III. THE RELEVANT STATUTES AND CONSTITUTIONAL LAW ON DNA IN INDIA

3.1. THE RELEVANT STATUTES ON DNA

This chapter describes the relevant statutes dealing with DNA technology under the Criminal Justice System in India. The relevant statutes are Criminal Procedure Code, 1973 (Sections 53, 54, 53A, 164A, 173(8) and 293(2) & (4)), Indian Evidence Act, 1872 (Sections 45 and 112) and The Prevention of Terrorism Act, 2002 (Section 27(1)). This chapter also describes the relevant Articles under the constitutional law (Article 51A (h) & (j), Article 246 (entry 65 and entry 66)) and clearly analyzes the Constitutional validity of DNA technology under Articles 21 and 20(3) of the Indian Constitution.

3.1.1. THE CRIMINAL PROCEDURE CODE, 1973

Though there is no specific DNA legislation enacted in India, Sections 53 and 54 of the Code of the Criminal Procedure, 1973 provide for DNA tests impliedly before 2005 amendment and they were extensively used in determining

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153 Section 53 of Criminal Procedure Code, 1973: Examination of accused by medical practitioner at the request of police officer

(1) When a person is arrested on a charge of committing an offense of such a nature and alleged to have been committed under such circumstances that there are reasonable grounds for believing that an examination of his person will afford evidence as to the commission of an offense, 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 examination of the person arrested as is reasonable 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.

Explanation—In this section and in section 54, "registered medical practitioner" means a medical practitioner who possesses any recognized medical qualification as defined in clause (h) of section 2 of the Indian Medical Council Act, 1956 (102 of 1956), and whose name has been entered in a State Medical Register.

Section 54 of Criminal Procedure Code, 1973: Examination of arrested person by medical practitioner at the request of the arrested person

When a person who is arrested, whether on a charge or otherwise, alleges, at the time when he is produced before a Magistrate or at any time during the period of his detention in custody that the examination of his body will afford evidence which will disprove the commission by him of any offense or which will establish the commission by any other person of any offense against his body, the Magistrate shall, if requested by the arrested person so to do direct the examination of the body of such person by a registered medical practitioner unless the Magistrate considers that the request is made for the purpose of vexation or delay or for defeating the ends of justice.
complex criminal cases. Section 53 deals with the examination of the accused person by a registered medical practitioner at the request of a police officer if there are reasonable grounds to believe that an examination of his person will afford evidence as to the commission of an offense. Section 54 of Criminal Procedure Code, 1973 provides for the examination of the arrested person by a registered medical practitioner at the request of the arrested person.

Section 53 of Criminal Procedure Code has been subsequently amended in the year 2005 by the Code of Criminal Procedure (Amendment) Act, 2005. The Code of Criminal Procedure Act, 2005 amendment has added two new Sections, namely Section 53A and Section 164A which authorize the investigating officer to collect DNA sample from the body of a person accused of rape as well as the rape victim with the help of a registered medical practitioner. Though Section 53

154 Amendment of section 53 of Criminal Procedure Code, 1973: In section 53 of the principal Act, for the Explanation, the following Explanation shall be substituted, namely:-

Explanation.-In this section and in sections 53A and 54,-

(a) "examination" shall include the examination of blood, blood stains, semen, swabs in case of sexual offenses, 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 (102 of 1956) and whose name has been entered in a State Medical Register.

155 Section 53A of Criminal Procedure Code, 1973: Examination of person accused of rape by medical practitioner.-

(1) When a person is arrested on a charge of committing an offense of rape or an attempt to commit rape and there are reasonable grounds for believing that an examination of his person will afford evidence as to the commission of such offense, 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 offense 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 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.
refers only to examination of the accused by a medical practitioner at the request of the police officer, the court has wider power for the purpose of doing justice in criminal cases, by issuing direction to the police officer to collect blood samples

(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 to 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.

Section 164A of Criminal Procedure Code 1973: Medical examination of the victim of rape.

(1) Where, during the stage when an offense of committing rape or attempt to commit rape is under investigation, it is proposed to get the person of the woman with whom rape is alleged or attempted to have been committed or attempted, examined by a medical expert, such examination shall be conducted by a registered medical practitioner employed in a hospital run by the Government or a local authority and in the absence of such a practitioner, by any other registered medical practitioner, with the consent of such woman or of a person competent to give such consent on her behalf and such woman shall be sent to such registered medical practitioner within twenty-four hours from the time of receiving the information relating to the commission of such offense.

(2) The registered medical practitioner, to whom such woman is sent, shall, without delay, examine her person and prepare a report of his examination giving the following particulars, namely:-

(i) the name and address of the woman and of the person by whom she was brought;
(ii) the age of the woman;
(iii) the description of material taken from the person of the woman for DNA profiling;
(iv) marks of injury, if any, on the person of the woman;
(v) general mental condition of the woman; and
(vi) other material particulars in reasonable detail.

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

(4) The report shall specifically record that the consent of the woman or of the person competent to give such consent on her behalf to such examination had been obtained.

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

(6) The registered medical practitioner shall, without delay forward the report to 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.

(7) Nothing in this section shall be construed as rendering lawful any examination without the consent of the woman or of any person competent to give such consent on her behalf.

Explanation.-For the purposes of this section, "examination" and "registered medical practitioner" shall have the same meanings as in section 53.
from the accused and conduct DNA test. After the completion of investigation, the charge sheet is filed before the Magistrate. In case of necessity the police can make an application before the court to conduct further investigation under Section 173(8) of Criminal Procedure Code, 1973. Then, the court may order for further investigation under Section 173(8) of Criminal Procedure Code, 1973. The report of certain Government Scientific experts may be used as evidence in any enquiry, trial or other proceedings under Section 293(4) of Criminal Procedure Code. Section 293(2) provides that the court may, if it thinks fit, summon and examine any such expert as to the subject-matter of his report.

Section 53 of Criminal Procedure Code, 1973 can be invoked even though the accused has been released on bail in the event of arrest under Section 438 of the Criminal Procedure Code, 1973. The Magistrate can order for collection of blood sample to conduct a DNA test on the request made by the police officer for an effective investigation. This has been clearly explained below by the higher courts. They are:

1. **Thaniel Victor v. State of Madras.**

   The accused was charged with an offense of rape under Section 376 of Indian Penal Code. The accused had filed an application before the Principal

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156 **Section 173(8) in The Code Of Criminal Procedure, 1973 –**

(8) Nothing in this section shall be deemed to preclude further investigation in respect of an offense after a report under sub-section (2) has been forwarded to the Magistrate and, where upon such investigation, the officer in charge of the police station obtains further evidence, oral or documentary, he shall forward to the Magistrate a further report or reports regarding such evidence in the form prescribed; and the provisions of sub-sections (2) to (6) shall, as far as may be, apply in relation to such report or reports as they apply in relation to a report forwarded under sub-section (2).

157 **Section 293(4) in The Code Of Criminal Procedure, 1973 - (4)** This section applies to the following Government scientific experts, namely:-

(a) any Chemical Examiner or Assistant Chemical Examiner to Government;
(b) the Chief Inspector of Explosives;
(c) the Director of the Finger Print Bureau;
(d) the Director, Haffkeine Institute, Bombay;
(e) the Director, Deputy Director or Assistant Director of a Central Forensic Science Laboratory or a State Forensic Science Laboratory;
(f) the Serologist to the Government.

158 **Section 293(2), Reports of certain Government scientific experts.**

(2) The Court may, if it thinks fit, summon and examine any such expert as to the subject-matter of his report.

159 1991 CriLJ 2416
Sessions Judge praying to release him on bail in the event of arrest under Section 438 of Criminal Procedure Code, 1973. The court granted him bail in the event of arrest. In the meantime, the Inspector of Police filed a petition before the Judicial Magistrate obviously under Section 53 of Criminal Procedure Code, 1973 to issue summons to the petitioner to appear before a registered medical practitioner for being examined to ascertain if he was physically capable of having intercourse. This prayer was made by the investigating officer to facilitate an effective investigation. The Magistrate issued summons to the accused. Meanwhile, the accused filed a revision petition before the Principal Sessions Judge against the order of Magistrate. The Principal Sessions Judge gave a judgment against the accused. The Court also held that though the petitioner could not be considered as a person arrested, the reasonable request made by the prosecution to have the petitioner examined by the medical officer could not be rejected. Such a medical examination was necessary to find out if the petitioner was potent to have had sexual intercourse as alleged. And further, the Sessions Court held that it would not be fair on the part of the petitioner to refuse to subject himself for medical examination. Again, revision petition was filed before the Madras High Court to set aside the aforesaid order of the Principal Sessions Judge.

The counsel for the accused raised the following contentions before the High Court:

(a) The first contention was that the request made by the investigating officer was not maintainable in law. Hence, it would not be covered under the provision of Section 53 of Criminal Procedure Code, 1973. Because, Section 53 of Criminal Procedure Code, 1973 contemplated subjecting of arrested persons alone for medical examination at the request of the police officer of a particular rank. On facts, since the petitioner had been enlarged on bail in the event of arrest as early without any condition like reporting before the respondent or Court, the provision of Section 53 of Criminal Procedure Code, 1973 would have no application. And moreover, the accused could not be deemed to be a person arrested by the police in connection with the offense.

(b) The second contention was that a person released on bail in the event of arrest never gets arrested and, therefore, seeking to invoke the provision of Section 53 of Criminal Procedure Code, 1973 would not be tenable.
(c) The third contention was that Section 53 of Criminal Procedure Code, 1973 did not prescribe any procedure to send a person released either on bail or on bail in the event of arrest to a medical practitioner for examination at the request of the police.

