CHAPTER: 6

DNA PROFILING VIS-A-VIS RIGHT OF PRIVACY UNDER INDIAN CONSTITUTION

6.1 INTRODUCTION

The startling scientific and technological advances that have been made in biology over the last 30 or 50 years have resulted in profound changes to the practice of medicine, allowed the development of new crop varieties with improved nutritional value, and resistance to diseases, and the most important is that it has revolutionized the identification of individuals (accused or the victims) from the biological samples. Crime amongst humans occurs at all levels of society and influences all people. Each individual who is involved in combating the crime must continually adjust their methods and look for new ones to be more effective. The investigating agencies cannot be present at all places where the crime is to be committed. So, it becomes necessary to enhance the investigation skills. The investigation becomes all the more important when all other methods fail to prevent, deter and stop criminals from committing crimes.

Law must keep pace with social values, scientific developments and other contemporary changes in society. Rules of law had never been static so, legislations should not be read in a rigid legalistic manner without taking into consideration the contemporary needs and values in society. The law of a country is bound to change due to revolutionary scientific changes. So, the Legislations must be interpreted in a manner to have optimum use of the innovations in science for the criminal justice system.\(^1\) Simply because, the modern inventions in the field of science and technology are bound to have serious impact upon the law and the administration of justice of any country.\(^2\)

Change is always hard to accept. Same was the case when DNA analysis was introduced 20 years ago for forensic purposes. It generated extreme controversy in the medico-legal world. It was required to pass the admissibility criteria as per evidence act. This has already been dealt in the preceding chapter. Also, Evidence Act provides

\(^1\) 2003 Cri LJ 353 (Journal).
\(^2\) 2006 Cri LJ 325(Journal).
that only the relevant evidence be produced in the court of law and it doesn’t matter how it is collected. However, with the inevitable improvements that were made in the process and methods, it is to be seen whether the process adopted for drawing the sample, or its retention and non destruction can have any implications on Right to privacy of the individual thus violative of Art 20(3) & Art 21 of the constitution.

DNA profiling, has the potential to ascertain whether the biological sample matches with that of the suspect or not. For this, a DNA profile needs to drawn from a DNA sample by processing it with molecular probes. During this process, forensic analyst tends to incidentally discover those secrets of an individual those may not be even in the knowledge of the individual. By this, the expert may intentionally or unintentionally transgress into the private domain of an individual. Further, DNA profiling requires collection of blood/ bodily sample from the accused/suspect. Perhaps, such person may plead intrusion of privacy or infringement of rights guaranteed to him under Article 20 (3) of the constitution.

So, in this context, it is relevant to study whether investigating agencies face any obstruction while collection of bodily samples for DNA profiling. If yes, whether an officer can use minimum force to draw the sample? Further, if he uses such force, whether it results in self-incrimination or infringement of right of personal liberty consequently infringing the right of privacy? Implication of genetics for e.g. retention of samples for future profiling will be studied under the separate head in chapter 10 “the ethical issues and the legal issues concerning DNA profiling/DNA databases”. In the present chapter, the focus would entirely be on the impact of DNA technology on the legal rights of an accused/suspect during sample collection.

6.2 ORIGIN OF PRIVACY & DENOTATION

The origin of the concept of privacy can be traced since antiquity. Privacy is the ability of an individual or group to seclude them or information about themselves from others including liberty to reveal information selectively. The threshold and content of what is considered private differs among cultures and individuals, but share basic common themes. Privacy is sometimes related to anonymity, the wish to remain unnoticed or unidentified in the public realm. In colloquial use, anonymity typically

3 Available at http://en.wikipedia.org/wiki/Privacy (last visited on 10/12/2012)
refers to the state of an individual's personal identity, or personally identifiable information, being publicly unknown. When something is private to a person, it usually means there is something within the individual that is considered inherently special or personally sensitive. The degree to which the private information be exposed therefore depends on how the public will receive the information, which differs between places and over time. Privacy partially intersects security, including for instance the concepts of appropriate use, as well as protection of information. Privacy may also take the form of bodily integrity. Bodily integrity is the inviolability of the physical body and emphasizes the importance of personal autonomy and the self-determination of human beings over their own bodies. The violation of bodily integrity is considered as an unethical infringement, intrusive and possibly criminal. It includes financial, sexual, religious or personal matters to be protected from disclosure. The recognition of the right to privacy can also be traced partly to the publication of an article authored by Samuel Warren and Louis Prandeis in year 1890 titled as “The Right to Privacy”. What was truly creative in the article was their insistence that privacy, the right to be let alone was an interest that man should be able to assert directly and not derivatively from his efforts to protect other interests.

The incidents of Right to Privacy though not strictly are found in various articles of the Universal Declaration of Human Rights 1948. However, the term “bodily integrity” in which the right to privacy is also impliedly embodied is protected by two key international documents namely The Universal Declaration of Human Rights and The International Covenant on Civil and Political Rights. The relevant Article are Article 12 of the Universal Declaration of Human Rights; Article 16 of United Nations Convention on the Right of Child; Article 17 of

4 Available at http://en.wikipedia.org/wiki/Anonymity (last visited on 10/12/2012)
7 Article 12 of the Universal Declaration of Human Rights reads as under:
   No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.
8 Article 16 of United Nations Convention on the Right of Child reads as under:
   • No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, or correspondence, nor to unlawful attacks on his or her honour and reputation.
   • The child has the right to the protection of the law against such interference or attacks.
9 Article 17 of International covenant on Civil and Political Rights, 1966 reads as under:
   1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
   2. Everyone has the right to the protection of the law against such interference or attacks.
International covenant on Civil and Political Rights, 1966; Art. 8 of the European Convention on Human Rights (1950) that includes Right to privacy also; and Article 21 of the Indian Constitution.

