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Right against Self-Incrimination: A Detailed Study & Analysis of Laws Prevailing in India

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ABSTRACT

The right to self-incrimination first appears in medieval Roman church law in the Latin maxim 'Nemon tenetur seipsum accusare' which means 'No one is obligated to blame himself.' Back in the middle-ages in England, demonstrations against inquisitorial and manifestly unfair practices of questioning of convicted persons eventually evolved the right of common law. This is one of the basic tenets of the British Code of penal jurisprudence, which the United States of America followed and introduced into their Constitution as "no person shall be compelled in any case to be a witness against himself", and thereafter adopted in the Indian Constitution as under Article 20(3). This immunity is only applicable to criminal proceedings. Although, the protection does not apply in case wherein an object or document is searched or seized from the accused's possession. For the same purpose, the provision would not exclude the accused from being examined, medically or having his thumbprint or specimen signature taken. However, the role of judiciary becomes more critical as the application of this protection varies from facts and circumstances of each case.

The Researchers in this paper attempts to examine the principle of self-incrimination rights as a fundamental & constitutional right in India from different aspects. Starting with the brief introduction in the Part I, Part II addressed the analysis/interpretation of Article 20(3). Part III addresses the similar provisions contained in the Code of Criminal Procedure. Part IV aims to balance the Right to remain silent with Right against self-incrimination. Part V covers the aspect of scientific examination of accused persons to see how well they match the spirit found underneath Article 20 (3) with Part VI reflecting the role of social media. Lastly, Part VII concludes the paper with overall views and opinions.

Keywords: *Self-incrimination, Protection, Accused, Fundamental Right, Penal Jurisprudence*

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I. INTRODUCTION

(A) The History & Origin

The Right against Self-Incrimination is constitutional right which is guaranteed by **Article 20(3)** of the Constitution of India, 1949. This is a basic concept which originated from a legal maxim i.e. “*Nemo Tenetur Seipsum Accusare*” which means that “No man, not even the accused himself can be compelled to answer any question, which may tend to prove him guilty of a crime, he has been alleged against” or in exact sense, “No one is bound to incriminate or accuse himself.” This provision was borrowed by the fathers of the Indian Constitution from the Fifth Amendment of American Constitution³ which can be traced back to British System of Criminal Jurisprudence. This privilege was first recognized in the mid-18th centuries along with other doctrines such as “Burden of Proof upon the Prosecution” and “Proving guilt beyond reasonable doubt.” This equipped the accused with some tools to defend himself against the State, minimizing the disadvantages faced by the defendants.⁴

It is not merely a legal right but a Fundamental Right which is secured in golden words of the Constitution under **Article 20(3), Part III**. It is one of the basic tenets of the criminal law. This protection is also backed by various other principles of criminal law, which are as follows:

- ❖ Presumption – Accused to be innocent until proven guilty
- ❖ Onus – Rests upon the head of the Prosecution to prove the guilty beyond reasonable doubt.
- ❖ Right to remain silent – Accused cannot be compelled to disclose any information against his will.

(B) Rationale

The rationale rudimentary to this provision was well acknowledged and is best put-forth in the case of *Saunders v. United Kingdom*⁵ whereby it was opined that in order to avoid miscarriage of justice, protection of accused is necessary against the improper compulsion of the concerned authorities. Ethics may be one point which forms the bases for this privilege. Ethical rationale is the need to protect the accused from being a prey to torture and brutalization by the investigators as such these involuntary statements if alone given weightage in the trial, then it would be easier for the investigating agency to just to arrest anyone on word of the victim and

³ U.S. CONST. amend. V, – “No person shall be compelled in any criminal case to be a witness against himself”.

⁴ Gautam Swarup, *Narco Analysis and Article 20(3) of the Constitution of India: Blending the Much Awaited* (2009), http://works.bepress.com/gautam_swarup/2

⁵ *Saunders v. United Kingdom*, 23 EHRR 313 (1997).

subject them to coercion, threats, inducement or deception in order to obtain enough evidence to incriminate the accused. Even if such methods are proved to be good, it shall not be ignored that such kinds of tactics are violative of basic Human Rights of Life, Integrity and Limb. Therefore, this right is necessary to maintain check and balances on the conduct of the police authorities while examining the accused. And on the same hand, to protect an innocent person who may make any false statement out of sheer despair, fear, stress and anxiety.

