

THE UNJUSTIFIABLE EQUIVOCATION ON THE CONSTITUTIONALITY OF COMPELLED VOICE SAMPLING

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ABSTRACT

The Indian judiciary struggled with the admissibility of compelled voice sampling for long, but with an evident inclination towards permitting it. Eventually, the said bias came to be consolidated in 2019. Prosecution under various criminal laws have since relied heavily on this mode of evidence, notably in the 2020-21 period. Other common law jurisdictions, with minor exceptions, have observed a similar trajectory. All these cases share the same, albeit unarticulated, premise: the act of submitting one's voice-sample for evidentiary appreciation cannot possibly be 'testimonial'. In parallel and quite contrarily, India witnessed expanding standards on the self-incriminatory bar and mental privacy. A synthesised ratio of the latter set of cases appears to staunchly oppose compelled voice-sampling. Furthermore, science suggests that voice-samples are heavily communicative of

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personal information. Hence, they must become self-incriminatory upon compulsory extraction. Significantly, Indian decisions on self-incrimination and privacy are aligned with this overwhelming scientific opposition. They also seem to have imported standards from the better common law judgments on voice-sampling. Lastly and resultantly, that set of ratios better captures the import of Article 20(3). In essence, the judicial position emanating from those posed a bar on the events of 2019-21. Testing the admissibility of mandated voice-sampling in light of the bar erected by these two domains of law is, therefore, an exercise in frivolity.

Keywords: Self-incrimination, Voice Spectrography, Law on Evidence, Indian Constitution, Constitution of India, Privacy, Selvi.

I. INTRODUCTION

The protection from self-incrimination in India has had an evolving jurisprudence around it, albeit at an extremely sedate pace. India has, more or less, the most lucid markers of what would constitute self-incrimination.¹ Information culled out from an accused through

¹Law Commission of India, *One Hundred Eightieth Report on Art. 20(3) of the Constitution of India and the Right to Silence* (Law Com No 180, 2002); Shubhankar Dam, 'Criminal Wrongs and Constitutional Rights - A View from India' (2013) 25 *Singapore Academy of Law Journal* <<https://journalsonline.academypublishing.org.sg/Journals/Singapore-Academy-of-Law-Journal-Special-Issue-Archive/ctl/eFirstSALPDFJournalView/mid/513/ArticleId/334/Citation/JournalsOnlinePDF>> accessed 24 March 2021.

B.E.A.P. (Brain Electrical Activation Profile) or other physiological tests, have been held to come within its fold.² Despite this, Indian High Courts seem to have grappled with the ‘validity’ of extractive tests such as spectrography. However, their problem with voice sampling and its conflict with self-incrimination is not surprising. Tests such as B.E.A.P. continue to put High Courts in analytical trouble with the law on self-incrimination.³

It is in this paradigm that taking voice-spectrography tests, samples or exemplars become an even more difficult jurisprudential issue. At the very beginning, the paper will summarise the jurisprudential examination of voice sampling of an accused by Indian courts exclusively. The paper will then describe the various nuances of voice sampling as opposed to other forms of testimonial means of communication. The empirical data on voice as an attribute, is a crucial factor to establish the latter’s irrelevancy in the law of evidence. A description of the varying legal standards on voice sampling across common law jurisdictions shall follow. This description achieves two objectives. Firstly, it highlights how deeply the courts of any jurisdiction continue to struggle in this specific domain. Secondly, it will highlight that these struggles have their basis in treating voice samples as ‘testimonially communicative’. If any piece of evidence is dubious for its fragile testimonial nature, it cannot possibly be treated as non-incriminatory.

Lastly, relevant Indian case laws on self-incrimination and privacy, which may directly impact the permissibility of voice sampling, will be used as a prism. This will necessarily entail speculation about their impact on the validity of voice sample extraction from a witness or an accused, irrespective of the decision in *Ritesh Sinha*.

²*Selvi v State of Karnataka* (2010) 7 SCC 263 (“*Selvi*”).

³*Abhijeet Ghosh v State of NCT, Delhi* (2019) SCC OnLine Del 10690; *Deepika Sharma v State of NCT Delhi* (2018) SCC OnLine Del 9260.

The decision in *Ritesh Sinha v. State of Uttar Pradesh* (“**Ritesh Sinha**”)⁴ saw the Supreme Court filling a legislative gap to carve out voice sampling as a *legislative* exception to self-incrimination. The case dealt with charges related to cheating and conspiracy. In misleading third parties to part with their money on false promises of handing them government jobs, the accused had generated one key evidence. The same being a voice recording, capturing one of the dubious transactions. The prosecution had solicited voice samples from the accused to authenticate his voice in the recording. After much discussion, the Supreme Court held that the voice sampling of the accused may be compelled. Lacking the support of relevant statutes, it went one step further to enable a Magistrate to facilitate this extraction. Needless to say, the prosecution jumped to utilise the newly introduced compromise on the procedural security of the accused in other cases. The ratio has been adopted most nonchalantly, often without an explicit citation of it, in a stream of cases since then.⁵ A few of them went on to hold the absence of a voice-sample to be a procedural infirmity, requiring magisterial intervention.⁶ The Supreme Court had achieved this feat by using Article 142 of the Constitution of India, which is otherwise supposed to be an exclusively civil-procedural concept.⁷ The scope of this paper, however, is not to analyse the mode through which voice-sampling of an accused was legalised at a pre-trial stage. The aim is to assail the permissibility of doing so, given the pre-defined standards of Indian criminal procedure. These standards are comprised

⁴*Ritesh Sinha v State of Uttar Pradesh* (2019) 8 SCC 1.

⁵*Mukul Roy v State of W.B.* (2019) SCC OnLine Cal 4341; *State of Maharashtra v Suresh BaliramRane* (2021) SCC OnLineBom 38; *P.C. Mishra v C.B.I.* (2021) SCC OnLine Del 82.

⁶*Satish Kumar v State of Haryana* (2019) SCC OnLine P&H 5032; *Prabudh Garg v Special Police Establishment Lokayukta* (2020) SCC OnLine MP 174.

⁷Abhinav Sekhri, ‘The Supreme Court on mandatory voice samples – I: Some glaring conceptual errors’ (*Indian Constitutional Law and Philosophy*, 04 August 2019) <<https://indconlawphil.wordpress.com/2019/08/04/guest-post-the-supreme-court-on-mandatory-voice-samples-i-some-glaring-conceptual-errors/>> accessed 22 January 2021.

of the prevailing law on self-incrimination and privacy. It fails on both counts. However, the gist of this argument remains that voice sampling is testimonial evidence, and, therefore, self-incriminating when extracted from an accused.

For convenience, it is submitted that wherever the phrase ‘voice exemplar’ is used, it would imply a phrase given by the Court or the Executive to be recited by the accused. The paper limits itself to discussing judicially supervised or directed voice sampling at a pre-trial stage.

II. INDIAN JURISPRUDENCE TESTING THE VALIDITY OF VOICE SAMPLING

As it stands, and what became a ground for the Supreme Court of India to become proactive in this regard, there is no legal provision dealing with voice samples at a pre-trial stage. The three main Indian statutes, namely, the Indian Evidence Act, 1872 (“**Evidence Act**”), the Identification of Prisoners Act, 1920 (“**Prisoners Act**”) and the Code of Criminal Procedure (“**CrPC**”), 1973 have not mentioned it at all. However, that did not stop the executive from taking samples at the pre-trial stage. Consequently, the issue started mushrooming across Indian High Courts.