Right to privacy is defined as “the state of being free from intrusion or disturbance in ones private life or affairs”. Indian constitution, an organic document, caters to the need of organic man with its omnipresence in the life of each individual. Fundamental rights are incorporated with a view to accelerate the development of man and also to keep check on the in-actions of the State. However, no right can be absolute, hence, are subject to certain exceptions. The fundamental rights cannot be stretched so far as to collapse the legal system. It is also pertinent to mention here that Right to privacy is not an explicit fundamental right provided by our constitution, but, it can be inferred from Article 21 and precedents.

6.3 PRIVACY UNDER INDIAN CONSTITUTION

Article 21 provides that:

“No person shall be deprived of his life or personal liberty except in accordance with the procedure established by law”.

Article 21 has been couched in negative language, yet confers on every person the fundamental right to life and personal liberty. These two rights have always been given paramount importance by our Courts. Right to life is most fundamental right but difficult to define. Corresponding to this, similar provision can be found in US i.e. the 5th and 14th Amendments which says that “No one would be deprived of his “life, liberty or property without due process of law”.

Article 8 of European Convention or Human Rights (1950) that also includes Right to respect for private and family life reads as under:

- Everyone has the right to respect for his private and family life, his home and his correspondence.
- There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.


Kehar Singh v. UOI, AIR 1989 SC 653.
Field J. in *Munn v. Illinois*,\(^{14}\) spoke of the right to life in the following words:

> By the term ‘life’ as here used something more is meant than mere animal existence. The inhibition against its deprivation extends to all those limbs and faculties by which life is enjoyed. The provision equally prohibits the mutilation of the body by the amputation of an arm or leg, or the putting out of an eye, or the destruction of any other organs of the body through which the soul communicated with the outer world.

The expression ‘liberty’ in the 5\(^{th}\) and 14\(^{th}\) amendment to the U.S. Constitution has a wider meaning. It's not only confined to mere freedom from bodily restraint and liberty under law, but also extends to the full range of the conduct which the individual is free to pursue. However, in India, under Article 21, the word ‘liberty’ is qualified by the word ‘personal’ leading to an influence that the scope of liberty under our constitution is narrow than that of United States Constitution.

For the first time, the meaning and scope of ‘personal liberty’ came up for consideration in *Kharak Singh v. State of U.P.*\(^{15}\). In this case, validity of certain police regulations were challenged. The regulation stated that the police was authorized to keep surveillance over the persons whose names were recorded in the ‘history-sheet’ maintained by the police and also of the persons who were or likely to become habitual criminals without any statutory basis. Surveillance as defined in the impugned regulation included secret picketing of the house, domiciliary visits at night, periodical inquiries about the person, an eye on his movements etc. It was alleged that this regulation violated his fundamental right to movement as enshrined under Article 19(1) (d) and ‘personal liberty’ under Article 21. The Court, thus had to define the scope of Article 19(1)(d), and the scope of ‘personal liberty’ under Article 21.

Speaking for the majority Ayyangar, J. rejected that personal liberty was confined to “freedom from physical restraint or freedom from confinement within the bounds of a person” and held that “personal liberty” is used in the Article as a compendious term to include within itself all the varieties of rights which go to make up the ‘Personal Liberties’ of man other than those dealt with in the several clauses of

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\(^{14}\) 94 U.S. 113.

\(^{15}\) AIR 1963 SC 1295
Article 19(1). In other words, while Article 19(1) deals with particular species or attributes of that freedom, ‘Personal Liberty’ in Article 21 takes in and comprises the residue”. He concluded that “an unauthorized intrusion into a person’s home and the disturbance caused to him thereby” violated ‘personal liberty’ enshrined in Article 21, and therefore, the regulation was invalid insofar as it authorized domiciliary visits but the rest of it did not violate either Article 19(1)(d) or Article 21. He also held that “the right to privacy is not a guaranteed right under our Constitution and therefore the attempt to ascertain the movement of an individual which is merely a manner in which privacy is invaded is not an infringement of a fundamental right guaranteed by Part III.

He held that right to privacy “is an essential ingredient of personal liberty and that the right to personal liberty is a ‘right of an individual to be free from restrictions or encroachments on his person, whether those restrictions or encroachments are directly imposed or indirectly brought about by calculated measures”. Applying that test he found the entire regulation violative of Article 21, and also of Article 19(1)(a) and (d).

