CHAPTER 4

ADMISSIBILITY OF SCIENTIFIC EVIDENCE
UNDER INDIAN LAWS

4.1 INTRODUCTION

Admissibility of scientific evidence has attracted a serious debate in India especially post Selvi v. State of Karnataka\(^1\) case wherein hon’ble Supreme Court has held that Narco-analysis, Brain-mapping and polygraph tests cannot be conducted without the consent of accused person. Admissibility of scientific evidence involves some important questions relating to basic rights that are available to accused under various provisions of law in India. Major problem in India is that we always look at provisions of law through the view-point of accused and we totally forget the pain, misery and trauma of a victim and victim’s family. There are various provisions if given interpretation keeping in mind at changed scenario would make scientific evidence admissible in court of law without any amendment.

Also, the first principle interpretation is that the words of an enactment should be given their ordinary and natural meaning because whatever was the intention of legislature, has been expressed by it through words. If the language of a statute is plain, the only duty of court is to given effect of to it.\(^2\) In this regard legal maxim, *ut res magis valeat quam pereat*, is also worth mentioning. According to this maxim where alternate constructions are possible the court must give effect to that interpretation which will help in smooth working of the system rather than that construction which will be responsible for putting unnecessary hindrances in the way of statute for which it has been exacted. As for as possible all the words used in the statute must be given meaning as legislature is not expected to use unnecessary words. Superfluous or insignificant words are not used by the makers of a statute.\(^3\)

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\(^1\) AIR 2010 SC 1974
\(^3\) T. Bhattacharyya, p. 55.
It has been specifically held by the Supreme Court in *Shreenath v. Rajesh*,\(^4\) that where two views are possible, especially while interpreting a procedural law, the one which curtails the procedure without eluding justice should be adopted because *procedural law is always subservient to and is in aid to justice. Noscitur a sociis*, also provide similar provision. When two or more words are put together, they are to be understood in their cognate sense. Associated words explain and limit each other.\(^5\) As in *Alamgir v. State of Bihar*,\(^6\) where section 498 of the Indian Penal Code, 1860 was involved specifically words “conceal or detains” were in question Supreme Court resolved controversy by saying that word ‘detains’ is to be interpreted with reference to the words takes, entices and conceals, therefore, here word detain means without the consent of husband and not its ordinary meaning which means detention against will.

Therefore, various provisions of Indian statutes should be interpreted keeping mind the changed circumstances of India, the advancement of crimes and criminals advancement of technology etc. Accused persons should not get benefit for the simple reason that Indian laws are centuries old and latest crimes have not been specifically mentioned therein. No doubt, statutory laws have been amended ‘n’ number of times but researcher humbly submits that despite the amendments, courts give decision based on benefit of doubt in favour of accused. This practice of courts is creating dissatisfaction among masses and is emboldening the criminals. In view of researcher courts should permit use of latest technology by concerned authorities to check increasing crime rate.

Courts must not forget victims while delivering judgments. The expression ‘victim’ has to be understood in a comprehensive and inclusive sense and not in a narrow sense of king and individual victim. The expression ‘victim’ was given a comprehensive meaning in VIIth United Nations Congress on Prevention of crime held in 1985. *It includes a collectivity comprising a group, a class or a community of persons... racial, economic, political or religious to when harm, damage, loss, injury have been caused by individual wrongdoer or group including persons in a lawful*
authority by abusing power. There is no denying fact that victim of a crime deserves our widest possible sympathy, care and attention. Victim of a crime find himself victimized not only by offenders but again by criminal justice delivery system during trial. In the present times, when conventional crimes are committed with the aid of advanced means, investigation of crimes should also be given effect with latest technology. Scientific and technological advancements can facilitate the investigation authorities to collect evidence. Many laws speak about science and technology, need is just to given wider possible interpretation. An endeavor is made by the researcher in the present chapter to study in detail Indian laws that are accommodating in use of scientific tools in interrogation even without amendment.

4.2 INDIAN LAWS VIS-À-VIS SCIENTIFIC EVIDENCE

In a recent case of State of Maharashtra v. Indian Hotel And Restaurants Association, hon’ble Supreme Court observed “it must be presumed that the legislature understand and correctly appreciates the need of its own people, that its laws are directed to problems made manifest by experience”. In the light of this statement of Supreme Court it can be safely construed that every provision of law must be interpreted keeping in mind the problem of general public. The major trouble being faced by Indian people is acquittal of criminals on the grounds of benefit of doubt and absence of proof. There are many cases in which real culprits get free from the clutches of law for simple reason that there is no direct evidence available.

4.2.1 Admissibility of Scientific Evidence under Constitution of India, 1950.

The Constitution of India is a product of the intense research and consideration of a body of distinguished spokespersons of the people who wanted to make better the existing system of administration. The framers of Indian Constitution were not writing on a clean slate. They had before them the working of the government under the government of India Acts of 1919 and 1935. While framing the Constitution, they also kept in mind geographical necessities, historical precedents and our cultural and social

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8 2013(2) RCR (civil) 859.
diversities. It, therefore, would be in the fitness of things\textsuperscript{10} to study and interpret every provision of the Constitution keeping in mind the needs of India. Articles of Indian Constitution related with the topic of research are discussed in detail as follows:

\textbf{4.2.1.1 Article 20(3) Self – Incrimination}

Clause (3) of Article 20 of Indian Constitution talks about self-incrimination. It provides “No person accused of any offence shall be compelled to be a witness against himself”. This clause is based on the legal maxim \textit{nemo tenetur prodere accusare seipsum}, which means that no man is bound to accuse himself.\textsuperscript{11} Making of any statement that has possibility of exposing the accused to criminal prosecution, either at present or in future is not permitted under the Constitution. This provision is inspired from the 5\textsuperscript{th} Amendment of the United States Constitution that prohibits the government from forcing any person to produce any sort of evidence that would incriminate that person. This immunity is available to every person against whom formal accusation has been framed.\textsuperscript{12}