Reliability may be second point which this privilege serves. When an accused is continuously pressurised to testify against himself, it may affect the mental status of that person. Thereby, affecting the reliability of the testimony, statements, evidence so procured on the basis of such information. Thus, misleads the court of law. These methods are likely to cause delays and miscarriage of justice. As it was rightfully opined in the case of *State of Bombay v. Kathi Kalu Ohgad*,⁶ that, “the absence of the privilege against self-incrimination would incentivize those in charge of the enforcement of the law to sit comfortable in the shade rubbing red pepper into the devil’s eye rather than go about in the sun hunting up evidence.”

(C) Scope & Essentials

The Hon’ble Supreme Court of India in *M.P. Sharma v. Satish Chandra*⁷ has widened the scope of **Article 20(3)** giving out the following essentials:

- ❖ The Right pertains to “accused of an offence”
- ❖ Also, provides protection against “compulsion to be witness”
- ❖ Such “compulsion” is also extended to him, giving “evidence” against himself.

This right was also given the umbrella of Right to Life⁸ when it was held that, “**Article 21** of the Constitution of India requires a fair, just and equitable procedure to be followed in criminal cases.”⁹ The Constitution (**44th Amendment**) Act, 1978,¹⁰ accorded a shield in the form of non-derogable status i.e. even in the circumstances of an Emergency in the country, this provision cannot stand suspended.

(D) Instance of Self-Incrimination

Where evidence or a statement is forced or threatened out of accused by the police authorities who endanger the case of him only. Then the Right against Self-Incrimination comes into play

⁶ State of Bombay v. Kathi Kalu Ohgad, AIR 1961 SC 1808.

⁷ M.P. Sharma v. Satish Chandra, AIR 1954 SC 300.

⁸ INDIA CONST. art. 21.

⁹ Maneka Gandhi v. Union of India, 1978 (1) SCC 248.

¹⁰ The Constitution (Forty-fourth Amendment) Act, 1978, No. 88, Bills of Parliament, 1978, § 40.

whereby such accused has all the “right to remain silent” and not disclose anything out of force. It is thus essential to defend the accused until upheld guilty. It is settled principle of law that, “no man can be seen with a guilty eye until and unless proved guilty in the court of law.”

Even if an accused admits to some degree in the court of law during the trial, it shall be looked into the aspect that the confession so made, whether was voluntary or involuntary. It shall be ensured that no undue influence was subjected to the accused. The main object of this constitutional protection is to respect freedom of human privacy and to place down some set standards in criminal justice system.

II. ARTICLE 20(3) OF THE INDIAN CONSTITUTION

Article 20(3)¹¹ seeks to promote further the spirit of ‘natural justice’ and ‘fair trial’. It was held in the case of *Kanti Kumari v. State of Jharkhand*¹² that no compulsion lies against any person to give a statement. The Hon’ble Supreme Court observed while interpreting **Article 20(3)** that certain essentials needs to be strictly followed so as to be eligible for invoking this particular Article.¹³ This Article lays down three essentials to be fulfilled in order to claim the privilege or benefit of **Article 20(3)**. These are discussed as follows:

(A) Person must be “accused of an offence”

The advantage of the aforementioned Article is only offered to somebody who is an alleged offender under the Indian Penal Code or any other special penal laws. But various doubts arose in the mind of the jurists as how to differentiate a normal person & an accused person for the purposes of this Article, and at what stage of accusation this right to be made available to an accused person. These were clarified by the Hon’ble Apex Court of India in the following cases:

1. **Accusation leading to further Prosecution** – *K. Joseph v. Narayana*¹⁴: It was held that a person is said to be an accused of an offence when an accusation of committing an offence is put against him and accusation is of such nature that it will led to further prosecution of the accused.

