CHAPTER 5

SOME JURISPRUDENTIAL NORMS VIS-À-VIS SELVI v. STATE OF KARNATAKA: A CRITICAL APPRAISAL

5.1 INTRODUCTION

In every corner of the world, 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\(^1\). In the contemporary scenario, there are many tools that are scientific in nature are available, however, it is indeed a paradox that Indian courts have never examined the constitutionality and validity of scientific tools in the light of changed circumstances of developing India. In _Selvi v. State of Karnataka_,\(^2\) a three court bench of honourable Supreme Court examined in detail involuntary administration of Narcoanalysis, Polygraph and Brain-Mapping and unfortunately held that involuntary administration i.e. without the consent of the subject who is to undergo these tests, the administration of Narcoanalysis, Polygraph and Brain mapping is unlawful, unconstitutional and therefore, inadmissible in the court of Law.

In India, “government is for the people, of the people, by the people” and people are not for the law. The utmost object of any law is to create an atmosphere of trust, quality and fearless co-existence among the people.\(^3\) For creation of such environment police authorities are vested with wide powers as police play a pivotal role in maintaining law and order, in enforcing regulations for prevention and detection of crimes, etc. However, these powers are often abused.\(^4\) Work load, lack of investigation facilities, political pressure to solve the case as soon as possible, unfair expectations are some of the factors that prompt shortcuts the police authorities embrace. In order to

---


eradicate this completely, science should be fully invoked. Aid of scientific tools and techniques should be taken. Some consider these investigation tools as arbitrary and blatant violation of Rule of Law; however, this is the high time to welcome these as no prisoner would ever be blinded again. As Law is a living process, it changes according to the changes in society, science, and ethics and so on.

India has always conducted itself in accordance with the principles laid down in international treaties and conventions it is party to. Of course, principles of International Law do not come into effect automatically, they have to be backed by a legislative enactment to be effective, and if they tend to be against the law of the land, the municipal law gets precedence over them. However, in case of violence in custody there are several conventions at the international level. Also, in India several statues, including the Constitution, the Code of Criminal Procedure, the Indian Penal Code provide for safeguards against custodial violence and effective protection in this respect. The government itself is ranking Narcoanalysis, Polygraph and Brain-Mapping low and there is no law in India that specifically authorize the use of such means in investigation against a plethora of international conventions that frown at the use of questionable means of extracting information during a criminal investigation. Our legal ethics should also be in tune with the developments and advances that take place in science to counter the increasing number of criminal activities in the present day scenario where the techniques used by criminals for commission of crimes are very sophisticated and modern.

5.2 SELVI V. STATE OF KARNATAKA: AN INCOMPREHENSIBLE PIECE OF JUDICIAL MIND

On May 5, 2010 a historic verdict came from the apex court of the land against forced Narcoanalysis, Brain-mapping and Polygraph. It is a real disappointment that the hon’ble Supreme Court has delivered a judgment as if it is still in ancient or medieval period. In the judgment, Supreme Court dealt with the most significant questions regarding the fundamental rights available to every citizen in India, the right of speedy

---

5 For details see Khatri v. State of Bihar, AIR 1981 SC 928
and fair trial and the fascination of effective investigation in India. The bench itself recognised the importance of issue before it, by observing:

“Ordinarily the judicial task is that of evaluating the rival contentions in order to arrive at a sound conclusion. However, the present case is not an ordinary dispute between private parties. It raises pertinent questions about the meaning and scope of fundamental rights which are available to all citizens. Therefore, we must examine the implications of permitting the use of the impugned techniques in a variety of settings”

It is sad that after identifying the magnitude of dilemma, court delivered such a rigid judgment. The concern which is shown by the Supreme Court itself, in number of cases, seems to have fallen like a leaf. The desirability of adopting scientific techniques in investigation has been put to rest with this judgment and the situation does not seem to be showing any noticeable change in coming years. The case before the Apex Court of the land arose out of special leave petition criminal in nature bearing numbers 10 of 2006 and 6711 of 2007 against the State of Karnataka. In this appellants were charged with the murder. It is a case of honour-killing. The then sitting MLA is also involved. The brief facts of the case are that the complainant namely, Kavita Murugesan wife of deceased Shiv Kumar and daughter of Selvi Murugesan, a Tamil Nadu sitting MLA, lodged complaint against her parents and their friend Govindraj for murdering her husband. She married against the wishes of her parents with Shiv kumar. This was an inter-caste love marriage. According to the complainant, on April 10, 2004, when she was returning along with her husband after having eatables in a bakery situated in front of L.L.T. College, around 8p.m. four persons kidnapped her husband in a maruti van. The number of van was KA-04-MA3167. She lodged a complaint regarding the kidnapping of her husband. The very next day dead body of her husband was found. His head was smashed with a boulder and his identity could be fixed by his driving licence. Kavita named her parents and one family friend as suspects. There was no evidence available that could help to solve the case. However, accused persons were subjected to polygraph and brain mapping. The accused were not cooperative during the polygraph test and they tried to defeat the test. The techniques showed their