The scope of this immunity has, prima facie, been widened by our Supreme Court by interpreting the word ‘witness’ to comprise both oral and documentary evidence which is likely to support a prosecution against him. Such evidence however should be in the nature of communication.\textsuperscript{13} Also, this protection is available against testimonial compulsion. This protection cannot be claimed by a person if at the time of making the statement he was not an accused. Moreover, it is immaterial that he becomes accused thereafter.\textsuperscript{14} Article 20(3) is not applicable in cases where any sort of recovery is made, be that an object or evidence, from the possession of a person.\textsuperscript{15} General statements given by any person at some regular inquiry or investigation without formal charges being framed against accused would not attract Article 20(3) even if that statement turns out to be incriminatory at some later stage.\textsuperscript{16} In the case \textit{Pakhar Singh}

\begin{thebibliography}{9}
\bibitem{11} Narender Kumar, p. 283.
\bibitem{12} M.P. Sharma v. Satish Chandra, AIR 1954, SC 300.
\bibitem{13} Durga Dass, p. 114.
\bibitem{15} M.P. Sharma v. Satish Chandra, AIR 1954 SC 300.
\end{thebibliography}
and anr. v. State\textsuperscript{17}, "The word ‘witness’ must be understood in its natural sense, i.e. as referring to a person who furnishes evidence. Indeed, every positive volitional act which furnishes evidence is testimony". The statement or information given by the accused to the police during investigation is evidence. Statements made under Narco analysis do not fulfill the above three ingredients at the same time thus Narco analysis should be outside the purview of Article 20(3).

In Dinesh Dalmia v. State of Maharashtra\textsuperscript{18}, the Madras High Court ruled that “Narco-analysis testimony was not by compulsion because the accused may be taken to the laboratory for such tests against his will, but the revelation during such tests is quite voluntary”. The Indian Courts seem to be trying to keep limited the scope of Article 20(3) on the basis of "Minimal Bodily Harm Doctrine”. This approach is reflected in the Bombay High Court verdict in Ramchandra Reddy and Ors. v. State of Maharashtra\textsuperscript{19} which upheld the legality of the use of P300 or Brain finger-printing, lie-detector test and the use of truth serum or Narco analysis. Another thought provoking decision is rather that of Rojo Gorge v. State of Kerala\textsuperscript{20} in which the petitioner was willing to undergo both Brain mapping and Polygraph test, and but he did not want to subject himself to Narco-analysis, alleging it to be an unscientific test. However, J. Padmanabhan Nair relaying on Kathi Kallu’s case\textsuperscript{21} rationale refused to grant the petition.

In the case of Nandini Sathpathy v. P.L. Dani\textsuperscript{22}, it was held that no one could forcibly extract statements from the accused that have the right to keep silent during the course of interrogation or investigation. However, Art. 20(3) can be waived of by a person himself. The idea behind the protection against self-incrimination is to encourage a free atmosphere in which the accused can be persuaded to come forward to furnish evidence in courts and be of substantial help in elucidating truth in a case, with reference to material within their knowledge and in their possession. Anything caused,
by any kind of threat or inducement by a person directed towards the accused or likely to be accused of any offence, which causes him to act involuntarily and further the case against himself in any prosecution against him or which results or is likely to result in the incrimination of that person qua any offence, is violative of the fundamental right guaranteed under clause (3) of Article 20 of the Constitution of India.

In *People’s Union for Civil Liberties v. Union of India*\(^\text{23}\) Supreme Court held that a person becomes witness only when he makes oral or written statements in or out of court relating to any person who is accused of an offence. The giving of any sort of identification as for instance impression of thumb or foot or palm or fingers or giving of specimen of hand-writing is not at all covered under Article 20(3). For testimonial compulsion it is essential that a person forwards his personal knowledge about happening or non-happening of an event. The perfunctory practice of producing documents which may throw light on any of the controversial points does not amount to self-incrimination.\(^\text{24}\) Considering Brain-mapping and Polygraph test, in these tests no statement is made, neither oral nor written. In polygraph test physiological changes are gauged and in brain-mapping, brain impressions are measured, so, these tests are not violative of Article 20(3)\(^\text{25}\).

In *State of U.P v. Boota Singh*,\(^\text{26}\) Apex Court held that if directions are issued to the accused to give his specimen signatures and handwriting that does not amount to testimonial compulsion similar is the case with scientific evidence because accused is just directed to undergo a test not to give a specific statement. It can be termed as a search of the person being conducted by experts and in India search and seizures are not held violative of Article 20(3)\(^\text{27}\) because it is not an act of the accused but a third person is doing that act i.e. the police officer or an expert. An accused is obliged to submit to the concerned authority be that police or investigating authority, and therefore,

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\(^{23}\) AIR 2004 SC 456.
\(^{25}\) Ishita Chatterjee, 133.
\(^{26}\) AIR, 1978 SC 1770
\(^{27}\) Narender Kumar, 287.
submission of accused to the authorities cannot in any case amount to his testimonial act.\(^{28}\)

Furthermore, Medical Examination of the accused is not barred under Article 20(3)\(^{29}\) even drawing of blood samples, pubic hair etc. in the offence of rape, where prosecution has to establish the guilt of accused beyond reasonable doubt is not held to be violative of Article 20(3)\(^{30}\) because right to fair investigation is a fundamental right,\(^ {31}\) that no victim should be derived to especially in a criminal case. It is humbly submitted that scientific evidence in such a scenario would provide a great help to investigation authorities in exhuming the truth from accused and establishing the guilt beyond reasonable doubt.