2. **Formal Accusation** – *Vera Ibrahim v. State of Maharashtra*¹⁵: It was observed that no benefit under this Article is available to a person who is arrested on mere suspicion without

¹¹ INDIA CONST. art. 20, cl. 3. – “**Protection in respect of conviction for offences:** (3) No person accused of any offence shall be compelled to be a witness against himself”.

¹² *Kanti Kumari v. State of Jharkhand*, 2013 (I) Crimes 212 (214) (Jhar).

¹³ *Narain Lal v. M.P. Mistry*, AIR 1961 SC 29; following *supra* note 05.

¹⁴ *K. Joseph v. Narayana*, AIR 1964 SC 1552.

¹⁵ *Vera Ibrahim v. State of Maharashtra*, AIR 1976 SC 1167.

FIR being filed against him or if there is immaterial information in Panchanama Report as such person would not be coming under the ambit of “formal accusations.” Meaning thereby, it was the opinion of the Hon’ble Court that this right extends to only those against whom a formal accusation has been levelled.

3. **Contemnors no “accused”** – *Delhi Judicial Service Association v. State of Gujrat*¹⁶: It was clarified that a party who is alleged to be in contempt of court will not be covered by the head of “accused person” for the purposes of **Article 20(3)**. The benefits under the said Article only extend to criminal proceedings and contempt proceedings are not a part of it.

4. **Stage of Accusation** – *R. B. Shah v. D. K. Guha*¹⁷: The question, at what step a person suspect can avail the privileges under this provision was answered by the court. It was opined that after the addition of the name of the person so accused of an offence is entered into the FIR and an order of the Magistrate for further investigation is passed, the protection under this Article can be pursued.

5. **Accused being a Witness in the same matter** – *Balasaheb v. State of Maharashtra*¹⁸: It was observed that a witness in one case who is also an accused in another case pertaining to same subject matter would not be in position to claim absolute immunity or protection but he may deny to respond to those questions which tend to incriminate him.

Indian Constitution by this very limitation only, narrows down the scope of the protection against self-incrimination. The benefit of the provision is only available to the accused persons in order to safeguard them from the forceful probing or interrogation practices of the authorities. No such protection is available to the “witnesses” under Indian Laws; the system has failed to foresee that the “witnesses” may be subjected to the harsh treatment.

(B) Protection against “Compulsion” to be a “Witness”

A witness is any person who possesses some knowledge about a matter who either by compulsion or voluntarily provides either oral or written testimonial evidence. The scope of “to be a witness” as used in **Article 20(3)** has been given a broader interpretation by the Indian Judiciary in the case of *M. P. Sharma v. Satish Chandra*¹⁹, wherein it was held that as in accordance with the Indian Evidence Act, 1872, an accused may be a witness even by providing documents and which is why protection under the said Article would be extended to such cases also but overruling the same, for the purposes of securing the essence of justice, it has been

¹⁶ Delhi Judicial Service Association v. State of Gujrat, (1991) 4 SCC 406.

¹⁷ R. B. Shah v. D. K. Guha, AIR 1964 SC 1196.

¹⁸ Balasaheb v. State of Maharashtra, 1994 Cri LJ 3044.

¹⁹ M. P. Sharma v. Satish Chandra, AIR 1954 SC 300.

scoped down in the following case-laws:

1. **Personal Information** – *State of Bombay v. Kathi Kalu Oghad*²⁰: The Hon’ble Apex Court observed that for the purposes of **Article 20(3)**, “self-incrimination must mean conveying information based upon personal knowledge of the accused person and shall not include the mechanical process of producing documents in court of law unless such documents contain any statement of the accused based on his personal knowledge.” It was held that “to be a witness” would not be alike to “furnishing evidence” in any sense.

2. **Finger prints, specimen writings, etc.** – *State v. M. Krishna Mohan*²¹: The Hon’ble Court elaborating the principles laid down in the aforementioned case held that compulsory taking of finger/thumb/foot/palm impressions, specimen writings, and photographs, etc. would not be covered under the ambit of “to be a witness.” Meaning thereby, the protection would not be extended to such compulsions as **Article 20(3)** only purports to safeguard the accused from harmful practices of the authorities and not to conceal the evidence pointing towards the accused who may be the real culprit.