---

7 Selvi v. State of Karnataka, Para 1.
involvement in the crime. Therefore, the police authorities sought permission for conducting narco-analysis from the magistrate against the order of which accused persons appealed before the Supreme Court.8

In the special leave petition, hon’ble Supreme Court has analysed Narcoanalysis, Brain-mapping and Polygraph in detail. Their origin, uses, limitations and precedents are thrashed out. All this is done taking into consideration two questions of Law:

“Whether the involuntary administration of the impugned techniques violates the `right against self-incrimination' enumerated in Article 20(3) of the Constitution?9”

Further this legal issue is bifurcated into two parts IA and IB.

I-A. “Whether the investigative use of the impugned techniques creates a likelihood of incrimination for the subject?”

I-B. “Whether the results derived from the impugned techniques amount to `testimonial compulsion' thereby attracting the bar of Article 20(3)?10

I. Whether the involuntary administration of the impugned techniques is reasonable restriction on `personal liberty' as understood in the context of Article 21 of the Constitution?”

Researcher has already answered these questions in previous chapter i.e. chapter 4 where it has been discussed that no, none of these techniques violate or defeat any provision of law. The only requirement is to give purposive interpretation taking into consideration the scientific advancements. Law should always be responsive to the change. If law would not change itself according to the changes in the society then it will become static and rigid. A stationary piece of legislation can never meet the demands of justice.

The other contentions considered by the court in the judgements are related to the importance of information during investigation, how information should be obtained where there is no evidence available, should narco-analysis, polygraph and brain

8 Selvi Murugesan and Others v. State of Karnataka, Cri. P. No. 1964/ 2004
mapping be used as substitute of custodial torture. Due concern has been showed by the court regarding the increase of custodial deaths. Relevant extracts of the judgment are as follows:

1. “the importance of extracting information which could help the investigating agencies to prevent criminal activities in the future as well as in circumstances where it is difficult to gather evidence through ordinary means

2. these scientific techniques are a softer alternative to the regrettable and allegedly widespread use of 'third degree methods' by investigators

3. The provisions in the Code of Criminal Procedure, 1973 that provide for 'medical examination' during the course of investigation can be read expansively to include the impugned techniques, even though the latter are not explicitly enumerated.”

The court has scrutinized the scope of clause (3) Article 20 and Article 21. The court also considered the concept of “due process of law” provided under Article 21. However, there are many apparent flaws in the judgment. This piece of judicial mind is confusing. The court has held in paragraph 81:

“In the Indian context, Article 20(3) should be construed with due regard for the inter-relationship between rights, since this approach was recognised in Maneka Gandhi’s case, Hence, we must examine the 'right against self-incrimination' in respect of its relationship with the multiple dimensions of 'personal liberty' under Article 21, which include guarantees such as the 'right to fair trial' and 'substantive due process'. “

Researcher humbly submits that if in Indian context court is recognising approach of Maneka Gandhi’s case then there is no need to ignore the case of D.K. Basu v. State of West Bengal, State of M.P. v. Shyamsunder Trivedi and Ors, Inder

---

11 Selvi v. State of Karnataka, Para 2
12 (1978) 1 SCC 248.
13 1997 (1) RCR (Cri) 372 SC
14 1995 (4) SCC 262
Singh v. State of Punjab\textsuperscript{15}, Smt. Nilabati Behera v. State of Orissa and Ors\textsuperscript{16}, Smt. Shalika Abdul Gafar Khan v. Vasant Raghunath Doble and Anr.\textsuperscript{17}, H.M. Prakash alias Dali v. State of Karnataka\textsuperscript{18} and so on, there is a long list where hon’ble high courts and hon’ble Supreme Court has expressed anguish over inhuman treatment in custody and have demanded scientific investigation by authorities.

The court has further remarked that ‘right to fair trial and ‘substantive due process’ is guaranteed under Article 21 and these rights cannot be suspended even during the operation of proclamation of Emergency.\textsuperscript{19}

“It must also be emphasized that Articles 20 and 21 have a non-derogable status within Part III of our Constitution because the Constitution (Fourty-Fourth amendment) Act, 1978 mandated that the right to move any court for the enforcement of these rights cannot be suspended even during the operation of a proclamation of emergency. In this regard, Article 359(1) of the Constitution of India reads as follows:

"359. Suspension of the enforcement of the rights conferred by Part III during emergencies. - (1) Where a Proclamation of Emergency is in operation, the President may by order declare that the right to move any court for the enforcement of such of the rights conferred by Part III (except Articles 20 and 21) as may be mentioned in the order and all proceedings pending in any court for the enforcement of the rights so mentioned shall remain suspended for the period during which the Proclamation is in force or for such shorter period as may be specified in the order. ..."

