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Self-Incrimination Vis a Vis Forensic Investigation

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Abstract

The 'right against self-incrimination', as given in Article 20(3) of the Indian Constitution, safeguards people from being forced to testify against themselves. The right is also provided as one of the basics of fair trial under jurisdiction of different countries and various other international human rights instruments. This protection is distinct from forensic evidence, which includes physical and biological samples obtained through various methods. While forensic evidence can be used in court, it does not violate the 'right against self-incrimination' because it doesn't involve testimonial compulsion. This includes a wide range of evidence collected and analysed in criminal investigations. It can be physical evidence (fingerprints or traces of substances) or biological evidence (DNA samples). Forensic evidence is often obtained through searches, seizures, or examinations that may not involve direct compulsion to provide a statement. However, Forensic tests like narco-analysis and polygraph tests, while helpful in investigations, can raise concerns about the right against self-incrimination. These tests, which involve eliciting information from a suspect, are considered testimonial and may trigger the protection of Article 20(3). The law attempts to balance the need for forensic evidence in criminal investigations with the 'right against self-incrimination'. Courts have to consider whether the evidence was obtained through compulsion, which would violate the right, or through lawful means. In this research paper the researcher will cover the law of self-incrimination as provided under the Indian Constitution and the Bharatiya Sakshya Adhiniyam, 2023 along with the different forms of forensic evidences which either go in line with the laws or go against the laws. Further, the role of judiciary in analysing the relationship between self-incrimination and forensic evidence shall be studied, based upon which the possible suggestions to the issues in hand will be provided.

Key Words: Self-Incrimination, Forensic Science, Scientific Methods, Investigation, Evidence, Compulsion.

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1.Introduction

The criminal justice system aims at protecting the life and property of individuals and punish the wrongdoer.¹ Thus, fair trial in the justice system helps in adjudication of disputes where the parties come to the court, present their evidence and the judge decides the matter based upon the evidence². The ‘right to remain silent’ is a common law principle. The principle means that the courts, the parties or the prosecutors should not hold the accused guilty if he/she chooses to remain silent to the questions asked by the police or the court.³ As per the ‘Black Law Dictionary’, ‘self-incrimination’ means ‘an act or declaration’ where during investigation the person, accused or a witness implicates oneself. Now, the right against self-incrimination is based upon the ‘doctrine of presumption of innocence’, which is a very important element in administration of criminal justice.⁴

Like India, most countries have recognized expressly or through necessary implications, the right against self-incrimination and its importance during trials.⁵ Under criminal trial, there is Adversarial⁶ and Inquisitorial trial⁷. In countries like the United Kingdom, the United States of America and India, the Adversarial Trial is applicable. In this system, the person is presumed to be innocent. He enjoys the right to be silent and cannot be forced to answer. The right is provided under the Indian Constitution⁸, the ‘International Covenant on Civil and Political Rights’ and the ‘European Convention for the Protection of Human Rights and Fundamental Freedoms’⁹. The essence of right against self-incrimination has been best stated in *Saunders v*

¹Dr. Anand K Deshmukh, “Adversarial and Inquisitorial Models of Criminal Justice System: A Comparative Analysis”, II, *International Journal of Legal Science and Innovation*, 70 (2020).

²B.R Sharma, *Forensic Science in Criminal Investigation and Trials*, 101 (LexisNexis, Delhi, 2014).

³Zaheeruddin and Asma Sultana, “Testing the Validity of Narco-Analysis on Touchstone of Article 20(3) of the Constitution”, *Allahabad Law Journal*, 67 (2015-16).

⁴Gagandeep Singh Narula, “Admissibility of DNA Test under Article 20 (3) of the Indian Constitution”, *Journal of Constitutional Law and Jurisprudence*, 1142 (2023)

⁵Ashish Chugh, “A Reassessment of the Self-Incrimination Clause”, SCC J, 19 (2006)

⁶“The adversarial system is guided by innocence of the accused and the burden is on the prosecution to prove beyond reasonable doubt that he/she is guilty. The judge acts like an empire to see whether the prosecution has been able to prove the case beyond reasonable doubt”. Gracy Singh, “The Indian Adversarial System of Criminal Justice”, IV, *International Journal of Law Management & Humanities*, 2763 (2021).