In Govind v. State of M.P\textsuperscript{16}, the Court contemplated that Right to personal liberty included Right to privacy too but upheld regulations similar to the one invalidated in Kharak Singh because the regulations had statutory basis. Without any reference to Article 21, in State of Maharashtra v. Madukar Narayan Mandikar,\textsuperscript{17} the Supreme Court has held that even a woman of easy virtue is entitled to privacy and no one can invade her privacy as and when he likes. Explaining the right to privacy in R. Raj Gopal v. State of T.N.\textsuperscript{18}, the Court has held that it is the right to be let alone and citizen has the right to safeguard the privacy of his own, his family, marriage, procreation, motherhood, child-bearing and education among other matters. No one can publish anything concerning the above matters without his consent whether truthful or otherwise and whether laudatory or critical. Exception may be made if a person voluntarily thrusts himself into a controversy or any of these matters becomes part of public records or relates to an action of public officials concerning the discharge of his official duty. Right to privacy also includes telephone conversation.

\textsuperscript{16} AIR 1975 SC 1378.
\textsuperscript{17} AIR 1991 SC 207
\textsuperscript{18} AIR 1995 SC 264.
Therefore, telephone-tapping amounts to its violation unless it is permitted under procedure established by law. So, the conclusion that right to personal liberty includes the right to privacy.

6.3.1 RIGHT TO PRIVACY NOT ABSOLUTE

A more elaborate appraisal of this right took place later in a case titled as Gobind v. State of Madhya Pradesh. In this case, it was held that privacy though a fundamental right but it not absolute. Direction for collection of blood/bodily sample for DNA profiling could be given keeping in view the conclusiveness of the DNA test and its scientific accuracy. JJ. Goswami and JJ Iyer while relying upon Grismold v. Connecticut and Roe v. Wade, traced the origin of “Right to Privacy” and observed that privacy dignity claims deserves to be examined with care and to be denied only when an important counter vialing interest is shown to be superior. Similar view was taken in case X v. Hospital. It was held that a HIV positive person does not have the right to privacy against the doctor not to disclose his status. Nor does such a patient has an absolute right to marry under Article 21. Right of others to healthy life justifies a breach of confidentiality in such case.

Recently, similar view has been held by the Hon’ble Supreme Court in Smt. Selvi v. State of Karnataka. The Court has held that Right to Privacy is not absolute and could be reasonably curtailed. However, a distinction must be made between the character of the restraints placed upon the right to privacy. While the ordinary exercise of police powers contemplates restraints of a physical nature such as the extraction of bodily substances and the use of reasonable force for subjecting a person to medical examination, it is not viable to extend these police powers to the forcible extraction of a testimonial responses.

So, from the above Judicial decisions it can be seen that though Right to privacy has not been enumerated explicitly in our constitution and is not an absolute

19 AIR 1975 SC 1378.
20 Savitabai v. Chandrabhan, MP-2006-93; also see Banarsi Dass v. Teeku Dutta and Anr., (2005) 4 SCC 449 (in this case however, the application for DNA test was rejected finding the case not fit for such direction).
21 1965 (385) U.S. 479.
23 1998 (8) SCC 296.
right, still expanding the scope of Article 21, it has been recognized as one of the most integral unit. Now the next question which needs to be seen whether taking of bodily sample violates Right to Privacy and are thus is violative of Article 20(3) of the constitution.

6.3.2 RIGHT OF PRIVACY AND DNA DRAGNETS

Crimes mostly have a motive behind. Though, in certain situations the victim may be chosen randomly without any planned motive or for fun. In such cases, the victim is not acquainted with the perpetrator of crime. So, the victim may or may not has an opportunity to notice physical appearance of the accused. If the victim does notice something, it may differentiate the accused from others that may be helpful for investigation purposes as it may be narrated to the investigating officer. For e.g. victim indicates that the accused had a fair complexion and was red haired. In absence, it’s only the circumstantial evidence viz trace evidence that can aid the investigation agencies. If any peculiar physical trait is narrated, need may arise for collecting samples from a large group of individuals with the narrated characteristics to reach at the perpetrator of crime. Such searches are termed as DNA sweeps or DNA dragnets. The first DNA dragnet was conducted in 1986 in a case involving rape and murder of two 15 year old girls in Narborough in Leicester Shire, England.25 It was a highly celebrated British case study of Joseph Wambaugh’s book, The blooding. Since then, DNA dragnets became quite useful tool in the serial killings. Serial Killers are accused by choice, those opt similar modus operandi or deliberately leave some evidence behind giving chase to the investigating officers. However, DNA sweeps have been subject to controversial ethical concerns26 as on one hand it might help to solve the crime but on the other hand it may expose the innocent person as suspect in the public. Many of the person’s who would volunteer for giving DNA sample might not be even aware of their basic human rights or the consequences they might have to face post such DNA profiling. In India, there is no history of DNA dragnet till date but certainly it would raise privacy concerns if the need arises in near future.

6.3.3 RIGHT OF PRIVACY AND INDIRECT SEARCHES

Georger Mendel, a monk turned father of Genetics hypothesized that traits transfer from one generation to another. In view of above hypothesis sample of any members of the family could be taken to find out the alleged involvement of the suspect by the investigating agencies. This procedure is termed as indirect searches. Also Police may lift samples for DNA profiling from either the traces left at the crime scene or the abandoned articles like chewing gum, saliva on a cup, glass, envelope, stamp, container etc or from the garbage as these traces are no more the part of the body of a person and have been already discharged, so no claim of privacy can be raised. Also, in case that person wants to challenge the same, then he would have to first prove his locus to move such a petition. Such searches are also termed as superstitious DNA collecting.

