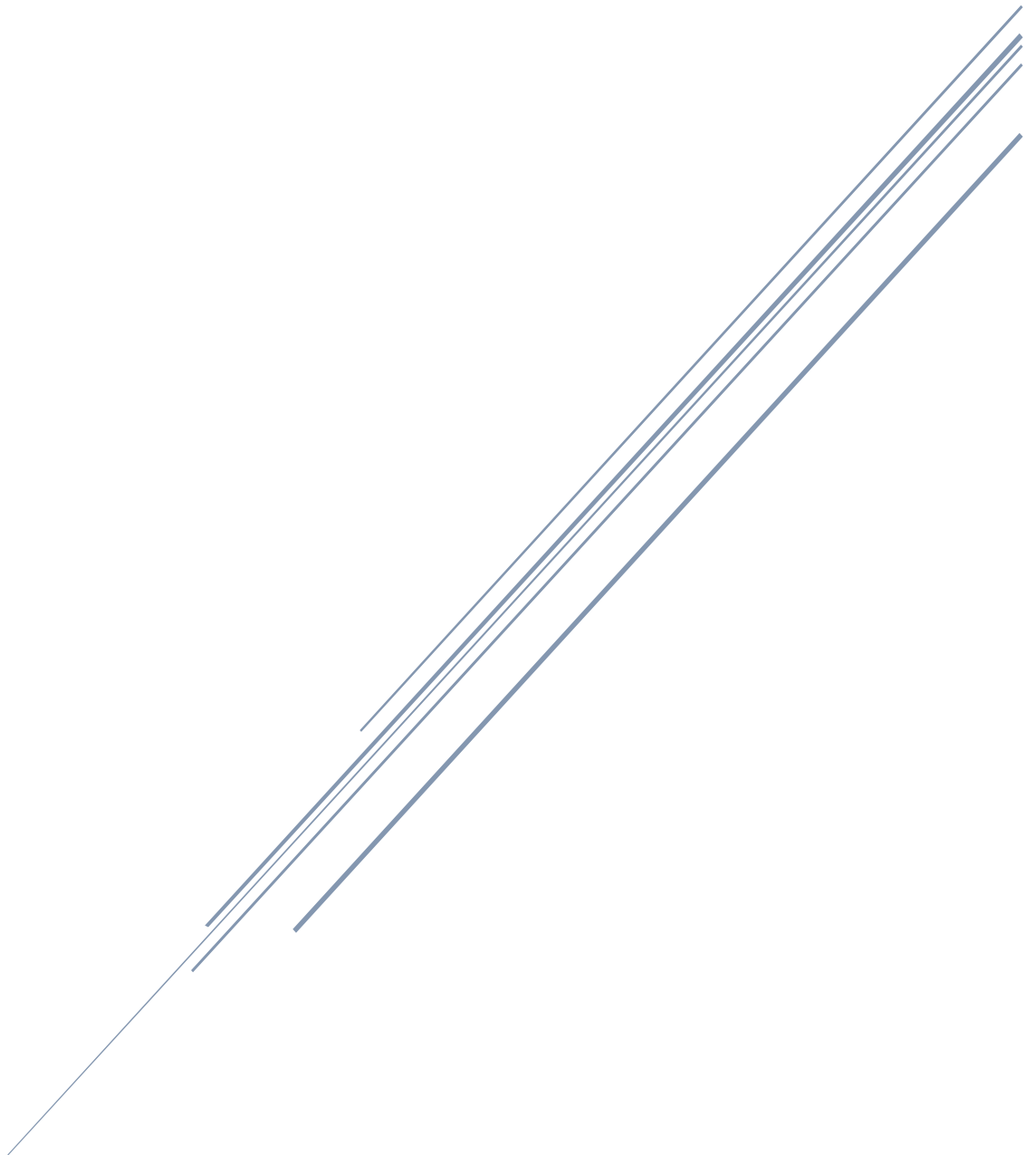


Selvi v. State of Karnataka

A Critical Analysis by Saikat Bhattacharya



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Introduction

In this critical case analysis, we would be analyzing the famous judgment of *Selvi v. State of Karnataka*, as this case was based on the fact that humans can be better than the technology. The judgment that was given by the Chief Justice along with companion said that the practice of narco analysis, brain mapping, fMRI, and the polygraph test we are unconstitutional. This case discusses a new unexplored area of privacy and the guarantee against self-incrimination, which is protected under the Article 20(3) of the Constitution. When the CJI pronounced this judgment, it was further regarded as the Landmark judgment.