These are the observations made by the court in the decision. Considering the observation, a question arises that is the right to move court for the enforcement of rights or the right to fair trial are the rights only available to accused? In the whole process of so called ‘fair trial’ what is role of victim? It is extremely unfortunate that now-a-days when law is taking into account the problems faced by victims, their

\textsuperscript{15} 1995(3) SCC 702
\textsuperscript{16} AIR 1993 SC1960
\textsuperscript{17} 2004 (1) RCR (Cri) 459 SC
\textsuperscript{18} 2004 (3) RCR (Cri) 879
\textsuperscript{19} Para 82
rehabilitation, compensation, etc. this stern judgment has totally ignored the victim in fair trial. In fact, victimology is an emerging branch of criminal law, recent amendments in Indian Penal Code 1860

20

is a glaring example of this and in such state of affairs ignoring the aggrieved party in fair trial is a huge error. Justice is to be done to the victim and according to the judgment he has no right under the fair trial. Is a trial possible without active participation of either party? If the courts have already made their mind that accused persons have ‘n’ number of rights available to them then it can be safely assumed that the courts are biased towards the accused persons and are not following the principle of natural justice of ‘Rule against Bias’. If the justice is to be delivered by following such a substantive due process then regrettably verdict delivered cannot be termed as justice delivered.

The concept of fair trial is not to be seen from the view point of accused only. Not only a fair trial but a fair investigation is also a part of constitutional rights of every citizen. The investigation has to be fair and judicious, which is the minimum requirement of rule of law. This constitutional guarantee is not available where the tainted investigation is directed against the accused person having an effect on him. It should be equally available for the aggrieved person and victim to allege that he is not being treated fairly by injudicious investigation to favour the accused person. Thus, it would violate his constitutional rights. The concept of fair trial and fair investigation is not only to be considered from the point of view of liberty or the right of the accused. At the same time, the society and the victim would also suffer on account of injudicious investigation. This will turn a fair trial into a casualty.

Further in the judgment court has also referred Section 39, Section 156(1), Section 161(1), Section 161(2), Section 313(3) and proviso (b) to Section 315(1) of Code of Criminal Procedure, 1973. The court has observed:

“Undoubtedly, Article 20(3) has an exalted status in our Constitution and questions about its meaning and scope deserve thorough scrutiny. In one of the impugned judgments, it was reasoned that all citizens have an obligation to cooperate with ongoing investigation. For instance reliance has been placed on

20 For details see Criminal Law Amendment Act, 2013.
21 Gurbax Singh Bains v. State of Punjab, 2013 (2) RCR(Cri) 246
Section 39, CrPC which places a duty on citizens to inform the nearest magistrate or police officer if they are aware of the commission of, or of the intention of any other person to commit the crimes enumerated in the section. Attention has also been drawn to the language of Section 156(1), CrPC which states that a police officer in charge of a police station is empowered to investigate cognizable offences even without an order from the jurisdictional magistrate. Likewise, our attention was drawn to Section 161(1), CrPC which empowers the police officer investigating a case to orally examine any person who is supposed to be acquainted with the facts and circumstances of the case. While the overall intent of these provisions is to ensure the citizens' cooperation during the course of investigation, they cannot override the constitutional protections given to accused persons. The scheme of the CrPC itself acknowledges this hierarchy between constitutional and statutory provisions in this regard. For instance, Section 161(2), CrPC prescribes that when a person is being examined by a police officer, he is not bound to answer such questions, the answers of which would have a tendency to expose him to a criminal charge or a penalty or forfeiture\textsuperscript{22}.

Not only does an accused person have the right to refuse to answer any question that may lead to incrimination, there is also a rule against adverse inferences being drawn from the fact of his/her silence. At the trial stage, Section 313(3) of the CrPC places a crucial limitation on the power of the court to put questions to the accused so that the latter may explain any circumstances appearing in the evidence against him. It lays down that the accused shall not render himself/herself liable to punishment by refusing to answer such questions, or by giving false answers to them. Further, Proviso (b) to Section 315(1) of CrPC mandates that even though an accused person can be a competent witness for the defence, his/her failure to give evidence shall not be made the subject of any comment by any of the parties or the court or give rise to any presumption against himself or any person charged together with him at the trial. It is evident that Section 161(2), CrPC enables a person to choose silence in response to

\textsuperscript{22} Para83.
questioning by a police officer during the stage of investigation, and as per the
scheme of Section 313(3) and Proviso (b) to Section 315(1) of the same code,
adverse inferences cannot be drawn on account of the accused person's silence
during the trial stage.”