6.3.4 RIGHT OF PRIVACY AND FAKE DNA EVIDENCE

Instances of Fake DNA evidence have cautioned the enthusiastic professionals relying on DNA profiling either for investigation purposes or gaining a favorable verdict from the court. One of such glaring example is the case of Dr. John Schnellerberger accused of raping one of his sedated patients in 1992. Also, a study conducted by the Life Science Company Nucleix demonstrated that an In vitro synthesized sample of DNA matching of any desired genetic profile can be constructed using standard molecular biology technique without obtaining any actual sample.

27 In California v. Billy Greenwood and Dyanne Van Honten, Supreme Court held that the fourth Amendment does not prohibit the warrant less search and seizure of garbage left outside the cartilage of a home. In United Kingdom, the Human Tissue Act, 2004 prohibited private individuals from covertly collecting biological samples for DNA Analysis, but excluded Medical & Criminal investigation from the offence.

28 He planted fake DNA evidence in his own body and left semen on her underwear. Police drew the sample and matched it thrice but with no results. It turned out that he had surgically inserted a penrose drain into his arm and filed it with foreign blood and anti-coagulates. In this case, the victim despite under the influence of sedative was able to remember the rape due to which she repeated the crime to the police. However, the sample from Schnellerberger did not match the semen of the rapist because of which, he was given clearance. In 1993, at the victim’s request the test was again repeated which also gave negative results and consequently the case was closed in 1994. The victim was still unconvinced, hired a private detective who broke into his car, obtained the sample, got it tested but since the sample was too small and of poor quality, no results could be taken out. However, in 1997, Lisa, the wife of the rapist found out that he had also raped her 15 years old daughter for which he reported to police and this time three sample viz blood, saliva and hair follicle were taken and the results were found to be positive. At trial he revealed the method to foil DNA evidence. He implanted a 15 cm. Penrose drain filled with another man’s blood and anticoagulants in his arm. During tests, he tricked the laboratory technician to obtain blood sample from the place where tube was planted.
tissue from that person. However, the company also explained the method through which, artificial and natural DNA could be segregated.

Similar was the case of Phantom of Heilbronn, where police detectives found DNA traces from the same woman on various crimes in Austria, Germany and France and the offences committed were murders, burglaries and robberies. Only after the DNA of the “woman” matched the DNA sample from the burned body of a male asylum seeker in France, detectives got to serious work. The phantom of Heilbronn alternatively referred as the “women without a face” was a hypothesized unknown female serial killer whose existence was inferred from DNA evidence found at numerous crime scenes in Austria, France and Germany since 1993, including six murders, one of the victims being a female police officer from Heilbronn Germany. The only connection between the crimes was DNA but investigators in late March 2009, came to the conclusion that the “Phantom” criminal did not exist and the DNA recovered at the crime scenes had already been present on the cotton swabs used for collecting DNA. All the swabs came from the same factory which employs several Eastern European women who fit the type the DNA was assumed to match. Although Sterile, the swabs were not certified for human DNA collection.

Stefon Koing of the Berlin Association of Lawyers says that the case of the Phantom illustrates the results of basing an investigation socially on DNA evidence. DNA analysis is a perfect tool for identification trace, he adds, but, what needs to be avoided is the assumption that the producer of the traces is automatically the culprit. So, there is good reason why the convictions should not the basis of DNA circumstantial evidence.

6.4 RIGHT AGAINST SELF-INCrimINATION UNDER INDIAN CONSTITUTION & SAMPLE EXTRACTION

Clause (3) of Article 20 declares that:

“no person accused of an offence shall be compelled to be witness against himself”.

29 Available at http://llen.wikipedia.org/wiki/phantomofHeilbronn (visited on June 6, 2011.)
30 Available at http://topics.time.com/dna/articles/7/ (last visited on 22/09/2014)
Similar provision citing principle of protection against compulsion of self incrimination can be found in British Constitution, American Constitution and the Federal Constitution. This protection is found in the 5th Amendment of the American Constitution which reads as under:

“no person shall be compelled in any case to be witness against himself.”

Reading of Article 20(3) would show that the privilege is not only confined to a person against whom a formal accusation relating to the commission of an offence has been leveled and resulted in prosecution but even a person whose name is mentioned in the first information report would also be entitled for this privilege. In Amin v. State, it was held that even a person who has not been named in the FIR, but there is evidence, oral or circumstantial, which points towards his guilt, would also be entitled for the said privilege i.e. the suspect.

Thus under Indian Law, the privilege against self-incrimination is not only confined to the accused but is also available to the witness. However, under the American as well as the English Law, the privilege extends only to the accused.

For the present Research, we are concerned to analyze whether obtaining of bodily samples/ blood for DNA profiling would be violative of the Rights of the accused guaranteed under article 20 (3) i.e. Right against self-incrimination.