The above-stated techniques are a great asset provided by the modern sciences, which are followed and used to tap vital information out a person that could further be used in a court as evidence. The evidence collector is bound to adhere to the rules set by the Constitution, but the methods as mentioned earlier easy are against such calibre and can be deemed as unconstitutional

Case Information

Brief facts

In the year of 2004, Selvi(petitioner), along with others, filed a criminal appeal, which we are followed by more appeals in 2005,06,07 and 2010; all were taken up by the Supreme court of India in accordance of a special leave petition(SLP) on May 2010. The appeals in this case raise objections against the instances where the accused person, suspect, or witness have been exposed to various tests without their will or consent. These methods were defended by the opposition for being an extraordinary method to find evidence in the case where it becomes hard to gather any evidence, they also said that using these procedures used does not cause any harm to the body and the information obtained from these are only used to make the investigation more successful and used as a piece of evidence at a trial. These would help increase the rate at which an individual is prosecuted as well as acquitted and also would be softer & humane methods that are better than currently used "third-degree method."

Legal Terms used & their history of use;-

Privacy

Privacy as an aspect is a relatively newly contested topic, and first, of the times it has been used, but this concept whose purpose has regularly been defeated in the history of the Constitution. Directly related provisions for privacy have not been available in the Indian Constitution, but it is mostly considered to be Embedded inside Article 21 of the Constitution of India.

Due Process

To ensure that the due process had been followed with fairness, we should judge the process through which it was obtained. The first way to ensure that is the accused not coerced and made to make an involuntary confession¹. Using a hidden camera to watch over a person for a long time is also not considered a correct process. The due process guarantees that an individual's personal privacy will not be breached as it is a fundamental right.² Oppressive and arbitrary regulation must not be used by the police.³ In short, the police, during a due process, cannot act outside its powers other than those sanctioned by the Constitution.⁴

Self-Incrimination

Any self-incriminating act done by the accused, which is non-volatile, would be called compulsion under article 20(3) of the Constitution of India.⁵ In the case of *M.P. Sharma v. Satish Chandra and others*,⁶ the question arose that whether the seizure and search order court give under section 94 CrPC violated the right of guarantee provided by Article 20(3) of Indian Constitution.

Legal Issues addressed: -

- Is narcoanalysis, brain mapping, polygraph test, etc. justified methods for gaining evidence under the constitutional ambit.

¹ AIR 2005 SC 186; (2008) 2 SCC 370

² (1963) 372 United States 528; (Basu n.d.)

³(1936) 297 United States 189

⁴ (1954) 348 US 26

⁵ (1952) 342 US 117

⁶ A.I.R.1954 S.C. page 300

- Whether the methods used for gathering new evidence result in weakening of the constitutional rights such for example, the right barring self-incrimination mentioned in the article 20(3) of the Constitution & according to Section 161(2) in the CrPC, 1973.
- If the procedure does or does not violate the due process
- Whether the use of anyone of the techniques is not justified entry inside the mental sphere of a person involved in the case.
- Whether -an accused, witness or a victim allowed to take these tests in order to get justice, keeping in mind that all safeguards are provided

CASE ANALYSIS

The chief justice on India, K.G. Balakrishnan, Gave most of the judgment in this case. He majorly puts light on self-incrimination under Article 20(3) of the Constitution. The minority aspect of this, which is privacy and due process, was not given much importance in the judgment even though it is an integral part of this case. Effective methods for interrogation have been researched upon for very long as it is needed that the information is obtained from a source that is not co-operating. When the analysis was done of the investigation conducted by the police, it was found that physical coercion has been used many times instead of painstaking and time-consuming ways as it has proved a better way to get results quickly. The criminology field has grown many-fold in recent years, and demand has arisen for searching a method that is efficient as well as detecting deception, which has to lead to an increase in concomitantly.

In the judgment, we can see the aspects such as the due process and privacy has not been given much importance. The judge agrees upon and gives his consent to the contentions of the ways to reach a rational, but a little bit more clarity on this aspect of privacy would have been helpful in understanding the reason behind it.

The judgment in the beginning deals which the breach of privacy when these tests tend to violate, but in the end, the judgment shifts towards the idea of self-incrimination. The reason is that the articles 20(3) 's interpretation has repeatedly been challenged at various levels of Court, and the grounds of privacy has been established as well.

Critical Analysis

The Beginning of the judgment tells us about the various types of tests that are mentioned in the case, how they are used and in what manner & finally how the law sees the process. CJI Balakrishnan has referred to many foreign judgments in which tests were used to reach final conclusions. He did so because judgments and case laws regarding these tests were not available in India back then to tackle this. All these tests were examined whether it was constitutional or not in countries like the United Kingdom and the United States who is case laws have a value in Indian courts. Many cases from the High Court were present, which supported the use of the tests, but this was opposed by the Supreme court of India. The reasoning by the High Court of Karnataka compared the forceful usage of article 20(3) with the term “duress” which involves consequential harm to body or threat, after which the Court said the pain caused after usage a of an injection for a narco-analysis test did match the intensity of hurt or pain required in order to label it as forceful usage⁷. The Madras high court also commented using their narrow view on forceful usage that it generally amounts to applying physical or other third-degree methods to gain evidence during an investigation, the Court also said that even if the dosage of medicine injected during the narco analysis is forceful, the individual voluntarily makes the statement during the test.⁸ The Supreme Court found the arguments as mentioned earlier baseless because it thought it to be more mechanical, and much thought was not put into it by the high courts. The judgment was labelled at landmark because the nature of the tests was held to be unconstitutional as the Supreme Court said that the right to privacy was being taken away by the usage of tests such as Narco-analysis, polygraph test, etc. on the without the will or consent of individuals involved in the case