In these paragraphs court is speaking about hierarchy between constitutional and
statutory law and makes it ample clear that scheme of law is such that no one is bound
to answer questions that are incriminatory in nature. Does that mean these techniques,
Narcoanalysis, Brain-Mapping and Polygraph, are perfectly valid and admissible piece
of evidence if accused while undergoing these tests exposes any other person than
himself? The court is silent on this question. The right to silence should be interpreted
in changed scenario of today’s society. Yes, right to silence is available to accused and
adverse inferences may not be made, however, purpose behind this right is to avoid
inhuman behaviour by authorities so that accused persons are not tortured for extracting
information. This should be interpreted in the way that general rule is every citizen is
bound to inform authorities about commission of any crime and should also answer
truthfully to any question put to him and if he does not want answer any question he
may choose to remain silent and authorities must not draw any adverse inference for it,
authorities also must not compel accused or any person to answer by using force such as
beating, electric shocks etc. however, this does not mean that authorities should stop
inquiring about that particular matter. In Degdu and others v. State of Maharashtra it
was held by the Supreme Court that “the police with their wide powers are apt to
overstep their zeal to detect crimes and are tempted to use strong arm against those
who happen to fall under their scheduled jurisdiction. That tendency and that
temptation must in the larger interest of justice be nipped in the bud”.

In the impugned judgment the court has also held that:

“the right against self-incrimination' is a vital safeguard against torture and
other 'third-degree methods' that could be used to elicit information. It serves as
a check on police behaviour during the course of investigation. The exclusion of
compelled testimony is important, otherwise the investigators will be more

---

23 Para 84
24 (1977) 3 SCC 68
inclined to extract information through such compulsion as a matter of course. The frequent reliance on such 'short-cuts' will compromise the diligence required for conducting meaningful investigations. During the trial stage, the onus is on the prosecution to prove the charges levelled against the defendant and the 'right against self-incrimination' is a vital protection to ensure that the prosecution discharges the said onus.”

Torturing a person and using third degree methods are of medieval nature. They are barbaric in nature and contrary to law. Now, when soft options to the widespread custodial torture is available, isn’t it wise to make use of it. Why the accused should be given benefit of right to remain silent that too when the same court in Peoples Union for civil liberties26 Supreme Court held that right to silence defeat all the purposes of examination of accused and no longer it shall be a right. Similarly, the person who is accused of a serious offence, would be let off not because of lack of any evidence or material but because of unfair and injudicious investigation27. This particular case is also related to honour-killing. Then M.L.A. of Tamil Nadu is one of the three accused persons and accusation is of killing of son-in-law. No direct evidence is available. After this judgment, all the accused persons are roaming free. Is this what is called fair trial? Fair trial should be such as to search the truth and not just bothered about technicalities. Section It must be conducted under such rules as to protect the innocent and punish the guilty28.

In para 91 the court has observed:

“the right against self-incrimination is now viewed as an essential safeguard in criminal procedure. Its underlying rationale broadly corresponds with two objectives - firstly, that of ensuring reliability of the statements made by an accused, and secondly, ensuring that such statements are made voluntarily”.

Statements made under these tests are reliable and are voluntary made. Even if there is any sort of compulsion to undergo the test then that compelling power is

---

25 Para 92  
26 PUCL v. Union of India AIR 1991 SC 207.  
27 Gurbax singh Bains v. State of Punjab, 2013 (2) RCR(Cri) 246  
28 Zahira Habibulla H. Sheikh v. State of Gujarat and Ors, 2004 (2) RCR(Cri) 836
restricted only to undergo the tests. There is no compulsion of any kind to deliver a particular statement. Before giving of statements no one knows what the statement would be.

Further in the same paragraph the court has observed that:

“It is quite possible that a person suspected or accused of a crime may have been compelled to testify through methods involving coercion, threats or inducements during the investigative stage. When a person is compelled to testify on his/her own behalf, there is a higher likelihood of such testimony being false. False testimony is undesirable since it impedes the integrity of the trial and the subsequent verdict.”

In these lines the court is concerned about the presence of coercion, threats or inducement that may give rise to false testimony and this is disadvantageous for the trial as well as for the final finding. Here, also the court is making an error as the court itself in para 41 of this judgment has observed that the subject undergoing Narcoanalysis tests are in ‘twilight sleep’, as a consequence the subject cannot give false testimony. Similar is the case with Brain-mapping, where brain catches P300 wave and Polygraph test, where physiological changes are gauged upon that too transpires only if the subject tries to lie. Hence, these tests are totally safe as regards ‘Rule against Involuntary Confessions’.