The conspicuous ingredient of the Article 20(3) is Compulsion. Compulsion here would mean what in Law is termed as Duress which is explained as follows:

“Duress is where a man is compelled to do an act by injury, beating or unlawful imprisonment or by the threat of being killed, suffering some grievous

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32 AIR 1958 All 293.
33 In case Nandini Satpathy v. P.L.Dani, the Supreme Court had to consider legal basis of the police practice of interrogating suspects in view of the constitutional and legal safeguards available to a person against oppressive and unjust police interrogations. In this case, Mrs. Satpathy was not yet an accused but, was the first suspect to be examined in the police station. She refused to answer certain questions for which she was charged under Section 179 of Indian Penal Code. J.Krishna Iyer did not take the restrictive view and extended the application of Article 20(3) to police interrogations. He also opined that expression accused of an offence no doubt includes a person formally brought into police diary as an accused person but it also includes a suspect.
34 Available at http://www.legalserviceindia.com/ article/ l466-Privilege- Against- Self----Incrimination. html (last visited on 23/9/2014)
bodily harm or being unlawfully imprisoned. Duress also includes threatening, beating or imprisoning of the wife, parent or child of a person”.\textsuperscript{36} It has also to be borne in the mind that compulsion can be both physical and mental.

So, the clause does not accordingly prohibit the admission or confession made without any inducement, threat, or promise\textsuperscript{37} (even though it may be retracted\textsuperscript{38} ) and neither does it debar the accused from voluntarily offering himself to be examined as witness.\textsuperscript{39} What Article 20(3) imparts is the immunity to the accused from being compelled to be witness against himself. So, it is very essential to understand the phrase ‘to be witness’ and also to see what constitutes in the said phrase. Earlier there was a controversy as to what constitutes in the phrase “to be witness” but it is now well settled that it includes oral as well as documentary testimony (State of Bombay v. Kathi Kalu Oghad, AIR 1961 SC 1808) Initially, this question came for consideration before the Supreme Court in M.P. Sharma v. Satish Chandra,\textsuperscript{40} The Court observed that:

\begin{quote}
A person can be a witness not merely by giving oral evidence but also by producing documents or making intelligible gestures as in the case of a dumb witness. To be a witness is nothing more than to furnish evidence and such evidence can be furnished through lips or by production of a thing or of a document or in other modes. The phrase used in Article 20(3) is to be a witness and not to appear as a witness.
\end{quote}

This question was reconsidered in the case State of Bombay v. Kathi Kalu, (Supra) where the Hon’ble Supreme Court while deciding bunch of three appeals; one from Bombay High court and one each from Punjab and Calcutta high court considered the following issues:

- Whether the production of the specimen handwriting of the accused could come within the phrase ‘to be a witness’?
- Whether giving of specimen handwriting in police custody would amount to compulsion?
- Whether Section 27 of Indian Evidence Act was violative of Article 14 of the constitution?

\textsuperscript{37} State v. Raj Khowa Upendra Nath, 1975 Cri LJ 354.
\textsuperscript{38} Kalwati v. State of H.P., 1953 SCR 546.
\textsuperscript{39} Bhagat R.S. v. UOI, AIR 1982 Delhi 191.
\textsuperscript{40} AIR 1954 SC 300.
• Whether accused impressions taken from him after arrest were not admissible in evidence in view of the provisions of Article 20(3) of the Constitution?

• Whether the direction given by a Court to an accused person present in the Court to give his specimen writing and signature for comparison under Section 73 of Indian Evidence Act infringes fundamental right enshrined in Article 20(3) of the Constitution?

The Court noted that ‘to be a witness’ may be equivalent to ‘furnishing evidence’ in the sense of making oral or written statements, but not in the larger sense of the expression so as to include giving of thumb impression or impression of palm or foot or fingers or specimen writing or exposing a part of the body by an accused person for purpose of identification. It was also observed that furnishing evidence could not be given a restrictive meaning as though the intention of legislature could have been to save the accused from self-incrimination but obviously it could not have been their intention to lay obstacles in the effective investigation. ‘To be witness’ means imparting knowledge in respect of relevant fact either oral or documentary by a person who has personal knowledge of the facts to be so communicated to the Court or to a person holding inquiry or investigation. Further, just because the statement has been given while in police custody would not be violative of Article 20(3) unless and until it can be shown that it was extracted under compulsion. So, the following conclusions were derived by the Hon’ble Court:

• Just because a person made a statement in the police custody would be of no inference that he made the statement under compulsion though that may be a case if coupled by other evidence on record.

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

• “To be witness” is not equivalent to “furnishing evidence”. It not only includes oral but also the documentary evidence.

• To be Witness would mean imparting knowledge in respect of relevant facts by an oral statement or a statement in writing made or given in Court or otherwise.

• Giving thumb impression, handwriting specimen, palm prints or showing parts of body for identification are not included in the expression ‘to be witness’.
A peculiar situation crept before the court when the court had to decide what was more important, whether the right to privacy of a person on one side or the public interest on the other. In the given situation there was no interference by a public authority in the exercise of the right except in accordance with the law. The court held that in such cases that where there is conflict between two interests, public interest on one side, and individual on the other, the law would lean in favour of the larger interest, and thus would not be violative of Article 21 of the Constitution. The court also opined that some interference is necessary in the domestic set-up for securing interest of national security, public safety or economic well being of the country or for prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others.