The first notable decision where the prosecution, at the trial stage, argued about its validity by reading it into pre-existing legal provisions was in the case of *Natvarlal Amarshibhai Devani v. State of Gujarat and Ors.* (“**Devani**”).⁸ The Gujarat High Court was deciding this issue strictly in the context of voice-spectrography. This meant taking a voiceprint of the accused and the same being retained by the forensic

⁸*Natvarlal Amarshibhai Devani v State of Gujarat and Ors.* (2017) SCR. A 5226 of 2015 (*Devani*).

department of the enforcement agency for comparative analysis.⁹ However, the judgment also analysed whether it was permissible for a Magistrate to order extraction of information by such means. The Court first noted that such a ‘print’ is not the same as a footprint or a fingerprint as specified by Section 2(a) of the Prisoners Act, which is the sum and substance of the definition of the term ‘measurement’. It then went on to cite all the possible relevant provisions in this regard to emphasise the absence of voice sampling in any form: Section 73 and Section 165, Evidence Act; Sections 311A and 53 of the CrPC. The Court held that even upon an expansive interpretation of any of these, voice sampling was excluded. The judgment reasons that if anything, voice-spectrography requires a medical practitioner (presumably to determine if the subject’s voice is healthy) and an expert (presumably for comparative purposes), both governed by two different provisions.¹⁰ The decision was an ‘emphatic no’¹¹ to permitting the same by reading the two provisions together, citing a strict interpretation of the criminal provisions.

A few other High Court decisions coming to the same conclusion had similarly relied on this legislative gap and strict interpretations of the Indian criminal law.¹² The year after the introduction of Section 311A (empowering a Magistrate to order a collection of signature or other handwriting specimens) in the CrPC, the Delhi High Court in *Rakesh Bisht v. Central Bureau of Investigation* (“**Rakesh Bisht**”)¹³ considered a subordinate court’s direction for collecting voice samples of an accused. The Court first noted that the amendment was limited to fingerprint and handwriting specimens, like the Supreme Court’s

⁹ibid [10], [35].

¹⁰Devani (n 8) 74.

¹¹Devani [85]-[86].

¹²*Rakesh Bisht v Central Bureau of Investigation* (2007) SCC OnLine Del 13 (‘*Rakesh Bisht*’); *Devan Amit Khetawat v State of Telangana* (2017) SCC OnLine Hyd 101 (‘*Khetawat*’).

¹³*Rakesh Bisht* (n 12).

decision in *Amrit Singh v. State of Punjab*.¹⁴ It then went a step further in treating voice samples to be the equivalent of hair specimens, without providing any elaboration. Accordingly, it followed the Supreme Court precedent that the accused was well within her rights to reject giving such a sample, failing which would attract the bar of Section 25 (non-admissibility of confessions made to the Police) of the Evidence Act.¹⁵ However, the most outstanding feature of this analysis was that it also took note of the Parliament's deliberate exclusion of 'technologies' such as tape recording in coming out with a provision such as Section 311A of the CrPC. Although this entire reasoning was not cited verbatim, the Kerala High Court in *Pratap v. Central Bureau of Investigation*,¹⁶ facing a similar set of facts, relied on *Rakesh Bisht* in holding voice sampling to be testimonial and consequently incriminatory. In effect, the Court barred voice samples at the admission stage itself, obviating the consideration of incrimination.

The Telangana High Court in *Devan Amit Khetawat v. State of Telangana* ("**Khetawat**")¹⁷ also held that collection of voice samples was barred by Section 25 of the Evidence Act. However, it went farther than *Devani* in looking at the texts of Sections 53A and 54 of the Evidence Act. It was held that a collective reading of these provisions barred the prosecution from sampling voices, as deducible by its specific exclusion. It also went as far as to state that voice sampling for extracting facts would not be a procedure established by law.

In barring voice sampling and spectrography, courts overwhelmingly came to one conclusion: the legislative exclusion of voice sampling is both unequivocal and specific. While the first conclusion is a direct consequence of strict interpretation of the law, the latter is open to inferences. The running theme was the notion that since voice sampling

¹⁴*Amrit Singh v State of Punjab* (2006) 12 SCC 79.

¹⁵*Rakesh Bisht* (n 12) 8.

¹⁶*Pratap v Central Bureau of Investigation* (2017) SCC OnLine Ker 8659.

¹⁷*Khetawat* (n 12).

is technologically dynamic, its evidentiary value is determined by the legislature. In stating this, the courts have hinted that there is no intrinsic problem with the voice as a subject for self-incrimination. The privacy argument had also not been cited in any of these as forming a part of the legal reasoning.

The other set of High Court decisions permitting this procedure held on to a different reasoning. In what seems to be the most pertinent logic adopted in all of these, the Telangana High Court contradicted itself by deciding the case of *Naveen Krishna Bothireddy v. State of Telangana and Ors.* (“*Bothireddy*”).¹⁸ It stated that the accused cannot dictate the course of pre-trial investigations and that consenting to submit voice samples does not constitute evidence. In other words, the same would not come to be categorised as a testimonial in the Court’s opinion. It stated that collecting samples *per se* to conduct tests is not testimonial. The Court created a false dichotomy between extraction and discovery in such cases.¹⁹ Extracting voice samples is not akin to a randomised search within one’s premises, but an intrusion to one’s bodily autonomy. A close parallel of this unbridgeable gap is found in Sections 25 and 27 of the Evidence Act. The former bars extraction by threatening the accused’s bodily autonomy. Whereas the latter deals with cooperation between the accused and the prosecution for discovering evidence.

However, the High Court’s mischaracterisation of voice sampling as another search and seizure exercise eliminated any exclusivity between the two concepts. The unarticulated premise for conflating the two seems to be that a seizure by search is purely an effort of the prosecution. It requires cooperation, not communication, from the accused. The question of compulsion, by this logic, did not arise for the court.

¹⁸*Naveen Krishna Bothireddy v. State of Telangana and Ors.* (2017) SCC OnLine Hyd 49, (20).

¹⁹*ibid* [9].

The very next year, the Rajasthan High Court stated that voice samples did not qualify as ‘substantive’ pieces of evidence.²⁰ The case dealt with a taped dialog related to the crime. The Court held that Article 20(3) of the Constitution of India will not be attracted as long as the voice was sampled against the words used in the tape (even if they were implicative).²¹ The decision does not mention how the eventual incriminatory effect of reading out the taped text is any different from words directly achieving the same effect. Nevertheless, it is demonstrative of its attempt to qualify the admissibility of voice samples. The judgment later justifies its eventual permission by claiming to arm the police with novel scientific methods to expedite investigations.²²

It was the Madras High Court, which noted scientific nuance to it to surprisingly *justify* its legality. In rejecting its implied exclusion in Section 311A CrPC, it held that voice sampling is essentially an exercise of wave-spectrography.²³ Since this means an analysis of the performative nature of a vocal cord, it becomes physical evidence, and hence protected by the exception to self-incrimination as devised in *State of Bombay v. Kathi Kalu Oghad*’s (“**Kathi Kalu Oghad**”).²⁴

However, these decisions came after the Delhi High Court’s decision in *Sudhir Chaudhry and Ors. v. State*,²⁵ which had developed the substantive-evidence argument for voice sampling. It stated that the sample had to qualify as the correct match to become evidence. Hence, its collection *per se* does not make it evidence.²⁶ However, in permitting its collection, the Court allowed inculpatory contents to be

²⁰*State of Rajasthan v Vikramjeet* (2018) SCC OnLine Raj 1343, (25) (“*Vikramjeet*”).

²¹*ibid* [14].

²²*Vikramjeet* (n 20) 16.

²³*Rabindra Kumar Bhalotia and Ors. v State and Ors.* (2017) SCC OnLine Mad 10277, (20-21) (“*Bhalotia*”).

²⁴ *State of Bombay v Kathi Kalu Oghad*’s (1962) 3 SCR 10 (‘*KathiKalu Oghad*’); *Bhalotia* (n 23) (4-5).