The High Court considered the scope of Section 53 and its applicability to persons who had been either bailed out after arrest or who had been released on bail in the event of arrest. The High Court relied on various judgments of Supreme Court and High Courts.

The Supreme Court in *Pokar Ram v. State of Rajasthan*,\(^{160}\) observed:

‘The release of an arrested person on bail did not appear to make any difference, since he did not cease to be an arrested person or an accused person for the purpose of Section 53 of Criminal Procedure Code, if the examination therein is found to be necessary by the Court for the purpose of proper investigation or an effective trial.’\(^{161}\)

In *Balchand Jain v. State of Madyapradesh*,\(^{162}\) Fazl Ali, J of Supreme Court has observed that:

‘we might, however, mention here that the term ‘anticipatory bail’ is really a misnomer, because what the section contemplates is not anticipatory bail, but merely an order releasing an accused on bail in the event of arrest. It is manifest that there can be no question of a person being released on bail if he has not been arrested or placed in police custody. Section 438 of the Code of Criminal Procedure expressly prescribes that any order passed under that section would be effective only after the accused has been arrested. The object which is sought to be achieved by Section 438 of Criminal Procedure Code is that the moment a person is arrested, if he has already obtained an order from the Sessions Judge or the High Court, he would be released immediately without having to undergo the rigors of jail even for a few days which would necessarily be taken up if he has to apply for bail after arrest.’\(^{163}\)

Similarly, the Supreme Court in *Gurbaksh Singh v. State of Punjab*,\(^{164}\) held that:

‘The order of anticipatory bail could not and did not in any way directly or indirectly take away from the police their right to investigate into charges made or to be made against the person released on bail.’\(^{165}\)

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\(^{160}\) *AIR 1985 SC 969*; (1985 Cri LJ 1175)

\(^{161}\) *Supra* note 159, (Para 21), P. 2422

\(^{162}\) 1977 *AIR 366*; (1977 Cri LJ 225)

\(^{163}\) *Supra* note 159, (Para 18), P. 2421

\(^{164}\) *AIR 1980 SC 1632*; (1980 Cri LJ 1125)

\(^{165}\) *Supra* note 159, (Para 19), P. 2422
The Court also relied on the principle enunciated by the Supreme Court in *Niranjan Singh v. P. Rajaram Kharote*, and observed:

‘A person released on bail in the event of arrest submits himself to the jurisdiction of the Court and the law had taken control of such person. The person released on bail in the event of arrest had submitted to the jurisdiction of the Court and, as stated earlier, the term “anticipatory bail” is a misnomer and the order directing bail in the event of arrest takes effect, the instant a person is arrested.’

In *Anil A. Lokhande v. State of Maharashtra*, the Bombay High Court went into this same question very elaborately and stated:

‘While considering the scope of Section 53 of Criminal Procedure Code, 1973, the Bombay High Court took a note of Section 173(8) of Criminal Procedure Code which conferred an express and specific power to the police to carry out further investigation after cognizance had been taken by court. Though Section 53 Criminal Procedure Code lays down a condition that medical examination will have to be done at the instance of police officer not below the rank of Sub-Inspector, it did not debar other superior officers or the Court concerned from exercising the said power when it was necessary for doing justice in a criminal case. The Court considers the object of Sections 53 and 54 of the code is not far to seek, since it may help the prosecution/the defense, but the ultimate aim is that justice must be done in a criminal case. Therefore, it is open to the Court which is seized of the matter to issue direction or to grant approval or permission to the police for carrying out further investigation in view of Section 53 of Criminal Procedure Code. As long as the directions are made by Court, which agree with the procedure established by law, the Constitution cannot be an obstacle for efficient and effective investigation into the crime and of bringing criminals to justice which will be necessary for the benefit of the community. The sacrosanct approach contemplated in Sections 53 and 54 of Criminal Procedure Code to my mind, appears to be necessary either for proving the guilt or the innocence of the concerned accused. The Bombay High Court has also taken the view that it will not be correct to say that only because the accused has been released on bail he ceases to be in custody and, therefore, powers under Section 53 of the Code cannot be exercised. The release on bail does not change the reality and from that fact alone, it cannot be said that he is not a person arrested for an offense. A person released on bail is still considered to be detained in the constructive custody of the Court through his surety. He has to appear before the Court whenever it requires or directs. Therefore, to that extent, his liberty is subjected to restraint. He is notionally in the custody of the Court and hence continues to be a person arrested. Even in spite of the fact that the accused has been released on bail, he continues to be a person arrested on a charge of commission of an offense and, therefore, his medical examination can be carried out under Section 53 of the Code. Thus, a

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166 1980 AIR 785:1980 SCR (3) 15
167 Supra note 159, (Para 23), P. 2423
168 1981 Cri L J 125
person who is released on bail in the event of arrest also cannot challenge this concept.\textsuperscript{169}

Modern community living requires modern scientific methods of crime detection, lest the public go unprotected. The right of an individual will have to be considered in the background of the interests of the society. Section 53 of Criminal Procedure code, 1973 at this stage of this case related to further investigation under the protective eye of law. The Allahabad High Court also highlighted the views expressed in \textit{Jameshed v. State of Uttar Pradesh},\textsuperscript{170} as follows:

\textquote{The examination of the accused contemplated under Section 53 of the Criminal Procedure Code included taking blood from the accused. Examination of a person under Section 53 of Criminal Procedure Code could not only mean what was visible on the body and if necessary would include examination of an internal organ for the purpose contemplated in the said Section.\textsuperscript{171}}

Based on the above ruling, the High Court held that the order of the Judicial Magistrate to direct the accused to appear in Court for the purpose of medical examination under Section 53 of Criminal Procedure Code, 1973 confirmed by the Principal District and Sessions Judge is in consonance with law and needs no interference. The accused must obey the summons issued by the Judicial Magistrate and present himself in person before the said Court for being forwarded for examination by a medical practitioner as contemplated under Section 53 of Criminal Procedure Code, 1973 and the criminal revision petition is dismissed. Immediately after the pronouncement of judgment, the learned counsel appeared for the accused made an oral application for leave to appeal to Supreme Court. The High Court clearly stated that the order pronounced by this Court based on the law laid down by the Supreme Court and the Court does not consider this to be a fit case for appeal to the Supreme Court. Leave refused.

2. \textit{Neeraj Sharma v. State of Uttar Pradesh}.\textsuperscript{172}

In this case Dr. P. S. Nagi, Chief Medical Officer, Hardwar was murdered. When inquest was held on his body some hairs were found in his hands. The hairs

\textsuperscript{169} Supra note 159, (Para 25), P. (2423-2424)
\textsuperscript{170} 1976 CriLJ 1680
\textsuperscript{171} Supra note 159, (Para 28), P. 2424
\textsuperscript{172} 1993 CRI. L. J. 2266
were sealed in a packet by the investigating officer. During investigation, it was revealed that at the time of incident, there was a scuffle between the deceased and the assailant. In the course of said scuffle, the deceased had caught the assailant’s hairs by his hand. The hairs had come in his hand when the assailant got himself released from the grip of deceased. Then, the assailant ran away from the spot. The sealed packet containing the hairs was immediately kept in safe custody in the Malkhana. The prosecution moved an application before the Chief Judicial Magistrate praying that samples of hairs of the accused Neeraj Sharma and Rajeev may be taken for getting the same compared with the hairs which were found in the hands of the deceased at the time of the inquest. This application was opposed by the accused on the ground that there was no provision of law which empowered the Magistrate to issue a direction for taking samples of the hairs of the accused against his wishes. The learned Chief Judicial Magistrate allowed the application moved by the prosecution. He directed to collect the hair samples of the accused. Aggrieved by the said order the accused filed a revision petition before the High Court. The High Court clarifies that:

‘It will not be proper to give a restricted meaning to the word “examination” used in Section 53 of the code. The examination of the accused should mean a complete examination which a medical practitioner may like to have by all modern and scientific tools available in order to give his opinion and it should not be confined to a superficial examination by merely having a look at the body of the accused. In fact a doctor who is trained and is used to employing modern day technique for diagnosis may refuse to give his opinion unless he performs the necessary scientific tests in this regard. The legislature was also conscious of this and has, therefore, made a specific provision permitting use of force while enacting Section 53 in the Code of 1974.’

‘If medical examination of an accused can be done at the instance of a Sub-Inspector of Police, then such a power should be deemed to be impliedly possessed by a Magistrate and also by a Court trying the offense. There is no warrant for curtailing the scope of the section and holding that only a Police officer not below the rank Sub-Inspector can exercise such a power and not a Magistrate or a Court of law. The primary duty of the Court is to ascertain the truth and its powers are not curtailed or unlimited save as provided by the Code. Therefore, in my opinion a magistrate has full power to direct that a medical examination of the accused be performed or samples of his hairs, nails etc., be taken where the offense alleged to have been committed is of such a nature and is alleged to have been committed under such circumstances that there are reasonable grounds for believing that such

173 Supra note 172, (Para 9), P. 2270
an examination will afford evidence as to the commission of an offense.\footnote{174}

3. \textit{H.M. Prakash Alias Dali v. State of Karnataka.}\footnote{175}

In this case, the accused made a promise to the complainant that he would marry her and had intercourse with her and caused her pregnancy resulting in giving birth to a baby boy. Later he denied. The complaint was lodged against the accused under sections 313, 417, and 506 of Indian penal code. During the course of investigation the accused was released on bail. The investigating officer filed an application before the judicial Magistrate of first class seeking permission to take blood sample of the accused for the purpose of conducting DNA test in order to ascertain the fact as to whether the accused caused pregnancy of the complainant or not. The said application is allowed by the court under section 53 of Criminal Procedure code, 1973. The accused filed a revision petition before the High Court of Karnataka to set aside the order passed by the Magistrate. The counsel for the accused raised three contentions.

a) There is no provision in Criminal Procedure Code, 1973 which enables the court or police to take sample of the blood of the accused for determining the blood group/DNA test. The expression used in section 53 of Criminal Procedure Code will have to be given a restricted meaning and can only include physical or external examination but cannot include taking of blood sample for determination of blood group which is brutal and offensive.

b) Section 53 of Criminal Procedure Code, 1973 contemplates subjecting only the arrested persons for medical examination and not the persons who have been released on bail.

c) Section 53 of Criminal Procedure Code, 1973 contemplates that the medical examination will have to be done at the instance of a police officer not below the rank of Sub-Inspector and that the Magistrate has no role to play under Section 53 of Criminal Procedure Code, 1973 and consequently, the impugned order passed by the learned Magistrate is bad in law.