Another question that needs to be answered is whether a party to divorce proceeding can be compelled to undergo medical examination or not? This question was answered by Hon’ble Supreme Court while deciding *Sharda v. Dharam Pal*, *(supra)*. The Hon’ble Court was of the view that a party to a divorce proceeding is likely to take defense of impotency, mental disorder or may dispute the paternity. So, in order to establish such plea, medical evidence is necessary, and it would be difficult to arrive at an opinion without the same. Resultantly, it may also render the very grounds on which divorce is permissible nugatory. So, the Hon’ble Court held that though Right to privacy is not specifically conferred by Article 21 but when it is read giving extended interpretation to the word “Personal liberty”, it cannot be treated as an absolute right. It was also emphasized that some limitation on this right had to be imposed particularly when there is clash between two competing interests. The endeavor of the Court should be to reconcile the two interests by striking the balance and not ordering for a roving inquiry. In light of this, *Gautam Kundu’s* case was also re-arranged and court sounded a note of caution that Courts should refrain themselves from passing mechanical order. The guidelines issued by the court are as follows:

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41 M. Vijaya v. The Chairman, Singareni Collerie; AIR 2001 AP 502.
43 *Ibid*.
44 Gautam Kundu v/s State of West Bengal AIR 1993 SC 2295
• A matrimonial Court has the power to order a person to undergo medical test.

• Passing of such an order would not be violative of Art.21 of Indian Constitution.

• However, Court has to see that there is strong prima facie case in favour of the applicant. If despite that the respondent fails to part with his/her blood sample, the Court will be entitled to drawn adverse inference. But in any case court cannot compel the respondent for the execution of its order.

Researcher is of the opinion that the view formulated in the Gautam Kundu case that the respondent cannot be compelled for execution of the court’s order for giving bodily sample needs to be reconsidered in light of the fact that what Article 21 contemplates is that no one shall be deprived of his life or personal liberty except according to the procedure established by law. It does not completely put the bar of just and fair deprivation of personal liberty. Also, where there is “sufficient material before the Court”, and a strong prima facie case has been made out by the victim, denial to give direction for conducting DNA test in order to determine paternity of children was not proper for e.g. it is alleged that the accused had sexual relations with the victim on assurance of marriage as a result of which, two children were born.

The next question that needs to be considered is whether taking of blood/bodily samples would be violative of Article 20(3) or not?

Section 53 of Criminal Procedure Code was incorporated in year 1973. Section 53 of the code imposes an obligation upon the arrested person to subject himself for medical examination at the instance of the police officer to facilitate the investigation. But the courts still feel reluctant to order for such collection of bodily samples. The reluctance can be well understood prior to year 1973. At that time, there was no specific provision either in Criminal Procedure Code or Indian Evidence Act, so the Courts didn't direct the accused to take the test especially when he was unwilling to part with his bodily sample.45

However, now this reluctance of the courts is beyond comprehension. The reason for which Section 53 of CrPC is enacted is to enable the Courts and the

Investigating officers to facilitate effective investigation through scientific means. This can either benefit the prosecution or the accused. The constitution does not say that no person shall be deprived of his right or personal liberty under any circumstances. What it mandates is that such deprivation can be done only in accordance with law. Recently, Courts are also of the view that they have the power to direct the taking of blood samples but it should not be done as a matter of course or to conduct a roving inquiry. It was also held that accused cannot be compelled to give blood sample in *Sadashiv Malikarjun v. Nandini Sadashiv*, but mere taking of blood sample will not amount to compulsion. Similar view was taken in *Jamshed v. State of U.P.* The Court observed though there is no specific provision for taking Blood sample yet in criminal case, “examination of person includes an examination of any organ inside the body and taking of blood sample also. So, restrictive meaning to the word “examination” cannot be imported as that would frustrate the basic object of Section 53 Cr.P.C. Hence, examination would not only mean the superficial examination of the person but the medical practitioner is at liberty to use any modern and scientific techniques available in order to give his opinion. Hence, Magistrate is in his full legal jurisdiction when it directs medical examination of accused.

Therefore, absence of documented statutory provisions in regards to DNA profiling should not be the impediment in the way of the courts to welcome the nouveau technology with open arms in the courtroom. This was explicitly explained by the Orrisa court when the hon'ble court ordered for DNA Test in 2004 in a case titled as *Thogorani v. State of Orrisa*, wherein it was observed that though Section 53 of Criminal Procedure Code only refers to examination of accused by medical practitioner at the request of police officer, however there is no reason why Court should not have a wider power for issuing directions to police officer to collect blood sample from the accused and conduct DNA Test for the purpose of further investigation under Section 173(8) of the code. The only caution for the Court issuing a direction for collecting the blood samples of the accused for conducting DNA Test

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46 1995 Cri LJ 4090.  
48 1976 Cri LJ 1680.  
50 2004 Cri LJ 4006
would be to balance the public interest on one hand and the Right of the accused guaranteed under Article 20(3) and 21 of the constitution on the other in obtaining evidence that would confirm or disprove the guilt or innocence of the accused who is said to have committed the offence.