²⁵*Sudhir Chaudhry and Ors. v State* (2015) SCC OnLine Del 7457 (“*Sudhir*”).

²⁶*ibid* [18]-[22].

a part of the police's exemplar, as long as it was also a part of the taped recording.²⁷ When appealed, the Supreme Court in a three-Judge Bench, upheld the decision of the High Court stating that commonality is the overwhelming factor for a fair and reasonable spectrographic examination.²⁸ As long as the same words from the voice box of the accused are being subject to analysis, the evidence so adduced is purely physical.

Therefore, by the time the issue of self-incrimination in voice sampling culminated in a three-Judge Bench decision in *Ritesh Sinha*, there existed two opinions on the issue, with the Supreme Court itself having picked a side by then. The line of cases barring the same was doing so on the lack of legal basis for admissibility. The one permitting it was doing so on the grounds of it being admissible and testimonial, but not incriminatory. The Supreme Court was hearing the case after the same was first heard by a Division Bench of the same court in 2013.²⁹ As stated previously, the case was premised on an accusation of fraudulently eliciting money from job aspirants. Some of these promises were aurally recovered through recorded call data on the accused's phone. The prosecution sought a voice sample from him for authenticating the recorded speaker. The Division Bench went through a similar exercise as those in *Devani* and *Khetawat*, except for additionally noting Section 5 of the Prisoners Act, and the 87th Report of the Law Commission of India.³⁰ Section 5 deals with the power of a Magistrate to order a person to be measured or photographed, but not to be sampled for her voice. The Law Report did intend to cover voice as evidence but was never given effect to. The Court concluded that this was a case of purposive interpretation and not strict interpretation. This reasoning was premised on the supposed fact that by enacting

²⁷Sudhir (n 25) 16-17.

²⁸*Sudhir Chaudhary and Ors. v State* (2016) 8 SCC 307.

²⁹*Ritesh Sinha v State of Uttar Pradesh & Anr.* (2013) 2 SCC 357.

³⁰Law Commission of India, *Eighty-Seventh Report on Identification of Prisoners Act, 1920* (Law Com No 87, 1980).

Section 5, Prisoners Act, read with Section 311A, CrPC, the legislature had already envisaged technological advances in extracting physical information.³¹ It reasoned that a Magistrate, as the trier of fact, not possessing powers such as voice sampling would be a narrow view of the law. The above-mentioned provisions, along with Section 53 CrPC, clearly gave life to the Law Commission's suggestions.³² The Court in 2019 dealt with two primary questions of law as framed by the Court in 2013: firstly, whether voice sampling involved a bar in the form of Article 20(3). Secondly, whether there existed a legislative gap in specifying the mode and legality of the same. The first was affirmed dismissively. The Court applied inherent powers to remedy the gap revealed by the second question.

The Court upheld the view taken by the Division Bench, approvingly quoting their interpretive reasoning. In examining the first question of law, the Court devoted three paragraphs to discussing a case of exclusively civil nature³³ to stress upon procedural harshness as an obstruction to substantive justice.³⁴ It also stated the non-invasiveness of voice sampling by a Magistrate as something self-evident, in its efforts to allay any 'Article 21' based concerns. It effectively ended its discussion by citing excerpts from *Kathi Kalu Oghad* wherein the non-alterability of information conclusively established the non-testimonial nature of such evidence.³⁵

The common running thread among the analyses of the High Court decisions and the two Supreme Court decisions permitting voice sampling despite the existence of Article 20(3) is that they completely missed the technical nuances involved. The commonality of High Court decisions barring the same is simply citing the lack of a legally

³¹*Ritesh Sinha* (n 4) 39.

³²*Ritesh Sinha* (n 4) 30-31.

³³*Sushil Kumar Sen v State of Bihar* (1975) 1 SCC 774.

³⁴*Ritesh Sinha* (n 4) 9-10.

³⁵*ibid* [11].

spelled-out source. Hence, the nature of the voice sample by itself is not deeply examined by jurisprudence on either side of the fence. However, an analysis of both the law as well as the nature of such evidence will reveal otherwise. The techno-legal nuances involved in using voice samples lift them out of the ‘purely physical’ category as mentioned in *Kathi Kalu Oghad* and thrust them into the mental testimonial-incriminatory category as evolved in *Selvi v. State of Karnataka* (“*Selvi*”).³⁶

III. TECHNICAL NUANCES THAT SET VOICE SAMPLING APART

The previous section of the paper described the Indian courts treating voice as some immutable attribute of an individual. Most of these cases post-date the 87th Report of the Law Commission, allowing them to factor in the points made therein. However, the suggestions made are faulty for being embedded in the notion of voice as some constant and not a variable. It is the very subliminal nature of voice that does not make it a ‘uniquely physical’ attribute.

The law commission defined the concept of a voice print amongst its suggestions for the overhaul of Section 5 of the Prisoner’s Act. In doing so, it defines what a voiceprint truly entails, albeit briefly.³⁷ Relying on the works of a criminologist, it states that a print of the voice is nothing but a concentration of sound energy at points on the wave frequency.³⁸ This pattern of concentration or lack thereof at various points in a wave spectrum remains unique to the individual.³⁹

³⁶*Selvi v. State of Karnataka* (2010) 7 SCC 263.

³⁷Law Commission (n 31) 5.27.

³⁸Law Commission (n 31) 5.27.

³⁹Law Commission (n 31) 5.27.

While the Report proceeds to analyse the benefits of including voice as evidence in the erstwhile legal framework, it remains silent about one very crucial aspect. It does not specifically state whether consent to giving up of a voice sample constitutes testimony in itself, let alone its categorisation between corroborative and substantive.

However, a glimpse into the nuances of voice-spectrography or any other form of voice sampling like an identification parade reveals two crucial evidentiary aspects: suggestiveness and reliability. Simply put, evidence dealing with voice samples or involving earwitnesses are infirm *per se*, even before they are legally appreciated.

The most popular empirical conclusions suggest that a ‘voice match’ is not as accurate as the probabilistic determination such as those of fingerprint analyses.⁴⁰ Even under normal circumstances and discounting external governing factors, there occur minor acoustic differences.⁴¹

Unlike other direct human-anatomical prints, such as the fingerprint or the DNA, the voice is a result of the complicated interaction of several factors. Most of these could be mutually exclusive from one’s identity, such as the medium of communication, emotion, background noise, health, and listener’s abilities.⁴²

⁴⁰Yuko Kinoshita, Shunichi Ishinara and Phil Rose, ‘Exploring the Discriminatory Potential of F0 Distribution Parameters in Traditional Forensic Speaker Recognition’ (2009) 16(1) IJSLL <https://www.researchgate.net/publication/250014083_Exploring_the_Discriminatory_Potential_of_F0_Distribution_Parameters_in_Traditional_Forensic_Speaker_Recognition> accessed October 26 2020.

⁴¹See Yuko Kinoshita, ‘Imperfect match: weighing probability in forensic voice analysis’ (*The Conversation*, 10 April 2011) <<https://theconversation.com/imperfect-match-weighing-probability-in-forensic-voice-analysis-270>> accessed 30 October 2020.

⁴²Kinoshita, ‘Exploring the Discriminatory Potential of F0 Distribution’ (n 41) 96.

The acceptability of scientific evidence has also seen a virtual parameter for acceptance since 1993.⁴³ It is generally followed in common law that scientific evidence could be admitted by a trier of fact if the error-rate for the technique is widely reported and is acceptably minimum. That apart, it has to be empirically verifiable and replicable. While voice sampling has varying error-rates, they are higher than other generally permissible forensic means of information extraction and it also fails on the other two counts.⁴⁴ One study found its accuracy to be as low as 9%.⁴⁵

The most notable factor that labels voice as a variable instead of a constant is that aural *memory* is the most error-prone.⁴⁶ Unlike visual memory, aural impressions in one's minds could have the exact opposite effect, thereby, misleading both triers of fact and listeners in opposite directions.⁴⁷ This is because accents or the manner of utterance lead humans more on its contents than the identity of the speaker.⁴⁸ This, therefore, assails the efficacy of voice as evidence on grounds of false suggestiveness.

