

## UNLOCKING THE PROTECTION OF ARTICLE 20(3): CASE NOTE ON STATE OF BOMBAY V. KATHI KALU OGHAD

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### ABSTRACT

*State of Bombay v. Kathi Kalu Oghad is the landmark case which decided the scope of being a witness against oneself. 'Being a witness against oneself' was limited to information given from personal knowledge. Provision of physical specimen like fingerprints was squarely excluded from the protection of Article 20(3) by the Supreme Court in Oghad. The right against self-incrimination is the most important right of an accused. Personal electronic devices today are used to store a lot of crucial information. With the advancement of technology, personal electronic devices can now be accessed through fingerprints and facial recognition. This presents new challenges in the context of criminal investigation and gathering of evidence from the device of an accused. This paper analyses whether Oghad holds up in the face of new technological challenges of accessing personal devices through physical attributes. To support its examination, it also*

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*looks at the recent case of Virendra Khanna v. State of Karnataka and Another.*

*This paper argues that both passwords and biometrics (like fingerprints and face recognition) are protected under Article 20(3) of the Indian Constitution. It shows that the requirements for invoking the protection of Article 20(3) are satisfied. It also highlights the dated nature of Oghad and advocates that the issues posed by Oghad can be solved by relying on Selvi v. State of Karnataka. It also draws attention to the minority judgement in Oghad and the purpose of Article 20(3) in a criminal investigation to further strengthen its argument. The paper also discussed the doctrine of forgone conclusion and its applicability in the Indian context.*

## I. INTRODUCTION

In *Virendra Khanna v. State of Karnataka and Another*,<sup>1</sup> the High Court of Karnataka held that compulsion to provide either passcodes or biometrics to access personal electronic devices (PEDs) would not be violative of Article 20(3) of the Indian Constitution.<sup>2</sup> It reasoned that providing a password or biometric key was akin to giving fingerprints and biological samples.<sup>3</sup> It seemed to support this

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<sup>1</sup>*Virendra Khanna v State of Karnataka and Anr* 2021 SCC OnLine Kar 5032 [hereinafter “Virendra Khanna”].

<sup>2</sup>ibid [14.8].

<sup>3</sup>ibid [14.7].

reasoning by relying on *State of Bombay v. Kathi Kalu Oghad* (hereinafter, *Oghad*).<sup>4</sup>

This paper aims to show that passwords and biometrics should be protected by Article 20(3) of the Indian Constitution. It makes this claim by demonstrating that passwords and biometrics fulfil the requirements needed to qualify for the protection of Article 20(3) as laid down by *Oghad*.

To demonstrate its claim, the paper has been divided into three parts. Part I provides a brief overview of the facts and the holding in *Oghad*. Part II builds on this foundation and makes a case for passwords and biometrics being protected by Article 20(3). It argues the contents and documents accessed through passwords and biometrics come under the personal knowledge of the accused, which is squarely protected by Article 20(3). Further, since this personal knowledge would be accessed through the accused, it helps establish a ‘link in the chain of evidence’ as termed by the Supreme Court in *Selvi v. State of Karnataka* (hereinafter, *Selvi*).<sup>5</sup> Here, the paper also relies on the importance of investigative agencies operating independently. It argues that using the accused as a ‘vehicle’ to access evidence would injure the design and foundation of the criminal justice system. In the context of biometrics, the paper highlights that the decision of the Court in *Oghad* to exclude physical characteristics from the scope of ‘being a witness’ must be interpreted keeping in mind the time, context and considerations of the Court. Finally, Part III of the paper also briefly discusses the doctrine of foregone conclusion and the suitability of its adoption in India.

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<sup>4</sup>*State of Bombay v Kathi Kalu Oghad* AIR 1961 SC 1808 [hereinafter “Oghad”].

<sup>5</sup>*Selvi v State of Karnataka* (2010) 7 SCC 263 [hereinafter “Selvi”].

## II. PART - I

### A. *State of Bombay v. Kathi Kalu Oghad*

Article 20(3) of the Indian Constitution enshrines the right against self-incrimination. It provides that a person accused of a criminal offence shall not be compelled to be a witness against themselves.<sup>6</sup> The scope of what it means to ‘be a witness ’has been a contested issue. *Oghad* is regarded as one of the most authoritative decisions on this.