J. Ranjana Prakash Desai observed in the case of *Ritesh Sinha v. State of Uttar Pradesh*\(^ {32}\) that “Taking of voice sample of accused is not violative of Article 20(3), though there is no specific statutory provision, but interpretation of provisions of Prisoner’s Act and Section 53 of Code of Criminal Procedure, showed that Magistrate has an ancillary or implied power to pass an order permitting taking of voice sample to aid the police in investigation”

Similarly, Punjab and Haryana High Court held that subjecting an accused to DNA test does not violate Article 20(3). It is out of question that any infringement of right against testimonial compulsion occurs if the court requires a person male or female to submit to DNA,\(^ {33}\) the courts can do so validly. The question arises that when courts can compel an accused for DNA tests; to give specimen signatures, hand, palm, foot impressions, there should be no hesitation in subjecting accused to Narco-analysis, polygraph and brain mapping tests as these techniques would help in efficient investigations and inquiries by authorities.

\(^{30}\) Halappa v. State of Karnataka, 2011(7) RCR (Criminal) 29 Karnataka.
\(^{31}\) Virbhadr Singh v. State of H.P 2011(1) RCR (Criminal) 396 (Ho.)
\(^{32}\) 2013 (1) MLJ (Cri) 30.
\(^{33}\) Harjinder Kaur v. State of Punjab, 2013(2) RCR (Criminal) 146 (P and H).
In *Usufalli v. State of Maharashtra*, it held by Supreme Court, that tape-recording of statements of accused is not violation of Article 20(3) even if the recording is done without consent and knowledge of accused. This recording may be used against accused but it would not attract Article 20(3) reason being there is no presence of compulsion here.

It is respectfully submitted by researcher that underlying idea in Article 20 clause 3 is compelling accused to give a statement. This should not be viewed as compelling an accused to undergo a test. In the opinion of researcher even if an accused is compelled to undergo a test, it would not come under the ambit of self-incrimination because result or outcome of a test can not be predicted beforehand, so, these tests should not be taken as violative of Article 20(3) but should be welcomed wholeheartedly as techniques of efficient investigation.

4.2.2.2 Article 21: Right to Life and Personal Liberty

Article 21 is considered as the heart of the Constitution. According to this, “*No person shall be deprived of his life and personal liberty except according to the procedure established by law*”. The word ‘person’ in Article 21 is wide enough that it covers the citizens of the country as well as the foreigners who come to visit India. The object of Article 21 is to preserve and protect certain basic human rights against interference by the state. The framers of the Constitution followed the American model is adopting and incorporating fundamental rights. Two rights are secured by Article 21:

1. Right to Life
2. Right to Personal Liberty

Both are most prized possessions of an individual. It was rightly observed the hon’ble Supreme Court in *Siddharam Satlingappa Mhetre v. State of Maharasthra*, that “*the inner wage for freedom is a natural phenomenon of every individual. Respect for life, liberty is not merely a norm of policy but an essential requirement of any*
The Apex Court defined the term “personal liberty” immediately after the Constitution came into force in India in the case of *A.K. Gopalan v. State of Madras* as “an antithesis of physical restraint or coercion”. Later, in the year 1963, Supreme Court, speaking through Justice Subba Rao, “defined personal liberty as a right of an individual to be free from restrictions or encroachment on his person whether these are directly imposed or indirectly brought about by calculated measure”. In a landmark judgement Supreme Court expanded the scope of expression ‘personal liberty’ and this happened in the case of *Maneka Gandhi v. Union of India*. In this case the hon’ble Supreme Court held that “the phrase personal liberty is of the widest amplitude and it covers a variety of rights which go to constitute personal liberty”. Thus, protection against arbitrary privation of ‘life’ no longer means mere protection of death or physical injury, but also an invasion of the right to live’ with human dignity and would include all these aspects of life which would go to make a man’s life meaningful and worth-living. Article 21 is repository of all human rights essential for a person. Life means something more than mere animal existence, it includes right to food clothing, shelter, decent environment and also the right to live in a clear city.

One of the important rights that came into existence by judicial interpretation is right to privacy. A new Constitutional jurisprudence is being laid down by the courts of law by extending the horizon of article 21 in India. The quest of privacy is an inherent instant of all human beings. As a matter of fact it is a natural need of an individual to establish individual boundaries with almost perfect seclusion. The Indian Constitution does not guarantee the Right to Privacy expressly as a fundamental right. In our country the sole-credit goes to the judiciary for recognizing the concept of privacy because neither the Constitution nor any other statute in our country defined this concept. The right to privacy is an essential component of right to life envisaged by Article 21. The right however is not absolute and may be lawfully restricted for the prevention of crime,

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38 AIR 1950 SC 27.
40 (1978) 1 SCC 248.
41 Francis Coralie Mullin v. Administrator, Union Territory of Delhi and Others (1981) SSC 608.
disorder, or protection of health or moral; or protection of rights and freedom of others.\textsuperscript{44} In District Registrar and Collector v. Canara Bank,\textsuperscript{45} Supreme Court defined privacy as “the state of being free from intrusion or disturbance in one’s private life or affair. Right to privacy is an integral part of right to life, a cherished Constitutional value.”\textsuperscript{46} In R. Rajagopal v. State of Tamil Nadu,\textsuperscript{47} Supreme Court held that right to privacy means right to let alone.