The Achilles Heel of voice evidence is its weakened reliability. The 'exposure length', in cases where the sample is not tested against a recording, becomes a shaky foundation. Unless the utterance or spoken words have sufficient phonetic variety, expectation biases come into

⁴³*Daubert v Merrell Dow Pharmaceuticals* (1993) 509 U.S. 579.

⁴⁴Kinoshita, 'Imperfect match' (n 42).

⁴⁵Christopher Sherrin, 'Earwitness Evidence: The Reliability of Voice Identifications' (2015) 52(3) *Osgoode Hall Law Journal* <<https://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=2957&context=ohlj>> accessed 25 November 2020.

⁴⁶Natalie Braber and Harriet Smith, 'Could you identify a criminal by their voice? It's far harder than it sounds' (The Conversation, 22 August 2018) <<https://theconversation.com/could-you-identify-a-criminal-by-their-voice-its-far-harder-than-it-sounds-96592>> accessed 26 March 2021.

⁴⁷Kinoshita 'Imperfect match' (n 42).

⁴⁸Sarah V. Stevenage, Amy Howland and Anna Tippelt, 'Interference in eyewitness and earwitness recognition' (2011) 25(1) *Applied Cognitive Psychology* <https://www.researchgate.net/publication/227872600_Interference_in_eyewitness_and_earwitness_recognition> accessed 15 November 2020.

play quite heavily.⁴⁹ More significant is the fact that empirically, witnesses tend to completely miscalculate the duration for which they were exposed to an incident-related utterance.⁵⁰ Another issue with unrecorded voices with which a comparison is to be made, is that of memory retention. The same retention interval for visual memory has a negligible impact on accuracy as compared to the much-pronounced impact on aural memory.⁵¹

Needless to be stated, situation-driven changes heavily govern the reception of a verbal utterance. These, under most circumstances, have turned out to be affected by factors such as the emotionality of the circumstances or intoxication of the speaker.⁵²

All the above conditions affecting both reliability and suggestiveness are only further compounded in cases of recorded voices against which the samples are to be compared. The formants of sound energy referred to by the Indian Law Commission could contain components upto 12,000 Hertz.⁵³ Speech signals on telephonic mediums, however, are transmitted on a band of frequencies between 300 and 3,400 Hertz.⁵⁴ In circumstances like those of *Ritesh Sinha*, a lot of acoustic information is lost in telephonic/recorded communication. Therefore, attempting to identify these degradations in a human speech on such media are nothing but exercises in *hypothesising recognition*.⁵⁵ This inevitably cranks up the likelihood of false identifications significantly.

⁴⁹Sherrin (n 46) 837.

⁵⁰A. Daniel Yarmey and Eva Matthys, 'Retrospective duration estimates of an abductor's speech' (1990) 28(3) *Bulletin of the Psychonomic Society* <<https://link.springer.com/article/10.3758/BF03334012>> accessed 18 October 2020.

⁵¹José Kerstholt and others, 'Earwitnesses: Effects of Accent, Retention and Telephone' (2006) 20(2) *Applied Cognitive Psychology* <https://www.researchgate.net/publication/229639637_Earwitnesses_Effects_of_accent_retention_and_telephone> accessed 13 November 2020.

⁵²*R v. Saddleback* (2013) ABCA 250.

⁵³Sherrin (n 46) 846.

⁵⁴Sherrin (n 46) 846.

⁵⁵Sherrin (n 46) 847.

The last pertinent point is that of the observer-expectancy bias in cases of voice evidence matched against recorded evidence. Surprisingly, this empirical observation is made for an expert analysing/comparing voices. Theoretically, this should be the most proximate to an objective ideal. Having a third-party expert eliminates biases which a police officer or a judicial member may develop by interacting with an accused. However, even the seemingly objective experts seem to be driven by ‘*sociolinguistic expectations than (sic) by the acoustic characteristics of the stimulus*’.⁵⁶ Repeatedly listening to a sample compounds the confirmation bias, creating an expectancy in the expert to affirm the comparison. Ambiguity in information may force forensic experts to misperceive an expected factum.⁵⁷ This compounds the probability of a false positive in comparative identification. Further, this is not the case in other extractive, anatomical, print-based evidence.

Voice sampling, therefore, finds itself to be a complete misfit in the class of physical specimens comprising of hair samples, fingerprints, etc. as per the mental-physical divide devised in *Kathi Kalu Oghad* (elaborated in Section V). The latter are generally indelible impressions from a crime scene. Visual and auditory memory, on the other hand, are ‘fading’ pieces of evidence. Between the two, the auditory memory is supposed to be the weaker since it is contingent on the existence of too many qualifying circumstances. Demonstrably, this natural possibility of false identification through voice is a pressing problem in itself. This gets compounded by the variability in an individual’s voice reacting to extraneous circumstances.

⁵⁶Marjoleine Sloos and Denis McKeown, ‘Bias in Auditory Perception’ (2015) 6(5) *i-Perception* <<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5016825/>> accessed on 29 October 2020.

⁵⁷Keith A. Findley and Michael S. Scott, ‘The Multiple Dimensions of Tunnel Vision in Criminal Cases’ (2006) 2 *Wisconsin Law Review* <https://media.law.wisc.edu/m/hyjb3/findley_scott_final.pdf> accessed 29 November 2020.

Therefore, the assumption of courts in Section II is incorrect. Voice is not a physical constant. Furthermore, the examining voice-based evidence is relatively subjective. The prosecution, a witness, or a trier of fact from the judiciary, all are exposed to the various frailties a voice sample or voice identification parade comes packed with. Biases such as observer-expectancy make such examinations dubious exercises. All this cumulatively leads to a higher probability of inaccuracy. This, in turn, makes voice samples all the more subject to the laws on self-incrimination.

However, various common law jurisdictions, unlike the Indian legal analyses, seem to have taken into account the impact of these factors. As will now be established, those approaches do not significantly differ from the Indian one.

IV. HOW COMMON LAW STRADDLED THE LINE BETWEEN SELF-INCRIMINATION AND ACCEPTABLE EVIDENTIARY STANDARDS

Common law jurisdictions apart from India often suffer from the same gap. Namely, no legal basis for voice sampling. The courts have either interpreted them to be physical and non-testimonial in nature, or have directly incorporated as such, by way of legislation.⁵⁸ However, they have judicially devised-qualifiers for treating the voice samples (either by way of digital recordings or in-court identification) as non-incriminatory.

⁵⁸Revised Statutes of Nebraska 2013, art 33, s 29-3301.

A. *United States of America*

In *United States v. Wade*,⁵⁹ the Supreme Court of the United States held that compulsion to speak in the presence of witnesses does not amount to self-incrimination. It stated that the Fifth Amendment (that *inter alia* deals with self-incrimination) to the U.S. Constitution⁶⁰ had not been violated since the accused was merely aiding in identifying a physical characteristic rather than speaking to his guilt.⁶¹ In this case, voice sampling by way of uttering words in front of the (laymen) witnesses was the issue, and hence, this assertion was *ratio*. However, in order to reach this conclusion, the Court had relied on what is deemed to be the source of determining self-incrimination in the U.S., namely, the decision in *Schmerber v. California* (“**Schmerber**”).⁶² On applying the same, the Court held that inducing one to speak for subjecting his voice characteristics for identification does not amount to compelling him to supply any real or mental evidence.⁶³

The rule in *Schmerber* came about deciding an issue of drunken driving. The police, in this case, had taken a blood sample despite the absence of consent on part of the accused. The Court held that the consent to part with blood for testing is neither *testimonial* nor *communicative*. In doing so, however, the U.S. Supreme Court went on to cite hypotheticals where self-incrimination would not apply. These obiter remarks referred to voice identification (before a jury) of an accused as something equivalent to demanding her to use a particular gesture for demonstration purposes. It was held to be completely out of the Fifth Amendment’s protection. A notable reasoning was given by Chief Justice Warren, who dissented with the majority by holding that sampling blood was communicative enough to be testimonial. It was

⁵⁹*United States v Wade* (1967) 388 U.S. 218 (“*Wade*”).

