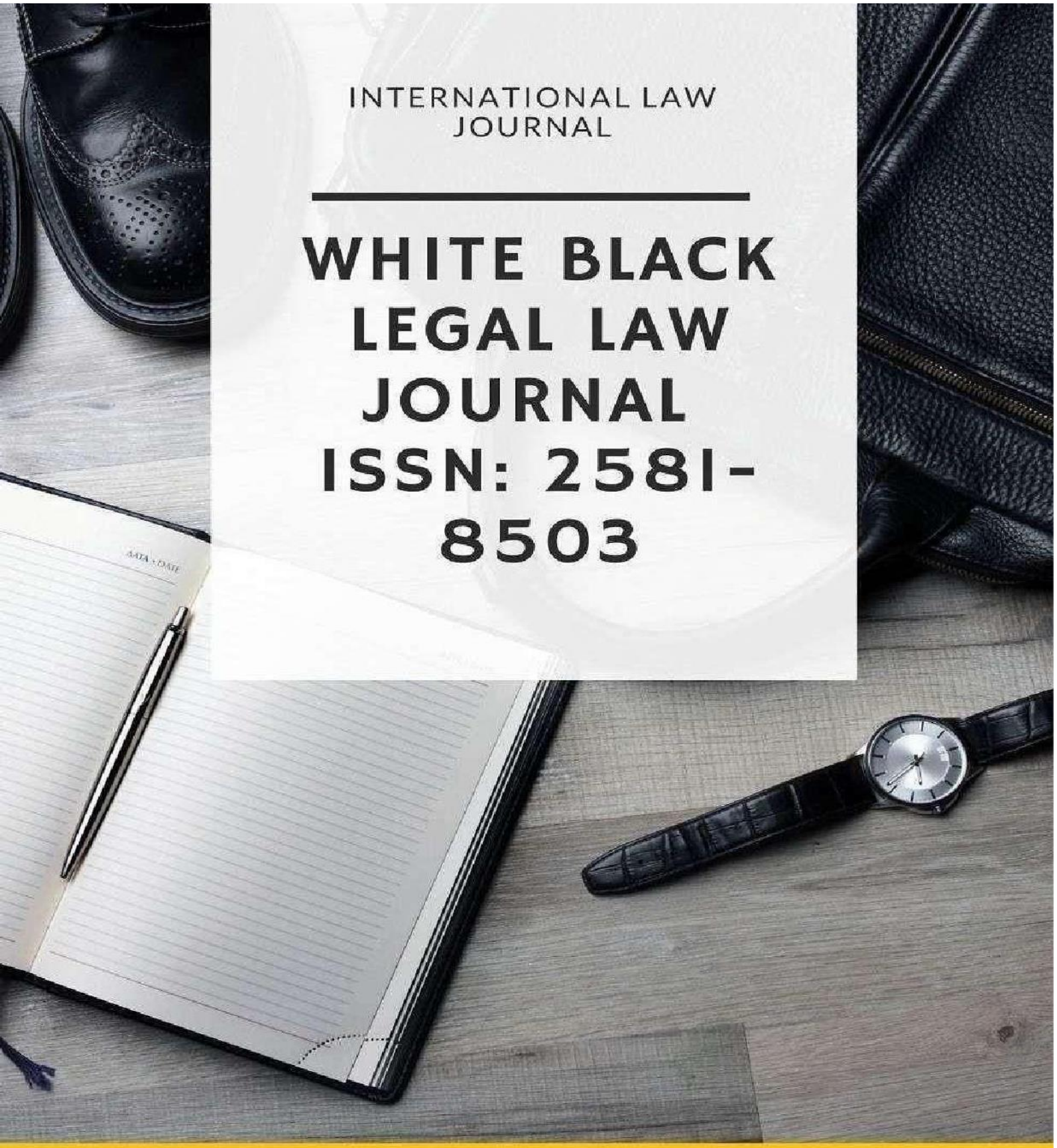


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THE RIGHT AGAINST SELF-INCRIMINATION AND THE LAW OF EVIDENCE UNDER THE BSA: A CONSTITUTIONAL APPRAISAL

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ABSTRACT

The right against self-incrimination is a fundamental safeguard against coercive investigative practices and an essential component of a fair criminal justice system. In India, this protection is expressly guaranteed under Article 20(3) of the Constitution, which prohibits compelling an accused person to be a witness against themselves. The enactment of the Bharatiya Sakshya Adhiniyam, 2023 (BSA), replacing the Indian Evidence Act, 1872, represents a significant stage in the restructuring of India's evidentiary framework. Although the BSA retains important safeguards concerning involuntary confessions and confessions made to police officers, its operation must be examined alongside constitutional guarantees and judicial interpretations of testimonial compulsion.