#### a) Facts

In *M.P. Sharma v. Satish Chandra*,<sup>7</sup> an eight-judge bench of the Supreme Court held that the scope of being a witness for the purpose of Article 20(3) was similar to ‘furnishing evidence. ’The Court held that such evidence could be furnished “through lips or by production of a thing or of a document or in other modes.”<sup>8</sup> After this holding, issues arose in three separate criminal cases as to whether an accused could be compelled to provide impressions of the body like fingerprints and handwriting and signature specimens. These directions were issued under Section 73 of the Indian Evidence Act, 1872 and under Sections 5 and 6 of the Identification of Prisoners Act, 1920. Therefore, issues were also raised about whether these provisions were violative of Article 20(3). An eleven-judge bench of the Supreme Court was constituted to decide these issues and examine the soundness of *M.P. Sharma*.<sup>9</sup>

#### b) Holding in Oghad

The interpretation of the Court in *Oghad* marked a stark move from the wide interpretation given in *M.P. Sharma*. Being a witness in *Oghad* was limited to providing oral or written statements which

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<sup>6</sup>The Constitution of India 1950, art 20(3).

<sup>7</sup>*M.P. Sharma v Satish Chandra* (1954) SCR 1077.

<sup>8</sup>*Oghad* (n 4) [8].

<sup>9</sup>*ibid* [11].

conveyed the personal knowledge of the accused.<sup>10</sup> The protection of Article 20(3) was extended only to ‘compelled personal testimony’ of this nature.<sup>11</sup> The Court seemed to indicate that since fingerprints, footprints, an imprint of the palm or specimens of writing or signature did not convey any personal knowledge, they did not amount to personal testimony.<sup>12</sup> Further, the Court seemed to indicate that a person could only be a ‘witness’ to aspects they could ‘alter or exercise control over.’ Therefore, since these features were unalterable by the accused, they were excluded.<sup>13</sup> The case was decided with eight judges in the majority and three in the minority, wherein the minority seemed to agree with the interpretation given in *M.P. Sharma*. However, they agreed with the majority that impressions of the body and handwriting specimens would not be protected by Article 20(3), although employing different reasoning.<sup>14</sup>

In interpreting *Oghad*, due recognition must be given to the elements that must be satisfied for an accused to invoke the protection of Article 20(3). *First*, an accused must have been compelled to convey their personal knowledge about relevant facts. *Second*, such information must either have incriminatory ‘tendencies’ or make the ‘case against the accused a possibility considered by itself.’<sup>15</sup> It is within this framework that the next section of this paper argues that both passwords and biometrics for the purpose of accessing the PEDs of the accused should be protected by Article 20(3).

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<sup>10</sup>ibid [11], [16].

<sup>11</sup>ibid [11], [12].

<sup>12</sup>ibid [11], [16].

<sup>13</sup>ibid [11], [12]; Gautam Bhatia, ‘Privacy and the Criminal Process: Selvi v State of Karnataka’ (2018) SSRN <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3166849](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3166849)> accessed 30 August 2021.

<sup>14</sup>Abhinav Sekhri, ‘The Right Against Self-Incrimination in India: The Compelling Case of Kathi Kalu Oghad’ (2019) 3 Indian L Rev 1, 35-36 <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=330443](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=330443)> accessed 30 August 2021

<sup>15</sup>Oghad (n 4) [12].

### III. PART - II

#### A. *Personal Knowledge*

The way to access a locked personal electronic device (hereinafter, 'PED') would be with a password. Today, with the advancement of technology, PEDs can be accessed through fingerprint scanners or via face recognition as well. Between these two options, it seems like passwords would satisfy the test laid down in *Oghad*. This is because such information is personal knowledge within the mind of the accused and is alterable.<sup>16</sup> However, an argument against this (as advanced in *Virendra Khanna*) is that just passwords or biometrics alone do not incriminate the accused.<sup>17</sup> It is here that we must focus on the fact that, ultimately, the password is used to access the PED. The contents and documents of this PED and their incriminatory potential is all personal knowledge within the mind of the accused. It is this personal knowledge which would squarely qualify for the protection of Article 20(3) as per *Oghad*. When the state initiates the process of prosecuting a person who has allegedly committed a crime, it must secure proof of such guilt independently. Such evidence cannot be gathered by the state by engaging the coerced assistance of the accused."<sup>18</sup> Password provided by the accused would lead the

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<sup>16</sup>A related argument has been made for biometrics. It is argued that since this reasoning would protect passwords, protection of Article 20(3) would extend to biometrics as well. This is because ultimately, both are ways to unlock the PED of the accused. Therefore, since, biometrics perform the same function as passwords, they should also be protected by Article 20(3). Abhinav Sekhri, 'Mobile Phones and Criminal Investigations in India' (2020) SSRN <<https://ssrn.com/abstract=3590996>> accessed 30 August 2021 [*hereinafter* "Sekhri"]. This paper agrees with this argument but also advances an argument which reaches the same conclusion that biometrics should be protected by Article 20(3).