⁶⁰The Constitution of the United States, Amendment V.

⁶¹*Wade* (n 60).

⁶²*Schmerber v. California* (1966) 384 U.S. 757.

⁶³*Wade* (n 60) 223.

‘communicative’ because the results of testing would reveal the fact that the accused was more or less intoxicated. It would be inconclusive if he were not the only sole, drunk accused found at the crime scene. But in the circumstances of that case, this result communicated a fact of guilt. This reasoning applies squarely to voice sampling, since testing blood for chemical traces and comparison of voices are both exercises in detection. However, the strongest argument in favour of compelling voice sampling also dates back to the same year when *Schmerber* was decided.

The Supreme Court of California, in *People v. Ellis* (“*Ellis*”),⁶⁴ held that there existed a clear distinction between testimonial evidence and a voice sample. It stated that the accused is simply compelled to engage in physiological processes to produce articulate sounds. It also stated that independent identification testimony does not probe the verity of the words uttered for sampling. It further grounded its reasoning on the assertion that it is completely non-invasive since this exercise does not force the accused into disclosing uncommunicated thoughts. It concluded by stating that unlike private documents (alluding to handwriting specimens), voice happens to be under constant public scrutiny, already.⁶⁵

The majority’s logic in these cases was the one that was seen in Indian decisions permitting voice sampling. The underlying premise of these Indian judgments assailed the testimonial nature of voice sampling. Irrespective of the right to privacy finding salience in the Constitution of India, both cases pre-dating and post-dating this affirmation seem to rely on the fact that voice is objectively physical because of its constant availability in the public domain. But this logic has found a very strong counter in the U.S. jurisprudence itself, albeit not specifically for voice identification. When a physical characteristic like handwriting or voiceprint is a matter of public knowledge, the overwhelming urge is

⁶⁴*People v. Ellis* 65 Cal.2d 529 (“*Ellis*”).

⁶⁵*Ellis* 536.

to classify it as purely physical and non-testimonial.⁶⁶ If it is not testimonial, the accused cannot possibly be incriminating herself.

Interestingly, the California Supreme Court thwarted this reasoning from a right to privacy perspective. In *People v. Graves* (“**Graves**”),⁶⁷ it reasoned that pre-existing handwriting samples of the accused cannot be forcefully culled out of her since they strictly belong to her private domain. Therefore, it would be illogical and paradoxical to compel her to produce a sample strictly for the court or the police.⁶⁸ Hence, when either the court or the police demands a voice sample, it is not asking the accused to submit something public, but rather *reproduce* something private in the public domain. This reasoning carved out for handwriting samples applies equally to the voice prints of an accused. Apart from pre-empting the argument that sampling shall be deemed a public attribute and not testimonial, the Court inadvertently highlighted a technical nuance involved. Unlike fingerprints or DNA which are private but are at no stage created with an individual’s efforts, (i) spoken words and written texts involve the coordination between mental faculty and physical attributes to *create* a print that (ii) may vary from the last time it was publicly exposed. This case is to be read with a U.S. Court ruling in *Fisher v. United States* (“**Fisher**”), which held that the production of a public document, a copy of which is already possessed by the State, is a separate and independent *testimonial act*.⁶⁹

Despite this logically sound reasoning, the American jurisprudence has not adopted it in voice identification cases. In *State v. Hubanks*,⁷⁰ the Court of Appeals of Wisconsin relied on obiter in another U.S. Supreme Court case⁷¹ for deciding a case dealing with voice identification through an exemplar. It stated that as long as the accused

⁶⁶See *United States v. Dionisio* (1973) 410 U.S. 1 (“*Dionisio*”).

⁶⁷64 Cal.2d 208.

⁶⁸*ibid* [215]-[216].

⁶⁹425 U.S. 391 (1976).

⁷⁰*State v. Hubanks* (1992) 173 Wis. 2d 1 (“*Hubanks*”).

⁷¹*Pennsylvania v. Muniz* (1990) 496 U.S. 582.

is not compelled to reveal his factual knowledge or personal beliefs, reciting an exemplar would not be self-incrimination.⁷² The Court reasoned that compelling recitation of written text does not reveal the contents of the accused's mind. In *United States v. Dionisio*,⁷³ the U.S. Supreme Court decided that an individual cannot reasonably expect witnesses or police to not be familiar with her voice. It stated that a wall of privacy cannot be constructed around an attribute that is otherwise publicly exposed.⁷⁴ However, as Section III revealed the fallacy involved herein, this 1973 pronouncement does not take into account that each voiceprint by the same individual could vary in intonation and acoustics, having a major impact on comparative tests. This variability applies to each time that print is exposed to the public. It is important to note that the United States has seen at least seventeen proven wrongful legal indictments based on evidence premised in voice identification.⁷⁵

B. Australia

The Australian jurisprudence has had its own set of issues with voice identification. Mostly, in controlling the admissibility of such identifications, it treated them as non-testimonial. The most significant case law on this matter is *R v. Smith* (“*Smith*”) since it tried to impose maximum limitations of its admissibility and⁷⁶ came up with the most unique proposition on the subject. The Supreme Court of New South Wales laid down that the voice related to a criminal encounter should have had such singular distinctiveness under those circumstances, that it's equally recognisable to a layman witness as it would be to someone familiar with the suspect's voice. Therefore, the indelible aural impression on the witness, should be equal to that of a by-passer to the

⁷²*Hubanks* (n 71) 222-223.

⁷³*Dionisio* (n 66).

⁷⁴*Dionisio* (n 66) 15; See *Katz v United States* (1967) 389 U.S. 347.

⁷⁵*Sherrin* (n 45) 3, 43-44.

⁷⁶*R v Smith* (1986) 7 NSWLR 444 (“*Smith*”).

suspect. The standard is unique for only accepting only those characteristics of an accused's voice that are known by the society. Shaker attributes of one's voice, such as rare exclamatory sounds, become inadmissible evidence. It does, however, challenge the very premise of *Graves*. The public-privacy divide over the attribute ends by this testing mechanism.

Later, in *R v. Brownlowe*,⁷⁷ the New South Wales Court of Criminal Appeal reversed the lower court's action of admitting the voice comparison claim, stating that corroborative evidence was presented to the jury as substantive evidence. Hence, the only qualification required then is that it be used for corroborative purposes. In deciding so, the Court emphasised that recognition of voice by a direct witness in itself does not mean *identification* by a trier of fact. The Court, therefore, distinguished between eyewitness testimony and earwitness testimony.

The standard adopted in *Smith* was however diluted in *R v. Brotherton*.⁷⁸ The Court held that sharpness of distinctiveness ought to be done away within the circumstances of the case since it was premised on a sexual crime and the witness happened to be the victim herself. The Court, therefore, presumed that the indelible mental impression on her mind was overwhelming. The accused, by speaking before her, supplied sufficient evidence for conviction. It accorded earwitness evidence the same treatment as direct eyewitness evidence. Arguably, it is in such circumstances that voice samples may be justifiably exempted from laws such as Article 20(3). While the Court, in this case, restricted itself to a digression, courts outside the legal jurisdiction of New South Wales outright rejected *Smith*.⁷⁹ The

⁷⁷*R v Brownlowe* (1986) 7 NSWLR 461.