\footnote{174 Supra note 172, (Para 10), P. 2270}

\footnote{175 2004 (3) KarLJ 584, Available at http://www.indiankanoon.org/doc/1502997/ , viewed on 09/05/2013 at 08.15am}
The learned Judge of Karnataka High Court answered this contention one by one and relied on various Judgments.

Regarding the first issue the Court held that:

‗The modern community living requires modern scientific methods of crime detection, lest the public go unprotected. Such scientific tests are necessary for proving the guilt as well as innocence of the accused. Otherwise, the general public, more particularly, the litigants in the criminal matters will go unprotected. There is nothing brutal or offensive or shocking in taking the blood sample under the protective eye of law. This is one of the well-recognized methods adopted in the crime detection all over the world. Insertion of Sections 53 & 54 of the code was intended to remove the lacuna found in the old code where there was no specific provision authorizing the police officer to subject the arrested person to medical examination without his consent. However, the new provision of Section-53 of the code confers power upon the investigating machinery to get the accused examined and Section 54 of the code confers such right on the accused to prove his innocence or otherwise. Section-53 of the code imposes an obligation upon the arrested person to subject himself for medical examination at the instance of police officer to help the investigation. The constitutional mandate does not say that no person shall be deprived of his right or personal liberty under any circumstances. On the contrary, if such deprivation of right or personal liberty is in accordance with the procedure established by law, the same does not violate Article 21 of the Constitution of India.‘

Therefore, the Court held that if the contention raised by the learned counsel for the petitioner that the examination of the petitioner will not include taking of blood sample for determination of his blood group but means only physical, external examination of the skin and the body, is accepted, then the very purpose of introduction of Section 53 of the Code will be frustrated or defeated.

In this connection the Court referred the Judgment of Andhra Pradesh High Court in Ananth Kumar Naik v. State of Andhra Pradesh, which observed that,

‗While considering the scope of Section 53 of the code examination of person by a medical practitioner must logically take in examination by testing his blood, semen, urine, etc. The Court further observed that Section 53 of the code provides for use of such force as is reasonably necessary for making such examination. Therefore, whatever discomfort might be caused when samples of blood and semen were taken from an arrested person, would be justified under the provisions of Section 53 and 54 of the Code.‘

\[176 \text{ Supra note 175, (Para 9), P. 3} \]
\[177 \text{ 1977 CriLJ 1797} \]
\[178 \text{ Supra note 175, (Para 11), P.4} \]
... Under the new code provision is made for the medical examination of an arrested person at the instance of a police officer of a proper rank and also at the instance of the arrested person himself. Such an examination necessarily forms part of investigation as defined in Section 2(h) of the Code. According to said definition, "investigation" includes all the proceedings under the Code for the collection of evidence conducted by a police officer or by any person who is authorized by a Magistrate in this behalf. Subjecting an arrested person to medical examination under Section 53 of the Code is a proceeding under the Code and therefore forms part of investigation.\(^\text{179}\)

The Madras High Court, in the case of Thaniel Victor v. State,\(^\text{180}\) has held that:

‘Examination of a person under Section 53 of the Code cannot be restricted to only physical examination of the body and if necessary would include examination of an internal organ.’\(^\text{181}\)

The Division Bench of Allahabad High Court, in the case of Jamshed v. State of Uttar Pradesh,\(^\text{182}\) has also taken the view that:

‘Though there is no specific provision under the Indian law permitting taking the blood sample, yet, in criminal case, “examination of a person” includes an examination of any organ inside the body, and taking of blood sample also. It is observed that in modern society, taking of blood could not be said to be something offensive or against the sense of decency and that there is nothing repulsive or shocking to the conscience in taking the blood sample. As such, even causing some pain in the process may be permissible under Section 53 of the Code.’\(^\text{183}\)

The Allahabad High Court, in the case of Neeraj Sharma v. State of U.P,\(^\text{184}\) while discussing the power of the Magistrate to direct medical examination under Section 53 of the Code held thus:

‘It will not be proper to give a restricted meaning to the word “examination” used in Section 53 of the Code. The examination of the accused should mean a complete examination which a medical practitioner may like to have by all modern and scientific tools available in order to give his opinion and it should not be confined to a superficial examination by merely having a look at the body of the accused. In fact a doctor who is trained and is used to employing modern day technique for diagnosis may refuse to give his opinion unless he performs the necessary scientific tests in this regard. The legislature was also conscious of this and has, therefore, made a specific provision permitting use of force while enacting Section 53 in the Code of 1974.’\(^\text{185}\)

\(^{179}\) Supra note 175

\(^{180}\) 1991 CriLJ. 2416

\(^{181}\) Supra note 175, (Para 12), P.4

\(^{182}\) 1976 CriLJ 1680

\(^{183}\) Supra note 175, (Para 13), P.4

\(^{184}\) 1993 CriLJ 2266

\(^{185}\) Supra note 175, (Para 14), P.4-5
Therefore, a Magistrate has full power to direct that a medical examination of the accused be performed or samples of his hairs, nails, etc., be taken where the offense alleged to have been committed is of such a nature and is alleged to have been committed under such circumstances that there are reasonable grounds for believing that such an examination will afford evidence as to the commission of offense.

Based on the above rulings, the Karnataka High Court held that for the first contention:

‘Looking to the dictum laid down in various decisions cited supra, it is clear that though Section 53 of the code does not specifically provide for taking of blood sample for examination, yet there is no embargo for the Court under Section 53 of the Code to order for drawing blood sample for tests. The examination of a person under Section 53 of the code cannot only be restricted to external examination but if necessary, would include examination of blood, urine and semen etc. Such an examination necessarily forms part of “investigation” as defined in Section 2(h) of the Code. Section 53 of the Code provides use of such force as is reasonably necessary for such examinations. In the process of such examination, if the accused undergoes discomfort, the same cannot be said to be unjustified. I concur with the opinions of the High Courts of Allahabad, Andhra Pradesh, Madras and Bombay referred to supra in taking the view that the expression “examination of person” as used in Section 53 of the Code will also include in its import, taking blood sample of the accused for determining his blood group in order to establish his guilt or innocence.’

In the second contention, the Karnataka High Court held that:

‘Merely because the accused is released on bail, he does not cease to be the “arrested person” or “person in custody” and that therefore, the power conferred on the Court/investigating officer under Section 53 of the Code can be exercised. Until the accused is tried, proved not guilty and acquitted of the charges leveled against him, he is the accused and under custody of the Court. The release on bail does not change the reality and from that fact alone, it cannot be said that he is not a person arrested for an offense. A person released on bail is still considered to be detained in the constructive custody of the Court through his surety. He has to appear before the Court as and when required or directed. He is notionally in the custody of the Court and hence, continues to be a person arrested. Therefore, to that extent, his liberty is subjected to restraint. Moreover, Section 173(8) of the Code confers an express power to the investigating authority to carry out further investigation after cognizance is taken by the Court. My aforesaid view is supported by the Judgments in Anil Ananthrao Kokhande v. The State of Maharashtra, Ananth Kumar Naik v. State of andhrapradesh and Thaniel Victor v. State (supra). As such, even in spite of the fact that the accused is released on bail, he continues to be a person arrested on a

\[186\] Supra note 175, (Para 17), P.6
charge of commission of an offense and, therefore, his medical examination can be carried out under Section 53 of the Code of Criminal Procedure even after his release on bail. ¹¹⁸⁷

Regarding the last contention, the Karnataka High Court held that:

‘Though Section 53 of the Code discloses that the medical examination will have to be conducted at the instance of a police officer not below the rank of sub-inspector, that does not prohibit other superior officers or the Court concerned from exercising said power if it is necessary for rendering justice in criminal case. If medical examination of an accused can be done at the instance of the police officer not below the rank of sub-inspector, then such a power should be deemed to be impliedly possessed by a Magistrate or Court trying the offense. There is no warrant for curtailing the scope of the Section 53 of Cr.P.C. The primary duty of the Court is to ascertain the truth. Thus, it is not correct to say that Court or Magistrate cannot direct or order the accused for medical examination as contemplated under Section 53 & 54 of the Code.’¹¹⁸⁸

From the above discussion, it is clear that the criminal court can make a direction for a blood test of the accused, depending on the facts and circumstances of the case to find out the guilt or innocence of the accused. In certain cases, where it is contrary to the future and interests of the child, the courts should be cautious as regards passing of such order mechanically. Such direction for medical examination may be made, if it is in the interest of the child depending upon the facts and circumstances of the case.