⁷In Inquisitorial Trial the judge, police and the prosecution are treated as parties to the crime. The main objective is to achieve justice through composite effort of all. The court has an active role to play in this system. Dr. Anand K Deshmukh, “Adversarial and Inquisitorial Models of Criminal Justice System: A Comparative Analysis”, II, *International Journal of Legal Science and Innovation*, Vol. 2, 72 (2020).

⁸Art. 20(3).

⁹ICCPR, Art. 14.

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*United Kingdom*¹⁰. In this case, Mr. Saunders was denied the fair trial.¹¹ It was observed in this case that the ‘right against self-incrimination’ is for the protection of the accused who at times can be forced by the authorities, which leads to miscarriage of justice. Further, the European Convention does not expressly mention the ‘right against self-incrimination’ or the ‘right to remain silent’ but it is to be read into it.

At the international level, in various jurisdictions and international human rights instruments, the ‘right against self-incrimination’ has been appreciated. Like in the United States of America, the ‘Fifth Amendment to the Constitution’ mentions various rights pertaining to civil and criminal proceedings, like forbidding double jeopardy, right to grand jury and also provides for the ‘right against self-incrimination’. It further states that the courts need to follow due process of law during the proceedings.¹² In the number of rights given under the amendment, it also specifies that ‘no person shall be compelled in a criminal case, to be a witness against himself’. Then, talking about the international human rights instruments, the ‘International Convention on Civil and Political Rights’ and the ‘European Convention for Protection of Human Rights and Fundamental Freedoms’ has also laid down provisions of ‘fair trial’. Article 14 of the ‘International Convention on Civil and Political Rights’ states that ‘every person shall have the right of a fair trial’¹³. India is a party to the ‘International Convention of Civil and Political Rights’ in which according to Article 14(3)(g), minimum rights of fair trial are guaranteed. It guarantees that ‘everyone has the right to not be compelled to testify against himself or herself’.¹⁴ Then, the ‘European Convention for the Protection of Human Rights and Fundamental Freedoms’ also talks about the basics of ‘fair trial’. Article 6(1) of the ‘European Convention’ mentions that ‘every person who has been charged with an offence has the right to a fair trial’. Further Article 6(2) states that ‘a person charged with an offence shall be presumed to be innocent until proven guilty’. The presumption here is related to the ‘right against self-incrimination’. If the person is compelled to testify, it puts the burden of proving the innocence on the accused instead on the prosecution to prove the guilt.¹⁵

¹⁰1997 23 EHRR 313.

¹¹The Law Society Gazette, “Human Rights-Silence is Golden”, *available at*: <https://www.lawgazette.co.uk/news/human-rights-silence-is-golden-/21250.article> (last visited on May 28, 2025).

¹² ‘Fifth Amendment’, *available at*: https://www.law.cornell.edu/constitution/fifth_amendment (last visited on 28 May, 2025).

¹³ Art. 14 (1).

¹⁴ *Supra* note 3 at 70.

¹⁵ European Convention for the Protection of Human Rights and Fundamental Freedoms, Art. 6.

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2. Relevance of Forensic Science in Criminal Justice System