⁷⁸*R v Brotherton* (1992) 29 NSWLR 95.

⁷⁹Gary Edmond, Kristy A. Martire and Mehera San Roque, 'Issues with ('Expert') Voice Comparison Evidence' (2011) 35(1) Melbourne University Law Review <https://law.unimelb.edu.au/__data/assets/pdf_file/0005/1703516/35_1_2.pdf> accessed 25 November 2020.

Supreme Court of Victoria in *R v. Hentschel*,⁸⁰ partially in parallel with *Ritesh Sinha* and *Sudhir Chaudhary*, held that there existed no legal provision which excluded voice sampling/identification on grounds of sharp distinctiveness or prior familiarity. This position was cemented in two more decisions, namely, *R v. Callaghan*⁸¹ and *R v. Harris*.⁸² The New South Wales courts have resigned themselves from the standard⁸³ after a comprehensive statute (with no mention of voice sampling/identification) on evidence was adopted in 1995.⁸⁴

C. Canada

The Canadian courts, just like the Australian ones, have dealt with the admissibility of such evidence but have had the same disturbing willingness to admit those with incriminatory potential. For instance, one Canadian court explained as to what constitutes the foundation for laying voice comparisons as admissible evidence. It stated that the witness attempting to identify the voice must have had more than a fleeting exposure to the suspect's voice and that too completely independent of the criminal encounter forming the basis of the trial.⁸⁵

But except for these cases, the jurisprudence seems to have grappled with cases relying on voice identification and have even convicted the accused by placing facile reliance on it. In *R v. Savoy*,⁸⁶ the voice identification in the opinion of the witness was rejected since the exposure to the suspect's utterances did not even exceed thirty seconds in duration. However, the British Columbia Court of Appeal, in *R v. Aulakh*,⁸⁷ convicted an accused when a witness claimed to identify him.

⁸⁰*R v Hentschel* (1988) VicRp 46.

⁸¹*R v Callaghan* (2001) VSCA 209.

⁸²*R v Harris* (1990) VicRp 28.

⁸³ See *Li v The Queen* (2003) NSWCCA 290; See also *R v. Adler*, (2000) NSWCCA 357.

⁸⁴Edmond (n 80) 61; Evidence Act, 1995, New South Wales.

⁸⁵*R v Portillo* (W.) (2003), 174 O.A.C. 226 (CA).

⁸⁶*R v Savoy* (2000) B.C.S.C. 296.

⁸⁷*R v Aulakh* (2012) BCCA 340.

During an incident of sexual assault, the suspect had repeated a single utterance thrice, which the witness was familiarised with due to an encounter the preceding evening. However, the facts of the case had already suggested that the accused had an exclusive opportunity to commit the crime and that this identification was forcefully corroborative. Further, in two other cases, the conviction at one tier of the system based on voice evidence was found to be wrongful.⁸⁸ One of these cases dealt with the cognitive bias of the victim, where she claimed she recognised a robber as a prior acquaintance. While the perpetrator was wearing a balaclava, the witness claimed recognition from his voice during a conversation between him and his accomplice. As was later found out, this was not a case of voice identification, but cognitive/expectation bias, since the actual robber had disclosed his financial situation during the conversation in question. The prior acquaintance of the witness was in the exact financial situation, which affected her judgment in assessing the voice.⁸⁹

There have been pronouncements from Canadian courts to proceed in earwitness cases with the greatest caution, but evidently for reliability or admissibility concerns.⁹⁰ In one case, however, unlike the Indian Supreme Court in *Ritesh Sinha*, a Canadian court rightly undermined the reliability of telephonic voices, assuming a heavy loss of acoustic data.⁹¹ It would have been acceptable to it if only the accused had been heard over the telephonic medium before the criminal encounter (familiarity over the same medium).⁹²

However, while probing and placing a few safeguards on voice-related evidence, the Canadian jurisprudence does not analyse whether such evidence even though admissible, makes submission of samples by the accused self-incriminatory. Demonstrably, the courts are inclined to

⁸⁸Sherrin (n 46) 3.

⁸⁹*R v Webber* (2003) SKPC 145 (CanLII).

⁹⁰*R v. Dodd* (2015) ONCA 286.

⁹¹*R v Garofalo* (1998) VSCA 145.

⁹²Sherrin (n 45) 11.

believe that a voice match may determine consciousness of guilt. But they did not examine the issues of self-incrimination or privacy intrusion. The inference emerging from these cases is that once the safe pre-admission criteria are satisfied, the voice identification (like any other ‘physical attribute’) will be used and not barred by the legal interpretation surrounding Section 13⁹³ of Canada’s Charter of Rights and Freedoms (dealing with self-incrimination). On the contrary, the Law Reform Commission of Canada left this to the jury on a case-to-case basis, after discussing the law on *self-incrimination*.⁹⁴

One notable mention in this string of cases would be *P.G. and J.H. v. the United Kingdom* (“**PG and JH**”)⁹⁵ which was eventually settled by the European Court of Human Rights and not strictly a common law case. Unfortunately, there is a significant dearth of cases dealing with the testimonial nature of voice sample submissions in English jurisprudence. This case is singularly notable, and relevant for the discussion herein, for its factual matrix. The police in this case had used secretly taped conversations for proving identification before the Court. The concerned English court held that this was out of the purview of ‘knowledge communication’, and hence, evades the bar of self-incrimination. In the appeal, the European Court held that the furtive collection of voice samples by the Police was legal; however, their non-disclosure of retaining this *personal* data violated the framework of privacy. Hence, the European Court, in a way, held that the personal information extracted from the accused even in the absence of consent would not be incriminatory.

It emerges from this analysis that common law has only concerned itself with reliability and admissibility of voice identification. A few

⁹³Charter of Rights and Freedoms, s 13, Part I of the Constitution Act, 1982.

⁹⁴Law Reform Commission of Canada, *Investigative Tests* (1984) Law Reform Commission of Canada Working Paper 34/1984 <<https://www.ncjrs.gov/pdffiles1/Digitization/94235NCJRS.pdf>> accessed 29 November 2020.

⁹⁵*P.G. and J.H. v the United Kingdom* 44787/98 (ECHR).

courts of all the three most engaging jurisdictions did attempt to factor in the nuances associated with such evidence as discussed in Section III, but only to the extent of admissibility. The placid assumption is that voice samples are purely physical, constant, non-incriminatory, and sometimes, even non-testimonial in nature. The courts that understood the frailties involved, such as in *Graves* or *Smith*, were neglected by their respective domestic counterparts.

It might seem evident that Indian courts, then, do not differ in their position from the rest of the common law world. However, this would be a fallacious conclusion to reach. This is because unlike the other jurisdictions, there exists a sufficient foundation on self-incrimination, which bars the position taken by the Indian courts permitting voice sampling, and which *Ritesh Sinha* seems to have callously ignored.

V. HOW ARTICLES 20(3) AND 21 DENATURE THE CONSTITUTIONALITY OF VOICE SAMPLING/ IDENTIFICATION

The Supreme Court of India has, through a string of cases, widened the concept of self-incrimination and its elements. The affirmation of privacy as a fundamental right read with the more or less expansive interpretation of Article 20(3) of the Constitution of India, would indicate precisely why *Ritesh Sinha* lacks presumptive legitimacy. Furthermore, the collection of voice samples, either recorded or identified by recitation before a Magistrate is self-incriminatory. This is simply because, *firstly*, Section III of this paper indicates that the voice of an accused comes within the purview of *Kathi Kalu Oghad*. *Secondly* and cumulatively, the criterion for qualifying as self-incriminatory evidence as laid down in *Selvi* cements this assertion. To assert the argument underlying the second proposition, however, *Selvi*

has to be read in light of some of the common law decisions discussed in Section IV.

