v State of West Bengal* (1997) 1 SCC 416 at para. 10

50 *ibid.*

51 See generally *Meryam Dabhoiwala*, Human Rights School Desk, Asian Human Rights Commission, available at http://www.article2.org/mainfile.php/0205/109/ (Last visited on January 22, 2011)

52 n. 1 above at para. 199

53 See generally *Manfred Nowak*, Report of the Special Rapporteur on the Question of Torture, E/CN.4/2006/6, December 23, 2005, available at http://www.unhcr.org/refworld/docid/441181ed6.html (Last visited on January 23, 2011). Also see, *D K Basu v State of West Bengal* (1997) 1 SCC 416 at 429 ("Any form of torture or cruel, inhuman or degrading treatment would fall within the inhibition of art.21 of the Constitution, whether it occurs during investigation, interrogation or otherwise".) Also see *Mullin v Union Territory of Delhi* AIR 1981 SC 746 ("[A]ny form of torture or cruel, inhuman or degrading treatment would be offensive to human dignity and constitute an inroad into this right to live and it would, on this view, be prohibited by art.21 unless it is in accordance with procedure prescribed by law").

unqualified right? The answer is in the negative. This is because, *firstly*, India has not ratified the Convention against Torture and hence the principles laid down therein have no binding force[54] and *secondly*, there is no law in India for the time being in force that prohibits use of "torture"[55]. In contrast, the CrPC encourages the use of "all means necessary" to effect arrest[56] and justifies the "use of armed forces" to disperse an unlawful assembly[57]. Even "death" can be caused to a person attempting to resist or evade arrest[58]. There are other laws that justify use of force also[59]. This implies that "torture" has got nothing to do with the revelation of information not "self – incriminating" that is relevant to a criminal case. But "torture" can be justified in case of "involuntary" "self – incrimination" also. In other words, "torture" in the form of "involuntary" tests administered on persons who possess relevant personal knowledge about a fact relevant is justified even if they face "penal consequences" due to such revelations. This is because one of the most efficient sources of evidence in a criminal case is the "accused" himself who has exclusive personal knowledge about a fact[60]. Extending potential witnesses the non – enumerated right against "torture" interferes invariably with crime control and maintenance of order in a State. A person has a duty and responsibility to speak the truth when "demanded". But when this duty is disregarded, reasonable force can be used because the state has a "compelling interest" to prevent crime and prosecute criminals[61]. More importantly, "torture" cannot be successfully proved in a court of law. The only witness in a case of custodial torture will

54 *Mark Weisburd*, Customary International Law and Torture: The Case of India, 2 Chi. J. Int'l L. 81 (2001)

55 *ibid.*

56 Section 46(2) reads thus: "If such person forcibly resists the endeavour to arrest him, or attempts to evade the arrest, such police officer or other person, may *use all means necessary* to effect the arrest". ("emphasis in the original")

57 Section 130(1) reads thus: "If any such assembly cannot be otherwise dispersed, and if it necessary for the public security that it should be dispersed, the Executive Magistrate…may cause it to be dispersed by the armed forces".

58 Section 46(3) reads thus: "Nothing…gives a right to cause the death of a person who is not accused of an offence punishable with death or with imprisonment for life".

59 Section 32 of the Prevention of Terrorism Act, 2002 reads thus: "Notwithstanding anything in the Code or in the Indian Evidence Act, 1872, but subject to the provisions of this section, a confession made by a person before police officer not lower in rank than a Superintendent of Police and recorded by such police officer either in writing or on any mechanical or electronic device like cassettes, tapes or sound tracks from out of which sound or images can be reproduced, shall be admissible in the trial of such person for an offence under this Act or the rules made thereunder".

60 Recommendation of the Malimath Committee on Reforms of Criminal Justice System, available online at http://flac.htmlplanet.com/news/malimath.htm (Last visited on January 25, 2011) ("As the accused is in most cases the best source of information…while respecting the right of the accused a way must be found to tap this critical source of information").

61 n. 33 above

normally be the investigating officer himself[62]. In this sense, the right against "torture" can never be successfully enforced and hence is ineffective[63]. And since in India there is no presumption of compulsion in custodial statements[64], such due process rights hold little or no ground. This discussion adds up to one conclusion: the Judge has extended the scope of a constitutional provision devoid of logic and authority and has also relied on rights which do not exist in the Indian Constitution. The legislature has created a pragmatic balance between conflicting interests of 'personal liberty' and 'public safety'. It is the task of a judge to preserve this balance as reflected in the text of legislations.

Coming out of the confusion

"Admissibility" and "constitutionality" of scientific tests are two different things and must be treated accordingly. Under the Indian evidence law, results of scientific tests may not be admissible in courts due to the presence of compulsion but that does not make it unconstitutional. Likewise, evidence collected by investigating officers contrary to law may still be admissible in a court[65]. The idea is to weigh the actual evidence placed before the court by applying its judicial mind irrespective of the source. In other words, "relevance" and not "source" of the evidence is important while admitting it in trial[66]. Under the IEA, scientific opinion cannot be a conclusive proof of the crime[67] and is used only for the purpose of collecting further evidence. It is then that the idea of "coercion" and "involuntariness" is relegated to oblivion if the results are fabricated and do not help the prosecution in collecting further evidence. Alternatively, if the results lead to "truth", then not using the "truth" in the trial would be against civic decency. After all, the criminal justice system is all about "search for the truth"[68] and not the discouragement of it[69]. It is the duty of a court to find the "truth"[70] and do justice. And justice will not be done if the guilty is acquitted for "unjustified failure to produce available evidence"[71]. In its overzealous pursuit to protect