The CJI, along with his companions, had stated that that the right against self-incrimination gets violated when such banned tests are used. The results of such cannot be used as evidence if they have been forcefully obtained. Protection is provided by the Indian Constitution in article 20(3) to an individual on whether he wants to disclose some facts or choose to remain silent, it does not matter whether the future statement proves the liability of the person or not. Further, the bench stated that the purpose of article 20(3) was to prevent the individual from forcefully spill out the conceived facts which are related to the case. The end product of each of these forceful

⁷ Supra note 2

⁸ CrI. R.C. No. 259 of 2006

tests has the potential to be a testimony and cannot be used in the Court as evidence. Therefore, if a person is forced to take such tests, then it will automatically be a breach of privacy of that individual, hence violating article 20(3) if such tests were made mandatory to go through. The Court stated that even in cases where the individual in a case wants to be subjected to any of the tests consensually, the outcome of the same cannot be submitted as evidence because that individual was still not control of his/her senses when the test was being conducted. However, section 27 of the Evidence Act allows any evidence to be submitted to the Court if it was found after administering the test voluntarily.

The concept defined under article 20(3) is being described as a relationship between different rights as it was reiterated in the judgment of *Maneka Gandhi v. Union of India*.⁹ Therefore, the judge used this to discuss the relationship of the right against self-incrimination with the various versions of personal liberty, such as the right to due process and many more.

Hence, there so no doubt that the meaning and scope of Article 20(3) of the Indian Constitution need to read and understood with more precision. A police officer is given the right to examine an individual related to the case under section 161(1) in CrPC who is doubted to have any knowledge about its facts. Nevertheless, the right vested in them by the Constitution cannot be at any point taken away from that individual during the interrogation. The rights also give the individual to remain silent by not answering, which may lead to a liability, and silence cannot be taken as a sign of guilt or that the individual is concealing some facts. During the stage of a trial, the Court has a limited power granted by the section 313(3) of CrPC in which it may use silence to come to a conclusion in exceptional circumstances; it says that the accused cannot make themselves held responsible for not answering and answering falsely. The right to silence is provided by the CrpC section 161(2), in which an individual can remain silent during questioning during an interrogation and investigation.

The undermined aspect of privacy

The second aspect that can be understood with the help of many precedents is whether some rights under article 21 are not complied with when such tests are administered.

⁹ 1978-1-SCC 248

During any ongoing administrative proceedings or any civil proceedings, the individual who may be asked to undergo specific tests in order to determine liability cannot protect himself with the right against self-incrimination. It can also be imagined that a person may not face any liability even if he/she is asked to undergo the tests forcefully. The article 20(3) cannot be invoked where the individual faces civil-consequences after the outcome of the test comes for the crimes like harassment, abuse during custody, etc. in order to understand these; we need to see that whether the forceful usage of such tests are in agreement with "substantive due process" as it is a base whether all the processes used for examination by the government we are valid or not.

In the case of *Maneka Gandhi vs. UOI*¹⁰, it was said that individual personal liberty means that the person is free from all the restrictions and rules, even if those are imposed on them by an external factor, therefore making the right to privacy an essential component of it. Right to a fair trial, rights against inhuman treatment are also some of the other rights whose violations have been discussed in the above case

There are many precedents through we can understand this-

- 1) In the case of *PUCL vs. UOI*,¹¹ it was held that wiretapping of an individual's telephone by the police was an infringement of the right to privacy. However, it was not mentioned in the case that the crime investigating officials were barred from using this method as it might be necessary in some cases during an investigation to prevent or catch any criminal activities. Hence, the regulated use of such methods was mandated.
- 2) IN the case of *Rochin v California*¹², it was said that breaking into the mental sphere and trying to extract information from the individual forcibly was offensive towards the hardened sensibilities. Also, using drugged methods to record responses from the person can be called as a breach of privacy of the individual. A person's behaviour or answers will change if he/she knows that they will be subjected to such methods. On the other hand, the behaviours of the investigators might also get influenced by the results generated. They may subject the people to

¹⁰ AIR (1978) Sc 597

¹¹ AIR (1997) Sc 568

¹² 34

harassment, leak their recording of them during the test, etc. as there have been many cases regarding the same. Such things may affect the mental state and also cause a social stigma against them.