This paper critically examines the relationship between Article 20(3) and the relevant provisions of the BSA, particularly Sections 22 and 23. It analyses the distinction between testimonial evidence and physical evidence, the admissibility of information leading to discovery, and the constitutional implications of modern investigative techniques. Through an examination of landmark judicial decisions, the paper evaluates whether the existing evidentiary framework adequately protects individual autonomy, dignity and procedural fairness. It argues that the effectiveness of the right against self- incrimination depends not merely on statutory exclusions but also on meaningful judicial scrutiny, safeguards against coercion and a constitutionally consistent approach to emerging forms of evidence.

Keywords: Article 20(3), self-incrimination, Bharatiya Sakshya Adhiniyam, testimonial compulsion, involuntary confession, criminal justice, constitutional safeguards.

1. INTRODUCTION

The right against self-incrimination occupies a central position in constitutional criminal jurisprudence. It protects an individual from being forced by the State to provide testimonial material that may establish their own criminal liability. The principle reflects a broader commitment to human dignity, individual autonomy and the presumption of innocence. A criminal investigation must seek the truth through lawful means rather than compel an accused person to contribute to their own conviction.

In India, this protection finds explicit expression in Article 20(3) of the Constitution, which provides that no person accused of an offence shall be compelled to be a witness against themselves. The provision places a constitutional limit on the investigative and prosecutorial powers of the State. Its significance extends beyond courtroom testimony to certain forms of compelled questioning and the extraction of incriminating statements during investigation.

The evidentiary framework governing confessions and related material has traditionally been shaped by the Indian Evidence Act, 1872. With the enactment of the Bharatiya Sakshya Adhiniyam, 2023, Parliament introduced a revised statutory framework for determining the relevancy and admissibility of evidence. The BSA came into force on 1 July 2024 and preserves important protections concerning confessions while adapting the broader law of evidence to contemporary requirements.

However, statutory continuity does not eliminate constitutional questions. Investigative practices involving custodial questioning, digital devices, biometric identification and scientific techniques continue to raise concerns about the boundary between permissible evidence collection and prohibited testimonial compulsion.

This paper examines the constitutional foundations of the right against self-incrimination, the relevant provisions of the BSA and the principles established by the Supreme Court of India. It further evaluates the challenges involved in ensuring that evidentiary rules operate consistently with constitutional liberty and fair trial guarantees.

2. RESEARCH OBJECTIVES AND METHOLOGY

The principal objective of this research is to examine the protection against self-incrimination within the evidentiary framework established by the BSA. The paper seeks to analyse Article 20(3), evaluate the admissibility of confessions and discovery-related statements, and assess the continuing relevance of judicial precedents to contemporary investigative practices.

The research adopts a doctrinal methodology based on constitutional provisions, statutory

interpretation and judicial decisions. It also employs a critical analytical approach to identify potential gaps between formal legal safeguards and their practical enforcement. The discussion is confined primarily to Indian constitutional and evidence law.

3. CONSTITUTIONAL FOUNDATIONS OF THE RIGHT AGAINST SELF-INCRIMINATION

Article 20(3) of the Constitution establishes three essential requirements: the individual must be accused of an offence, there must be compulsion, and the compelled act must amount to being a witness against oneself. These elements distinguish constitutionally prohibited testimonial compulsion from every other form of evidence collection.

The expression "to be a witness" has received substantial judicial interpretation. The protection is not confined to a person being compelled to testify in open court. It may also apply to incriminating statements obtained during investigation, provided the constitutional requirements are satisfied. In M.P. Sharma v. Satish Chandra, AIR 1954 SC 300, the Supreme Court considered the constitutional protection against self-incrimination in the context of documentary searches and seizure. The subsequent decision in State of Bombay v. Kathi Kalu Oghad, AIR 1961 SC 1808, clarified the distinction between testimonial evidence and the production of physical characteristics, such as fingerprints and specimen handwriting. The Court held that the constitutional protection does not ordinarily extend to the mere provision of physical identifying characteristics that do not communicate personal knowledge.