Finally the High Court of Karnataka ruled that though the child is born out of the alleged sexual relationship between the complainant and the petitioner, he has every right to live with all dignity and respect in the society. In order to ascertain the truth in the allegations made against the accused, to save the complainant Poornima from possible stigma that could be attached to her and to save the baby boy from being called as 'bastard' in the society, it is just and necessary for the investigating authority to get the blood sample of the accused for testing and to subject him for medical examination.

4. **Thongorani Alias K. Damayanti v. State of Orissa and Ors.**¹¹⁸⁹

The complainant filed rape allegation against the accused. During the time of investigation, medical examination was not conducted. Charge sheet was filed before the Judicial Magistrate. The case was committed to Court of Sessions.

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¹¹⁸⁷ *Supra* note 175, (Para 28), P. 13
¹¹⁸⁸ Id, (Para 29), P. 13
¹¹⁸⁹ 2004 CriLJ 4003
Then, the complainant filed an application before the Additional Session Judge, under Section 173(8) of Criminal Procedure Code, 1973 for directing to make further investigation of the case. The complainant stated that the police during investigation had not taken steps for medical examination of the complainant with regard to her age and had not conducted DNA test regarding the paternity of the child born to the accused and unless the investigating agency conducts DNA test, the accused will go scot-free. The application was rejected by the Additional Session Judge on the ground that the application had not been filed by the prosecution. The complainant challenged this order through Criminal Revision Petition before the High Court in which the impugned order was setaside and the Additional Session Judge was directed to take a decision on the said petition a fresh. Pursuant to the order, the Additional Session Judge directed the investigating officer to investigate the case and submit a supplementary case diary within 45 days from the date of such order before the Judicial Magistrate with regard to the age of the petitioner by conducting ossification test and further gave liberty to the investigating officer to take steps for DNA test after determining the blood group of the victim, her two children and the accused. Based on that order, the petitioner was examined by the doctor and ossification test was conducted and the report of the said test filed in the Court that the age of the petitioner was above 17 and below 19 years on the date of the test. The investigating officer neither conducted DNA test nor blood grouping test of anybody. But, he gave an opinion in the supplementary case diary by considering the date and time of occurrence and no DNA test or blood grouping test was necessary.

Being aggrieved by the said action of investigating officer the complainant filed a writ petition under Article 226 and Article 227 of the Constitution of India praying for the direction to investigating officer to conduct DNA test and blood grouping test. At the time of filing writ petition, the case was pending before the Additional Session Judge.

First, the prayer made by the complainant counsel was:

(a) The reasons assigned by the State in support of the action of investigating officer that it was not necessary to conduct the DNA test in view of the admitted position that the petitioner was a minor when she conceived the two female issues are fallacious, since no doubt, a
person having sexual intercourse with a woman would amount to rape bereft of the fact of consent or no consent if the woman is a minor, but in order to prove an offense of rape the prosecution is required to prove that the accused committed sexual intercourse with the victim petitioner and in the instant case if, DNA test is not conducted to conclusively prove that the accused is the father of the two female issues born to the petitioner and is therefore guilty of commission of the offense of rape, not only the accused will go scot-free but also it will have the effect of branding the children as bastards and the mother as an unchaste woman.

The contentions raised by the council appeared for accused was:

(a) After the submission of charge-sheet, commitment of the case to the Court of Sessions and after trial of the case has begun it is no more open under law for the Court to issue a direction to the investigating officer to conduct DNA test by drawing a sample of blood from the person of accused would amount contrary to law.

Before answering the above contentions, the Court explained that:

‘The DNA evidence is now a prominent forensic technique for identifying criminals when biological tissues are left at scene of crime. DNA testing on samples such as saliva, skin, blood, hair or semen not only to convict but also serves to exonerate. The sophisticated technology makes it possible to obtain conclusive results in case in which the previous testing had been inconclusive. Moreover, DNA sampling may also impinge on familial privacy where information obtained from one person’s sample provides information regarding his or her relatives.’

The court after held that for properly appreciating the controversy raised before us, it would be appropriate to make a detail reference to the provisions of Sections 53 and 173(8) of Criminal Procedure Code, 1973 which read under:

Section 53: Examination of accused by medical practitioner at the request of police officer –

(1) When a person is arrested on a charge of committing an offense of such a nature and alleged to have been committed under such circumstances that there are reasonable grounds for believing that an examination of his person will afford evidence as to the commission of

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190 Supra note 189, (Para 11), P.4005
an offense, 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.

Explanation.--In this section and in Section 54, registered medical practitioner means a medical practitioner who possesses any recognized medical qualification as defined in Clause (h) of Section 2 of the Indian Medical Council Act. 1956 (102 of 1956) and whose name has been entered in a State Medical Register.

Section 173: Report of Police officer on completion of investigation.

(8) Nothing in this section shall be deemed to preclude further investigation in respect of an offense after a report under Sub-section (2) has been forwarded to the Magistrate and, where upon such investigation, the officer in charge of the police station obtains further evidence, oral or documentary, he shall forward to the Magistrate a further report or reports regarding such evidence in the form prescribed; and the provisions of Sub-section (2) to (6) shall, as far as may be apply in relation to such report or reports as they apply in relation to a report forwarded under Sub-section (2).

Section 53 of Criminal Procedure Code makes a provision for the examination of the person of the accused by a registered medical practitioner at the request of a police officer not below the rank of Sub-Inspector in order to ascertain the fact which may afford evidence and also to use such force as is reasonably necessary for that purpose. This is a part and parcel of the process of investigation. “Investigation” has been defined in Section 2(h) of the Criminal Procedure Code, 1973 in the following terms:

Section 2(h), ‘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.

This definition includes all the proceedings under the Code for the collection of evidence by a police officer who after completion of investigation is expected to submit a report under Section 173 of the Code. Sub-section (8) of Section 173 was introduced in the Criminal Procedure Code in 1973 and the true import of this sub-section was considered by the Supreme Court in Ram Lal Narang v. State (Delhi Administration). The Supreme Court in the said case

191 AIR 1979 SC 1791: (1979 Cri LJ 1346)
after referring to decisions of various High Courts and the report of the Law Commission observed that further investigation is not ruled out merely because the Court has taken cognizance of the case. Defective investigation coming to the light during the course of trial may be cured by further investigation if circumstances permit it. In the said decision the Supreme Court has held as follows:

‘As observed by earlier, there was no provision in the Code of Criminal Procedure, 1898 which, expressly or by necessary implication barred the right of the police to further investigation after cognizance of the case had been taken by the Magistrate. Neither Section 173 nor Section 190 led us to hold that the power of the police to further investigate was exhausted by the Magistrate taking cognizance of the offense. Practise, convenience and preponderance of authority, permitted repeated investigations on discovery of fresh facts. In our view, notwithstanding that a Magistrate had taken cognizance of the offense upon a police report submitted under Section 173 of the 1898 Code, the right of the police to further investigate was not exhausted and the police could exercise such right as often as necessary when fresh information came to light. Where the police desired to make a further investigation, the police could express their regard and respect for the Court by seeking its formal permission to make further investigation.’

This being the position prior to amendment of the Code and before Sub-section (8) of Section 173 of the Code was introduced, in our view, the new provision, i.e. Section 173(8) of the Code of Criminal procedure has clarified this position. This sub-section confers such an expression and specific power upon the Investigating Officer.

Though Section 53 of Criminal Procedure Code, 1973 refers only to examination of the accused by medical practitioner at the request of a police officer, there is no reason why the Court should not have a wider power for the purpose of doing justice in criminal cases by issuing a direction to the police officer to collect blood sample from the accused and conduct DNA test, for the purpose of further investigation under Section 173(8) of Criminal Procedure Code, 1973.

The Court held that in this present case even though the complainant established a strong prima facie case in support of her contention that it is a fit case where a direction should be issued to the investigating officer to collect

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192 Supra note 189, (Para 12), P.4006
blood sample from the accused to conduct DNA test the learned Additional Sessions Judge failed to exercise the discretion. It is, therefore, inevitable to hold that in the event of refusal of accused to give his blood sample for conducting DNA test, an adverse inference can be drawn by the trial court.

3.1.2. INDIAN EVIDENCE ACT, 1872

Apart from the provisions under Criminal Procedure Code, 1973, Section 45 of the Indian Evidence Act, 1872 is more important so far as the admissibility DNA evidence is concerned. Section 45 of the Evidence Act, 1872, deals about expert opinion. It states that when the court has to form an opinion upon a point of foreign law, or science, art or as to identity of handwriting (or finger impressions), the opinion upon that point of persons specially skilled in such foreign law, science or art, (or in question as to identity of handwriting) (or finger impressions) are relevant facts. Such persons are called experts.

In Kunhiraman v. Manoj, it was the first paternity case in India, which was solved by DNA fingerprinting in the Court of Chief Judicial Magistrate of Tellicherry. The Chief Judicial Magistrate held that:

‗The Evidence of Expert is admissible under Section 45 of The Indian Evidence Act, 1872. So also, the grounds on which the opinion is arrived at are also relevant under section 51 of The Indian Evidence Act. Dr. Lalji Singh (PW4) is an expert in the matter of molecular biology and the evidence tendered by him is quite convincing and I have no reason why it should not be accepted. Just like the opinion of a chemical analyst, or like the opinion of a fingerprint expert, opinion of Dr. Lalji Singh (PW4), who is also expert in the matter of cellular and molecular biology, is also acceptable.‘

In order to determine the child’s parentage there is a statutory presumption under section 112 of the Indian Evidence Act, 1872 that any person born during the continuance of a valid marriage between his /her mother and any man, or within two hundred and eighty days after its dissolution, the mother remained unmarried, shall be conclusive proof that he is the legitimate child of that man, unless it can be shown that the parties had no access to each other at any time when that child could have been begotten.