3. **Admissibility of Statement of Accused** – *Pershadi v. State of U.P.*²²: The court was of the view that statement of accused made after arrest which may ultimately lead to discovery of incriminatory articles would be admissible as evidence in the court of law. **Section 27**²³ of the Indian Evidence Act, 1872 was held to be a good law to this regard.

Even though the judiciary have interpreted and cleared out the scope of this particular clause, the applicability would be dependent on the facts and circumstances of each case.

(C) “Compulsion” to Give Evidence Against Himself

The protection against self-incrimination can only be claimed when the person accused of an offence is being compelled to give such statement or information which would likely to incriminate him in the case. But when such information is disclosed by the accused voluntarily or on request then he waives off his right under **Article 20(3)** and the same cannot be invoked. What constitutes “compulsion” has been discussed by the court in the following cases:

1. **“Compulsion” to be necessarily applied** – *Mohd. Dstgir v. State of Madras*²⁴: It was observed by the Hon’ble Court that this protection is only available to a person who is accused of an offence and there is application of duress upon him for a peculiar operation.

²⁰ State of Bombay v. Kathi Kalu Oghad, AIR 1961 SC 1808.

²¹ State v. M. Krishna Mohan, AIR 2008 SC 368; relied on *Id.*

²² Pershadi v. State of U.P., AIR 1957 SC 211.

²³ The Indian Evidence Act, 1872, No. 1, Acts of Parliament, 1872, § 27.

²⁴ Mohd. Dstgir v. State of Madras, AIR 1960 SC 756.

2. **Psychological Interrogation** – Ordinarily compulsion may include threats, beatings or undue influence, etc. but the meaning was expanded in the case of *Nandini Satpati v. P. L. Dani*²⁵: the aspect of psychological interrogation was taken into consideration and it was held that this provision can also be invoked in case of “*mental torture which may include tiring interrogations, atmospheric or environmental pressure or any sort of intimidation*” as it would be as much as dangerous to the accused as physical abuse.

3. **Admissibility of information obtained without knowledge** – *Yusufali v. State of Maharashtra*²⁶: The question regarding the admissibility of the information which was recorded without the knowledge of the accused was dealt. The court was of the view that information which may be provided without the knowledge cannot be said to be obtained by the use of force or compulsion and the same would not be hit by **Article 20(3)**, and will be admissible as evidence. Even seizure of documents or property of some kind from the dwelling of the accused cannot be said to strike by the said provision.

Thereby, as in the light of the above authorities it is made clear that an accused person cannot be forced to provide any such testimony or evidence which later turns contradicts him only. Even where some strands of hair was found in the hand of deceased and accused was asked to give sample of his hair for verification, the court held that the accused has all the rights to refuse as he could not be compelled to be a witness against his will.²⁷

(D) Applicability to Civil and Administrative Proceedings

The very language of the **Article 20(3)** suggests that the protection is available in cases of criminal nature only but the judiciary have over the times have widened the scope of the said protection and the question whether right against self-incrimination exists outside criminal law has been answered in the following cases:

1. **Civil Proceedings** – *Sharda v. Dharmpal*²⁸: The question before the court of law was whether under Section 151²⁹ of the Code of Civil Procedure, 1908 a person can be forced to give information. The Hon’ble Supreme Court observed that, “the primary duty of a court is to see that truth is arrived at. A party to civil litigation, it is axiomatic, is not entitled to constitutional protections under **Article 20** of the Constitution of India. Thus, the civil court

²⁵ Nandini Satpati v. P. L. Dani, AIR 1977 SC 1025.

²⁶ Yusufali v. State of Maharashtra, AIR 1968 SC 147.

²⁷ Amrit Singh v. State of Punjab, AIR 2007 SC 132.

²⁸ Sharda v. Dharmpal, (2003) 4 SCC 493.