The significance of Article 20(3) is not limited to the exclusion of particular statements. It restrains the State from employing coercive methods to obtain evidence from an accused person through compelled personal testimony. This safeguard also supports the presumption of innocence by preventing the prosecution from shifting its evidentiary burden onto the accused through forced admissions.

The protection must, however, be distinguished from an unrestricted right to prevent the collection of all potentially incriminating material. Lawful searches, seizures and the collection of physical evidence may remain permissible, subject to the applicable constitutional and statutory requirements. The central question is whether the State is compelling the individual to communicate personal knowledge in a manner prohibited by Article 20(3).

4. THE BHARATIYA SAKSHYA ADHINIYAM, 2023: RELEVANT PROVISIONS

The BSA reorganises the law of evidence and retains several established principles governing the admissibility of confessions. Sections 22 and 23 are particularly significant in assessing the relationship between evidentiary rules and the constitutional prohibition against self-incrimination.

i. Section 22: Confessions Induced by Threat, Coercion or Promise

Section 22 provides that a confession made by an accused person is irrelevant in criminal proceedings where it appears to the court that the confession resulted from an inducement, threat, coercion or promise relating to the charge, originating from a person in authority and sufficient to create a reasonable apprehension of temporal advantage or disadvantage.

The provision recognises that a confession cannot automatically be treated as reliable merely because it has been obtained during an investigation. A statement produced by pressure or an improper inducement may reflect the circumstances of interrogation rather than the truth of the alleged offence.

Section 22 also recognises that the exclusionary consequence may cease where the impression created by the relevant inducement, threat, coercion or promise has been fully removed. This qualification requires judicial assessment of the circumstances in which the subsequent confession was made.

The section therefore performs an important evidentiary function by addressing both the reliability of confessions and the circumstances in which they are obtained. Nevertheless, its application should remain consistent with Article 20(3). A confession that is excluded under the constitutional guarantee cannot become admissible merely because the statutory conditions concerning the removal of an earlier inducement are subsequently satisfied.

ii. Section 23: Confessions to Police Officers and Information Leading to Discovery

Section 23 establishes a general prohibition against proving a confession made to a police officer against a person accused of an offence. It also excludes confessions made while a person is in police custody unless made in the immediate presence of a Magistrate.

The provision contains an important qualification concerning information that leads to the discovery of a fact. Where a fact is discovered in consequence of information received from an accused person in police custody, the portion of that information that distinctly relates to the

fact discovered may be proved. This exception attempts to balance the need for reliable investigative evidence against the danger of admitting unverified custodial confessions. Its operation is limited: the entire confession does not become admissible merely because part of the information leads to a discovery.

For example, if a custodial statement identifies the location of a concealed object subsequently recovered by investigators, the admissible portion must be confined to the information that distinctly relates to the discovery. Any additional assertion of guilt does not automatically acquire evidentiary value. The discovery exception requires particular care because custodial circumstances can create a substantial risk of coercion. Courts must examine the actual information supplied, the fact discovered and the causal connection between the two. The exception should not become a means of indirectly introducing a confession that the law otherwise prohibits.

iii. Continuity and Change Under the BSA

Sections 22 and 23 substantially preserve the core approach previously contained in Sections 24 and 25 of the Indian Evidence Act, 1872, with the discovery principle formerly appearing in Section 27. The transition to the BSA has therefore not displaced the constitutional foundation of the law governing compelled confessions.

The practical significance of the new legislation lies in its operation within a revised evidentiary structure. Courts must interpret its provisions in harmony with Article 20(3), established judicial principles and the wider requirements of a fair criminal process. The change in statutory terminology does not diminish the binding force of constitutional guarantees.

5. JUDICIAL INTERPRETATION OF THE RIGHT AGAINST SELF-INCRIMINATION

The constitutional meaning of self-incrimination has developed through judicial decisions that seek to reconcile the requirements of effective criminal investigation with individual liberty. These precedents remain essential to interpreting the BSA because statutory provisions governing confessions must operate within constitutional limits.

i. Nandini Satpathy v. P.L. Dani

In Nandini Satpathy v. P.L. Dani, (1978) 2 SCC 424, the Supreme Court examined the application of Article 20(3) during police interrogation. The Court recognised that protection

against compelled self-incrimination is not restricted to testimony delivered before a court. It extends to the investigative stage where questioning involves constitutionally prohibited compulsion.

The judgment adopted a broad understanding of compulsion, recognising that pressure may arise through psychological intimidation and oppressive interrogation rather than physical violence alone. This approach is particularly important because coercive practices are not always visible or documented.