This golden expansion of right to life and personal liberty has left right to privacy in a state of perplexity. This is often misused by persons. Accused person frequently plead that their right to privacy has been infringed. In Malak Singh v. State of Punjab\textsuperscript{48} petitioner’s name was include in the surveillance register by the police and he considered this as violation of Article 21. It is appropriate to mention here that right to privacy is not an absolute right. Irony is that often right to privacy is violated of an accused and it is most of the times resolved in the favour of accused. In Selvi v. State of Karnataka\textsuperscript{49} Supreme Court expressed that Nacro-analysis, Brain-mapping and Lie-Detector tests cannot be conducted on accused without accused’s consent, else it would violate Article 21. Researcher ceremoniously submits that fundamental rights are equally available to everyone, whether that be accused or victim. While considering fundamental rights of accused, same rights available to victim must not be forgotten. In Sharda v. Dharmpal\textsuperscript{50} Supreme Court itself held that in case there is a conflict between fundamental rights of two parties, that right which advances public morality would prevail.

Looking at things from accused’s point of view always is not correct. Recently, it was held that right to privacy and confidentiality is not or absolute right and could be

\textsuperscript{44} Ishita chatterjee, 142.
\textsuperscript{45} 2005(1) SSC 496.
\textsuperscript{46} Ram Jethmalani v. Union of India, 2011(3) RCR (Criminal) 480 (SC).
\textsuperscript{47} AIR 1995 SC 264.
\textsuperscript{48} AIR 1981 SC 760.
\textsuperscript{49} AIR 2010 SC 1974
\textsuperscript{50} AIR 2003 SC 3450.
reasonably curtailed\textsuperscript{51} and it is important that human beings should be allowed domains
of freedom that are free from public scrutiny unless they act in unlawful manner.\textsuperscript{52}

In \textit{D.K. Basu v. State of West Bengal}\textsuperscript{53} in the year 1997 Supreme Court
expressed that there is a need to develop scientific techniques and methods for
investigation and interrogation of accused as custodial deaths and torture is nothing else
but a blow at rule of law. Nacro-analysis, Brain-mapping and polygraph test is nothing
but an efficient and scientific method of investigation. In India, where right to life is a
fundamental right, a sad picture of custodial crimes is also present. Custodial Rapes,
Deaths, torture all violate right to life which includes right to live with human dignity.\textsuperscript{54}
There are thousands of cases of custodial torture, where accused implicated large
number of injuries for the purpose of extorting information regarding theft and
eventually accused die.\textsuperscript{55} Newspapers are full of such unfortunate incidents. Custodial
crime is violation of fundamental rights subjecting an accused to undergo a scientific
test is much better option than to letting him face third degree torture. These tests are
viewed as violative of Articles 20(3) and 21 rather they should be taken as supportive of
fundamental rights. Right to speedy and fair trial is also a fundamental right available to
both accused and victim. In fact, if trial is not quick it cannot be regarded as reasonable,
just or fair and it would fall foul of article 21\textsuperscript{56} and these scientific techniques help in
speedy and fair trial. The concept of fair trial and fair investigation is not only to be
considered from the point of view of liberty or right of accused only, the victim and the
society also suffers where investigation becomes a casualty.\textsuperscript{57}

It should be remembered that administering criminal justice system is a two-end
process, where granting justice to the victim is as imperative and important as
safeguarding the rights of an accused under Constitution,\textsuperscript{58} but our legal system is going

\begin{itemize}
  \item Rohit Shekhar v. Naryan Dutt Tiwari (2001(4) RCR (Criminal) 307 (Delhi).
  \item Ram Jethmalani v. Union of India, 2011(3) RCR (Criminal) 480 (SC).
  \item AIR 1997 SC 610.
  \item Haricharan v. State of M.P. 2011(2) RCR (Criminal) 330 (SC).
  \item Mohan Lal v. State of Punjab AIR 2013 SC 2408.
  \item Gurbax Singh Bains v. State of Punjab 2013(1) Law Herld 652.
  \item Amitbhai Anil Chandra Shah v. Centitra Bureau of Investigation 201393) R.A.J. 61.
\end{itemize}
in a direction which is making life extremely easy for criminals and too rough, difficult and hard for citizens who obey law.  

Right against inhuman treatment, use of third degree torture and custodial violence is available to the accused only and with the help of these techniques, custodial crimes can be completely eradicated. So, these methods or techniques should not be abrogated but made part and parcel of investigations.

4.2.2 Admissibility of Scientific Evidence under India Evidence Act, 1872

The expression ‘evidence’ has been defined in sec 3 of the Act which has been discussed in chapter 2. The word ‘evidence’ signifies that state of being evident. All instruments by which relevant facts are brought before court are included in the term ‘evidence’. As regards the topic of research section 27 and section 45 of the Act is relevant, section 27 talks about disclosure statement and section 45 speaks about expert evidence.

4.2.2.1 Sec 27 recognizes the presumption that when the accused alone gives information which was hitherto not known and recovery is made pursuant to the said disclosure, the court can presume existence of fact which is likely to have happened having regard to the common course of the natural events, human conduct and private and public witness in their relations to the facts of the particular case. It provides

“Provided that when any fact is deposed to as discovered in consequences of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether if amounts to a confessions or not, as relates distinctly to the fact thereby discovered, may be proved.”