In balancing this interest, the following guidelines may be relevant:

- The court should peruse the material on record to see the extent to which the accused participated in the commission of crime. If the material on record is sufficient then the court must direct for DNA profiling.
- The gravity of the offence and the circumstances in which it is committed.
- Age, physical and mental health of the accused at the time of commission of crime to the extent they are known.
- Availability of less intrusive and practical way of collecting evidence tending to confirm or disprove the involvement of the accused in the crime.
- The reasons, if any, for the accused for refusing such consent either to the court or to the police officer.

The above observations were made keeping in mind the fact that the DNA evidence is now a predominant and established forensic technique for identification from the left over biological tissues at the scene of crime or when the investigation is based upon the circumstantial evidence. The sophistication of the technology may not only produce conclusive results in declaring the accused guilty in light of other evidence but also help the falsely implicated accused exonered.

In case *Kanchan Bedi & Others v. Gurpreet Singh Bedi,*\(^5\) relying upon *Sharda v. Dharam Pal (Supra)*, the Hon’ble Court held that it is different to resist the law as it stands today and it does not create any impediment or violation of rights in directing the person to submit themselves for DNA test, especially where the parentage of a child is in dispute. Similar observation was made in *Seema Sharma v. Amar Sharma,*\(^5\) and it was held that the direction of DNA profiling can be given keeping in view its conclusive nature\(^5\) of the test.

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51 AIR 2003 Delhi 446.
52 MP-2006-340
53 Savitabai v. Chandrabhan, MP-2006-93; also see Banarsi Dass v. Teeku Dutta and Anr., (2005) 4 SCC 449 (in this case however, the application for DNA test was rejected finding the case not fit for such direction).
Again while considering the scope of Section 53 Criminal Procedure Code in *Anant Kumar Naik v. State of A.P.*, the Court held that in order to extract the bodily sample, Section 53 provides for use of reasonable force. In exercise of this force, if some discomfort is caused, the same would be justified and such examination of accused body would also include examination of internal organs.

### 6.4.1 RIGHT AGAINST SELF-INCrimination UNDER OTHER COUNTRIES

The Recognition of Right to Privacy also finds mention in countries like U.S but in these countries also, it's not an absolute right.

In *Breithaupt v. Abran*, blood sample was removed from the body of an unconscious motorist suspected of drunken driving. He raised objection however, the Court rejected his plea saying that right to privacy is not an absolute right and it can be curtailed in interest of society which, in his case was the hazards to public due to drunken driving.

Similarly, in *Schmerber v. California*, the convict Schmerber objected of withdrawing blood sample from his body being violative of fourth Amendment of US constitution relating to search and seizures. However, Court while rejecting the objection observed that it was not violative of the rights of accused as taking of a blood sample plainly constitutes searches of Persons and it was done with a probable cause of determing the concentration of alcohol if any, as the same would start diminishing shortly after drinking stops and elimination by the body functions starts. Similarly in *Bell v. Wolfis*, the mandatory blood test of all the prisoners to detect the presence of AIDS virus was held not to be violative and instead reasonable under the fourth Amendment.

Taking of a swab for collection of Saliva inside the mouth came for consideration before the Court in so many cases. Earlier the view of the Courts was conservative as they opined that when a citizen was directed to submit to an intrusion

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54 1977 Cri LJ 1797.
57 352 U.S. 432 (1957).
58 384 U.S. 757.
59 441 U.S. 520.
into his body, would implicate his signatory interests\(^6\). But broader view was taken in year 2000\(^{61}\) (where Court held that swabbing inside of the mouth is significantly less intrusive means than piercing the skin to draw blood).

Thus, Courts have consistently held in many cases that “DNA testing” is reasonable under the fourth Amendment of United States Constitution. It has been held the DNA samples can be collected without penetration below the skin for e.g. from hair follicle, dandruff, skin, cells, saliva and can also be collected from discarded or abandoned biological material. So, in such cases, there is very mild intrusion of one’s bodily integrity and because such samples are collected from the surface of the body and from the discarded biological samples.

In Jones v. Murray\(^6\), six inmates challenged the validity of DNA statute but Court upheld the validity saying that it very well stood the scrutiny of the fourth Amendment. Similar view was taken by the Courts in Roe v. Mascotte\(^6\).

**6.5 REFUSAL TO GIVE BODILY SAMPLE & ITS CONSEQUENCES**

What if the accused refuses to give the bodily sample for comparison purposes and what remedy, if any is available with the court? Illustration attached to Section 114 shows that if a man refuses to answer a question which he is not compelled by law to answer, but the answer to it might cause loss to him in matters unconnected with the matter or if given would be unfavorable to him, then the court may draw adverse inference against him.

We have seen that Court has ample power to give a direction to a party to give a blood sample for the purpose of examination but party cannot be compelled to give the sample. Invoking provision 114 of Indian Evidence Act, if the party has been asked to give sample say for DNA Testing and he refuses, the Court is at liberty to draw adverse influence against that person.\(^6\) Ironically, Courts in Padamaji Ramana

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\(^6\) Henry v. Ryan, 775 F. Supp 247.
\(^{61}\) Re Non testimonial order Directed to R.H. 762 A. 2D 1239, 1244 Civil 2000.
\(^{62}\) 962 F.2d 302.
\(^{63}\) 193 F. 3D 72.
\(^{64}\) 2000 (1) Kar LJ 281; Sharda v. Dharmapal, 2003 AIR SCW 1950 ; Also see Rohit Shekar v. N D Tiwar 2011(4) SC 307
v. Pedamaji Raman & Others,\textsuperscript{65} took a view that no adverse presumption can be taken if accused refuses to undergo DNA test when blood grouping test already had been conducted. The researcher differs in opinion as the Court must raise an adverse inference against the accused because of its superior nature over the other biological tests for comparison. Suppose the blood group of a person comes out to be A+ve, then there can be thousands of people with A+ve Group but to reach at conclusive opinion, DNA profiling would be conclusive as the possibility of two people except the monozygotic identical twins to have same profile is very low. Also, refusal to give bodily sample for testing becomes relevant fact under Section 8 or 9 of the Indian Evidence Act.