The decision also reinforces the relationship between the constitutional protection and the right to silence. An accused person cannot be forced to provide incriminating answers merely because investigators consider those answers necessary for establishing guilt.

The principles in Nandini Satpathy remain relevant to the application of Sections 22 and 23 of the BSA. They demonstrate that the assessment of a confession must consider the circumstances in which it was obtained rather than merely its apparent consistency with the prosecution's case.

ii. State of Bombay v. Kathi Kalu Oghad

In State of Bombay v. Kathi Kalu Oghad, AIR 1961 SC 1808, the Supreme Court clarified the distinction between testimonial evidence and physical identifying material. The Court held that obtaining fingerprints, specimen handwriting and comparable physical characteristics does not ordinarily amount to compelling an accused person to be a witness against themselves. This distinction is fundamental to evidence law. The Constitution does not prohibit every investigative measure that may produce incriminating material. Instead, the relevant inquiry concerns the nature of the evidence and whether its collection requires the accused to communicate personal knowledge through compelled testimony.

Nevertheless, the distinction should not be applied mechanically. The fact that an investigative measure involves scientific technology does not automatically establish its constitutional validity. Courts must examine the substance of the procedure, the nature of the information obtained and the manner in which it was collected.

iii. Selvi v. State of Karnataka

In Selvi v. State of Karnataka, (2010) 7 SCC 263, the Supreme Court considered the constitutional validity of involuntary narcoanalysis, polygraph examinations and Brain Electrical Activation Profile tests.

The Court held that the involuntary administration of these techniques violated the protection

against self-incrimination under Article 20(3), and also examined their implications for personal liberty. It rejected the proposition that compelled scientific techniques fall outside the constitutional guarantee merely because they do not resemble ordinary courtroom testimony.

The judgment is especially significant because it recognises that personal testimony may be extracted through methods other than conventional questioning. Information obtained by impairing an individual's ability to exercise conscious control over responses cannot be treated as constitutionally unobjectionable simply because the technique is described as scientific.

Selvi therefore provides an important constitutional framework for evaluating contemporary investigative technologies. Its reasoning supports a substantive approach in which the court examines whether a technique compels the disclosure of personal knowledge rather than relying solely on its technological form.

iv. Tofan Singh v. State of Tamil Nadu

In Tofan Singh v. State of Tamil Nadu, (2021) 4 SCC 1, the Supreme Court considered, among other questions, the evidentiary status of statements made to officers empowered under the Narcotic Drugs and Psychotropic Substances Act, 1985. The Court held that officers invested with the relevant powers under the NDPS Act were police officers for the purposes of the confession bar, and confessional statements made to them could not be used in the manner sought by the prosecution.

Although the decision arose under a special statute, its broader significance lies in the Court's insistence that evidentiary rules concerning confessions must be interpreted with attention to constitutional safeguards and the risks of compelled statements.

The judgment also illustrates why the protections contained in the BSA cannot be viewed in isolation. The admissibility of a confession may depend on other applicable legislation and binding constitutional precedents, particularly where a special statute regulates investigation and evidence.

6. TESTIMONIAL AND PHYSICAL EVIDENCE: THE CONSTITUTIONAL BOUNDARY

One of the most difficult questions in self-incrimination jurisprudence concerns the distinction between testimonial and physical evidence. Testimonial evidence communicates knowledge, recollection or assertions attributable to an individual. Physical evidence, by contrast, generally consists of bodily characteristics or objects whose evidentiary significance does not depend

upon a compelled verbal assertion.

Fingerprints, blood samples and certain forms of biometric identification may ordinarily fall outside Article 20(3), subject to the governing law and other constitutional protections. However, not every request involving a digital device or scientific procedure can automatically be classified as the collection of physical evidence.

For instance, compelling an individual to disclose a password, explain the meaning of a document or identify the location of concealed material may involve the communication of personal knowledge. Such acts raise different questions from merely collecting an existing physical characteristic. The precise constitutional assessment depends upon the circumstances and the applicable legal principles.

Digital evidence creates further complexity. Smartphones and computers may contain messages, photographs, financial records and other material relevant to an investigation. Although the collection of such evidence may be lawful under applicable procedures, the compulsory disclosure of information that communicates personal knowledge may raise questions under Article 20(3).

The governing principle should therefore be functional rather than purely technological. Courts should consider whether the State is obtaining pre-existing material, collecting physical characteristics or compelling an individual to provide testimonial information. This approach would preserve the legitimate needs of investigation without allowing technological developments to dilute constitutional safeguards.