In addition to it in the same paragraph the court has remarked:

“The premise is that involuntary statements are more likely to mislead the court and the prosecutor, thereby resulting in a miscarriage of justice. Even during the investigative stage, false statements are likely to cause delays and obstructions in the investigation efforts”.

At this point the court is worried over delays and obstructions in the investigative efforts, however, the final verdict delivered by the court is itself creating hurdles in the methods of effective investigation. The judgment is not at all aiding in

---

29 Relevant text of the judgment: This test involves the intravenous administration of a drug that causes the subject to enter into a hypnotic trance and become less inhibited. The drug-induced hypnotic stage is useful for investigators since it makes the subject more likely to divulge information.
speedy disposal of cases. It seems that the court is not clear about what it is saying. Rarely in cases of police torture in particular, and other crimes where accused persons have used modern technology in general, direct ocular evidence is available, so this is the high time for the investigation agencies to incorporate contemporary tools in their investigation to make the fair trial more flawless.

In para 192 the court has remarked:

"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, reflect the deficient reasoning power in giving shape to the issues of constitutional significance. It seems that for the court demand of the society is not at all important. All importance is duly attached with the personal preference of the accused, in circumstances where the answer may implicate the accused. This means a person may be allowed to exercise his personal preference whether to comply with the investigation going on or not, whether to answer truthfully any questions put to him concerning any commission of crime or not. In other words administration of criminal justice system is dependent on the personal preferences of the accused persons. The right of privacy is available to the accused person in self-incriminating circumstances so this means if there is no question of self-incrimination then the right of privacy is not available to the accused.

The court has further held that:

“This 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...To address such circumstances, it is important to examine some other dimensions of Article21”\(^{30}\).

This means any individual against whom no formal charge has been framed cannot exercise the right to privacy. Also, even the accused person cannot exercise the

\(^{30}\) Para 193.
right to privacy if the statement given by him exposes any other person. A person cannot refuse to answer any query of police authority on account of the right to privacy. The right to privacy has always been unavailable in the situations where the answer does not incriminate the person giving the statement. This right is always available to the accused so that he may not be compelled to testify against himself. So, it means a person cannot be compelled to undergo narco-analysis, polygraph and brain mapping only if there is apprehension that he may give self-incriminatory statement. If there is no such apprehension or the person is not accused or suspect he may be compelled to subject himself to the tests as for instance witness or victims.

The right to privacy is not an absolute right. Its scope can be restrained.\textsuperscript{31} there are a number of glaring examples in which right to privacy was restricted. For instance, \textit{the Immoral Traffic Prevention Act, 1956} provides

\begin{quote}
“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\textsuperscript{32}.”
\end{quote}

No right to privacy is available to sex workers. They can be forced to undergo any sort of tests even HIV, so that society at large can be saved from the suffering of venereal diseases. Similarly, a person can be compelled for medical examination if there is an allegation of rape against him.\textsuperscript{33} Any person who can spreading infectious diseases negligently dangerous to life can also be medically examined\textsuperscript{34}. The most important

\begin{footnotes}
\item Maneka Gandhi v Union of India AIR 1978 SC 597, in this case hon’ble Supreme Court held that Courts must not interfere where the order is not perverse, unreasonable, mala fide or supported by no material.
\item Section 15(5A)
\item 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’.
\item Sections 269 of the IPC is titled „Negligent act likely to spread infection of disease dangerous to life and reads: ‘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’
\end{footnotes}
statutory provision curtailing right to privacy is found in Section 5(2) of the Telegraph Act 1885. It 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...”

Furthermore, under The Indian Evidence Act, 1872 under Section 132 requires every witness to answer all the questions put to him in the court of law even self-incriminatory questions. Likewise, evidence adduced through illegal method that leads to discovery of any material is also valid and admissible in the court of law under section 27 of the Act. It can be therefore safely said that the right to privacy in India is not more important than the state’s interest of prevention of crime.

In the present judgment the court recognized the accused’s right of privacy, however, the court did not strike balance between the privacy of accused on one side and prevention of crime on the other side. The court actually failed to define the horizons of the right of privacy. Without settling the issue of ‘privacy’ the court raised the issue of torture. The court held that:

---

35 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

36 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.

“The compulsory administration of the impugned techniques constitutes cruel, inhuman or degrading treatment” in the context of Article 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 means that if tests are conducted involuntarily then it would amount to torture. The problem here again arises that as the right of privacy is not defined in any statute similarly right against torture is nowhere defined. There is no legislation in India that defines the term torture. So, what implies torture is not clear. Moreover, India has not ratified the Convention against Torture yet and it is referred in the judgment also. The court said:

“It is necessary to clarify that we are not absolutely bound by the contents of the Convention...This 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.”