‘Forensic science’ is an advanced scientific method which is being put to use to prove the guilt or innocence of the parties to a dispute. It helps in answering important questions and forms an integral part of the criminal justice system.¹⁶ If criminals can use advanced technologies as a shield, then the law enforcement agencies will be powerless if they don’t adapt themselves to the latest technologies.¹⁷ Forensic science has various sub-divisions like Criminalistics (such as fingerprints, footwear impressions, tire tracks, ballistics), Digital forensics (recovery of data from electronic media), forensic DNA analysis, Forensic psychology, Forensic toxicology, Mobile device forensics and so on.¹⁸ Different sub-divisions are used for different parts of investigations in a case. In situations where investigation is weak, the use of forensic science strengthens it. However, the methods of forensic science are to be used keeping in mind the concept of fair trial and the rights of the people.¹⁹ Some of the tests like ‘Narco Analysis’, ‘Brain Mapping’ and ‘Polygraph Tests’ have been brought under the court’s attention for being violative of the fundamental rights of the people, possible health risks and violation of privacy. Thus, through various judicial decisions and the provisions of the Indian Constitution and the Bharatiya Sakshya Adhiniyam, 2023, validity of different methods have been analysed.²⁰

3. Admissibility of Forensic Evidence: Indian Legal Regime

Article 20 (3)²¹ provides the ‘right against self-incrimination’. It is seen as an important protection in law. The sole purpose of the provision is to prevent the usage of ‘third-degree’ and ‘torture’ techniques during investigations. The provision relies on the maxim ‘nemo tenetur prodere accusare seipsum’ which means ‘no person is bound to accuse himself’. It is also called the ‘Miranda Principle’. The American Constitution in its Fifth Amendment²² also provides that ‘no person shall be compelled in any criminal case to be a witness against himself’.²³ Under the Indian Constitution, to get the protection against self-incrimination,

¹⁶ Dr. S.R. Myneni, *Forensic Science*, 3, (Allahabad Law Agency, Faridabad, 2023).

¹⁷ A.S. Dalal and Arunava Mukherjee, “Constitutional and Evidentiary Value of New Scientific Tests”, *Journal of Indian Law Institute*, 529 (2007).

¹⁸ *Ibid* at 4-5.

¹⁹ B. Yamuna Saraswathy and R.B. Rishabh, “India’s Call on Scientific Criminal Investigation”, *Vivekanand Student Law Review*, 55 (2020).

²⁰ Kanak Mishra, “Squinting at the Narco Analysis and the Brain Mapping Tests through Fluid Consent”, *Vivekanand Student Law Review*, 86 (2020).

²¹ Art. 20 (3). It provides: No person accused of an offence shall be compelled to be a witness against himself.

²² The Fifth Amendment provides rights in relation to criminal and civil proceedings. It provides the right against double jeopardy, self-incrimination and to include due process of law in any proceeding. Available at: ‘Fifth Amendment’, https://www.law.cornell.edu/constitution/fifth_amendment (last visited on 27 May, 2025).

²³ Dr. Narender Kumar, *Constitutional Law of India*, 313 (Allahabad Law Agency, Faridabad, 2023).

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firstly, the individual should be accused of an offence and secondly, it requires the person should be compelled to be a witness through inducement or threat and such compulsion must result in giving information against him.²⁴ The ‘right against self-incrimination’ is considered a reflection of the ‘fundamental values’ that a person shall not be subjected to cruelty, contempt or self-accusation. The right has three basic features. Firstly, the accused shall be presumed ‘innocent until proven guilty’. Secondly, the prosecution shall establish the guilt ‘beyond reasonable doubt’ and thirdly, the accused shall not be compelled to make any statement against himself.²⁵

In the case of ‘*State of Bombay v Kathi Kalu Oghad*’²⁶, the ‘right against self-incrimination’ was further elaborated. In this case, a murder accused was identified and held guilty on the basis of his ‘handwriting samples’ taken at three varied occasions under police custody. The case redefined what constituted as being as ‘witness against himself’. It stated ‘*witness is the one who gave written and oral testimony, which by themselves had the ability to incriminate a person. All other kinds of physical, biometric, forensic and material evidences were not considered personal testimony and did not attract the right against self-incrimination*’. ‘*Similarly, evidences like handwriting samples, fingerprints, thumb prints, palm prints, footprints or signatures were declared as material evidences and not incriminating the accused and thus falling outside the scope of Article 20(3) of the Constitution*’. Accordingly, the courts can order the accused to provide fingerprints or handwriting samples and it would not amount to violation of the Constitutional provision. Thus, for such material evidences, a person can be compelled. It was held that where the accused makes a statement or confesses voluntarily, the provisions of Article 20(3) are not applicable. Thus, a statement being voluntarily does not lead to violation of the right, whereas, a statement under compulsion is violative.²⁷

Further the question arose what amounts to compulsion. The Supreme Court in *Nandini Satpathy v P.L. Dani*²⁸ held ‘*compulsion includes not only the physical threats but also mental torture, atmospheric pressure, coercion, over-bearing and different methods of intimidation*’.