The eleven-Judge Bench decision in *Kathi Kalu Oghad* came about as an expansion of prior law, even though it adhered to a supposed mental-physical divide espoused by prior cases. The determining factor for whether the evidence culled out from the accused is hit by the bar of Article 20(3), is intrinsically linked with the very nature of the evidence in question. The Supreme Court has vacillated between volition on part of the accused in communicating guilt and non-alterability of the attribute in question as to the determinant for self-incrimination.

In *M.P. Sharma v. Satish Chandra* (“*Satish Chandra*”),⁹⁶ an accused was held to be a witness for Article 20(3) whenever there existed a positive volitional act on her part to furnish evidence. Akin to the logic underpinning *PG and JH*, the Supreme Court held that a search warrant allows the police to elicit cooperation from the accused. Any evidence discovered in that process is not compelling the accused to testify, to begin with. Cooperation requires assent to part with knowledge that shan’t incriminate. The Court believed that compelled production of documents lacks this precise element. Hence, the case was expansive insofar as it increased the breadth of ‘testimony’ to include documents. The interpretation of ‘compelled’ remained unaltered and archaic. This is the same reasoning that was later adopted in *Bothireddy*.

The Court in *Kathi Kalu Oghad* attempted to remedy this. It interpreted testimonial communication to be any communicative act that involved imparting knowledge of a relevant fact. This communication, however, had to come through an immutable attribute of the accused. It is on these grounds that fingerprints and handwriting samples do not qualify as testimonial, according to this decision.⁹⁷ Therefore, the ‘positive volitional standard’ gave way to the ‘immutability of the attribute’

⁹⁶*M.P. Sharma v Satish Chandra* (1954) SCR 1077 (*‘Satish Chandra’*).

⁹⁷*Kathi Kalu Oghad* (n 24) 7-8.

standard to determine whether the accused is ‘being a witness’. These immutable and physical samples became salient only upon a successful match being made, not at the stage when the accused submitted them. Another important observation was that this interpretation of Article 20(3) came as a consequence of the framework provided by the Evidence Act, CrPC and Prisoners Acts.⁹⁸

In *Selvi*, the Supreme Court was tasked with analysing narco-analysis (more popularly known as an inhibition-lowering truth serum test), polygraph test, and B.E.A.P. within the above-cited self-incriminatory framework. The Court had first rejected the argument by the State that the above are covered by Section 53, CrPC.⁹⁹ It stated that the provision dealt with bodily substances as opposed to testimonial responses. The Court then stated that the physically immutable characteristics as defined in *Kathi Kalu Oghad* are distinguishable from the attributes targeted by these tests. This is primarily because the accused is compelled to convey personal knowledge, irrespective of volition.¹⁰⁰ In the same breath, it also stated that the accused is deprived of her right to choose between remaining silent or offering factual information.¹⁰¹ After referring to the expansion of Article 21 in *Maneka Gandhi v. Union of India*,¹⁰² it held that in the face of criminal charges, the personal autonomy in speaking and remaining silent becomes supreme.¹⁰³ It also distinguished illegally and unconstitutionally procured evidence, stating that Article 20(3) bar applies to the latter category.¹⁰⁴

It is also pertinent to note that the part dealing with privacy in *Selvi* was later cemented in *K.S. Puttaswamy & Anr. v. Union of India & Anr.*¹⁰⁵

⁹⁸*Satish Chandra* (n 96) 5-6.

⁹⁹*Selvi* (n 36) 78-81.

¹⁰⁰*Selvi* (n 36) 84-85.

¹⁰¹*Selvi* (n 36).

¹⁰²*Maneka Gandhi v Union of India* (1978) 1 SCC 248.

¹⁰³*Selvi* (n 36) 95.

¹⁰⁴*Selvi* (n 36) 100-101.

¹⁰⁵*K.S. Puttaswamy & Anr. v. Union of India & Anr.* (2017) 10 SCC 1.

It held that all citizens have the right to control the dispensation of personal information. Hence, the electability between silence and information may be exercised to safeguard privacy, and not merely to avoid self-incrimination. This would then include an individual's disclosure of any temporary speech impediment or pattern, for instance, which may or may not be public otherwise.

The main argument, however, is that even without the decision in *Puttuswamy*, the self-incrimination bar would have applied. The interpretation of Article 20(3) was envisaged to run somewhat parallel to its source, the U.S. Fifth Amendment.¹⁰⁶ *Graves* and *Fisher* complete the gaps that appear in the Indian jurisprudence concerning voice sampled evidence. First, applying the rationale of these decisions, the act or consent to submit a sample, or to subject oneself for identification before a witness by the act of speaking is in itself a testimonial communication. Chief Justice Warren's dissent in *Schmerber* also covers voice as necessarily communicative. This is easily demonstrated using an example, wherein the speaker in a crime scene has an occasional speech impediment. Similar to exposing the effect of intoxication, the speaker, in this case, would disclose the extent of her disability, being extremely communicative by Chief Justice Warren's standards. Second, and in line with this reasoning, communication, as opposed to remaining silent, involves imparting information according to the court in *Selvi*.¹⁰⁷

It is difficult to state how voice-print fails to qualify as information for these purposes. Additionally, it must be noted that as discussed in Section III of this paper, voice-print qualifies as testimonial communication even by the standards of *Kathi Kalu Oghad*, since it is a mutable attribute. This mutability assumes greater significance in light of the mutability principle being expanded in *Nandini Satpathy v.*

¹⁰⁶B. Shiva Rao, *The Framing of India's Constitution*, vol 2 (1st edn, N.M. Tripathi Pvt. Ltd. 1966) 147, 149.

¹⁰⁷*Selvi* (n 36) 84-85.

P.L. Dani.¹⁰⁸ Therein, the Court held that mutability could be induced by various means, including psychic pressure or a coercive atmosphere.¹⁰⁹ As discussed in Section III, the voice-print then is a susceptible attribute, which could vary in response to a court's atmosphere, which is not at all a factor for the specified attributes under Section 311A, CrPC. Another aspect of *Kathi Kalu Oghad* is that the immutable physical attribute becomes testimonial in nature only when there is a successful match. The match in cases of these immutable characteristics such as saliva or blood samples is technical analysis. That is, the examination of specimens by themselves do not make the guilt of the accused any probable. Only the results may. Other than the form of a sample, voice identification by layman witnesses by re-hearing the accused in a court cannot possibly fall in this category. However, both *Ritesh Sinha* and *Sudhir Chaudhary* did not deal with court identification but submission of samples for subsequent forensic comparisons. Voice-spectrography does not suffer from this limitation at least.

However, coming strictly to the circumstances in those cases, a taped conversation as a sample is still barred under the repeatedly interpreted Article 20(3). It is hard to suggest that speaking is not a direct consequence of mental processes. Additionally, if the voice of a suspect is a relevant fact for the criminal proceeding, compelling her to speak would fall directly within the ambit of *Selvi*. The Court was unequivocal in stating that:

*'...since the test subject's physiological responses are directly correlated to mental faculties...personal knowledge is conveyed in respect of a relevant fact.'*¹¹⁰

This is precisely the underlying premise of *Graves*, which held that any product of coordination between mental and physical faculties is

¹⁰⁸*Nandini Satpathy v. P.L. Dani*. (1978) 2 SCC 424.

¹⁰⁹*ibid* [30].

¹¹⁰*Selvi* (n 36) (84).

deemed testimonial. This is also the direct repudiation of the ratio in *Ellis*, wherein it was a combination of physiological factors *only*.