62 n. 60 above

63 *Vincent Martin Bonventre*, An Alternative to the Constitutional Privilege Against Self-Incrimination, Brooklyn Law Review, Vol. 49 (1982)

64 n. 1 above at para. 106

65 n. 46 above

66 *State of Madhya Pradesh through CBI etc v Paltan Mallah* (2005) 3 SCC 169 at para.18

67 See generally, *State of Haryana v Bhagirath* (1999) 5 SCC 96; *Solanki Chimanbhai Ukabhai v State of Gujarat* AIR 1983 SC 484

68 *Santokben Sharmanbhai Jadeja v State of Gujarat* 2008 Cri. L. J. 68. See also, Committee on Reforms of Criminal Justice System, Vol 1, (2003) at 57 available online at http://www.mha.nic.in/pdfs/criminal_justice_system.pdf (Last visited on January 22, 2011)

69 *ibid*.

70 *Sri Krishna Gope v State of Maharashtra* (1973) 4 SCC 23

71 *State of Maharashtra v Praful B Desai* at para. 13

rights of the accused, Indian courts have forgotten "that the victims also have rights"[72]. In almost all cases confirming the unconstitutionality of scientific tests, the Courts have placed an overarching reliance on fundamental rights of the accused persons. In contrast, the 42nd Amendment to the Indian Constitution added ten fundamental duties in Chapter IV under art.51A in the form of a 'code of conduct' for the citizens towards the State. There is an "inherent interconnection between fundamental rights and fundamental duties" because both of them complement each other[73]. In other words, if the citizens fail to perform their fundamental duties that they owe to the State then it is likely that the latter would not be able to "live up to its promise in regard to fundamental rights of citizens"[74]. Clause (f) of art.51A enjoins a duty on the citizens to "value and preserve the rich heritage of our composite culture". "Valuation" is necessarily a prelude to "preservation" for one cannot preserve the cultural heritage without appreciating the value of it[75]. India's composite culture emphasizes upon a "higher law" which cures all forms of evils in the society and is a "determined resolve to a conduct and behavior which will have the effect of rendering all penal laws redundant"[76]. One such "higher law" is the law of "Satya" (truth). "Satya" (truth) as a part of our composite culture was deeply embraced and cherished by national leaders like Mahatma Gandhi during freedom struggle. Mahatma Gandhi himself valued the "inexhaustible reservoir" of the basic tenets of "Satyam" (Truth), "Shivam" (Goodness) and "Sundaram" (Beauty) in his fight against political oppression[77]. To protect "Satya" (truth) as a rich heritage of our composite culture is a significant part of the fundamental duties enjoined in the citizens. Therefore, refusal by persons to voluntarily state the truth on demand by the investigating officers constitutes non – observance to an important fundamental duty and the State, as a preserver of the fundamental duties, has the authority to compel observance from deviant citizens. The judiciary itself, being a creature of the Constitution, is bound by constitutional mandates and must ensure its due observance[78].

72 *ibid.*

73 *D N Saxena*, Basic Issues and Tasks, at 151 in: D N Saxena (ed.), Citizenship Development and Fundamental Duties, New Delhi (1988)

74 *ibid.*

75 Effectuation of Fundamental Duties of Citizens, National Commission to Review the Working of the Constitution (2001), available online at http://lawmin.nic.in/ncrwc/finalreport/v2b1-7.htm (Last visited on January 27, 2011)

76 *ibid.*

77 *ibid.*

78 See generally, *Shubhankar Dam*, Vineet Narain v Union of India: "A court of law and not of justice" – is the Indian Supreme Court beyond the Indian Constitution?, Public Law, 248 (2005).

Conclusion

I have made three important claims in this Analysis. *First*, the use of scientific tests is bad in law if "involuntarily" administered to any person likely to "expose himself to a criminal charge". However, use of such tests is completely legal if administered "voluntarily" or "involuntarily" to persons not likely to face "criminal accusation". *Secondly*, scientific tests can be "involuntarily" administered to persons whether or not likely to "expose themselves to a criminal charge" in "compelling state interest". Whether "torture" or "privacy" rights have been discriminately flouted will be a matter of fact in each case depending upon the seriousness of the offence. *Thirdly*, a potential witness to a relevant fact in a criminal trial is failing in his fundamental duty by not "voluntarily" speaking the "truth" before the authorities. To ensure observance to fundamental duties enjoined in the Constitution, the State has the power to use compelled scientific tests in its pursuit for the "truth".

Judge Balakrishnan was correct in holding that "involuntary" administration of scientific tests is unconstitutional if it results or is likely to result in "self – incrimination". He was also correct in holding that use of such tests impede upon privacy rights of persons and also amount to cruel and degrading treatment. But the Judge ignored another class of persons who can be administered scientific tests "involuntarily" i.e. persons who will not "self – incriminate". This is so because there is no right under the Constitution or statutes which protects persons from "incriminating" any other person. In contrast, the Constitution casts a fundamental duty on every person to speak the "truth" – "value and preserve the rich heritage of our composite culture". With this, I leave it with the readers to reflect – whether a confusing judiciary is worse than a confusing legislation?