²⁴ Simran Sahoo, “Protection of Right Against Self Incrimination”, II, *Indian Journal of Integrated Research in Law*, 2-3 (2022).

²⁵ Bhat Waseem Ahmed, “Dilemma created by the Privilege of Self-Incrimination”, *GMLU Journal of Law, Development and Politics*, 30 (2019).

²⁶ AIR 1962 SCR (3) 10.

²⁷ Shivani Mittal, “The Right Against Self-Incrimination and State of Bombay v Kathi Kalu Oghad: A Critique”, *National Law University Jodhpur Law Review*, 75 (2013)

²⁸ AIR 1978 SC 1025.

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Thus, it can be mental as well as physical'.²⁹ In the Indian legislations, the forensic evidence finds place under Section 39 and 40 Bharatiya Sakshaya Adhinyam, 2023, which talks about the Expert Opinion. The provisions of the expert opinion in BSA, 2023 includes admissibility of forensic evidences. The provision permits opinions of experts to be considered in the field of 'science, art and foreign law', where the court deems fit. This also includes the forensic experts whose inputs are considered crucial in cases. The forensic evidence is accepted based upon the concept of relevance and admissibility as provided under different provisions of the BSA, 2023. In addition to this, Section 52 of the Bharatiya Nagarik Suraksha Sanhita, 2023 permits the use of advanced scientific methods in investigations. An amendment was brought in the year 2005 to bring in more advanced scientific methods by inserting the phrase 'such other tests'. Thus, it has brought within its ambit various methods like DNA Tests and Narco-Analysis.

4. Different Forensic Methods

With the change and development in law and science, various scientific methods have emerged. They are being used extensively, despite the fact that the evidence collected through the above-mentioned tests are not admissible in the court as a general rule. The admissibility and reliability of the tests are different from one another. The results of the tests are being used to further aid the investigation to punish the culprits. Even the courts have agreed to administering of these tests only with consent of the person not otherwise. There have been different opinions of the courts with respect to use of different forensic methods in investigations and their admissibility. Some of the commonly used forensic methods include:³⁰

4.1 Brain Mapping Test (also called the P300 Waves Test)

In this method, the person has to wear a headband with 'sensors' that measure the electric brain responses. The brain sends out a MERMER brain wave when the brain has something familiar stored in it, which triggers a response. The computer analysis the brain wave responses and determine whether the facts related to the crime are stored in the person's brain. The conclusion is drawn by the experts after the test has been conducted and the map is derived.³¹

²⁹SSRN, Abha Nadkarni, *A Critical Analysis of Nandini Satpathy v. P.L. Dani*, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2604514 (last visited 3 June, 2025)

³⁰ Ngamthonba Thangal, *Narco-Analysis and its Relevance under Article 20(3) of the Indian Constitution*, White Black Legal, 2 (2019)

³¹A.S Dalal and Arunava Mukherjee, "Constitutional and Evidentiary Validity of New Scientific Tests", *Journal of Indian Law Institute*, 531 (2007).