193 1991 (2) K.L.T. 190
194 Cited in http://thelawgix.com/dna-tests-a-legal-perspective/ , viewed on 15/05/2013 at 4.00pm
The only exception to disprove the legitimacy of a child under section 112 of the Indian Evidence Act, 1872 is to prove non-access. The word ‘access’ in section 112 has been interpreted by Madras High Court in *Krishnappa v. Vennkatappa*,195 to mean only opportunity of sexual intercourse and not effective access.

The only way in which a man may rebut this presumption of paternity levied against him is by proving that he has no access to the mother at any time during which the child was begotten i.e. he has to prove before the court that either due to extreme physical distance or due to his impotency, there was not even a remote possibility of his having sexual intercourse with the mother at any time during which she could have conceived the child born.196 In case, the husband fails to prove any of these, he shall be deemed to be the father of the child even in the presence of infallible scientific evidences to the contrary. Here the word ‘access’ connotes only existence of opportunity for marital intercourse.197

Section 112 of Indian Evidence Act, 1872 creates a strong legal presumption of legitimacy that leaves no room for a scientific rebuttal. Various litigants have, nevertheless, sought the court’s indulgence in accepting medical evidence to displace this formidable legal presumption. These efforts have yielded a measure of success, and steady line of precedents since the early 1990s now affirms the right of courts to direct medical evidence in cases they consider fit. In these cases, the court has frequently invoked privacy rights as an important consideration to be weighed before ordering a person to submit to any test.198

In *Goutham Kundu v. State of West Bengal*,199 the Supreme Court expressed the most reluctant attitude in the application of DNA evidence in resolving the paternity dispute arising out of maintenance proceedings. In the said case, the father disputed paternity and demanded blood grouping test to determine

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195 AIR 1943 Mad 632
196 Available at http://www.isrj.net/UploadedData/1189.pdf, viewed on 04/01/2014 at 06.35pm
197 Id
198 Available at http://cis-india.org/internet-governance/publications/limits-privacy.pdf, viewed on 04/01/2014 at 07.30pm
199 AIR 1993 SC 2295; 1993 SCR (3) 917
parentage for the purpose of deciding whether a child is entitled to get maintenance under section 125 of the Code of Criminal Procedure, 1973 from him. In this context, the Supreme Court held that where the purpose of the maintenance application was nothing more than to avoid payment of maintenance without making out any ground whatever to have recourse to the test, the application for blood test could not be accepted. It was also held that no person could be compelled to give sample of blood for analysis against his/her will and no adverse inference can be drawn against him/her for such refusal.\footnote{200}

In *Kamti Devi v. Poshi Ram*,\footnote{201} the Supreme Court held:

‘The result of a genuine DNA test is said to be scientifically accurate it is not enough to escape from the conclusiveness of Section 112 of the Indian Evidence Act, 1872. If a husband and wife were living together during the time of conception but the DNA test revealed that the child was not born to the husband, the conclusiveness in law would remain irrebuttable. This may look from the point of view of the husband who would be compelled to bear the fatherhood of a child of which he may be innocent. But even in such a case the law leans in favor of the innocent child from being bastardised if his mother and her spouse were living together during the time of conception. Hence the question regarding the degree of proof of non-access for rebutting the conclusiveness must be answered in the light of what is meant by access or non-access as delineated herein.’\footnote{202}

The Court again observed in view of the aforesaid case:

‘The standard of proof of prosecution to prove the guilt beyond any reasonable doubt belongs to criminal jurisprudence whereas the test of preponderance of probabilities belongs to civil cases. It would be too hard if the standard of criminal cases is imported in a civil case for a husband to prove non-access as the very concept of non-access is negative in nature. But at the same time the test of preponderance of probability is too light as that might expose many children to the peril of being illegitimatized. Therefore, the burden of the plaintiff husband should be higher than the standard of preponderance of probabilities. The standard of proof in such cases must be least be of a degree in between the two as to ensure that there was no possibility of the child being conceived through the plaintiff husband.’\footnote{203}

\footnotesize{\begin{itemize}
\item \footnote{200} Cited in Ajit Namdev and Jitendra Parmar, DNA Technology and Its Application in the Administration of Justice, \textit{Available at} http://www.gofothelaw.com/articles/fromlawsstu/article44.htm, viewed on 04/01/2014 at 06.45pm
\item \footnote{201} (2001) 5 SCC 311; 2001 SCC (Cri)892
\item \footnote{202} Cited in Jothirmoy Adikari, \textit{DNA Technology in the Administration of Justice}, Lexis Nexis Butterworths, 2007, P.249
\item \footnote{203} \textit{Id}, P.250
\end{itemize}}
Again in Amarjit Kaur v. Harbhajan Singh,204 Benarasi Dass v. Tiku Dutta and Another,205 it may be recalled that Section 112 of the Indian Evidence Act 1872 was enacted at a time when the modern scientific advancements with DNA as well as ribonucleic acid (RNA) tests were not even in contemplation of the legislature. The result of genuine DNA test is said to be scientifically accurate. But even that is not enough to escape from the conclusiveness of the Section 112 of the Indian Evidence Act, 1872, for instance, if a husband and wife were living together during the time of conception but the DNA test revealed that the child was not born to the husband, the conclusiveness in law would remain irrebuttable.206

Recently in Bhabani Prasad Jena v. Concernor Secretary, Orissa State Commission for Women and Another,207 the Supreme Court sketched the approach for courts while directing DNA test. The Apex Court observed,

‘In a matter where paternity of a child is in issue before the court, the use of DNA is an extremely delicate and sensitive aspect. One view is that when modern science gives means of ascertaining the paternity of a child, there should not be any hesitation to use those means whenever the occasion requires. The other view is that the court must be reluctant in use of such scientific advances and tools which result in invasion of right to privacy of an individual and may not only be prejudicial to the rights of the parties but may have devastating effect on the child. Sometimes the result of such scientific test may bastardise an innocent child even though his mother and her spouse were living together during the time of conception. In our view, when there is apparent conflict between the right to privacy of a person not to submit himself forcibly to medical examination and duty of the court to reach the truth, the court must exercise its discretion only after balancing the interests of the parties and on due consideration whether for a just decision in the matter, DNA is eminently needed. DNA in a matter relating to paternity of a child should not be directed by the court as a matter of course or in a routine manner, whenever such a request is made. The court has to consider diverse aspects including presumption under section 112 of the Evidence Act; pros and cons of such order and the test of “eminent need” whether it is not possible for the court to reach the truth without use of such test.’208

204 (2003) 10 SCC 228
205 (2005) 4 SCC 449
206 Cited in Jothirmoy Adikari, DNA Technology in the Administration of Justice, Lexis Nexis Butterworths, 2007, P.254
207 (2010) 8 SCC 633
208 Cited in http://ijtr.nic.in/JTRI%20Journal%202012.pdf, 04/01/2014 at 08.30pm
In a high profile case in 2010, *Shri Rohit Shekhar v. Shri Narayan Dutt Tiwari*,209 the Delhi High Court was called upon to determine whether a man had a right to subject the person he named as his biological father to a DNA test. Contrary to the trend in the proceeding cases, it was the biological father who pleaded his right to privacy in this case. The Court relied on United Nations Conventions on the Rights of Child (UNCRC) to affirm the right of the child to know of her (or his) biological antecedents irrespective of her (or his) legitimacy. The court ruled that there is of course the vital interest of child is not to be branded illegitimate; yet the conclusiveness of the presumption created by the law in this regard must not act detriment to the interests of the child. If the interests of the child were best sub-served by establishing paternity of someone who was not the husband of her (or his) mother, the court should not shut that consideration altogether.

The protective cocoon of legitimacy, in such case, should not affect the child’s aspiration to learn the truth of her or his paternity. The court went on to draw a distinction between legitimacy and paternity that may both be accorded recognition under Indian law without prejudice to each other. The legitimacy may be established by a legal presumption (under Section 112 of the Evidence Act), paternity has to be established by science and other reliable evidence. The Court held that the plaintiff would have to establish a prima facie case and weigh the competing interests of privacy and justice before it could order a DNA test. In this case, the petitioner was able to produce DNA evidence that excluded the possibility that his legal father was his biological father. In addition, photographic and testimonial evidences suggested that the respondent could be his biological father. On these grounds the Delhi High Court ordered the respondent to undergo a DNA test. This was upheld in an appeal to the Supreme Court.