²⁹ The Code of Civil Procedure, 1908, No. 5, Acts of Parliament, 1908, § 151. – “**Saving of inherent powers of Court** – Nothing in this Code shall be deemed to limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court”.

although may not have specific provisions in the Code of Civil Procedure and the Evidence Act, has an inherent power in terms of Section 151 of the Code of Civil Procedure to pass all orders for doing complete justice to the parties to the suit.” Meaning thereby, the power under Section 151 of the code is a “*suo-moto* power” and trite in nature which can also be exercised on applications by the parties. **Article 20(3)** has no application under civil proceedings

2. **Administrative Proceedings** – The protection under **Article 20(3)** is not available in administrative proceedings as there is no involvement of persons in the investigation process. The entire proceedings are based upon facts and documents. Thereby, no essentials of **Article 20(3)** can be fulfilled so as to invoke the benefit of protection secured thereunder.³⁰

Therefore, it is safe to conclude that Right against Self-incrimination exists and can be applied only in criminal proceedings i.e. offences relating to Indian Penal Code, 1860 or any other special penal law. It has no application in either civil or administrative proceedings.

III. SECTION 161 OF CODE OF CRIMINAL PROCEDURE

Section 161³¹ provides for the procedure to be followed by a police officer while examining a person. *Prima facie* this provision is applicable to all persons who may be examined by the police authorities but the judiciary have limited the ambit of “person” as used in the said section. In the case of *Pakala Narayan Swami v. Emperor*³², the Privy Council while interpreting **Section 161** of the Code, “persons” take account of any person who may be subsequently a suspect.

Although this provision imposes duty on the person to answer truthfully but on the same it provides protection from answering those questions which subsequently may be proved against the accused himself or in other words incriminate him. Therefore, in addition to **Article 20(3)** of the Constitution, **Section 161(2)** of CrPC safeguards the interests of the accused.

(A) Scope & Applicability

Section 161(2) takes into the ambit the Right to Remain Silence also. The duty under this provision requires the person giving answers to be truthful but it is at the option of the person not to answer at all and remain silent. The provision in anyway does not allow for compulsion

³⁰ Aqa Raza & Pankaj Kumar Pandey, “‘Protection against Self-Incrimination’ as a Fundamental Right in India: A Critical Appraisal,” RESEARCH GATE (Jul. 27, 2016), https://www.researchgate.net/publication/305656462_Protection_Against_Self-Incrimination_as_a_Fundamental_Right_in_India_A_Critical_Appraisal.

³¹ The Code of Criminal Procedure, 1973, No. 2, Acts of Parliament, 1974, § 161. – “**Examination of witnesses by police** – (2) Such person shall be bound to answer truly all questions relating to such case put to him by such officer, other than questions the answers to which would have a tendency to expose him to a criminal charge or to a penalty or forfeiture”

³² *Pakala Narayan Swami v. Emperor*, AIR 1939 PC 47.

to be used so as to force the statement out of the person. Therefore, **Section 161** when r/w **Article 20(3)**, Right against Self-incrimination extends its umbrella to witnesses and suspects as well.

(B) Other Provisions

Section 313(3)³³ protects the Right to Silence at trial. Section 315(1) proviso and clause (b)³⁴ of the said proviso, protects the accused by restricting the parties and the court of law to make any comments with regard to the failure of the accused to produce evidence.

The aforementioned provisions create presumption against the guilt and in support of the innocence of the accused, and also grant the accused, the Right to Silence at the point of inquiry as well as at trial, further safeguard this right by prevent any party and even the court to remark upon the silence of the accused.³⁵

IV. RIGHT TO REMAIN SILENT

“...throughout the web of English Criminal Law, one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner’s guilt.”³⁶

The ‘Right to Silence’ is a common law principle. It suggests that no court of law is encouraged to conclude, that a suspect or a person accused is guilty of an offence merely because he has choose not to respond to the questions put forth by the Court or police.³⁷

(A) Nexus between the Two Rights

Indian Constitution by the virtue of **Article 20(3)** take into its ambit the Right to Silence, making it a fundamental right available to any person accused of an offence. The principle of “beyond reasonable doubt” is followed in the Indian Criminal Jurisprudence which means that no accused is liable to be harassed or his rights to be seized unless his guilt is proved in the court of law beyond reasonable doubt. In the case of *D. K. Basu v. State of West Bengal*³⁸, the Hon’ble Supreme Court held that as soon as person is arrested he should be expressly informed his Right to remain silent as under **Article 20(3)** as every person so accused have all the right

³³ The Code of Criminal Procedure, 1973, No. 2, Acts of Parliament, 1974, § 313(3). – “**Power to examine the accused** – (3) *The accused shall not render himself liable to punishment by refusing to answer such questions, or by giving false answers to them*”.