4.2 Polygraph Test

The polygraph test, also called the 'lie detector test' is carried out by attaching many probes to a person's body and then his answers to the questions are examined based upon the pulse rates. The person is made to sit in a chair with paraphernalia attached to the chest and upper arm to measure variations in patterns of 'breathing, heart rate and pulse rate'.³² In *Virender Khanna v State of Karnataka*³³, the court upheld the 'right against self-incrimination' and 'personal liberty' by stating that a 'polygraph test' can be administered only after the person agrees to it. Further, it stated that specific consent is mandatory for any kind of examination and judicial scrutiny for admissibility of forensic evidence. The Supreme Court in *Selvi's case* had also directed adherence to the guidelines put out by the 'National Human Rights Commission' for the Administering 'Polygraph Test' on Accused in 2000 and suggested framing of similar guidelines for the brain mapping and narco-analysis test.³⁴

4.3 DNA Test (Deoxyribose Nucleic Acid)

DNA is an organic material contained in living cell that offers unique genetic blueprint. It can be extracted from saliva, hair, blood, urine, bodily fluids and bones, which is then used to match the sample with high precision in terms of the things that can help distinguish one source from another.³⁵ The use of DNA test has received different opinions when it comes to 'right to privacy' and the 'right against self-incrimination'. The Kerala High Court in the case of *Das@Anu v State of Kerala*³⁶ held that the 'right against self-incrimination' as guaranteed by the Constitution is only applicable in case of testimonial evidences and drawing of a DNA Sample, specifically in case involving sexual offence does not violate this right. It was further clarified that right against self-incrimination extends to restrictions on use of physical or oral compulsion to get testimony from a person. Taking of blood sample does not amount to tendering of evidence.

4.4 Narco-Analysis Test

³²Tisha Tulsyan, *Constitutional and Evidentiary Value of Scientific Crime Detection Tests*, Supremo Amicus, 3, available at: <https://supremoamicus.org/wp-content/uploads/2020/05/A19.v17.pdf> (last visited June 2, 2025)

³³AIR ONLINE 2021 KAR 525.

³⁴Batuk Lal, *The Law of Evidence*, 394 (Central Law Agency, 2020).

³⁵Sidharth Kumar Pathak, "Forensic Science Impact: DNA Tests and Narco-Analysis Evidentiary Relevance", *Journal of Constitutional Law and Jurisprudence*, 1057 (2022).

³⁶CrI. Mc. No. 8065 of 2018.

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Out of all the tests, narco-analysis is most controversial one. 'Narco-Analysis' involves administering of small amounts of 'Sodium Penthatol' and 'Sodium Amytal' dissolved in still water mixed with dextrose for a period of three hours. As a result of which, when administered the person loses inhibition and the ability of manipulating the answers is considerably reduced. When compared with other forms of forensic methods like brain mapping and polygraph tests, narco-analysis is based upon distinct principles.³⁷ In the case of *Ramachandra Reddy v State of Maharashtra*³⁸, the court was of the view that the administering tests like 'brain mapping and or lie detector tests' do not specifically provide information on a subject matter rather they indicate that a individual is concealing information pertaining to the case. The interpretations of the experts based upon the readings of the tests are admissible, thus they do not violate any rights.³⁹ Further, there is no reason to restrict the administration of narco-analysis test, as the 'Bharatiya Sakshya Adhiniyam, 2023' and the 'Bharatiya Nagarik Suraksha Sanhita, 2023' provide sufficient safeguards to prohibit including any statement made that may incriminate during the use of the test. Section 52 of BNSS has included narco-analysis as one of the acceptable scientific methods. The same was upheld in *Santokben Jadeja v State of Gujarat*.⁴⁰ An amendment was brought in the year 2005 to bring in more advanced scientific methods by inserting the phrase 'such other tests'. Thus, such other tests would include narco-analysis under the legal sanction.⁴¹ However, in the case of '*Selvi v State of Karnataka*'⁴², validity of 'involuntary administration' of certain scientific tests, namely 'narco-analysis, polygraph test and brain electrical activation profile (BEAP)' were in question. The court was of the opinion that firstly, the 'involuntary' administering of scientific tests is violative of 'the right against self-incrimination' as given under the Indian Constitution. The right protects not only the accused but also the suspects as well as the witnesses. Secondly, the outcome of such tests cannot be given as evidence where they were administered under compulsion. Thirdly, even where a person has undergone the tests with consent, the outcome cannot be used as evidence

³⁷ 'Ananthi S Bhardwaj and Sumithra Suresh', "Narco Analysis and Protecting the Rights of the Accused", *Nalsar Student Law Review*, 122 (2008).