Recent judgment of Supreme Court overrules the presumption under Section 112 of Indian Evidence Act, 1872. In *Nandlal Wasudeo Badwaik v. Lata Nandlal Wasudeo Badwaik & Anr.*,210 the fact of the case was that the wife filed a maintenance proceeding under Section 125 of Criminal Procedure Code 1973 claiming maintenance for herself and her daughter. She alleged that she started

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209 23rd December, 2010, Available at https://indiankanoon.org/doc/504408/, 04/01/2014 at 09.00pm
210 (2014) 2 SCC 576
living with her husband from 1996 and stayed with him for about 2 years and during that period became pregnant. She was sent for delivery at her parent’s residence where she gave birth to a girl child. The petitioner-husband denied the assertion of his wife that she stayed with him since 1996 hence the girl child is not his daughter. He denied that the girl child is his daughter. After 1991, according to the husband, he had no physical relationship with his wife. He had also requested for DNA test. The Magistrate Court accepted the plea of wife and granted maintenance at the rate of Rs. 900/- per month to the wife and at the rate of Rs.500/- per month to the daughter. The Court denied the claim of petitioner to apply for DNA test. The Court gave a judgment based on the presumption laid down under Section 112 of the Evidence Act, 1872. The husband filed a revision petition before the High Court against the order of Magistrate Court. Revision failed and the High Court confirmed the order of Magistrate Court. Aggrieved by the said order, husband preferred a Special Leave Petition before the Supreme Court and leave was granted. At the husband’s request Supreme Court had ordered DNA test. DNA test resulted in favor of the husband. At the request of the respondent wife the Supreme Court again ordered for re-test. Both the tests supported the man’s claim. The Apex Court held that the appellant (man) was not the biological father of the girl-child. The DNA test report proved the husband’s plea that he had no access to the wife when the child was begotten and therefore the Court said it could not coerce the appellant to bear the fatherhood of a child when the scientific reports prove to the contrary. It, thus, released the husband of the burden of paying maintenance to the child. The Apex Court justifies the admissibility of DNA test report and held that:

‘As stated earlier, the DNA test is an accurate test and on that basis it is clear that the appellant is not the biological father of the girl-child. However, at the same time, the condition precedent for invocation of Section 112 of the Evidence Act has been established and no finding with regard to the plea of the husband that he had no access to his wife at the time when the child could have been begotten has been recorded. Admittedly, the child has been born during the continuance of a valid marriage. Therefore, the provisions of Section 112 of the Evidence Act conclusively prove that respondent No. 2 is the daughter of the appellant. At the same time, the DNA test reports, based on scientific analysis, in no uncertain terms suggest that the appellant is not the biological father. In such circumstance, which would give way to the other is a complex question posed before us.’

‘We may remember that Section 112 of the Evidence Act was enacted at a time when the modern scientific advancement and DNA test

211 Supra note 210, (Para 16), P.585
were not even in contemplation of the Legislature. The result of DNA test is said to be scientifically accurate. Although Section 112 rises a presumption of conclusive proof on satisfaction of the conditions enumerated therein but the same is rebuttable. The presumption may afford legitimate means of arriving at an affirmative legal conclusion. While the truth or fact is known, in our opinion, there is no need or room for any presumption. Where there is evidence to the contrary, the presumption is rebuttable and must yield to proof. Interest of justice is best served by ascertaining the truth and the court should be furnished with the best available science and may not be left to bank upon presumptions, unless science has no answer to the facts in issue. In our opinion, when there is a conflict between a conclusive proof envisaged under law and a proof based on scientific advancement accepted by the world community to be correct, the latter must prevail over the former. 212

‘We must understand the distinction between a legal fiction and the presumption of a fact. Legal fiction assumes existence of a fact which may not really exist. However presumption of a fact depends on satisfaction of certain circumstances. Those circumstances logically would lead to the fact sought to be presumed. Section 112 of the Evidence Act does not create a legal fiction but provides for presumption. The husband’s plea that he had no access to the wife when the child was begotten stands proved by the DNA test report and in the face of it, we cannot compel the appellant to bear the fatherhood of a child, when the scientific reports prove to the contrary. We are conscious that an innocent child may not be bastardized as the marriage between her mother and father was subsisting at the time of her birth, but in view of the DNA test reports and what we have observed above, we cannot forestall the consequence. It is denying the truth. “Truth must triumph” is the hallmark of justice.” 213

Based on the above judgment, it is clear that the Apex Court favors science over the law.

3.1.3. PREVENTION OF TERRORISM ACT, 2002

Section 27 of the Prevention of Terrorism Act, 2002, 214 has also impliedly allowed the DNA technology. When an investigating officer requests the Court of

212 Id. (Para 17), P.586
213 Id. (Para 18-19), P.586
214 Section 27 of the Prevention of Terrorism Act, 2002: Power to direct for samples, etc.-

(1) When a police officer investigating a case requests the Court of a Chief Judicial Magistrate or the Court of a Chief Metropolitan Magistrate in writing for obtaining samples of handwriting, finger-prints, foot-prints, photographs, blood, saliva, semen, hair, voice of any accused person, reasonably suspected to be involved in the commission of an offense under this Act, it shall be lawful for the Court of a Chief Judicial Magistrate or the Court of a Chief Metropolitan Magistrate to direct that such samples be given by the accused person to the police officer either through a medical practitioner or otherwise, as the case may be.

(2) If any accused person refuses to give samples as provided in sub-section (1), the Court shall draw adverse inference against the accused.
Chief Judicial Magistrate or the Court of Chief Metropolitan Magistrate in writing for obtaining sample of handwriting, fingerprints, footprints, photographs, blood, saliva, semen, hair, voice of any accused person, reasonably suspected to be involved in the commission of an offense under this Act. It shall be lawful for the Court of Chief Judicial Magistrate or the Chief Metropolitan Magistrate to direct that such samples shall be given by the accused person to the police officer either through a medical practitioner or otherwise as the case may be. If the accused refuse to give his sample, then the Court shall draw an adverse inference against the accused.

3.2. THE CONSTITUTIONAL LAW ON DNA IN INDIA

Under the Part IV of the Constitution of India, Article 51A denotes the fundamental duties. This Article represents that every citizen is obligated to perform certain duties called the fundamental duties. Article 51A (h) and (j), comments that it shall be the fundamental duty of every citizen of India ‘to develop the scientific temper, humanism and the spirit of enquiry and reform’ and ‘strive towards excellence in all spheres of individual and collective activity so that the nation constantly rises to higher level of endeavor and achievements. The word scientific temper denotes:215

(i) The mental attitude which is behind the method of acquiring reliable and practical knowledge
(ii) Not accepting answers without testing and trial
(iii) Requiring solid information and incontrovertible data, and then suitable analysis before accepting anything
(iv) Not accepting views and opinions, simply because traditionally these views are accepted
(v) Not observing obscurantist and superstitious practises and
(vi) Openness of mind and absence of dogmatism.

The Division Bench of Delhi High Court in Shri Rohit Shekhar v. Narayan Dutt Tiwari,216 clearly explains that:

‘Even the Constitution of India, while laying down the fundamental duties, by Article 51-A (h) and (j) declares it to be the duty of every citizen of India to develop a scientific temper and the spirit of

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215 Available at http://therationalistsociety.com/blogging/?p=221, viewed on 08/01/2014 at 06.30pm.

inquiry and reform and to strive towards excellence, to reach higher levels of achievement. What we wonder is that when modern tools of adjudication are at hand, must the courts refuse to step out of their dogmas and insist upon the long route to be followed at the cost of misery to the litigants. The answer obviously has to be no. The courts for doing justice, by adjudicating rival claims and unearthing the truth and not for following age-old practices and procedures when new, better methods are available.”

The facts of the above mentioned case were that the plaintiff, Shri Rohit Shekhar filed a suit for declaration that he was the biological son of defendant no.1, N.D. Tiwari before the Single Bench of High Court, Delhi. During the pendency of trial, the plaintiff filed an interim application before the Single Bench of High Court and sought a direction to the defendant no.1 to submit to DNA testing. The said interim application was contested by the defendant no.1. The Single Bench of High Court passed an order in favor of the plaintiff to undergo the defendant no.1 to DNA test. The defendant no.1 preferred an appeal before the Division Bench of High Court. The Division Bench dismissed the appeal filed by the defendant no.1 and ordered to obey the decision of Single Bench of High Court. The defendant no.1 again preferred a Special Leave Petition before the Supreme Court in order to seek an ad interim exparte stay of the operation of the order of the Division Bench. The Supreme Court refused to stay the matter of conducting DNA test.

The Joint Registrar of Delhi High Court in charge for taking of blood sample of the defendant no.1 directed the defendant no.1 to appear for collection of blood sample. The defendant no.1 did not appear on the contrary again filed an interim application before the Single Bench of Delhi High Court. The defendant no.1 sought a direction that he should not be pressurized, compelled or forced in any manner to involuntarily provide blood and or other tissue sample for DNA testing. The Single Bench of High Court held that though the refusal of the defendant no.1 to submit the blood sample to be willful, malafide, unreasonable, and unjustified, the defendant no.1 could not be physically compelled or be physically confined for submitting a blood sample for DNA profiling, in implementation of the earlier order passed by the same Single Bench of Delhi High Court. The Single Bench further held that the weight to be attached to such refusal. Such a refusal should be considered while evaluating the evidence.

\[217\] \textit{Id}, (Para 24), P.19
produced by the parties. The plaintiff challenged the order before the Division Bench of High Court comprising acting Chief Justice A.K. Sikri and Justice Rajiv Sahai Endlaw which set aside the Single Bench Order.

The Division Bench quoted Article 51A (h) and (j) the fundamental duties of citizen of India and observed that the courts for doing justice, by adjudicating rival claims and unearthing the truth and not for following age-old practises and procedures when new, better methods were available. The Division Bench allowed the defendant no.1 to submit DNA test. The Division Bench further held that if the defendant no.1 continues to defy the order, the Single Judge shall be entitled to take police assistance and use reasonable force for compliance thereof.

In another Article under the Indian Constitution Article 246-Entries 65 and 66 of the Union List, the Parliament has a power to make laws under the Constitution of India. The Parliament is legislatively competent to make laws with respect to the Union agencies and institutions for professional, vocational or technical training, promotion of special studies or research, or scientific or technical assistance in the investigation or detection of crime and with respect to coordination and determination of standards in institutions for higher education or research and scientific and technical institutions. These constitutional provisions take care of the scientific developments that may take place and may be put to use for the benefit of the people. The Constitution provides efficient scales for balancing between public and private interests and the Courts have put to use its provisions for an effective social engineering to protect both the cherished human rights recognized by the Constitution and the paramount public interest in a welfare State.

