

UNFAIR OPERATION PRINCIPLE: CRITIQUING ITS OPEN-ENDED DISSENSION

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ABSTRACT

Indian system of justice although conform to the Due Process Model but in recent times courts have welcomed the illegally obtained evidences (aka Unfair Operation Principle) keeping in mind their catalytic nature which eases the process of concluding judicial proceedings. The admissibility of illegally obtained evidence infringes certain fundamental and legal rights of the accused or the convict. This kind of evidence is unreliable and defies the disciplinary and judicial integrity principles. Certain flaws in the Criminal procedure code of India also devises the room for the evidence to be obtained unlawfully. The courts should disregard such evidence and give importance to the fundamental and legal rights of individuals. Although courts have kept the same in mind and given brilliant judgements at times, but that is limited to only certain acts such as NDPSA. An evidence detrimental to abovementioned rights should never be acknowledged in the courts of law and justice.

Hypothetical 1. A cop Z has been working on a case of opium smuggling. In order to catch the smugglers, he detains two trans people who were under suspicion and strips their blouses forcibly in front of everyone, to find out the opium hidden underneath.

Hypothetical 2. A team of cops has been stalking every movement of the accused to keep a check on his activities. They have installed hidden cameras everywhere around his house and have been following him everywhere. Cops find out about his illegal activities, but they also got recordings of his extremely private stuff.

Hypothetical 3. In order to get the accused to talking, cops threaten him and eventually pulls out a gun and aims it on his head. Out of fear of death the accused gets to talking and confesses.

A lot of past Indian judgements have set the precedent which renders the illegally obtained evidence admissible in the courts of law in India. In the above mentioned hypotheticals, the evidence collected would be admissible in courts since it is serving the purpose of the

investigation¹. In H1 cops didn't just violate the privacy but also brazenly molest those trans people. H2 is again illustrating how cops invaded privacy of the accused. And in H3 cops have flouted the human rights of the accused. Even though these are hypothetical situations but obtaining an evidence illegally will always be violative of someone's rights. That is the whole design of it being called 'illegal'. This paper strives towards scrutinizing the rationale behind the admissibility of illegally obtained evidence and will argue against the same. Furthermore, this paper will demonstrate why the admission of illegally obtained evidence is problematic at macro level.

In multiple judgements where the courts have admitted the evidence, which was obtained illegally, have taken into view the ease at proceedings and decision upon admission of illegally obtained evidence. Judges have felt that illegally obtained evidence such as oral evidence can make the process of justice speedier while also corroborating to the witness's statements.² In *S. Pratap Singh v. The State of Punjab* to confirm the evidence produced by witnesses, an illegally obtained tape recording was admitted in the court. Further in *Yusufalli Esmail Nagree v The State of Maharashtra*³, a tape record made without the appellant being informed of was held to admissible just because it was a mere tape where the dialogue between the two parties happened naturally and not in front of any police officer.

The rationale provided by courts in certain cases is limited to the untroubled functioning and meteoric redressal of the grievances and also uniform scrutiny of evidence in the hierarchy of courts. In *Pooran Mal v Director of Inspection*, court said, "the Indian law of evidence permits relevancy as the only test of admissibility of evidence...and that there is no other law in India that permits exclusion of relevant evidence on the ground that it was illegally obtained."⁴ But can the smooth functioning and ease of the process be equated to the enjoyment of the fundamental rights by the accused? Or just because they are effectuating the objective of the search, they should be relied on? There are several constitutional provisions and principles which outweigh this rationale provided by the courts.

Fundamental Rights and Right to Privacy

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¹ R. M. Malkani vs State Of Maharashtra, 1973 AIR 157, 1973 SCR (2) 417

² Bipin Shantilal Panchal vs State Of Gujarat, 2001

³ Yusufalli Esmail Nagree vs The State Of Maharashtra, 1968 AIR 147, 1967 SCR (3) 720

⁴ Pooran Mal vs Director Of Inspection, 1974 AIR 348, 1974 SCR (2) 704

The utmost indispensable aspect to be taken into consideration is the right to life and right to privacy. Article 21 of the Indian constitution which states right to life has included the purview of right to privacy after the judgement on the case of *Justice K.S. Puttaswamy (Retd) vs Union Of India*⁵. In *R. M. Malkani vs State of Maharashtra*, court upheld the relevance of the evidence even if it is a telephone interception doesn't violate any fundamental rights.⁶ But this case was later overruled by the Puttaswamy judgement. In all the cases adduced above, right to privacy has been violated when the calls or voices were recorded without the knowledge of the accused. Digital privacy in the Indian law has also failed to stand to the challenges that it poses to privacy and has been rigid by surveillance of communication such as telephone tapping and allowing access to digital records of online communications such as emails, weblogs, etc to obtain certain evidence because certain sections of information technology⁷ rule allow accessibility to information by a simple written order by any agency or person lawfully authorized for investigating and protecting cyber security or intelligence activity and hence violating the fundamental right to privacy. breaching this right to privacy will lead to the violation of other fundamental rights too and right against self-incrimination given to an accused would also be presumptuously infringed.

The Reliability Principle

This principle avers that only the reliable evidence should be admitted in courts. So, if a piece of evidence is pertinent but not reliable, it should not be admitted by the courts. As per this principle, evidence procured by improper means like violence or torture are not reliable. For example, a confessional statement of an accused is relevant evidence but if the same has been extracted from the accused by beating or torturing him, it is not reliable as he may have been forced to give such a statement. However, Indian courts has a different stance on this matter where they accept the evidence on the basis of its relevance to the case.⁸ But they fail to scrutinize its reliability which might lead to the overlooking of certain rights of accused while producing a verdict.