This section simply lays down that when at trial evidence is led to the effect that some fact was discovered in consequence of the information given by the accused of an offence in custody of the police officer, so much of the information as relates to the facts discovered by that information, may be proved irrespective of the facts whether

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59 Ranjan Dwivedi v. C.B.I. 2012(8) SCC 495.
61 Rakesh Kumar Jha v. State of Delhi 2013(7) RCR (Criminal) 2427.
that information amounts to confession or not. Inculpatory statements are relevant if they are connected with the discovery of facts. Essential requirement of sec 27 are:

1. Accused is in police custody.
2. Accused makes a statement.
3. Accused’s statement leads to discovery of a fact.

If all of above requirements are fulfilled then statement of accused is admissible even if it is incriminating. If during the investigation of a crime by the police, accused person gives information and in pursuance of such an information, discovery is made within the meaning of Section 27 of the Evidence Act, such information and the discovery made as a result of the information is admissible in the court of law even though it may tend to incriminate the person giving the information, while in police custody. The question whether Section 27 of the Evidence Act is unconstitutional because it offended Article 14 of the Constitution was considered by the court in the case of State of Uttar Pradesh v. Deomen Upadhyaya. It was held by the Court that Section 27 of the Evidence Act is not violative of Article 14 of the Constitution. But the question whether Section 27 of the Evidence Act contravenes the provisions of clause (3) of Article 20 was not considered by the court. The information given by an accused person to a police officer leading to the discovery of a fact which may sometimes prove to be incriminatory has been made admissible in evidence under Section 27 of the Evidence Act. If it is not incriminatory of the person giving the information, the question does not arise. It can arise only when it is of an incriminatory character so far as the giver of the information is concerned. It was further held that if an accused person is giving the self-incriminatory information without any threat, that will be admissible in evidence and that will not be hit by the provisions of clause (3) of Article 20 of the Constitution for the reason that there has been no compulsion. It must, therefore, be held that the provisions of Section 27 of the Evidence Act are not within

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64 A.I.R. 1960 S.C. 1125
the prohibition aforesaid, unless compulsion had been used in obtaining the information.

In Jagroop Singh v. State of Punjab\textsuperscript{65} there was recovery of weapon of offence made in pursuance of the disclosure statement of the accused and same was held admissible in the court of law.

In Narayan Debnath v. State of Assam,\textsuperscript{66} accused made a disclosure statement to the police. He stated that he has buried the dead body of the victim on the bank of a pond. Police discovered the dead body from the bank of the pond and statement of the accused was held to be admissible. In Magraj patodia v. R.K. Birla,\textsuperscript{67} it was held by the Apex court that discoveries made by improper or illegal means would not be a bar to its admissibility if it is relevant its genuiness is proved. Similar view was expressed again by Supreme Court in Pushpadevi M. Jatia v. M.L. Wadhwan\textsuperscript{68} that where ‘evidence’ offered comes within the meaning of its definition, the court can act on it and need not concern itself with the method by which the evidence in question was obtained. The test to be applied in considering whether evidence is admissible is whether it is relevant to the matter in issue. If it is, it is admissible and the court is not concerned with how with was obtained.\textsuperscript{69}

Considering the view point of various law courts of India, it is safe to say that section 27 of Indian Evidence Act, 1872 greatly facilitate evidence adduced by scientific tools as it lays down that any information given or obtained in the process of investigation which is confirmed by the finding of any object or fact is admissible in the court. Recovery made even by undesired means is no bar to its use in court. If scientific techniques are taken into consideration these are not at all illegal or unlawful. Once recovery is made with the help of scientific tools and techniques, prosecution can easily establish the close link between discovery of a material object and its us in the commission of an offence. Thus, use of Narco-analysis polygraph and brain-mapping

\textsuperscript{65} AIR 2012 SC 2600.
\textsuperscript{66} 2010 CrLJ 275.
\textsuperscript{67} 1971 (2) SCR 118
\textsuperscript{68} AIR 1987 SC 1748.
would greatly facilitate investigation authorities that too in a scientific manner without requiring authorities to take resort to inhumane treatment.

4.2.2.2 Section 45: Expert Evidence

Expert evidence has been incorporated in the Indian Evidence Act under Sec 45.

It runs as:

“When the court has to form an opinion upon a point of foreign law or of science or art or as to identity of handwriting or finger impressions, the opinions upon that point of persons specially skilled in such foreign law, science or art or in questions as to identity of handwriting or finger impressions are relevant facts.

Such persons are called experts”

Section 45 makes opinion of specially skilled persons relevant. In *Bal Krishna Das v. Radha Devi*⁷⁰, “an expert was defined as a person who by his training and experience has acquired the ability to express an opinion”. The purpose of an expert opinion is primarily to assist the court in arriving at a final conclusion.⁷¹ But expert opinion cannot form the sole basis of conviction of accused,⁷² unless something inherently defective appears, court can not substitute opinion of an expert.⁷³ In general, it may be said that there are two distinct classes of cases in which expert testimony is admissible. In one class of cases, the facts are to be stated by the experts and the conclusion is to be drawn by the courts. In the other group of case the experts states the facts and gives his conclusion in the form of an opinion which may be accepted or rejected by the courts.⁷⁴

Originally, when this section was enacted words ‘finger impressions’ was not part of the section. However, they were inserted in the year, 1899 and this insertion is sufficient to indicate that the expression science or art therein is of wide import. It is presumed that parliament intends the court to apply to an on going Act, a construction

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⁷⁰ AIR 1989 All 133.
⁷¹ Dayal Singh v. State of Uttaranchal, 2012(3) RCR (Criminal) 949.
⁷³ Mahalakshmi v. State of To No, 2012(6) RCR (Criminal) 100.
that continuously updates its working to allow for changes since the Act was initially framed. While it remains law, it is to be treated as always speaking. This means that in its application on any date, the language of the Act, though necessarily embedded in its own time, is nevertheless to be construed in accordance with the need to treat it a current law.\textsuperscript{75}

There can not be any doubt that Indian evidence Act is an on going act. Keeping in mind the time when the said act was enacted, it should be updated timely so that it embraces all the developments in its sphere.

Recently, it has been held by Supreme Court in \textit{Gajraj v. State (NCT) of Delhi}, that accused can be convicted on the basis of conclusive scientific evidence.\textsuperscript{76} This scientific evidence may be of any kind, be that mobiles phones, internet, DNA samples, etc. In everything technology is involved, so these scientific techniques should be incorporated in criminal justice system too.