<sup>17</sup>Virendra Khanna (n 1) [13.5], [14.3].

<sup>18</sup>Charles G. Geyh, 'The Testimonial Component of the Right Against Self-Incrimination' (1987) 36 *Catholic Uni L Rev* 611, 617 <<https://www.repository.law.indiana.edu/cgi/viewcontent.cgi?article=1875&context=facpub>> accessed 2 September 2021.

investigating agency to evidence on the PED, which they would not have had access to without the accused providing the same. Therefore, passwords should be protected by Article 20(3).<sup>19</sup>

Similarly, biometrics should also be protected. A mechanical application of *Oghad* may lead one to conclude that due to their physical nature, biometric-based access can be compelled. It is here that we must understand the reason which led the Court in *Oghad* to exclude physical features from the scope of being a witness. Decided in 1961, the primary consideration of the Court was to ensure a smooth and efficient investigation. The decision of the majority in *Oghad* must be understood in terms of this limited view.

a) Considerations of Smooth and Efficient Investigation

A pressing concern of promoting efficiency in criminal investigation guided the decision of the majority in *Oghad*. As a result, they decided to exclude ‘finger impression or signature or handwriting specimens ’from the scope of being a witness.<sup>20</sup> It was held that ‘furnishing evidence ’in the manner proposed by *MP Sharma* could not have been intended by the drafters of the Constitution. They reasoned that while the drafters sought to extend the protection against self-incrimination, they could not have intended to hinder the established investigative processes.<sup>21</sup> Within these processes, they justified that ‘taking of impressions of parts of the body of an accused person ’may be ‘legitimately ’demanded by the needs of the investigation.<sup>22</sup> The Court believed such impressions and samples were necessary for the purpose of identification of the accused and comparison with the samples procured by the police.<sup>23</sup> They also held that it must be assumed that the drafters were aware of the existing

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<sup>19</sup>Sekhri (n 16) 7-8.

<sup>20</sup>*Oghad* (n 4) [16].

<sup>21</sup>*ibid* [10].

<sup>22</sup>*ibid* [10].

<sup>23</sup>*ibid* [10], [11], [16].

laws which authorised the procurement of such specimens from the accused.<sup>24</sup> The judgement in *Oghad* should be viewed within this restricted scope. The use of imprints of the body parts of the accused should be allowed only when it is limited to comparison with the other samples procured or for identifying the accused.<sup>25</sup>

One may still argue that *Oghad* also held that since physical features, such as biometrics, do not convey any personal knowledge and should not be protected by Article 20(3). It is here that we must turn our attention to the decision of the Supreme Court in *Selvi*. In this case, the Court was confronted with deciding whether information obtained through the conduct of polygraph examination, Brain Electrical Activation Profile (BEAP) test and narcoanalysis on an unwilling accused would be violative of Article 20(3).<sup>26</sup> They had to negotiate with the test laid down by the majority in *Oghad*, which limited the scope of compelled personal testimony to personal knowledge conveyed through oral or written statements.<sup>27</sup> While narcoanalysis involved oral statements, the same was not true of the polygraph or the BEAP test. These involved drawing inferences from the physiological responses gathered in the course of conducting these examinations.<sup>28</sup> A mechanical application of *Oghad*'s test would have led to a result wherein polygraph, and BEAP tests would not be protected under Article 20(3) because of the purely physical and inalterable nature of the bodily impulses. However, the Court in *Selvi* focused on the fact that, ultimately, personal knowledge was being conveyed to the investigators, even if it was through the inferences drawn from these physiological responses.<sup>29</sup> The Court further held that this personal knowledge may either itself lead to prosecution or

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<sup>24</sup>ibid [10].

<sup>25</sup>ibid [12].

<sup>26</sup>*Selvi* (n 5) [2].

<sup>27</sup>*Oghad* (n 4) [11], [12].

<sup>28</sup>*Selvi* (n 5) [180].

<sup>29</sup>ibid [184].



establish ‘a link in the chain of evidence.’<sup>30</sup> The Court in *Selvi* seems to indicate more strongly that the goal of Article 20(3) is to protect the personal knowledge of the accused even if it is accessed through physical features. The Court in *Selvi* highlighted that BEAP and polygraph tests were not within the contemplation of the judges in *Oghad*. In 1961, they could not have foreseen that personal knowledge could be conveyed through physical features in this manner.<sup>31</sup> The Court in *Selvi*, by recognising the limited vision of the judges in *Oghad*, succeeded in balancing technological advancements with a guarantee of fundamental rights.