- 3) In the case of *D.K. Basu vs. the State of West Bengal*, the Court says that it is crucial to prevent the torturous treatment of any individual who has been detained by the authorities. But the police and the law enforcement authorities, to some extent, can apply such forceful methods in order to ensure that the required information is obtained. The right to personal liberty does give an individual perfect rights, i.e., some restrictions are always placed on an individual, and they are evaluated regularly on various criteria such as reasonableness, fairness, etc.
- 4) The Supreme Court of Israel, in a case, had said that when they are interrogating terrorist suspects, they cannot use the torturous methods such as Sleep deprivation, electric shocks, etc. which are also banned Geneva conventions.¹³

Adverse effects of the test concerning privacy:

1. In the polygraph test, there are many drawbacks due to which errors are frequently made. The answers that are given by the suspected individuals are mostly due to fear, nervousness, etc. Which may be taken in a wrong sense, I.e., it may look like the person is lying.
2. The accused, witness, or the victim needs to be in a healthy state of mind because, if the person is depressed or hyperactive, he/she is more likely to give a false answer, which would further confuse the interrogator/ examiner.
3. Since there is always a possibility that the person interrogated is not in a healthy state of mind or hypnotic, he/ she may tell or disclose imaginary facts that may have never happened.
4. Sometimes the subject may have created a false version of an incident. This generally happens due to PTSD or when they are asked to recollect information about traumatic events. In such a situation the subject cannot be said to be lying as they may not be aware of it; hence it leads to the creation of errors.
5. The various types of tests are not successful at all times. Statistics show that most of the responses during drug tests are hardly relevant to the case, and many, at times, the individual may reveal information about his private life.

¹³ H.C. 5100 / 94 1999

6. The interrogators are needed to be highly qualified and skillful so that during interrogation, he/ she should be able to identify which information is necessary. This is so because many people who are being tested are still able to deceive in the drugged state and that the investigators may ask such questions, which are specially aimed at framing that individual.
7. There are some cases in which an individual might suffer a memory loss in the time between which the crime/ incident took place, and when the following tests were conducted. There, in this case, the result would not be of any use as the individual is not aware of the truth.

We can now say that the judgment given by the Supreme Court, in this case, has cleared all the doubts and the questions that arose regarding the validity of various tests (narco analysis, polygraph test, etc.) by holding that forceful usage are prohibited as these are inhuman and torturous treatment. An individual (accused/ witness/suspect) is given the right to self-incrimination at all stages of the trial. Many foreign judgments were used in this case due to the unavailability of landmark judgments, which helped us have an excellent idea about whether these tests/ scientific techniques were valid or not.

A few things that the Supreme Court has left to the discretion of the authorities is when and at what times can the use of such tests can be brought into use. It has mostly left the scope of these tests to be used only when one wants to do it voluntarily. There may be cases where an individual is forcefully asked to undergo due to some coercion, therefore resulting in a mockery of the judgment.

Some judgments after the case of Selvi vs. State of Karnataka in which these tests were used to gain evidence to reach an outcome.

1. K.M. Seema Azad vs. State of Uttar Pradesh¹⁴: This case is also commonly known as the Shashi murder case. In this case, the CJM allowed the police to conduct a narco analysis test in order to gain more evidence on the murderer. After the test was conducted in this case that the Co-accused, in this case, had asked the accused to call the victim at

¹⁴ HC NO.1055 OF 2011

a lonely place and strangle the victim to death. Based on the statement recorded, the accused were sent to jail and continues to be in prison.

2. Nupur Talwar vs. CBI and Another¹⁵: This case does not need an introduction as it is one of the most famous murder cases of all time. Since there was very little evidence for moving forward in the investigation. A narco analysis test was done on Nupur as well as Rajesh Talwar. However, even after the tests, there was not any outcome as they both knew nothing different about the murder. After this case, the importance of increasing the quality of the forensic science in the justice system was highlighted as the officials currently present in the country were not highly trained, which further put the justice system in it is backfoot.

From the above two cases, we understand that to date, the scope of using the tests that were kept open by the Supreme court in the selvi case remains open. The necessity of these tests is still determined on a case to case basis.

Conclusion

It has always been witnessed in the Indian legal system that no matter how much judgment is well written, it is always faced by criticism. The same theory applies to the case of Selvi v. State of Karnataka. This case was set as a landmark judgment and set a procedure, but still, it is countered with criticism. When we talk about a judicial decision, a scope for criticism is always present to provide their views. The above-given judgment is one of the best examples of how a neutral judgment can be provided.

¹⁵ AIR 2012 (CrI) No(s).2982/2011 SCC 68

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