³⁴ The Code of Criminal Procedure, 1973, No. 2, Acts of Parliament, 1974, § 315(1) proviso, cl. b. – “**provided that** – (b) *his failure to give evidence shall not be made the subject of any comment by any of the parties or the Court or give rise to any presumption against himself or any person charged together with him at the same trial*”.

³⁵ Law Commission of India, *180th Report on Article 20(3) of the Constitution of India and Right to Silence*, LAW COMMISSION OF INDIA (May 09, 2002), <http://lawcommissionofindia.nic.in/reports/180rpt.pdf>.

³⁶ *Woolmington v. DPP*, 1935 AC 462.

³⁷ *supra* note 34.

³⁸ *D. K. Basu v. State of West Bengal*, 1997 (1) SCC 416.

to know that such rights exists in his favour.

The observation made by Krishna Iyer J. in the case of *Nandini Satpati*³⁹ is still very much accurate. The learned Judge held the accused to be entitled to keep his mouth shut if he feels the questions asked are of such nature which would expose him to guilt, be it before trial or during the trial. It was observed that, “whether we consider the Talmudic Law or the *Magna Carta*, the **Fifth Amendment**, the provisions of other constitutions or **Article 20(3)**, the driving force behind the refusal to permit forced self-incrimination is the system of torture by investigators and courts from medieval times to modern days. Law is response to life and the English rule of the accused’s privilege of silence may easily be traced as a sharp reaction to the Court of Star Chamber when self-incrimination was not regarded as wrongful. Indeed then the central feature of the criminal proceedings, as Holdsworth noted, was the examination of the accused.”

Thereby, if a person choose to remain silent upon his arrest for instance, he cannot be liable for remaining silent as it is not an offence but his right guaranteed the law of the land. This right gives him this personal choice to speak or not. Right to Silence can also be covered under the Right to freedom of speech and expression as under **Article 19(1)(a)** of the Constitution.

(B) Waiver of Right against Self-Incrimination

Right against Self-incrimination as enshrined under **Article 20(3)** is a fundamental right and as a general principle of law it is understood that no person can waive off the fundamental rights. The applicability of the provision depends upon the facts and circumstances of each case. The essentials or the criteria in order to invoke this protection includes “compulsion” or “external force” but in case if an accused voluntarily by his own will gives a statement contradicting himself and knowingly refuse to exercise the right the available, then it can be said that the right under **Article 20(3)** is waived off.

What is important for the right to be considered waived off is that it must be real one. Meaning thereby, the accused must be knowing that a right of such kind exists in his favour and it should not be in his ignorance. As discussed in the landmark case of *D.K. Basu*⁴⁰, that in order to protect the accused he must be made aware of his rights well in advance. Also in the case of *Kartar Singh v. State of Punjab*⁴¹ it was held that it is necessary for the police office in charge to bring into the notice of the accused the rights available to him. Hence, Right against Self-

³⁹ *supra* note 24.

⁴⁰ *supra* note 37.

⁴¹ *Kartar Singh v. State of Punjab*, AIR 1956 P&H 122.

incrimination can be considered to be waived off by the person accused only if he does it knowingly & voluntarily, free of every sort of compulsion.

V. “SCIENTIFIC EXAMINATION” OF THE ACCUSED WHETHER VIOLATIVE OF ARTICLE 20(3)

The three major requirements to be met for the scientific evidence to be admissible in the court of law are validity, reliability and legality which depend upon the method used and consistency in the accuracy of the results procured thereafter.⁴² Scientific Examination methods have proved to be effective in establishing the truth in criminal cases. But whether or not it violates **Article 20(3)** is the question.