Whenever any new scientific tools adopted in criminal cases, it should fulfill the constitutional mandate of right to privacy and right against the self-incrimination under Article 21 and Article 20(3) of the Indian Constitution. So, when applied new scientific DNA technology it should not violate the person’s right to privacy and right against self-incrimination under Articles 21 and 20(3) of the Constitution of India.

3.2.1. **ARTICLE 21 - RIGHT TO PRIVACY**

Article 21 of the Indian Constitution states that:

‘No person shall be deprived of his right to life and personal liberty except according to the procedure established by law’.²¹⁹

Thus, in the light of Article 21, a person’s right to life or personal liberty cannot be taken away by the state except in accordance with a procedure established by law. The Supreme Court in *Menaka Gandhi v. Union of India*,²²⁰ held that a person can be deprived of his life and personal liberty if two conditions are complied with:²²¹

1. There must be a valid law.
2. There must be a procedure established by that law, provided that the procedure is just, fair and reasonable.

In this research work, the main issue is whether taking of blood sample or bodily sample of an accused or an individual for DNA analysis offends Article 21 of the Indian Constitution.

The landmark decision of the Supreme Court in *“X” v. Hospital “Y”*,²²² on testing appellant’s blood sample it was found that he was HIV positive which resulted in calling off his marriage. The question that arose was whether the hospital which was in possession of this information was duty bound to disclose these facts to the prospective wife. The Apex Court held that the right to privacy has been culled out of the provisions of Article 21 and other provisions of the Constitution. However, the right cannot be treated as an absolute right. It may be lawfully restricted for prevention of crime, disorder or protection of health and morals or protection of rights and freedom of others. The Court observed that the lady was entitled to information regarding appellant’s medical condition. Hence, there was no infringement of the right to privacy.²²³

In *H. M. Prakash Alias Dali v. State of Karnataka*,²²⁴ while discussing the Magistrate’s power to order for DNA test under Section 53 of Criminal Procedure

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²²⁰ AIR 1978 SC 597


²²³ Dr. Paramjit Kaur, DNA fingerprinting and its evidentiary value, *Cri L.J. Vol-2*, 2006

²²⁴ Supra note 175
Code as well as the expression used under Section 53 of Criminal Procedure Code will have to be given a restricted meaning only to include a physical or external examination of the accused, the Karnataka High Court held that:

‘The modern community living requires modern scientific methods for proving the guilt as well as innocence of the accused. Otherwise, the general public, more particularly, the litigants in the criminal matters will go unprotected. There is nothing brutal or offensive or shocking in taking the blood sample under the protective eye of law. This is one of the well-recognized methods adopted in the crime detection all over the world. Insertion of Sections 53 & 54 of the Code was intended to remove the lacuna found in the old code where there was no specific provision authorizing the police officer to subject the arrested person to medical examination without his consent. However, the new provision of Section 53 of the Code confers power upon the investigating machinery to get the accused person to subject himself for medical examination at the instance of police officer to help the investigation. The constitutional mandate does not say that no person shall be deprived of his right or personal liberty under any circumstances. On the contrary, if such deprivation of right or personal liberty is in accordance with the procedure established by law, the same does not violate Article 21 of the Constitution of India. Thus, the court has held that the examination of the accused will not include taking of blood sample for determination of his blood group but only physical, external examination of the skin and the body, is accepted, then the very purpose of introduction of Section 53 of the Code will be frustrated or defeated.’

So, taking of blood sample for DNA analysis is not violating Article 21 of the Indian Constitution. But, it has to be done in accordance with the procedure established by law.

In Thongorani Alias K. Damayanti v. State of Orissa And Ors, while discussing the direction to conduct DNA test by collecting blood sample of the accused whether would it infringe the rights of the accused rights under Articles 20(3) and 21 of the Constitution of India, the Orissa High Court ruled that:

‘The only restriction for issuing a direction to collect the blood sample of the accused for conducting DNA test would be that before passing such a direction, the Court should balance the public interest vis-à-vis the rights under Articles 20(3) and 21 of the Constitution in obtaining evidence tending to confirm or disprove that the accused committed the offense concerned.

While balancing this interest, consideration of the following matters would be relevant:

(i) The extent to which the accused may have participated in the commission of the crime;

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225 Supra note 175
226 Supra note 189
(ii) The gravity of the offense and circumstances in which it is committed;
(iii) Age, physical and mental health of the accused to the extent they are known;
(iv) Whether there is less intrusive and practical way of collecting evidence tending to confirm or disprove the involvement of the accused in the crime;
(v) The reasons, if any, for the accused for refusing consent.\(^{227}\)

The above decisions of Supreme Court and High Courts have clearly held that the taking of blood or bodily samples of the accused for conducting DNA analysis as per the procedure prescribed by law is not violating right to privacy under Article 21 of the Indian Constitution.

### 3.2.2. **ARTICLE 20(3) - RIGHT AGAINST SELF-INCrimINATION**

Article 20(3) of the Indian Constitution states that:

‘No person accused of any offense shall be compelled to be a witness against himself.’\(^{228}\)

This provision will be found to contain the following components:\(^{229}\)

- **(i)** It is a right available to a person accused of an offense,
- **(ii)** It is a protection against compulsion to be a witness, and
- **(iii)** It is a protection against such compulsion resulting in his giving evidence against himself.

All the three ingredients must necessarily co-exist before the protection of Article 20(3) and it can be claimed. If any of these ingredients is missing, Article 20(3) cannot be invoked.\(^{230}\) This article aims to protect the accused from the possible police torture during investigation. The person can remain silent if the answer to any question would tend to incriminate him. This leads to the debate as to whether DNA or other tests can be done against the accused. The question for constitutionality of taking a fingerprint came before the Supreme Court as early before the introduction of DNA technology in the case of *State of Bombay v. Kathi Kalu Oghad*.\(^{231}\)

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\(^{227}\) Supra note 189  
\(^{229}\) Id, P.1244-1245  
\(^{230}\) Id, P.1245  
\(^{231}\) AIR 1961 SC 1808
The Bombay High Court held that:

‘(1) An accused person cannot be said to have been compelled to be a witness against himself simply because he made a statement while in police custody, without anything more. In other words, the mere fact of being in police custody at the time when the statement in question was made would not, by itself, as a proposition of law, lend itself to the interference that the accused was compelled to make the statement, though that fact, in conjunction with other circumstances, disclosed in evidence in a particular case, would be a relevant consideration in an enquiry whether or not the accused person had been compelled to make the impugned statement.

(2) The mere questioning of an accused person by a police officer, resulting in a voluntary statement, which may ultimately turn out to be incriminatory, is not compulsion.

(3) ‘To be a witness’ is not equivalent to ‘furnishing evidence’ in its widest significance; that is to say, as including not merely making of oral or written statements but also production of documents or giving materials which may be relevant at a trial to determine the guilt or innocence of the accused.

(4) Giving thumb impressions or impressions of foot or palm or fingers or specimen writings or showing parts of the body by way of identification are not included in the expression ‘to be a witness’.

(5) To be a witness means imparting knowledge in respect of relevant facts by an oral statement or a statement in writing, made or given in Court, or otherwise.

(6) ‘To be a witness’ in its ordinary grammatical sense means giving oral testimony in Court. Case law has gone beyond this strict literal interpretation of the expression which may now bear a wider meaning, namely, bearing testimony in Court or out of Court by a person accused of an offense orally or in writing.

(7) To bring the statement in question within the prohibition of Article 20(3), the person accused must have stood in the character of an accused person at the time he made the statement. It is not enough that he should become an accused, anytime after the statement has been made.‘

Thus, the Court further held that:

‘Self-incrimination must mean conveying information based upon the personal knowledge of the person giving the information and cannot include merely mechanical process of producing documents in Court which may throw a light on any of the points in controversy, but, which do not contain any statement of the accused based on his personal knowledge. Finger impressions or handwritings in spite of efforts of concealing the true nature of it by dissimulation, cannot change their intrinsic character. Giving of finger impressions or of specimen writing

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232 Id, (Para 16), P.1816-1817
or of signatures by an accused person, though it may amount to furnishing evidence in the larger sense, is not included within the expression ‘to be a witness’.\textsuperscript{233}

‘A specimen handwriting or signature or finger impressions by themselves are no testimony at all being wholly innocuous because they are unchangeable except in rare cases where the ridges of the fingers or the style of writing have been tampered with. They are only materials for comparison in order to lend assurance to the Court that its inference based on other pieces of evidence is reliable. They are neither oral nor documentary evidence but belong to the third category of material evidence which is outside the limit of testimony.’\textsuperscript{234}

‘The makers of the Constitution should not have intended to put obstacles in the way of efficient and effective investigation into crime and of bringing criminals to justice. So, it does not offend Article 20(3) of the Indian Constitution.’\textsuperscript{235}

The Supreme Court finally ruled that giving thumb impressions or impressions of foot or palm or fingers or specimen writings or showing parts of the body by way of identification does not offend Article 20(3) of the Indian Constitution.