The court is trying to say that if scientific tests are conducted without consent then it is cruelty and torture. In the administration of scientific tests how is the torture relevant? This means that sharing of personal knowledge with the investigating agencies amounts to torture. If it is so then Section 161(2) of Code of Criminal Procedure, also amounts to torture because of the simple reason that a person has to answer truthfully under the section.

The court is speaking about torture by the investigating agencies in extracting information but till date the only so-called legislation that authorities are following are the guidelines laid down by the court in D. K. Basu v State of West Bengal. The guidelines laid down in this case are followed by the authorities while making arrest of

---

38 Para 205
39 Para 199
40 (1997) 1 SCC 416
accused or suspect so as the fundamental rights of detained persons are not violated. The object is to maintain transparency and curb custodial torture. These guidelines are as follows:

“(i) The police personnel carrying out the arrest and handling the interrogation of the arrestee should bear accurate, visible and clear identification and name tags with their designations. The particulars of all such police personnel who handle interrogation of the arrestee should bear accurate, visible and clear identification and name tags with their designation. The particular of all such personnel who handle interrogation of the arrestee must be recorded in a register.

(ii) That the police officer carrying out the arrest shall prepare a memo of arrest at the time of arrest and such memo shall be attested by at least one witness, who may be either a member of the family of the arrestee or a respectable person of the locality from where the arrest is made. It shall also be counter signed by the arrestee and shall contain the time and date of arrest.

(iii) A person who has been arrested or detained and is being held in custody in a police station or interrogation centre or other lock up, shall be entitled to have one friend or relative or other person known to him or having interest in his welfare being informed, as soon as practicable, that he has been arrested and is being detained at the particular place, unless the attesting witness of the memo of arrest is himself such a friend or a relative of the arrestee.

(iv) The time, place of arrest and venue of custody of an arrestee must be notified by the police where the next friend or relative of the arrestee lives outside the district or town through the Legal Aids Organization in the District and the police station of the area concerned telegraphically within a period of 8 to 12 hours after the arrest.

(v) The person arrested must be made aware of his right to have someone informed of his arrest or detention as soon as he is put under arrest or is detained.
(vi) An entry must be made in the diary at the place of detention regarding the arrest of the person which shall also disclosed the name of the next friend of the person who has been informed of the arrest and the names and particulars of the police officials in whose custody the arrestee is.

(vii) The arrestee should, where he so request, be also examined at the time of his arrest and major and minor injuries, if any present on his/her body, must be recorded at that time. The Inspector Memo must be signed both by the arrestee and the police officer effecting the arrest and its copy provided to the arrestee.

(viii) The arrestee should be subjected to medical examination by the trained doctor every 48 hours during his detention in custody by a doctor on the panel of approved doctor appointed by Director, Health Services of the concerned State or Union Territory, Director, Health Services should prepare such a panel for all Tehsils and Districts as well.

(ix) Copies of all the documents including the memo of arrest, referred to above, should be sent to the Magistrate for his record.

(x) The arrestee may be permitted to meet his lawyer during interrogation, though not throughout the interrogation.

(xi) A police control room should be provided at all district and State headquarters where information regarding the arrest and the place of custody of the arrestee shall be communicated by the officer causing the arrest, within 12 hours of effecting the arrest and at the police control room it should be displayed on a conspicuous notice board”.

There are guidelines laid down by National Human Rights Commission also regarding the arrest of a person. The guidelines are significant, because arrest and detention means restriction on personal liberty of persons, these guidelines provide the procedure to be followed by the agencies so that arrest and detention do not amount to violation of fundamental rights. However, the courts must not give so wide interpretation to the accused’s rights that it may result in the decline of the criminal justice system. Further in the paragraph 209, the court has laid down that:
“Since the subject is not immediately aware of the contents of the drug-induced revelations or substantive inferences, it also conceivable that the investigators may chose not to communicate them to the subject even after completing the tests. In fact statements may be recorded or charges framed without the knowledge of the test subject. At the stage of trial, the prosecution is obliged to supply copies of all incriminating materials to the defendant but reliance on the impugned tests could curtail the opportunity of presenting a meaningful and wholesome defence. If the contents of the revelations or inferences are communicated much later to the defendant, there may not be sufficient time to prepare an adequate defence”.