The infringement of Right to Privacy was alleged by Alika Khosal in case titled as Alika Khosla v/s Thomas Mathew & others\textsuperscript{66} saying that Courts in India do not have authority to order DNA test particularly in Civil and Quasi-Civil matters. Hence, any such order passed in these cases would infringe the constitutional right to privacy. The Hon’ble Court while rejecting the plea of the petitioner observed that right to privacy is not an absolute right.

Similar view was taken by Madras HC in D. Rajeshwar v. State of Tamil Nadu,\textsuperscript{67} where the Court allowed the termination of undesired pregnancy of a rape victim and also passed a direction to preserve the fetus for investigation purposes. Recently, Court passed an order in a paternity suit filed by a 31 years old Delhi based lawyer, Mr. Rohit Shekhar claiming that he is a biological son of the Mr. ND Tiwari, the veteran leader.\textsuperscript{68} N.D. Tiwari, 85 years old leader defied the Court direction on paternity test and refused to appear in a Delhi High Court dispensary for a paternity test. He maintained through an application that nobody can be compelled to give evidence in this manner.

\textsuperscript{65} 2004 (II) DMC 441.
\textsuperscript{66} 2002 (62) DRJ 851. In this case, respondent had requested for the DNA profiling of the fetus of the petitioner. Same was contested by petitioner on the ground that fetus was the discharged part of her, so its examination would infringe her right of privacy. However, the court observed that undoubtedly, there is a bond between the mother and fetus, but that came to an end as soon as it was discharged. After discharge, fetus is an organism in itself. Thereupon, it could not be treated as a part of the mother but an individual or an independent organism. Hence, no question of infringement of right to Privacy arose and both the contentions were turned down.
\textsuperscript{67} 1996 Cri LJ 3795.
\textsuperscript{68} Rohit Shekar v. N D Tiwar 2011(4) SC 307
DNA profiling also involves conflict between the larger interest of society and the individual chosen for extraction. If any biological evidence is collected from the crime spot, it doesn't impinge upon the legal rights of the person. However, same may not be the case if the sample has to be extracted from an individual. The extraction may be obstructed especially by the accused raising violation of his fundamental rights guaranteed under Article 20(3) and Article 21 of the constitution. There had been many such cases in the past but the precedents in this aspect have now set at rest all the controversies holding that taking of blood sample from accused does not amount to compelling him ‘to be a witness against himself’, though it may amount to furnishing evidence in the larger sense. So, the overall evaluation of the various judgments of the Hon’ble High Court’s and also in light of the Explanation added to Section 53 of Criminal Procedure Code vide amendment Act of 2005, it is clear that there would be no violation of Article 20(3) if the accused is called to give his blood sample, handwriting specimen or for that purpose any biological sample for either comparison or investigation purposes. It may not only facilitate the prosecution but also help the accused to prove him innocent. Otherwise, also, the intrinsic character of biological samples of a person would not change despite concealment.

Also, perusal of Section 53 mentions that the examination of the accused would only be conducted on the request of police officer not below the rank of Sub-Inspector. However, this does not mean that the Superior officer for that purpose does not include the Magistrate or the Court. The purpose of the Court is to ascertain the truth, so the Court can direct the medical examination of the accused. This right is even available to the accused on his own request, if he feels that he has been falsely implicated in the case. However, study shows that the accused are not aware of their legal right guaranteed under Section 53 of Criminal Procedure Code. What to talk about right, they don't even know who or how they were identified in the case they were alleged to have been involved. Legal services authorities across India are doing commendable job in spreading Legal Awareness. The objectives of the authority are to provide Free Legal Aid and spread Legal Awareness. So, Legal services authorities can play a prominent role in making accused aware of all legal rights available to
them and aid can be taken from the authority to facilitate this vision. Further, under Section 315 Criminal Procedure Code, an accused can waive off his right under Article 20(3) and tender himself as witness if he chooses to do so.

So, not only the police but courts too who have the power to direct a person to part with his bodily sample for comparison however, courts should refrain themselves to conduct a roving inquiry while passing such orders. Nevertheless, the person who has been directed to give his sample can refuse to do so despite orders and cannot be compelled for execution of the orders passed by the court. The only remedy available with the court is to draw an adverse opinion under section 114 of the Indian Evidence Act. Reference in this context can be made to the recent case of Mr. N.K. Tiwari, where hon'ble Supreme court of India has thrashed and discussed whole law on the extraction of DNA sample for analysis and its implications on the individual and consequences of refusal to part with the body sample.