³⁸ MANU/MH/0067/2004.

³⁹ 'Abhyudaya Agarwal and Prithwijit Gangopadhyay', "Use of Modern Scientific Tests in Investigation and Evidence: Mere Desperation or Justifiable in Public Interest", II, *National University of Juridical Sciences Law Review*, 43 (2009).

⁴⁰ 2007 CrilJ 4566.

⁴¹ Ananthi S Bhardwaj and Sumithra Suresh, "Narco Analysis and Protecting the Rights of the Accused", IV, *Nalsar Student Law Review*, 128 (2008)

⁴² MANU/SC/0325/2010.

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as the person is not under conscious control during the test.⁴³ Even in the US, in the case of *Indianapolis v Edmond*⁴⁴, it was observed that truth serum can be used in cases of terrorism or other grave crimes. If the situation so requires, the public interest will override the individual rights.⁴⁵

5. Conclusion and Suggestions

With the advancement of society, the crimes are also presenting themselves in different forms. With the increase in new forms crime, it is imperative to use new modern methods in investigations and judicial proceedings like ‘DNA, fingerprints, lie-detector, brain mapping, narco- analysis’ etc.⁴⁶ In India the rate of criminal conviction is low, which needs to be checked. The low conviction rate can be attributed to the lack of evidence to support the cases. It is not only the lack of evidence but lack of reliance and further the admissibility of different forms scientific evidences. The scientific tests play a very intrinsic role in criminal cases. The increased use of the scientific tests can help bring out the truth from the criminals and thereby contributing to their convictions. However, all forms of scientific tests cannot be applied in a uniform manner to different cases. The status of brain mapping and polygraph are clear. Both the methods are quite similar. Both the tests do not pose a threat to the health of a person as they are not invasive. The reports prepared by the experts of such tests can be used in the courts as evidence and they are not against ‘Article 20(3) of the Constitution’. However, they cannot be sole basis of conviction, as their reliability can be in question where a person knows the tricks to deceive the tests. In case of DNA’s, the courts have ruled that ‘the right to life and personal liberty’ are not absolute, thus the use of DNA tests does not violate the rights of the people. Further, with respect to narco-analysis, there have been mixed views. It has been debated that it can harm the health of the person when the dosage of the sedatives used in the test are given in increased proportion. In addition to this, the results of the narco-analysis cannot be produced in the courts as evidence but the findings can be used to further help the investigation, which further attracts criticism as to why put a person’s life in danger for an

⁴³Manupatra Academy, “Case Analysis”, available at: <https://www.manupatracademy.com/legalpost/manu-sc-0325-2010> (last visited June 2, 2025).

⁴⁴ 531 US 32 (2000)

⁴⁵Justia u.s. Supreme Court, “Indianapolis v Edmond”, 531, U.S. 32 (2000), available at: <https://supreme.justia.com/cases/federal/us/531/32/> (last visited on June 2, 2025).

⁴⁶Abhyudaya Agarwal and Prithwjit Gangopadhyay, “Use of Modern Scientific Tests in Investigation and Evidence: Mere Desperation or Justifiable in Public Interest”, *National University of Juridical Sciences Law Review*, 31 (2009)

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information which cannot be produced in the courts directly. Based upon the above analysis, the researcher is of the opinion that firstly, a clear policy should be framed by the government, which specifies the standard as to how various scientific methods should be conducted, which does not violate the rights of the people. Secondly, the use of narco-analysis after giving a detailed procedure, should be permitted without consent in rarest of the rare cases involving heinous offences like murder, rape or which puts the security of the country under question like terrorism, where there is lack of sufficient evidence to decide upon the matter. This will help in effective and efficient investigation, which will punish the offenders, as it is equally necessary to punish the wrongdoers as it is to protect the rights of the individuals against being compelled to self-incriminate.