

# **SPLASHES OF ADM JABALPUR IN VIJAY MADANLAL V. UOI AND ANALYSIS OF THE JUDGMENT IN THE LIGHT OF THE MODELS OF THE CRIMINAL PROCESS**

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## **INTRODUCTION**

This article aims to trace the Constitutional rights of the accused in terms of personal liberty by showing a parallel between *ADM Jabalpur vs. Shivkant Shukla and Vijay Madanlal Choudhary & Ors. vs. Union of India & Ors.* It discusses the Criminal Law Jurisprudence in terms of both Crime Control Model and Due Process Model to trace the legal developments of the fundamental protection against self-incrimination as envisioned under the Indian Constitution with the help of landmark judgements such as *M.P Sharma*, *Selvi*, *Kathi Kalu Oghad*, *R.C Cooper*, *Nandini Satpathy*, *K.S Puttaswamy*. The article discusses the unbridled power of the Enforcement Directorate in leading the lamb to the slaughter.

## **BACKGROUND**

“O’Cracy, D.E.M., beloved husband of T. Ruth, loving father of L.I Bertie, brother of Faith, Hope, Justice expired on June 26.”<sup>1</sup>This obituary notice was considered to be an act of defiance against the Emergency imposed on the nation. The Maintenance of Internal Security Act, 1971 was amended on June 29 1975, firstly, to bar courts from applying the Principle of Natural Justice in detention cases whereby an individual could be detained without disclosing to them the grounds of detention. Secondly, an ordinance of July 15 1975, allowed for the attachment of the property of anyone who had absconded. Fast forward to 2022, the Enforcement Directorate (“ED”) under The Prevention of Money-Laundering Act, 2002 (“PMLA”) do not supply the Enforcement Case Information Report (“ECIR”) to the accused which is akin to the First Information Report violating the basic tenets of the criminal justice system and the rights enshrined under Article 14, 20 and 21 of the Constitution. The ECIR contains the grounds of arrest and details of the offence without which the accused cannot

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<sup>1</sup>Obituary, *The Times of India*, June 28, 1975.

even defend him at the stage of bail. The revival of twin bail conditions under Sec 45<sup>2</sup> further prolong the agony. The ED exercises unbridled power of arrest search and seizure under the PMLA which was upheld by the Apex Court citing the seriousness of the offences committed under PMLA giving way to detentions without remedy.

After the Emergency was clamped, writ petitions were filed against the illegal detentions giving way to the famous ruling of *ADM Jabalpur V Shivkant Shukla*, famously known as the Habeas Corpus case. Justice Khanna seek clarification from Niren De “Would there be any remedy if a police officer because of personal enmity killed another man?” The answer of Mr De was unequivocal: “There would be no judicial remedy in such a case as long as emergency lasts”, and he added, “It may shock your conscience, it shocks mine, but consistently with my submissions, no proceedings can be taken in a court of law on that score.”<sup>3</sup> History repeats itself quickly, in this case, way quicker. The Apex Court in *Vijay Madanlal Choudhary* not only upheld the malefic state power but also grant the power of Wolf to ED and what happens when the wolf hunts? Well, the prey has preyed.

### **DECODING ARTICLE 20(3): THE JOURNEY FROM CRIME CONTROL MODEL TO THE DUE PROCESS MODEL**

‘Repression of criminal conduct’ is the ultimate goal of the Crime Control Model and so primacy is given to the criminal process which suspects, determines guilt and secures appropriate deposition of persons convicted of a crime. The Due Process Model, on the other hand, place strong emphasis on human dignity and individual rights as being non-negotiable in the criminal process.<sup>4</sup>

In *Vijay Madanlal Choudhary & Ors. V. Union of India & Ors.*<sup>5</sup>, the validity of Section 50 of the 2002 Act<sup>6</sup> was challenged as being violative of Article 20(3) and 21 of the Constitution. Sec 50 allows the authorised officer to summon any person and record his statement during the course of the investigation. Sec 50 also mandates that the person should disclose true and correct facts known to his personal knowledge in connection with the subject matter of

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<sup>2</sup>The Prevention of Money Laundering Act, 2002 (Act 15 of 2003).

<sup>3</sup>H.R. Khanna, *neither roses nor thorns* 85 (EBC, Lucknow, 1987).

<sup>4</sup>Gautam Bhatia, *The Transformative Constitution* 303(Harper Collins, Noida, 2019).

<sup>5</sup>2022 LiveLaw (SC) 633.

<sup>6</sup>The Prevention of Money Laundering Act, 2002 (Act 15 of 2003).

investigation (vide sec 50(3) of the 2002 Act). The person is also obliged to sign the statement so given with the threat of being punished for the falsity or incorrectness thereof in terms of Section 63 of the 2002 Act. The director is also empowered to exercise the same powers as are vested in a civil court under the Code of Civil Procedure while trying a suit in respect of matters specified in sub-section (1). Vide Section 50(4) the proceeding under the 2002 Act is considered to be a judicial proceeding within the meaning of sec 193 and 228 of the Indian Penal Code, 1860.<sup>7</sup>

The Court while answering the above challenge observed that Article 20(3) would come into play only when the person so summoned is an 'accused' of an offence at the relevant time. At the stage of 'recording of a statement' for the purpose of inquiring into the relevant facts in connection with the property being proceeds of crime, according to the Court, not an investigation for prosecution as such; and in any case there would be no formal accusation against the person summoned.<sup>8</sup>