(A) DNA Test Analysis

It is argued many a times that DNA test have challenged functional rights of an individual and stands violative of ‘Right to Privacy’ and ‘Right against Self-incrimination’ but on the same it is very vital to note that to access the truth in criminal cases, DNA test may be the best option in terms of accuracy. The question whether DNA test is violative of Right against Self-incrimination came up before the Hon’ble Supreme Court in the case of *Kharak Singh v. State of U.P.*⁴³ and *Govind Singh v. State of M.P.*⁴⁴ wherein it was observed that Fundamental Rights as under **Part III** of the Constitution are subject to various restrictions due to public influences and are not absolute. Thereby, it does not violate **Article 20(3)**. However, there have been many different opinions of the court regarding the same.

In the case where the parentage of the child was not known and DNA test was required to produce better results, the court opined that it is not violative of Fundamental Rights.⁴⁵ But what the court highlighted are the few core indispensable angles which need to be observed upon for improved process of these tests:

- Suitable procedure/amendments for DNA tests need to be inserted in CrPC.
- Prompt & immediate measures to generate a reliable data base of DNA basis of which may be regional considerations.
- The main aim should be to provide fair and speedy justice.

⁴² *supra* note 30.

⁴³ *Kharak Singh v. State of U.P.*, AIR 1963 SC 1295.

⁴⁴ *Govind Singh v. State of M.P.*, AIR 1975 SC 1378.

⁴⁵ *Kanchan Bedi v. Gurpreet Singh Bedi*, AIR 2003 DEL 446.

- The need is to maintain the equilibrium between the rights guaranteed to the accused and procedure for such tests.

The Hon'ble Supreme Court in the case of *K. Damayanti v. State of Orissa*⁴⁶ recognized the need of striking the balance between the rights available to the accused and the procedure of procurement of evidence through DNA test i.e. to balance the rights under **Article 20(3) & Article 21**. And for harmonizing this interest, considerations of the following was held to be relevant:

- The extent of participation of the accused in the offence.
- The gravity of circumstances in which the offence was committed.
- Factors like age, mental and physical health of the accused must be considered to the extent possible.
- Consent of the accused is necessary and if he denies then reason for such denial must be recorded.

The judiciary have also discussed about the inference which may be drawn against the accused on his refusal for such test. The court interpreted **Section 114**⁴⁷ of the Evidence Act to enable the court to adversely infer if a person refuses to produce relevant evidence in his power or possession.

(B) Narco Test Analysis

Wherein the accused person is put to a subconscious state by the insertion of a test drug and an electronic tendency is given in the brain through BEAP technology so as to extract information from the accused is known as Narco Test. It is essential to treat the accused in compassionate manner and to maintain the proper dignity of the accused as he also possesses the "Right to Privacy,"⁴⁸ be it either physical or mental health.⁴⁹

The landmark judgement to this regard was given by the Apex Court in the case of *Selvi v. State of Karnataka*.⁵⁰ The question before the court was to decide the validity of these scientific techniques. The court observed that administration of various inputs in the body of the accused though is not a physical threat but amounts to "mental compulsion," after effect of which would

⁴⁶ K. Damayanti v. State of Orissa, 2004 Cri LJ 4003.

⁴⁷ The Indian Evidence Act, 1872, No. 1, Acts of Parliament, 1872, § 114. – "**Court may presume existence of certain facts** — The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case".

⁴⁸ Kishore Singh v. State of Rajasthan, AIR 1981 SC 265.

⁴⁹ Gobind Singh v. State of M.P., AIR 1975 SC 1378.

⁵⁰ Selvi v. State of Karnataka, AIR 2010 SC 1974.

lead to giving of statements or evidence by the accused but it would not be by his own will or voluntarily. It was thereby held that, “no individual should be forcibly subjected to any of the techniques namely Narco-analysis, polygraph examination and the Brain Electrical Activation Profile (BEAP) test. Doing so would amount to an unwarranted intrusion into personal liberty. However, any information or material that is subsequently discovered with the help of voluntary administered test results can be admitted, in accordance with **Section 27**⁵¹ of the Evidence Act, 1872.” The court further highlighted the importance of consent of the accused before administration of such tests. It was opined that the accused must be accompanied by his lawyers at each stage of such proceedings and consent shall be recorded and all factors regards to the nature of detention must be decided by the Magistrate.