In civil cases, accused can be compelled to undergo a scientific test as for instance DNA, and if such person refuses to undergo, adverse inference is drawn against him\textsuperscript{77} but in criminal cases accused can not be compelled. It is humbly submitted that there should not be any distinction in investigation techniques in civil and criminal cases. In civil cases where interest of an individual is involved scientific tools are used whereas in criminal cases where interest of society, faith of public in justice delivery system is involved, scientific methods are ignored. This is shaking the core of criminal justice delivery system. It is now settled law that have and nails of the accused can be taken for utilization during investigation even if the accused does not agree to the same. If that invasion of the person of the accused is permissible, the same principle should be applicable to Narco-analysis, Brain-mapping and polygraph test.\textsuperscript{78} Moreover, Narco-analysis, brain-mapping and polygraph can be conducted on any person who is not an accused or witness. This means in such circumstances, results of these tests are admissible in court of court of law vide sec 27 or section 45. The

\textsuperscript{75} Statutory interpretation by Francis Bennion, quoted in State v. S.J. Choudhary 1996 (2) RCR (Criminal) 721.
\textsuperscript{76} 2012(1) R.A.J. 28.
\textsuperscript{77} Harjinder Kaur v. State of Punjab, 2013(2) RCR (criminal) 146.
permission of court is required if investigation authorities want to subject accused to these tests and if accused consents then authorities can conduct these tests. This appears to be arbitrary. If accused has committed a crime obviously, he will not consent. Investigation is hampered with such decisions of Apex Court. If given an option, accused will never consent for giving DNA, hair, nail samples, finger impressions etc. and if investigation authorities can extract all these without the consent of accused, consent should not be given so much of importance in Narco-analysis, Polygraph and Brain-mapping.

These tests are always conducted by experts who are especially skilled in this field so they should treated normally under section 45 as other expert evidence. These scientific tests are like taking MRI or C.T. scan. The scientific value have to be evaluated only during the course of trial. They are neutral type of evidence and must not be discarded.

4.2.3 Admissibility under Criminal Justice System

The criminal justice system in India, apart from Constitution and Evidence Act largely depend upon Code of Criminal Procedure and Indian Penal Code, 1860. The Penal Code provides punishment and criminal procedure code ensures that the accused person gets fair trial. Investigation plays a crucial role in the administration of criminal justice system. It is one of the most important aspects of Criminal Procedure Code. The term investigation has been defined is the section 2(h) of the Criminal Procedure Code. It lays down:

"investigation includes all the proceedings under this Code for the collection of evidence conducted by a police officer or by any person (other than a Magistrate) who is authorized by a Magistrate in this behalf";

It includes all the proceedings for the collection of evidence conducted by a police officer or any person (other than a magistrate) who is authorized by a magistrate in this behalf. It was held in State of U.P. v. Sant Prakash, that the main purpose of an investigation is collection of evidence and it must be conducted by a police officer or a

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80 1976 Cri.L.J. 274 (All)
person enjoying the powers of a police officer or authorized by a magistrate in this behalf or a person in authority. This definition given in code is not exhaustive.\(^8^1\) The arrest and detention,\(^8^2\) examination of witnesses, arrangement of raids\(^8^3\) are integral part of investigation. Investigation is the foremost and most important part of a criminal trail. An investigation done in a fair manner will let no guilty escape.

In this regard section 39, section 53 and section 161(2) are worth mentioning. Section 39 provides:

“(1) Every person, aware of the commission of, or of the intention of any other person to commit, any offence punishable under any of the following sections of the Indian Penal Code, (45 of 1860) namely:-

(i) sections 121 to 126, both inclusive, and section 130 (that is to say, offences against the State specified in Chapter VI of the said Code);

(ii) sections 143, 144, 145, 147 and 148 (that is to say, offences against the public tranquility specified in Chapter VIII of the said Code);

(iii) sections 161 to 165A, both inclusive (that is to say, offences relating to illegal gratification);

(iv) sections 272 to 278, both inclusive (that is to say, offences relating to adulteration of food and drugs, etc.);

(v) sections 302, 303 and 304 (that is to say, offences affecting life);

(vi) section 382 (that is to say, offence of theft after preparation made for causing death, hurt or restraint in order to the committing of the theft);

(vii) sections 392 to 399, both inclusive, and section 402 (that is to say, offences of robbery and dacoity);

\(^{8^3}\) Maha Singh v State, 1976 AIR, 1976 SC 449.
(viii) section 409 (that is to say, offence relating to criminal breach of trust by public servant, etc.);

(ix) sections 431 to 439, both inclusive (that is to say, offences of mischief against property);

(x) sections 449 and 450 (that is to say, offence of house-trespass);

(xi) sections 456 to 460, both inclusive (that is to say, offences of lurking house-trespass); and

(xii) sections 489A to 489E, both inclusive (that is to say, offences relating to currency notes and bank notes), shall, in the absence of any reasonable excuse, the burden of proving which excuse shall lie upon the person so aware, forthwith give information to the nearest Magistrate or police officer of such commission or intention.

(2) For the purposes of this section, the term "offence" includes any act committed at any place out of India which would constitute an offence if committed in India”.

Section 39 lays a duty on a person, aware of any offence, to furnish information regarding the offence committed. Breach of duty under this section is made a punishable offence under section 176 and section 202 of Indian Penal Code for which imprisonment may be awarded which may extend upto 6 month and fine may also be imposed upto Rs. 1000.