It is with this reasoning that we should view biometric-based access to PEDs. Ultimately, it is the physical features which allow access to contents of the PED which are within the personal knowledge of the accused.

Further, compelling passwords and biometrics to access PEDs can also be viewed as being similar to compelling an accused to produce documents which are within the personal knowledge of the accused. The Court in *Oghad* draws a distinction between producing a document for comparison with a handwriting specimen and producing a document which conveyed the personal knowledge of the accused.<sup>32</sup> They seem to indicate that the former would not qualify as ‘personal testimony’ while the latter may.<sup>33</sup>

Therefore, passwords and biometrics in the context of accessing PEDs must be granted protection under Article 20(3) because they act as a ‘vehicle’ to access the contents of PEDs which fall within the personal knowledge of the accused.<sup>34</sup>

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<sup>30</sup>ibid [181], [185].

<sup>31</sup>ibid [182].

<sup>32</sup>*Oghad* (n 4) [11].

<sup>33</sup>ibid.

<sup>34</sup> Raila Cinda Brejt, ‘Abridging the Fifth Amendment: Compelled Decryption, Passwords, & Biometrics’ (2021) 31 *Fordham Intellectual Property, Media &*

### B. *Self-incrimination*

As per *Oghad*, the personal testimony must be of a nature that, considered by itself, increases the probability of the accused getting convicted.<sup>35</sup> In *Selvi*, the Court has termed this as also providing a link in the chain of evidence. In the event that incriminatory information is found on the PED, the ability of the accused to unlock such a device by either password or biometrics would establish their ownership, control and access to the device and its contents.<sup>36</sup> Such confirmations would help establish a link in the chain of evidence which may lead to a higher chance of the accused getting convicted.<sup>37</sup>

Based on the arguments developed in the previous section, both passwords and biometrics should be protected within the scope of Article 20(3). Following this, the act of compelling the accused to provide passwords or biometric access to PEDs would be violative of this fundamental right. Therefore, evidence obtained in this manner must be inadmissible.<sup>38</sup>

### C. *Use of the Accused: A Means to an End*

Indian courts must also notice the fine distinction between body of the accused being evidence and the investigating agency using the body of the accused to lead them to fresh evidence.<sup>39</sup> In *Oghad* it was held that it was only when impressions of the body parts of the accused were used for comparison or corroboration that they may tend to

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Entertainment LJ 1154, 1172-1173  
<<https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1783&context=iplj>>  
accessed 30 August 2021 [*hereinafter* “Brejt”].

<sup>35</sup>*Oghad* (n 4) [12].

<sup>36</sup>*Brejt* (n 33) 1165; Abhinav Sekhri, ‘Mobile Phones and Criminal Investigations: The Karnataka HC Judgment in Virendra Khanna’ (2021) Proof of Guilt <<https://theproofofguilt.blogspot.com/2021/03/?m=0>> accessed 30 August 2021.

<sup>37</sup>*Selvi* (n 5) [153]; *Brejt* (n 33), 1165; Sekhri (n 16).

<sup>38</sup>Aparna Chandra and Mrinal Satish, ‘Criminal Law and the Constitution’ in Sujit Choudhary and others (eds), *The Oxford Handbook of the Indian Constitution* (OUP 2016) 1064.

<sup>39</sup>*Brejt* (n 33) 1172-1173.

incriminate the accused.<sup>40</sup> The important aspect here that these physical specimens themselves do not lead to fresh evidence. The investigators must operate independently of the accused to get the initial samples with which comparison can later take place. In *Selvi* also, it was held that by studying the results of the polygraph and BEAP test the investigators are able to access personal knowledge they could not have had access to otherwise.<sup>41</sup> This indicates a need for the investigators to conduct investigation independently of the accused. The minority in *Oghad* also hints at the same. Otherwise, they may just take the easy way out by focusing on coercing the accused to provide evidence against themselves.<sup>42</sup> They seem to indicate that it is only through independent and diligent investigation that the state must obtain 'reliable evidence' which will lead to the discovery of the truth.<sup>43</sup> This need for independent investigation also stems from the understanding that ultimately it is the prosecution which must prove the charge beyond reasonable doubt. We must also give due regard to the inextricable link between the right against self-incrimination and the presumption of innocence. Compelling the accused to provide evidence against themselves shifts the burden from the prosecution to prove their guilt on to the accused to prove their innocence.<sup>44</sup> Therefore, investigative agencies must operate independently. They should not 'piggyback' off the accused, forcing them to provide evidence.<sup>45</sup>

Therefore, as indicated by both *Oghad* and *Selvi*, the use of biometrics should be limited to corroboration of facts already known and gathered by the investigating agency. In the context of biometric based access to PEDs, the investigators would be forcing the accused

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<sup>40</sup>Oghad (n 4) [12].