VI. ROLE OF SOCIAL MEDIA

In this day and age social media being a vibrant element in every individual’s life has also proved to be effective in the investigation of case or to facilitate the investigator. Social networking sites, email accounts, Facebook posts, comments, photographs, etc. have become a potentially rich source of evidence because they show a way into the mind and thoughts of an accused or a suspect which can be rarely extracted out from him.⁵²

The relation between Right against Self-incrimination and evidence from such online sources can better be understood from the following example: there may be a situation where the suspect/accused X is allegedly the last person to be seen on the murder site. If X’s Facebook page or his Google location reveals that at the time of murder, he was in fact present at the site or nearby the site, then such information tends to incriminate him.

If this situation is to be addressed by the authority in *Oghad*⁵³ case then it would be the easily decided as social networking records of an accused are not protected under **Article 20(3)** as it was the *ratio* in the judgment that, “the giving of personal testimony must depend upon his volition.”⁵⁴ What **Article 20(3)** protects is the ‘testimony’ of accused and such online content would neither constitute as written or oral testimony as it cannot be proved whether this deposition was wilful or not.

Social media is a source of unobtainable evidence for the prosecutors. Such information gives an insight to the inner-self of the accused or defendant. The minority judgement in *Oghad*⁵⁵

⁵¹ *supra* note 22.

⁵² *supra* note 29, at Pg. 19.

⁵³ *supra* note 19.

⁵⁴ *Id.*

⁵⁵ *supra* note 19.

case recognized the content as accessible on these online databases to be a rich foundation of testament and to be fit for the purpose of **Article 20(3)**. This principle was recognized in its true sense which was not adaptable at that point of time but now when the era of technology have taken over it is well apt to deal with principles of “Self-incrimination” accordingly. The interpretation as to what includes into self-incriminatory evidences needs to be widened so as to meet the present day needs.

VII. CONCLUSION & SUGGESTIONS

Law has always been an active practice as it changes agreeing to the latest trends of the society and principles. The Legal System must indulge progress and advancements in science & technology as well. But it must be kept intact that it shall not be against the basic fundamental principles and good of the society at large. Just and equitable principles form the very basis of the Criminal Justice.

The Right as enshrined under **Article 20(3)** *prima facie* preserves the interests of the person accused of an offence but as a fundamental principle it also preserves the interests of the State so as to maintain law and order in the society. Self-incrimination in itself is a very broad principle and for its effective use the Judiciary has to understand the ethical, scientific, technological aspects balancing them with the legal umbrella. The shortcoming of **Article 20(3)** is that it is applicable only to proceedings of criminal nature and is provided only to an alleged offender. However, by interpreting **Section 161(2)** of CrPC, a witness or prime suspect in a criminal case can also avail the benefit of this Right. It is settled that this Right is not subjected to waiver but if a person voluntarily and knowingly that he possesses such right decides to waive it, and then it is by the will of the person that the right stands waived off.

Importance to strike a sense of balance between the rights available to the accused and the interests of victims/state are very much necessary for the assurance of justice. No settled principle of law can be established to define what constitutes such balance. It is agreed that restrictions are necessary for the benefit of public policies but whether a restriction is reasonable depends upon the facts of each case. Hence, it makes the role of the judiciary more crucial as it becomes the duty to analyse in detail the facts and circumstances of each case for said purposes.

Lastly, it is the duty of the State to assure their citizens that their rights are protected and to ensure that no individual would get an unfair trial. Though, there have been many instances where State has utterly failed due to clash of interests of society at different levels. To counter such clashes a system of accountability must be reached. Public’s “Right to Know” is one way

in order to maintain the sanctity of fundamental rights. One can claim only if one has the knowledge of such claim. Standards of quality & security at the same are needed to be maintained.