A recent amendment in 2005 is positive and protective towards the recognition of scientific tests. Sec 53 empowers the investigative agencies to take recourse to an efficient and scientific method of investigation. Section 53 provides:

“(1) When a person is arrested on a charge of committing an offence of such a nature and alleged to have been committed under such circumstances that there

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are reasonable grounds for believing that an examination of his person will afford evidence as to the commission of an offence, it shall be lawful for a registered medical practitioner, acting at the request of a police officer not below the rank of sub-inspector, and for any person acting in good faith in his aid and under his direction, to make such an examination of the person arrested as is reasonably necessary in order to ascertain the facts which may afford such evidence, and to use such force as is reasonably necessary for that purpose.

(2) Whenever the person of a female is to be examined under this section, the examination shall be made only by, or under the supervision of, a female registered medical practitioner."

Under this section medical examination of accused can be done at the request of police officer and this would be part and parcel of investigation process only. This could be done even after framing of the charge by the court. In fact, under see 53-A specifically DNA test has been included. It provides:

“Examination of person accused of rape by medical practitioner:

1. When a person is arrested on a charge of committing an offence of rape or an attempt to commit rape and there are reasonable grounds for believing that an examination of this person will afford evidence as to the commission of such offence, it shall be lawful for a registered medical practitioner employed in a hospital run by the Government or by a local authority and in the absence of such a practitioner within the radius of sixteen kilometers from the place where the offence has been committed by any other registered medical practitioner, acting at the request of a police officer not below the rank of a sub-inspector, and for any person acting in good faith in his aid and under his direction, to make such an examination of the arrested person and to use such force as is reasonably necessary for that purpose.

2. The registered medical practitioner conducting such examination shall, without delay, examine such person and prepare a report of his examination

85 Sec. 53-A(2) (IV) of code of criminal procedure, 1973
giving the following particulars, namely:-

(i) the name and address of the accused and of the person by whom he was brought,

(ii) the age of the accused,

(iii) marks of injury, if any, on the person of the accused,

(iv) the description of material taken from the person of the accused for DNA profiling, and”

(v) other material particulars in reasonable detail.

3. The report shall state precisely the reasons for each conclusion arrived at.

4. The exact time of commencement and completion of the examination shall also be noted in the report.

5. The registered medical practitioner shall, without delay, forward the report of the investigating officer, who shall forward it to the Magistrate referred to in section 173 as part of the documents referred to in clause (a) of sub-section (5) of that section.”

Explanation attached to this section lays down that, In this section (Section 53 CrPC) and in Sections 53A and 54,

“(a) "examination" shall include the examination of blood, blood stains, semen, swabs in case of sexual offences, sputum and sweat, hair samples and finger nail clippings by the use of modern and scientific techniques including DNA profiling and such other tests which the registered medical practitioner thinks necessary in a particular case:

(b)"registered medical practitioner" means a medical practitioner who possesses any medical qualification as defined in clause (h) of section 2 of the Indian Medical Council Act, 1956 and whose name has been entered in a State Medical Register.”

The expression ‘such other tests’ used in the Explanation to the amended Section 53 of Code of Criminal Procedure should be interpreted in such a way as to include within its ambit the Narco-analysis, polygraph and brain mapping. The examination of the person has been defined by an inclusive definition and the use of
words “shall include” in the explanation in the Code of Criminal Procedure suggests that all the modern and scientific techniques are included in it. There is no reason of excluding narco-analysis, polygraph and brain mapping from its scope. Thus, the term examination of a person in terms of Section 53 Code of Criminal Procedure takes within its ambit the examination of a person by way of narco-analysis, polygraph or brain mapping test as these are modern and scientific techniques. In other words, there should be an acceptance that Section 53, Code of Criminal Procedure provides statutory sanction for the narco-analysis, polygraph and brain mapping and, said tests can be used as helping tools in the process of investigation. In a recent case of Maghar Singh @ Magha v. State of Punjab it was held by the court that consent of accused is not required in medico-legal examination of accused section 53 and 53-A of criminal procedure code permit the investigation officer to arrest the accused and if he finds that some evidence could be made available from the body of the accused, then he could get him medico-legally examined. Researcher submits here that section 53-A should not be combined only to DNA profiling specifically. No distinction should be made between scientific techniques and sec 53 and 53-A should be construed to include Brain-mapping, Narco-analysis and Polygraph test.

It has also been held in Anil A. Lokhande v. State of Maharasthra by Supreme Court that for the purpose of collecting evidence person of accused can be examined. For this purpose both internal and external examination of his body can be done. If necessary some organs inside the body may also be examined.

Another provision relevant with the topic of research is contained in section 161(2) of criminal procedure code. Section 161 lays down the procedure of examination of witnesses by police.

“(l) Any police officer making an investigation under this Chapter, or any police officer not below such rank as the State Government may, by general or special order, prescribe in this behalf, acting on the requisition of such officer,
may examine orally any person supposed to be acquainted with the facts and circumstances of the case.

(2) Such person shall be bound to answer truly all questions relating to such case put to him by such officer, other than questions the answers to which would have a tendency to expose him to a criminal charge or to a penalty or forfeiture.

(3) The police officer may reduce into writing any statement made to him in the course of an examination under this section; and if he does so, he shall make a separate and true record of the statement of each such person whose statement he records”.

Section 161(2) states that every person is bound to answer all the questions put to him by a police officer, other than the questions having tendency to expose that person to a criminal charge, penalty or forfeiture. Indirectly he has a right to remain silent so that he may no incriminate himself. However, Supreme Court held in peoples Union for civil liberties §88 Supreme Court held that right to silence defeat all the purposes of examination of accused and no longer it shall be a right.

It is submitted when there is availability of modern and advanced techniques of investigation, there should be no hesitation in making such techniques part of Indian criminal justice system especially when number of countries across the globe are taking aid of scientific techniques as discussed in previous chapter. There is an urgent need to check custodial torture, inhumane treatment, etc. These tools of investigation are soft alternative to third degree torture.