### **DECODING "WITNESS" VIS-À-VIS ARTICLE 20(3) OF THE CONSTITUTION OF INDIA**

In *M.P Sharma v. Satish Chandra*<sup>9</sup> the court answered whether the phrase 'to be a witness against himself' also means self-incrimination through documentary evidence? Court defined "witness" as a person who furnished evidence (both oral and documentary), performing a testimonial act of some kind (beyond the courtroom, also includes police interrogations) within the meaning of Art 20(3)<sup>10</sup>. Vide Sec 50 of the 2002 Act the person summoned is required to produce the documents required which makes him a witness against himself and acts as self-incrimination. The Court in *M.P Sharma* also answered whether a search and seizure would amount to compelling a person to be a witness against himself? Adopting the Crime control model the court answered this in negative because in search and seizure the documents were recovered by the police and there was no testimonial act.

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<sup>7</sup>The Prevention of Money Laundering Act, 2002 (Act 15 of 2003), s.50.

<sup>8</sup>*Vijay Madanlal Choudhary & Ors. v. Union of India & Ors.* 2022 LiveLaw (SC) 633.

<sup>9</sup>1954 SCR 1077.

<sup>10</sup>The Constitution of India.

The broad definition of 'witness' was later challenged in *State of Bombay v. Kathi Kalu Oghad*<sup>11</sup> where the 11 judge Bench held that to be a witness meant something narrower. It means to communicate knowledge of a relevant fact and cannot include merely the mechanical process of producing documents in court. To be 'witness' only included a conscious testimonial or communicative act. With the advancement in technology and in interrogation techniques the Apex court was called upon to re-examine the meaning of Article 20(3) of the Constitution in *Selvi v. State of Karnataka*<sup>12</sup>. The court applied the Due process model by reading Article 20(3) in the language of choice, a choice whether or not to convey personal information. Article 20(3) does not exist in isolation from Article 21 of the Indian Constitution and rights in Part III are interdependent on each other.<sup>13</sup> 'Right to privacy' is one aspect of personal liberty and there is a distinction between privacy in a physical sense and privacy of one's mental processes. The importance of personal autonomy must be recognised as the choice between remaining silent and speaking. The court in *Selvi* drew a distinction between physical and mental privacy. Article 20(3), therefore, is illuminated by the constellation of freedoms that surround it, all of which point to due process being at the heart of the guarantee against self-incrimination.<sup>14</sup>

The Court in *Vijay Madanlal* narrowly interpreted Sec 50 of the 2002 Act by limiting Article 20(3) of the constitution to a person summoned as 'accused'. To begin with, there is no way for the person summoned to know whether he is summoned in the capacity of an accused or a witness. In the scheme of the Code of Criminal Procedure a witness is summoned under section 160 or an accused/suspect is summoned under section 41A. In either of the cases, statements of both are recorded under section 161 and they both enjoy the protection under section 162. Moreover, to invoke protection under Article 20(3) of the Constitution it is not necessary to make a formal accusation in the form of FIR/chargesheet/complaint and that protection is available even to a suspect at the time of interrogation.<sup>15</sup> Vide section 50(3) of the 2002 Act the person summoned is bound to state the truth about the subject for which he is examined and to disclose true facts known to his personal knowledge which in a way amounts to 'compulsion' and violates both Article 20(3) and Article 21(mental privacy) of

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<sup>11</sup>AIR 1961 SC.

<sup>12</sup>(2010) 7 SCC 263.

<sup>13</sup>*R.C. Cooper v. Union of India* AIR 1970 SC 564.

<sup>14</sup>Gautam Bhatia, *The Transformative Constitution* 321 (Harper Collins, Noida, 2019).

<sup>15</sup>*Nandini Satpathy v. P.L Dani & Anr.* (1978) 2 SCC 424.

the constitution. The court believes that the statement recorded by the Authorities under section 50 of the 2002 Act will not end in prosecution. In *Selvi*, the word ‘witness’ was linked with testimony and testimony is nothing but imparting personal knowledge which the person summoned under the 2002 Act is bound to state (vide Sec 50(3) of the 2002 Act) and which exist within the mind of the individual giving way to the concept of mental privacy which was later affirmed by a nine-judge bench in Justice *K.S. Puttaswamy v. Union of India*.<sup>16</sup> The court in *Vijay Madanlal* re-adopted the crime control model (which was adopted in *M.P Sharma*) rather than the due process model (in *selvi*) in interpreting Sec 50 of the 2002 Act.

## CONCLUSION

What happens when a person is arrested or detained? His troubles begin then.<sup>17</sup> By bypassing Article 20(3) of the Constitution the authorities exercise wide power over an individual whereas his Constitutional protection of personal liberty has been taken over by the courts by citing the detrimental impact of white-collar crime. The personal liberty and the Constitutional guarantee has forsaken by the Constitutional Court by citing the interest of the state. The Supreme Court accepted the review of the judgement limiting it to just two points i.e. (i) regarding no legal requirement to provide ECIR copy to the accused and (ii) the reversal of the presumption of innocence by calling the object noble<sup>18</sup>. Till the Apex Court grants some relief, We, the people of India, are at the mercy of the arbitrary lawgiver.

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<sup>16</sup>AIR 2017 SC 4161.

<sup>17</sup>Thakur Das Bhargava, Constituent Assembly Debates (September 1949).

<sup>18</sup>*Karti P Chidambaram vs. The Directorate of Enforcement RP(Crl) 219/2022 in TC(Crl) 4/2018.*