This observation by the court compels one to think are Indians following the law of fishes? Is there no ‘rule of law’ prevalent in India? Is it possible that accused will not get to know the charges framed against him? It is the right of accused to be informed of allegations levelled against him. In the court of law also, notice is served to the accused, copies are supplied to him, he engages a lawyer to defend himself or in case he cannot afford to engage lawyer legal aid is provided to him. The trial is public trial it is not conducted in isolation. Moreover, if any act of the prosecution results in miscarriage of justice the accused can appeal to the high court. The above stated extract from the judgment needs a review badly.

In paragraph 211 the court has gone a step further by questioning the credibility of experts. The court has stated:

“Another factor that merits attention is the role of the experts who administer these tests. While the consideration of expert opinion testimony has become a mainstay in our criminal justice system with the advancement of fields such as forensic toxicology, questions have been raised about the credibility of experts who are involved in administering the impugned techniques. It is a widely accepted principle for evaluating the validity of any scientific technique that it should have been subjected to rigorous independent studies and peer review. This is so because the persons who are involved in the invention and development of certain techniques are perceived to have an interest in their
promotion. Hence, it is quite likely that such persons may give unduly favourable responses about the reliability of the techniques in question.”

Here view of the court is very disappointing. On one hand the court is admitting that expert testimony has become part and parcel of criminal justice system and on the other hand court is saying that such persons may give unduly favourable responses so as to establish the techniques as reliable. The opinion of the court is disastrous. Instead of welcoming the scientific tools of investigation, the court is seeing them as objects of promotion. The court is correct that new techniques need peer review and intense study, for that there is no need to discard the techniques. In fact, the courts should encourage research, experiments regarding impugned techniques so that maximum benefit could be taken out of them. The courts must not cast doubt on experts. The experts who conduct these tests are well-qualified doctors specially appointed by the government. There is no reason that they will promote new developments which are not reliable. Experts do not approach courts, it is always the courts that approach experts to seek their help. The justification given by the court not using the techniques is frustrating.

The decision given is literally appalling. In the very next paragraph the court is saying:

“Even though India does not have a jury system, the use of the impugned techniques could impede the fact-finding role of a trial judge. This is a special concern in our legal system, since the same judge presides over the evidentiary phase of the trial as well as the guilt phase. The consideration of the test results or their fruits for the purpose of deciding on their admissibility could have a prejudicial effect on the judge's mind even if the same are not eventually admitted as evidence”

In this paragraph court has questioned the reasoning power of judges. Are the techniques so influential that they will influence the mind of the judges? This contention is unimaginable. While deciding a case a judge is expected to be impartial. Objectivity is anticipated from every judge. It is not perceivable that a mode or tool of investigation can have effect on the thinking of a judge. Additionally, in India it takes a
pretty long time in disposal of cases, so between ‘evidentiary phase’ and ‘guilt phase’
long time period elapses. The court need not to worry about that.

Likewise, the court raised another very important issue. In the words of the
court:

“Another important consideration is that of ensuring parity between the
procedural safeguards that are available to the prosecution and the defence. If
we were to permit the compulsory administration of any of the impugned
techniques at the behest of investigators, there would be no principled basis to
deny the same opportunity to defendants as well as witnesses. If the
investigators could justify reliance on these techniques, there would be an
equally compelling reason to allow the indiscrete administration of these tests at
the request of convicts who want re-opening of their cases or even for the
purpose of attacking and rehabilitating the credibility of witnesses during a
trial.”

One more justification that came from court in refusing the use of narco-
analysis, polygraph and brain mapping is that if investigating agencies are allowed to
make use of such techniques there will be no good reason to deny their use if demanded
by defendants or witness. The point is why the use is to be denied? The courts seems to
have already decided that defendants or witness should not be allowed to use these
techniques but because there is no ground of denial the court is not allowing even the
investigating authorities to use the said techniques. Is this the same ‘prejudice’ the court
was talking in the previous paragraph? Well, the finding of the court is wrong and
erroneous. The court should encourage the fair-trial. If any party to the case is willing to
take help of scientific techniques, it should be permitted. These techniques are neutral
evidences and experts will not give unfavourable reliable results as thought by the court.

The court also observed in paragraph 220 that:

“One of the main functions of constitutionally prescribed rights is to safeguard
the interests of citizens in their interactions with the government. As the
guardians of these rights, we will be failing in our duty if we permit any citizen
to be forcibly subjected to the tests in question. One could argue that some of the
parties who will benefit from this decision are hardened criminals who have no regard for societal values. However, it must be borne in mind that in constitutional adjudication our concerns are not confined to the facts at hand but extend to the implications of our decision for the whole population as well as the future generations. Sometimes there are apprehensions about judges imposing their personal sensibilities through broadly worded terms such as 'substantive due process', but in this case our inquiry has been based on a faithful understanding of principles entrenched in our Constitution.”