The Bombay High Court in \textit{Anil Ananthorav Lokhande v. State of Maharashtra},\textsuperscript{236} clarifies that:

‘Taking of blood sample of the accused for comparison does not amount to testimonial compulsion. Thus, there is no violation of Article 20(3) of the Indian Constitution.’\textsuperscript{237}

In \textit{Miss Swati Lodha v. State of Rajasthan},\textsuperscript{238} the accused was charged with an offense of rape. The complainant sought a direction to order for medical examination of accused to conduct DNA test. The Sessions Court ordered to convey the accused’s willingness to give his blood sample for conducting DNA test. The accused denied. The complainant filed a criminal revision petition before the Rajasthan High Court to order for collection of blood sample for conducting DNA test. The court itself framed two questions that:

(i) Whether the accused can be compelled to subject himself to blood test for being compared through an expert, so that, the expert’s report and testimony be adduced as an evidence of sexual

\begin{itemize}
  \item \textsuperscript{233} Supra note 231, (Para 11), P. 1815
  \item \textsuperscript{234} Id, (Para 12), P. 1815
  \item \textsuperscript{235} Id
  \item \textsuperscript{236} 1981 CriLJ 125 (Bom)
  \item \textsuperscript{237} Id
  \item \textsuperscript{238} 1991 CriLJ 939, 1990 (2) WLN 110, \textit{Available at} http://indiankanoon.org/doc/1147672/, viewed on 23/06/2013 at 02.30pm
\end{itemize}
intercourse and whether any form of testimonial compulsion arises in these circumstances? Can we compel the accused to become a witness against himself so as to infringe upon his fundamental rights?

(ii) Can we compel the accused to get a syringe entered into his body to extract blood out of his veins for the above purpose without his consent?

For the first question the Court relied on the Supreme Court judgment of State of Bombay v. Kathi Kalu Oghad. 239

Regarding the second question, the Court held that,

‘(1) Report of a blood-test is capable of amounting to corroboration of the statement of the complainant. It amounts to corroboration even under the common law. The nature of the corroboration would necessarily vary according to the particular circumstances of the offense charged. The test applicable to determine the nature and extent of the corroboration is the same whether the case falls within the rule of common law or within that class of offenses for which corroboration is required by statute. A criminal court can make a direction for a blood-test to be taken by taking blood-sample of the complainant, accused and of the child. In certain cases, where it is contrary to the interest of a minor, the court may not make a blood-test direction.

(2) The court cannot order an adult to submit to blood-test. A blood-test which involves insertion of a needle in the veins of a person, is an assault, unless consented to. It would need express statutory authority to require an adult to submit to it. This is based on the fundamental that human body is inviolable and no one can prick it.

(3) Where a court makes a direction for a blood-test, and the accused fails or refuses to comply with the blood-test direction, the court can in the circumstances of the case, use the refusal or failure of the accused to submit to blood test as corroborative evidence against him. If a party refuses to submit to blood-test, the court may infer that some impediment existed which pointed out towards the implication of the accused.’ 240

The Rajasthan High Court in Miss Swati Lodha v. State of Rajasthan, 241 ruled that it is the choice of the accused to give his consent to submit to blood-test or to refuse to give consent. It also observed that it would ultimately be for the Sessions Judge to use the failure or refusal of accused to submit to blood-test, as a corroborative piece of evidence to corroborate the statement of the complainant that sexual-intercourse was committed with her by the accused.

239 Supra note 231
240 Supra note 238, (Para 16), P.11
241 Supra note 238
In *Neeraj Sharma v. State of Uttar Pradesh*, the accused challenged before the High Court the Magistrate’s direction for taking samples of the hairs of the accused against his wishes under Section 53 of Criminal Procedure Code and further the taking of hairs would violate his right under Article 20(3) of the Constitution of India. The Uttar Pradesh High Court held that:

‘The evidence of specimen handwriting, finger prints, blood or hairs will incriminate an accused only if on comparison with certain other handwritings, finger prints, blood or sample of hairs, identity between the two sets are established. By themselves they do not incriminate an accused. Again by themselves they are of no assistance at all to establish the charge against an accused. It is almost impossible for an accused to change his blood or nature of hairs or ridges in his finger impression. Thus by giving sample of hairs an accused does not become a witness against himself. In this view of the matter the provision of Article 20(3) of the Constitution will not be violated, if an accused is directed to give sample of his hairs.’

In *H. M. Prakash Alias Dali v. State of Karnataka*, the learned counsel appeared on behalf of the accused challenged the Magistrate’s order before the High Court to direct the accused to subject him for blood test under Section 53 of Criminal Procedure Code is violation of the fundamental right guaranteed under Article 20(3) of the Constitution of India as it amounts to testimonial compulsion. The High Court held that:

‘When the accused is called upon by the Court or any other authority holding investigation to give his finger impression or signature or specimen of his hand writing or blood for DNA test, he is not giving any testimony of the nature of personal testimony. The giving of a personal testimony depends upon his volition. He can make any kind of statement or may refuse to make any statement. But his finger impression, handwriting or blood sample, in spite of efforts at concealing the true nature of them, by dissimulation, cannot change their intrinsic character. Thus, giving of finger impressions or specimen writing or signatures or blood sample by an accused person, though it may amount to furnishing evidence in the larger sense, is not included within the expression ‘to be a witness’. In this view of the matter, Article 20(3) of the Constitution of India will not be violated if the accused is directed to give sample of blood. The true meaning of the word ‘to be a witness’ under Article 20(3) of the Constitution is explained by the 11 judge's bench of the Apex Court in *State of Bombay v. Kathi Kalu Oghad’s case* referred to supra. The Constitution makers could not have intended to put obstacles in the way, of efficient and effective investigation into a crime and for doing justice by punishing real culprits. Even otherwise, mere examination of a person and taking of blood sample in itself is not an incriminating circumstance and therefore, it cannot be said that by mere taking of blood sample of a person, he is compelled to be a witness

Supra note 172

Id. (Para 6), P.2268-2269

Supra note 175
against himself. As aforesaid, the Law Commission of India, in its 41st Report, observed that the provision of Section 53 of the Code is necessary for effective investigation and such provision will not offend against Article 20(3) of the Constitution.245

‘Specimen handwriting, signature, finger impressions, blood or semen samples by themselves are not testimony at all, being wholly innocuous because they are unchangeable except in rare cases where the ridges of the fingers or the style of writing have been tampered with. They are only materials for comparison in order to lend assurance to the Court that its inference based on other pieces of evidence is reliable. They are neither oral nor documentary evidence but belong to the third category of material evidence, which is outside the limit of ‘testimony’. The expression ‘to be a witness’ means imparting knowledge in respect of relevant facts by an oral statement or a statement in writing made or given in Court or during investigation. Giving blood sample for DNA test does not amount to imparting knowledge by the accused in respect of the relevant facts. The blood in human being cannot be concealed and cannot change its character in spite of efforts. Consequently, I have no hesitation to hold that taking of blood sample from the accused does not amount to compelling him “to be a witness against himself. Thus, the impugned order does not violate Article 20(3) of the Constitution of India, as contended by the learned Counsel for the petitioner.”246

In Thongorani Alias K. Damayanti v. State of Orissa and Ors,247 the accused challenged the order of Sessions Judge to draw a sample of blood from the accused as infringing his rights under Article 20(3) the Constitution. The High Court held that:

‘With regard to the right guaranteed under Article 20(3) of the Constitution of India which says that “no person accused of any offense shall be compelled to be a witness against himself” it would be seen from the case of State of Bombay v. Kathe Kalu Oghad, the phrase "to be a witness" was interpreted to mean ‘imparting knowledge in respect of relevant facts by means of oral statement or statements in writing by a person who has personal knowledge of the facts to be communicated to a Court or to person holding an enquiry or investigation. The Supreme Court has pointed out that the hand-writing or finger impression could not change their intrinsic character and, therefore, even ‘though the taking of finger impression or specimen hand-writing may amount to furnishing evidence in the larger sense, but they could not be included within the expression to be a Witness’. It was further observed that the Constitution makers may have intended to protect an accused from the hazards of self-incrimination, but they could not have intended to put obstacles in the way of efficient and effective investigation into a crime and of bringing criminals to justice. The majority Judges in the said decision came to the finding that taking specimen writing or thumb impressions etc. did not amount to ‘testimonial compulsion.”248

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245 Supra note 175, (Para 26), P.12
246 Id, (Para 27), P.12-13
247 Supra note 189
248 Supra note 189 (Para 21), P.4007-4008
The only restriction according to us for issuing a direction to collect the blood sample of the accused for conducting DNA test would be that before passing such a direction, the Court should balance the public interest vis-a-vis the rights under Articles 20(3) and 21 of the Constitution in obtaining evidence tending to confirm or disprove that the accused committed the offense concerned.\(^{249}\)

In *Smt Selvi & Ors v. State of Karnataka*,\(^{250}\) while discussing the constitutional validity of involuntary administration of certain scientific techniques, namely Narco Analysis, Polygraph Examination and the Brian Electrical Activation Profile (BEAP) test, the Supreme Court held that:

‘DNA profiling technique has been expressly included among the various forms of medical examination in the amended explanation to Sections 53, 53-A and 54 of the Criminal Procedure Code. It must also be clarified that a ‘DNA profile’ is different from a DNA sample which can be obtained from bodily substances. A DNA profile is a record created on the basis of DNA samples made available to forensic experts. Creating and maintaining DNA profiles of offenders and suspects are useful practices since newly obtained DNA samples can be readily matched with existing profiles that are already in the possession of law-enforcement agencies. The matching of DNA samples is emerging as a vital tool for linking suspects to specific criminal acts. It may also be recalled that the as per the majority decision in *Kathi Kalu Oghad*, the use of material samples such as fingerprints for the purpose of comparison and identification does not amount to a testimonial act for the purpose of Article 20(3). Hence, the taking and retention of DNA samples which are in the nature of physical evidence does not face constitutional hurdles in the Indian context. However, if the DNA profiling technique is further developed and used for testimonial purposes, then such uses in the future could face challenges in the judicial domain.’\(^{251}\)

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\(^{249}\) *Supra* note 189

\(^{250}\) (2010) 7 SCC 263

\(^{251}\) *Id.*, (Para 220)