7. CRITICAL APPRAISAL OF THE BSA FRAMEWORK

The BSA retains established safeguards concerning confessions, but the effectiveness of those safeguards depends on their interpretation and implementation.

First, Section 23 maintains a general prohibition against proving confessions made to police officers, together with a limited exception for information distinctly related to a discovered fact. This framework recognises the particular risks associated with custodial confessions. However, disputes may arise over whether a statement genuinely led to a discovery and whether the prosecution seeks to introduce information extending beyond the statutory exception.

Secondly, Section 22 addresses confessions influenced by inducement, threat, coercion or promise. Its application requires careful judicial scrutiny of the circumstances surrounding the confession. The absence of visible physical injury cannot, by itself, establish that a statement was voluntary. Equally, an allegation of coercion must be assessed against the evidence and

circumstances of the particular case.

Thirdly, the relationship between evidentiary exclusion and constitutional protection requires clarity. Section 22 addresses specified circumstances affecting confessions, whereas Article 20(3) independently prohibits compelled self-incrimination when its constitutional requirements are met. Compliance with a statutory procedure cannot legitimise conduct that violates the Constitution.

Fourthly, the discovery exception presents a continuing interpretative challenge. Investigators have a legitimate interest in locating concealed objects and identifying relevant evidence. Yet the exception must remain confined to its statutory purpose. Courts should scrutinise the precise words attributed to the accused, the discovery allegedly resulting from them and the connection between the information and the recovered material.

Finally, the expanding use of digital and scientific investigative methods requires a consistent constitutional approach. The BSA's treatment of electronic and digital records does not, by itself, resolve whether the method used to obtain a particular record infringes Article 20(3). The admissibility of evidence and the legality of the means by which it was obtained are related but distinct questions.

A sound evidentiary system must therefore ensure that the pursuit of reliable evidence does not displace constitutional limits. The objective is not to obstruct legitimate investigation, but to prevent the State from obtaining an evidentiary advantage through prohibited compulsion.

8. RECOMMENDATION FOR STRENGTHENING CONSTITUTIONAL SAFEGUARDS

Several measures could strengthen the practical protection against self-incrimination under the BSA.

First, judicial scrutiny of custodial statements should focus on the complete circumstances of interrogation, including the duration of questioning, the conduct of investigating officers and any credible allegation of physical or psychological pressure.

Second, investigators should maintain reliable records of custodial questioning and the circumstances in which significant statements are obtained. Appropriate recording procedures can assist courts in distinguishing voluntary disclosures from statements allegedly produced through coercion.

Third, the discovery exception under Section 23 should be applied narrowly and consistently. Only the portion of information that distinctly relates to the discovered fact should be admitted

under the exception, rather than treating the discovery as validation of an entire custodial confession.

Fourth, judicial officers and investigating agencies should receive continuing training on the distinction between testimonial and physical evidence, especially in cases involving digital devices, biometric identification and scientific investigative techniques.

Finally, courts should adopt a constitutionally informed approach to emerging technologies. Where a method effectively compels an individual to disclose personal knowledge, its scientific character should not exempt it from scrutiny under Article 20(3).

These recommendations seek to improve investigative accountability while preserving the legitimate evidentiary objectives of criminal proceedings.

CONCLUSION

The right against self-incrimination is a fundamental constitutional safeguard that protects individuals from being compelled to contribute to their own prosecution. Article 20(3) embodies this principle, while Sections 22 and 23 of the Bharatiya Sakshya Adhiniyam, 2023, regulate important aspects of confession evidence and its admissibility.

The judicial decisions in Nandini Satpathy, Kathi Kalu Oghad, Selvi and Tofan Singh demonstrate that the protection must be understood in substantive terms. Its application depends upon the nature of the evidence sought, the presence of compulsion and the circumstances in which information is obtained.

The BSA preserves significant evidentiary safeguards, but their effectiveness cannot be measured solely by the language of the statute. Proper implementation requires careful judicial assessment, accountability during interrogation and a principled distinction between testimonial compulsion and lawful evidence collection.

As criminal investigations increasingly rely on digital information and scientific techniques, constitutional interpretation must remain responsive to changing methods without weakening established protections. The right against self-incrimination is not an obstacle to justice; it is a condition of legitimate criminal justice. A system that respects this right strengthens the credibility of its investigations, the fairness of its trials and the constitutional legitimacy of its outcomes.

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