<sup>41</sup>Selvi (n 5) [184], [185].

<sup>42</sup>Oghad (n 4) [28].

<sup>43</sup>ibid.

<sup>44</sup>Selvi (n 5) [87].

<sup>45</sup>Sekhri (n 16).

to lead them to evidence on these devices which they did not reach using their independent investigative efforts.

#### IV. PART - III

##### A. *Doctrine of Foregone Conclusion*

Based on the reasoning in *Oghad* and *Selvi*, we must also acknowledge that when the investigative agency is able to show that they are aware of the contents present on the PED of the accused, they may be allowed to access the same. This understanding is based on the doctrine of foregone conclusion which developed in the United States of America.<sup>46</sup> It provides that if the investigating agency is already aware of the existence of incriminatory evidence independently of the accused, they can ask the accused to produce the same. This is because the act of the accused producing this evidence would “add little to nothing” to the case built by the agency against them.<sup>47</sup> The Court in *Selvi* stated that compelled testimony can be used to corroborate facts that the investigators are already aware of.<sup>48</sup> This seems to indicate shades of the foregone conclusion reasoning. In *Virendra Khanna*, the High Court seemed hesitant to extend the protection of Article 20(3) to passwords and biometrics because they felt it would hamper the ability of investigative agencies to carry out investigation altogether.<sup>49</sup> Perhaps the incorporation of the doctrine of foregone conclusion may assuage these concerns.

In USA, the courts require that to make use of this doctrine, the investigating agency must be able to show that it is independently aware of the ‘existence, location and authenticity’ of evidence it seeks

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<sup>46</sup>Brejt (n 33) 1161.

<sup>47</sup>ibid 1176.

<sup>48</sup>Selvi (n 5) [145].

<sup>49</sup>Virendra Khanna (n 1) [14.4].

from the accused.<sup>50</sup> While the standard set is that of reasonable particularity, in practice, it has remained vague and unclear. The trend is to decide each case depending on its peculiar facts and circumstances.<sup>51</sup> Further, the Fourth Amendment in the USA provides protection against unlawful search and seizure.<sup>52</sup> In India, protection of such nature has not been articulated in this express manner. It can be argued that post-*Puttaswamy*, such a protection can be located within the contours of Article 21 of the Indian Constitution.<sup>53</sup> However, in India there still needs to considerable development in this regard.

Incorporating a standard to regulate foregone conclusion doctrine in India is desirable. It would ensure that investigators do not deceive the courts when they are claiming independent knowledge of the contents of the device. However, we must be mindful and develop a robust standard that fits within the Indian legal framework. It is only then that such a standard would be truly useful.

## V. CONCLUSION

There are many advocates for extending the protection of Article 20(3) to both passwords and biometric-based access. However, decisions like *Virendra Khanna* show that we still have a long way to go before this becomes a reality. The reasoning adopted in *Virendra Khanna* highlights the need for us to re-evaluate the way we apply

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<sup>50</sup>Brejt (n 33) 1163.

<sup>51</sup>ibid 1193, 1185.

<sup>52</sup>Congress Gov, 'Fourth Amendment' (*Constitution Annotated*) <<https://constitution.congress.gov/constitution/amendment-4/>> accessed 2 September 2021.

<sup>53</sup>Vrinda Bhandari and Karan Lahiri, 'The Surveillance State, Privacy and Criminal Investigation in India: Possible Futures in a Post-*Puttaswamy* World' (2020) 3(2) U of OxHRH J 15, 36 <<https://ohrh.law.ox.ac.uk/wp-content/uploads/2021/04/U-of-OxHRH-J-The-Surveillance-State-Privacy-and-Criminal-Investigation-1-1.pdf>> accessed 2 September 2021.

precedents like *Oghad*. This paper attempts to put forward a possible way in which *Oghad* could be interpreted and applied. Technological advancements bring with them new challenges. We must navigate these in a manner that ensures that these technological advances do not denude the fundamental rights we have been guaranteed.<sup>54</sup>

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<sup>54</sup>Sekhri (n 16) 7.