All that is required by this reasonable standard is a verbal response to a physical stimulus. This significantly expands the definition of 'compelled'. At the same time, the Court expanded the breadth of 'testimony'. In *Kathi Kalu Oghad*, narco-analysis was the only neuro-scientific test qualifying under its definition. *Selvi* brought B.E.A.P. and polygraph tests at par with narco-analysis.

As regards extraction of voice evidence, *Yusufalli Esmail Nagree v. State of Maharashtra* ("*Nagree*")¹¹¹ is a more direct authority. Herein, the Court held that since the police tape-recorded the accused's conversation in secret, the question of compulsion never arose. The accused was speaking out of his own volition and the surveillance was unknown to him. In stating this, the Court deviated from the otherwise similar *PG and JH*. It would have applied Article 20(3), but for the 'voluntariness' on part of the accused to speak. The observations of *Selvi* become relevant once again in this light. The Court laid down that at the stage of choosing between speaking and remaining silent, the permission to admit (or compel) an involuntary statement merely because it might be inculpatory, would render Article 20(3) otiose.¹¹² It held that it is for a suspect or an accused to factor in the probability of the information later turning out to be inculpatory, and choosing to remain silent. It is this point that is cemented in the forms of Article 20(3) and Section 313(3) CrPC (limitations on the power of the Magistrate to question the silence of the accused). It is these principles that are assailed when a Magistrate gets the power to compel an accused to submit voice samples upon a direction to do so. It is also extremely significant to note that the decision in *Nagree* and *Satish*

¹¹¹*Yusufalli Esmail Nagree v. State of Maharashtra* AIR 1968 SC 147 ('*Nagree*').

¹¹²*Selvi* (n 36) 107.

Chandra could not have benefitted from the decision in *Puttuswamy* due to chronological disadvantage.

Another singular aspect of *Selvi* strikes at the heart of the powers to extract voice samples, as currently bestowed on Judicial Magistrates. It is that Article 20(3) would apply if the result of the information provided is likely to furnish a link in the chain of evidence, using Sections 162, 163, and 164 of the CrPC as an illustration.¹¹³ This would include material relied upon for both corroboration and/or identification. The Indian cases that permit voice-spectrography, incorrectly hold it to be non-testimonial because it is merely corroborative. The entire jurisprudence, with minor blanks, has erected a framework which is likely to land voice sample in the domain of self-incrimination. Lastly, the inclusion of voice exemplars/samples from an accused is in harmony with the legislative intent behind Article 20(3). This inference, interestingly, comes from an erroneous reading of the Constituent Assembly Debates by the Bombay High Court.¹¹⁴ In attempting to construe the intention behind Article 20(3), which was Article 14(2) in the Draft Constitution as it was then, it narrowed down to two possible interpretations. It stated that given that compelled testimony was already covered by CrPC and Evidence Act at the time of the debates, Article 20(3) would have to go against either a) the compulsion of an accused to submit/consent to an extractive test or b) or the implicative consequences of that submission. It then proceeds to state that the Assembly had duly noted that similar provisions existed in those two legislations, and the intent was to provide constitutional protection from any further legislative tinkering. Therefore, the Court stated, the framers did not intend to add to the pre-existing provisions. It endorsed the exposition carried by (b) as the correct interpretation.¹¹⁵ However, it is submitted that those observations were wrong. The

¹¹³*Selvi* (n 36) 65.

¹¹⁴*Ramchandra Ram Reddy v State of Maharashtra* (2004) BOMHC Criminal Writ Petition No. 1924 of 2003.

¹¹⁵*ibid* [3]-[5].

intent to limit legislative powers on pre-existing procedural safeguards were discussed exclusively for Draft Article 15-A (present Article 22), and not for the draft Article 20(3). Therefore, by not stating this to be the intent in its limited discussions on Article 20(3), the framers very much intended to expand the then procedural safeguards on self-implicative statements by the accused. This, unfailingly, denotes a significant implication. The intent of Article 20(3) was captured by point (a) of the court's formulation: the act of submission/consent of the accused to an incriminatory, extractive test. This interpretation is also congruous with the synthesised view emerging from the cases discussed above. This interpretation also contradicts the line of reasoning in cases such as *Bothireddy* by deeming the act of consent to be testimonial. Reading Section III and Section IV along with the development of law on the subject in India, is clear. A compelled voice test that dispenses private information about voice prints barred by Article 20(3).

VI. CONCLUSION

The Indian line of cases, both permitting and barring voice identifications or comparisons as evidence, have much in common with those decided in jurisdictions outside. The weakness is that the judicial prevarication in testing such evidence is limited to the stage of admission. This essentially emanates due to their superficial treatment of voice as a piece of evidence. By limiting their analyses to the stage of comparisons, the courts seem to have completely ignored that the submission of voiceprints or exposing oneself to a voice-based identification in court imparts more private information as compared to the supposed equivalent class of evidence.

The problem with the decision of the Indian cases, especially with *Ritesh Sinha*, is that the nuances of voice-spectrography are not even discussed. It does not lay down *Smith*-like pre-conditions for

admissibility and holds Section 25, Evidence Act, to be the sole qualifier holding the field. It does not justify the power given specifically for spectrographic examinations. With a deeper analysis of the issue in light of pre-existing jurisprudence at the time of the judgment, the decision might have been different. There exist minor gaps regarding voice sample submission in the domestic jurisprudence. All of those are easily remedied by three factors espoused in Sections III to V. The empirical data on the technical nature of a voice ‘print’ overwhelmingly suggests it to be incriminatory. This is vindicated by a limited foreign jurisprudence treating voice samples as a consent-based exercise in the privacy. Lastly, the Indian Constitutional intent behind the law on self-incrimination consolidates the bar on compelled voice sampling, along with its continually expanding ambit. As a consequence, voice-sampling leading to incrimination is rendered unconstitutional through the application of Article 20(3).¹¹⁶

Indian jurisprudence has a stronger foundation for giving a definite shape to this amorphous bar. *Sudhir Chaudhary* and *Ritesh Sinha* are departures from the correct law. The exercise of extracting vocal cord information ought to be tested against the bar of self-incrimination, instead of solely examining their admissibility.

As the endnote of this analysis, please consider this. This flawed, frail and novel evidence is being relied upon since 2019 which may have the most significant impact on trials. From late 2019 to February, 2021, the prosecution has cited pendency in/results of this evidentiary test to further its case in trials of offences under various laws and circumstances: pre-trial bail,¹¹⁷ offences under the Indian Penal Code,

¹¹⁶*Selvi* (n 36) 100-101.

¹¹⁷*Sharjeel Imam v State of NCT of Delhi* (2020) SCC OnLine Del 734; *Munnawar v State of M.P.* (2021) SCC OnLine MP 152.

1860,¹¹⁸ the Prevention of Corruption Act, 1988,¹¹⁹ Scheduled Caste and Scheduled Tribe (Prevention of Atrocities) Act, 1989,¹²⁰ and the Narcotic Drugs and Psychotropic Substances Act, 1985.¹²¹ The precipitous fall in an accused's pre-trial security from procedural harshness may now only be gauged over time unless this is opportunely ruled as self-incriminatory and violative of her privacy.

¹¹⁸*Kumaresan v State*, Rep. by Inspector of Police (2019) SCC OnLine Mad 8601.

¹¹⁹*Vinod Mittal v State of H.P.* (2020) SCC OnLine HP 764; *Daisy M.P. v State of Kerala & Anr.* (2020) SCC OnLine Ker 1694; *Devidas v State of Maharashtra* (2020) SCC OnLine Bom 1041; *P.C. Mishra v C.B.I.* (2021) SCC OnLine Del 82.

¹²⁰*State Rep. by Assistant Commissioner of Police v R.S. Bharathi & Anr.* (2020) SCC OnLine Mad 1209.

¹²¹*Pawan Kumar v State of H.P.* (2020) SCC OnLine HP 1893.