The Disciplinary Principle

⁵ Justice K.S. Puttaswamy(Retd) vs Union Of India, 2018

⁶ R. M. Malkani vs State Of Maharashtra, 1973 AIR 157, 1973 SCR (2) 417

⁷ The Information Technology Act, 2000

⁸ Pooran Mal vs Director Of Inspection, 1974 AIR 348, 1974 SCR (2) 704

The principle is more about a guideline to the courts in regard to admission of the illegally obtained evidence. According to the principle, courts must not admit such illegally procured evidence in order to curb malpractices like torture or violence used by police and prosecution to procure evidence like confessional statements, etc. If courts do not admit such evidence, it would discourage the police from resorting to such techniques as it won't be benefitting them anymore. In the Indian scenario, this principle is of noteworthy importance. Indian courts are vested with wide powers when it comes to admitting evidence and if they start admitting only genuinely procured evidence, it would repress such malpractices by police to a great extent.

The Judicial Integrity

This principle goes back and looks at the psychology of courts behind admitting the illegally derived evidence. The admission of such evidence implies that they are endorsing illegal procurement of evidence. It is tremendously necessary that no courts should admit such evidence in order to set a precedent. In the Indian scenario, judgments of higher courts (Supreme Court and High Courts) have the maximal precedential value and are binding on the future verdicts. Hence, setting such a precedent by the higher courts is required to preserve the faith in the justice delivery mechanism as well as making sure that they are upholding the basic rights of the individuals (accused). And since India is a common law country, judicial decisions put affect on the formation of new laws. Welcoming of unlawfully acquired evidence could prove to be problematic if looked at from a larger perspective.

Problems in the procedural law

As per Code of Criminal Procedure, 1973, the state's power of search and seizure of evidence where section 93 and section 100 includes certain safeguards such as presence of witness and requirement of a warrant. However, section 165 and section 51 excludes the requirement of a search warrant being a necessary thing. Section 165 provides that an officer on charge of a police station, or any officer authorized by him to conduct search of the place as long as it is believed that the search would be for the purpose of investigation and a belief that the search warrant cannot be obtained with undue delay. In some cases, police can distort the investigation and conduct the search without the warrant which creates a thin line between a lawful and illegal search and it gets onerous to separate between the two.

Whereas, section 51 allows the search of a person arrested lawfully and the person cannot be admitted to bail and requires any seized items to be written in the search memo. But Police has an unqualified authority to search the person upon arrest till the fulfillment of the conditions. So, there are chances that in cases of warrantless arrest, the search and seizure of the person might not be regular, and the evidence so collected is subject to greater scrutiny by court which can clearly infringe the rights of the accused and then manipulation of the method of search might cause discrepancies leading to an innocent person be held guilty.

Besides some minimal protections there is no additional procedural protection established making the powers of police discretionary and wide.

Tracing the progress of the courts

The dissension on the admissibility have created a room for contrasting views on the same. There has been judgements where courts have not admitted the illegally obtained evidence.

A leading Indian case is *Baldev Singh v. State*⁹ where the issue was that the evidence before the court was in contravention of Sec 50 of Narcotic Drugs and Psychotropic Substances Act¹⁰, whether such evidence is admissible in the court. The Court held that Sec 50 grants procedural safeguards and when a right is created, there are also obligations on the police to follow those procedures. Hence, in this case the evidence was inadmissible. However, the problem was that this judgment was restricted to the NDPS Act. Another case is *Selvi v state of Karnataka*¹¹ the Supreme Court of India declared that three prominent police interrogation techniques narco-analysis, the lie-detector test, and brain-mapping - violated an accused person's right against self-incrimination under Article 20(3), and her right to life and personal liberty under Article 21 of the Constitution¹². Also in another case of *Vinit Kumar v. Central Bureau of Investigation*¹³, court cited the Puttaswamy judgement and upheld the importance of right to privacy by saying "in cases where fundamental rights are infringed, it is not enough for the government cite law and order, and for the Court to engage in an undefined balancing exercise..." in regard to the admissibility of the illegally procured evidence, has laid down a four step test to confirm its immediate requirement and has brilliantly

⁹ Baldev Singh vs State Of Punjab, 1971 CriLJ 234

¹⁰ Narcotic Drugs and Psychotropic Substances Act, 1985

¹¹ Selvi & Ors vs State Of Karnataka, 2010

¹² Bhatia, Gautam, Privacy and the Criminal Process: Selvi v State of Karnataka (April 22, 2018)

¹³ Vinit Kumar vs Central Bureau Of Investigation, 2019

differentiated between public safety and public interest. The court has condemned the illegal methods resorted to by the government while obtaining the evidence in the name of 'public safety'.¹⁴

Along with the case laws, the Law Commission of India in its 94th Report recommended that a new Section 166-A should be inserted in the Indian Evidence Act, 1872 to give power to courts to assess evidence obtained using malpractices and also to give courts the power of discretion while admitting evidence. This is a step towards empowering the courts to not admit illegally obtained evidence.

Although this is an ongoing open-ended debate whether to rely on the illegally obtained evidence, but the fundamental rights of an accused especially the right to privacy can never be weighed equal to the ease of judicial process or speedy trials. With the establishment of privacy as a fundamental right, state cannot under any circumstances, except for in the cases of national emergencies, violate this right of an individual. If looked at the hypotheticals mentioned at the beginning or infact real case scenarios, right to privacy holds paramount importance followed by the right against self-incrimination. An evidence detrimental to these rights should never be acknowledged in the courts of law and justice.

¹⁴ Justice K.S.Puttaswamy(Retd) vs Union Of India, 2018