Section 330 of Indian Penal Code, 1860 provides,

“Whoever voluntarily causes hurt for the purpose of extorting from the sufferer or from any person interested in the sufferer, any confession or any information which may lead to the detection of an offence or misconduct, or for the purpose of constraining the sufferer or any person interested in the sufferer to restore or to cause the restoration of any property or valuable security or to satisfy any claim or demand, or to give information which may lead to the restoration of any property or

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88 PUCL v. Union of India AIR 1991 SC 207.
valuable security, shall be punished with imprisonment of either
description for a term which may extend to seven years, and shall also be liable to fine.”

and Section 331 of Indian Penal Code, 1860, provides that

“Whoever voluntarily causes grievous hurt for the purpose of extorting from the sufferer or from any person interested in the sufferer any confession or any information which may lead to the detection of an offence or misconduct, or for the purpose of constraining the sufferer or any person interested in the sufferer to restore or to cause the restoration of any property or valuable security, or to satisfy any claim or demand or to give information which may lead to the restoration of any property or valuable security, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.”

Voluntarily causing of hurt or grievous hurt to extort confession or to compel restoration of property is made by a punishable offence for which imprisonment may extent upto 7 and 10 years respectively. Police officers are covered under these sections but it is of no use. Authorities misuse their powers, commit crimes and then a different colour is given to the whole case. In a case, accused died in police custody but police fabricated an encounter case. Right to social security and protection of family should not be forgotten. They are important part of right to life and personal liberty. No one is authorized to take life of a person except for procedure duly established by law whatever crime, however heinous it may be is a police officer authorized to take accused’s life. The answer is no. Still they commit custodial crimes and still nothing has been done scientific techniques have ability to vanish such type of crimes along with effective investigation. They should be adopted in the interest of public welfare.

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89 Ibid
4.3 ROLE OF NATIONAL HUMAN RIGHTS COMMISSION

National Human Rights Commission has always worked for the protection of the basic human rights available to every human being. Human rights have been defined in Section 2 (d) of the Protection of Human Rights Act 1993 as "rights relating to life, liberty, equality and dignity of the individual guaranteed by the Constitution or embodied in the International Covenants and enforceable by courts in India". The modern techniques of investigation are considered as blatant violation human rights. These tools of investigation are considered as torturous techniques. There is no specific statutory law on the use of narco-analysis, polygraph and brain mapping in India. The interpretation is given by the courts differently in different cases. Some judicial decisions are in favour of using these techniques and some are critical. They are not in favor of utilization of such tools in investigation. However, in absence of legislation National Human Rights Commission has laid down certain guidelines that are to be observed while conducting these tests. The guidelines given by National Human Rights Commission are as follows:

“(1) No lie detector tests should be administered except on the basis of consent of the accused. An option should be given to the accused whether he wishes to avail such test.

(2) If the accused volunteers for a lie detector test, he should be given access to a lawyer and the physical, emotional and legal implication of such a test should be explained to him by the police and his lawyer.

(3) The consent should be recorded before a Judicial Magistrate.

(4) During the hearing before the Magistrate, the person alleged to have agreed should be duly represented by a lawyer.

(5) At the hearing, the person in question should also be told in clear terms that the statement that is made shall not be a "confessional" statement to the Magistrate but will have the status of a statement made to the police.

(6) The Magistrate shall consider all factors relating to the detention including the length of detention and the nature of the interrogation.
(7) The actual recording of the lie detector test shall be done in an independent agency (such as a hospital) and conducted in the presence of a lawyer.

(8) A full medical and factual narration of manner of the information received must be taken on record.”

At present in India only the above stated guidelines are available that regulate the use of these techniques. Even these guidelines were referred by the Apex Court in *Selvi v. State of Karnataka*, wherein the court ordered that these guidelines should be followed while conducting narco-analysis, polygraph and brain mapping.

### 4.4 CONCLUSION

The case of scientific techniques especially Narco-analysis, Brian-Mapping and polygraph, are held to be violative of fundamental rights, which themselves have no fixed content. It is well established that new scientific technology is helpful in detecting lie, crime and criminal, and it may be borne for criminal justice system. The courts in India have yet not decided on its acceptability, but certainly this type of scientific test do provide some evidence or clue about the culpability of accused which may corroborate other oral testimonies. The courts should approve the legal use of narco-analysis, polygraph and brain mapping. Brain fingerprinting and lie-detector test is not statement because it only discloses existence of knowledge about crime in brain Though statement is given in Narco- analysis test however it cannot be termed as involuntary. The protection given by Article 20(3) gives protection from compulsory testimony that is *no one is to be compelled to be witness against himself*. So, as long as, the person is not compelled to give testimony protection of Article 20(3) is not available. Narco analysis test is a step in aid of investigation. It forms an important base for further investigation as it may lead to collection of further evidence on the basis of what transpired during such examination. The use of above stated techniques is of particular relevance in the context of terrorism related cases, conspiracy to commit murder and other serious offences where the Investigating agencies do not have vital leads. The attempt of the courts should be to expand the reach and ambit of the fundamental rights by process of judicial interpretation. The fundamental rights have not been declared immutable, but these have to be kept in conformity with the changing conditions. The
Constitution has to be kept young, energetic and alive.\textsuperscript{90} If it is the duty of the judge to see no innocent is punished then he must also ensure that no guilty man escapes. Both are public duties\textsuperscript{91} when security, protection and justice to the society is in conflict with the rights of accused, obviously first should get importance. Social security is more important the accused rights and moreover, these techniques are not at all unlawful. They will just help in investigation, courts of law will decide on that basis. It is respectfully submitted that by exaggerating rights of accused obstacles should not be put into the way of scientific, efficient and effective investigation into crime.

\textsuperscript{90} People’s Union for civil liberties v. Union of India, AIR 2003 SC 2363.