In this paragraph the citizens court is referring are either accused persons or suspects. The court itself is acknowledging the fact that by the decision of the court hard core criminal will be benefited who has no respect for the social values. It is again error committed on the part of the court. Our legal system cannot ignore the accused considering it hard core criminal. Indian prison system is reformative in nature. The object of criminal justice system is to reform the criminal. The punishments awarded are never degrading or cruel or inhuman. They are awarded with the purpose of reforming the wrong doer. Hence, ignoring them in delivering the judgment is not good. When the court itself knows that its decision would give unjust benefit to a section of society be that criminals only, the court should have reconsidered its decision. In addition to it, the court is aware of the fact that this decision will have effect on future generations as well still it is turning blind eye on the needs of society.

The Constitutional principles are available to every citizen but this piece of judicial mind has showed its concern only towards a particular section of citizens.

In paragraph 221 the court has held that:

“In our considered opinion, the compulsory administration of the impugned techniques violates the 'right against self- incrimination'. This is because the underlying rationale of the said right is to ensure the reliability as well as voluntariness of statements that are admitted as evidence. This Court has
recognised that the protective scope of Article 20(3) extends to the investigative stage in criminal cases and when read with Section 161(2) of the Code of Criminal Procedure, 1973 it protects accused persons, suspects as well as witnesses who are examined during an investigation. The test results cannot be admitted in evidence if they have been obtained through the use of compulsion. Article 20(3) protects an individual’s choice between speaking and remaining silent, irrespective of whether the subsequent testimony proves to be inculpatory or exculpatory. Article 20(3) aims to prevent the forcible ‘conveyance of personal knowledge that is relevant to the facts in issue’. The results obtained from each of the impugned tests bear a ‘testimonial’ character and they cannot be categorised as material evidence.”

In this paragraph, court has concluded that evidence adduced with the help of narco-analysis, polygraph and brain mapping cannot be made admissible in court because it amounts to testimonial compulsion. The suspects and accused persons have right to choice between speaking or remaining silent during investigation. If the suspects and witness can remain silent then what is purpose of holding an investigation. No case can be solved where persons are not helpful while investigation. If the accused or suspects or witnesses are not going to utter a single word then what investigating agencies will do? The court has also held that the results of narco-analysis, polygraph and brain mapping are not admissible in the court if obtained through use of compulsion. It means in cases where element of compulsion is missing, evidence adduced by narco-analysis, polygraph and brain mapping are admissible in the court of law. If evidence is admissible then which guidelines are to be followed while conducting these tests? On this issue the court has referred the guidelines issued by the
National Human Rights Commission\textsuperscript{41}. These guidelines were issued by the National Human Rights Commission in the year 2000 for the administration of polygraph test. Instead of laying down any guidelines for narco-analysis and brain mapping, the court said these guidelines should be followed in narco-analysis and brain mapping. The underlying theory of narco-analysis, polygraph and brain mapping tests are different. Even the guidelines published by National Human Rights Commission for polygraph test are not comprehensive guidelines. Adhering to same guidelines for conducting three different tests is not safe rule.

The court concluded with the decision that evidence adduced through narco-analysis, polygraph and brain mapping is not admissible in court. However, if any discovery if made during voluntary administration of the tests same will be admissible.

5.3 CONCLUSION

The decision made in Selvi v. State of Karnataka is inflexible and full of errors. It seems all the contentions in favour of narco-analysis, polygraph and brain mapping were not thoroughly considered by the court. The court did not take into consideration the problems being faces by the investigating authorities while solving cases. If every

\textsuperscript{41} The National Human Rights Commission had published 'Guidelines for the Administration of Polygraph Test (Lie Detector Test) on an Accused' in 2000:

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

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

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

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

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

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

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

(viii) A full medical and factual narration of the manner of the information received must be taken on record.
tool of investigation be seen as violative of Article 20 (3) and Article 21 then the police authorities will be left with no other option than to resort to custodial violence. There has been urge that novel and scientific tools of investigation should be embraced. However, in such a scenario cooperation was expected from the court. In cases where no direct evidence is available it becomes extremely difficult for the investigating authorities to detect crime. The court should have kept room for the use of scientific techniques at least in blind cases. The benefit is always enjoyed by the criminal. The court has discussed the rights and privileges available to the accused. No attention has been paid to the victim and the society at large. Such types of judgements encourage the criminals. They play with the law. They use sophisticated means in commission of crimes. They leave no clue of their crime. Hence, they are rarely put behind the bars. The courts should allow the use of modern techniques in crime investigation. In blind cases no miracle is going to happen. Every case will meet the fate of Selvi v. State of Karnataka. Kavita is still mourning her husband’s death. Kavita is still awaiting justice.