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# **ADMISSIBILITY OF DNA FINGERPRINTING** **IN THE INDIAN LEGAL SYSTEM**

AUTHORED BY - SNIGDHA SOOD<sup>1</sup>

## **Abstract**

*Crime is a social evil from which all of the humanity has been plagued, since the beginning of civilization or perhaps even before that. Often, crimes go punished, owing to the lengthy and stringent procedures around the convicts actually getting caught by the officers of law, followed by being put under trial for their alleged crimes. In the course of that, extraction of evidence and testimony is one of the greatest hurdles that the appropriate authorities have to overcome. Amidst these challenges, the latest innovations and techniques may be perceived as light at the end of the tunnel that eventually help nipping the criminals in the bud and expedites the process of seeking justice in especially complex criminal matters.*

*The same has been case with innovation of DNA Fingerprinting, as DNA is one of the unique features of a human being and can be found in practically every organic matter such as hair, saliva, blood, semen etc. Since DNA is unique in each human being, organic matter left in the crime scene provides a sure shot opportunity for law enforcement officers to apprehend the suspects and get them on trial.*

*While, there is no specific law as of now that deals with DNA Fingerprinting and its admissibility in the legal system, the courts from time to time make provisions and grant admissibility to the same by deploying the various provisions of Evidence law and the Criminal Procedure Code. Despite being a rather new concept, in the recent times, it has become a major force to reckon with, owing to the breakthroughs that it has made in the field of crime scene investigation.*

*The paper primarily focuses on the role played by DNA fingerprinting in furthering the criminal investigation and providing justice. Further, the paper sheds light on the admissibility of DNA Fingerprinting as evidence and analyzes its evidentiary value in the court of law.*

**Keywords** – DNA, Evidence, Criminal Investigation, Admissibility

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## I. Introduction

DNA is an abbreviation of “*Deoxyribo Nucleic Acid*”, which can be found in every living cell of all the species found on the face of the planet Earth. DNA is especially useful in a criminal investigation primarily because each and every person on the planet, has a rare and unique DNA sequence which the law enforcement agencies can put to use to find and pinpoint the perpetrator of a crime and help him bring to justice.

Interestingly, like most innovation, the practice of using DNA fingerprinting as the means for investigating crimes was first used in West, in the case of *Colin Pitchfork*, who was an alleged serial killer and rapist who managed to mislead the justice system for a long time, but, on one such occasion, he left his semen in one of the victims, which led to the tracing of his DNA Profiling.

Following that, years later when DNA database was setup, and eventually gained momentum, it became rather simple to pinpoint the perpetrator- he was apprehended and brought to justice<sup>2</sup>. In the present times, DNA fingerprinting has brought a wave of reforms in the criminal justice system for it acts a huge deterrent for the criminals, owing to the fact that a single strand of hair can lead to them being captured or apprehended.

Besides, criminal investigation, DNA Fingerprinting has also helped in other instances such as in the identification of the last remains of Tsar Nichols II<sup>3</sup>, the identification of Former Nazi SS officer Josef Mengele found in Brazil<sup>4</sup> where he escaped in an attempt to evade justice. In this frame of reference, it may be said that, DNA Fingerprinting is not always used to put people behind bars, but sometimes it may even come to the rescue of those in question, as was the matter in the case of Henry McCollum and Leon Brown in United States, where it helped to finally acquit him<sup>5</sup> and 17 other death row inmates<sup>6</sup> by proving their innocence with DNA fingerprinting.

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<sup>2</sup> Ian Cobain, “Killer breakthrough – the day DNA evidence first nailed a murderer”, *The Guardian*, 07/06/2017, available at <https://www.theguardian.com/uk-news/2016/jun/07/killer-dna-evidence-genetic-profiling-criminal-investigation>

<sup>3</sup> Brigit Katz, “DNA Analysis Confirms Authenticity of Romanovs’ Remains”, *Smithsonian*, 17/07/2018, available at <https://www.smithsonianmag.com/smart-news/dna-analysis-confirms-authenticity-remains-attributed-romanovs-180969674/>

<sup>4</sup> Jeffreys AJ, Allen MJ, Hagelberg E, Sonnberg A. Identification of the skeletal remains of Josef Mengele by DNA analysis. *Forensic Sci Int.* 1992 Sep;56(1):65-76. doi: 10.1016/0379-0738(92)90148-p. PMID: 1398379.

<sup>5</sup> Joseph Neff, “They Did 30 Years for Someone Else’s Crime. Then Paid for It.”, *The New York Times*, 07/04/2018, available at <https://www.nytimes.com/2018/04/07/us/mccollum-brown-exoneration.html>

<sup>6</sup> ACLU “DNA Testing and The Death Penalty” available at <https://www.aclu.org/other/dna-testing-and-death-penalty>

As far as crime scene investigation is concerned, DNA can be extracted from the organic matter present at crime scene by thorough caution and investigation, and can then be matched against the suspects, but in order for DNA Fingerprinting to work, the law enforcement should have suspects to match it against or a comprehensive database of every citizen of the country. Although even if sufficient database of DNA is available, it can certainly help to narrow down the list of possible convicts to some extent as generally, immediate family or the people closely related with the family, have somewhat similar DNA. This can in turn, help the law enforcement agencies in those instances where there is no evidence or no witness to help solve the case, DNA profiling can provide a big piece of the puzzle and put it right where it ought to be to solve crime scene mysteries.

## II. Admissibility of DNA Fingerprints in the Court

In order for DNA fingerprinting to actually make an impact on the perpetrator and bring them to justice, it is vital for it to be admissible in the Court of Law. In the case of *Pantangi Balarama Venkata Ganesh vs. State of Andhra Pradesh*<sup>7</sup>, the DNA Expert deposed in front of the court and stated that “*If the DNA fingerprint of a person matches with that of a sample, it means that the sample has come from that person only. The probability of two persons except identical twins having the same DNA fingerprint is around 1 in 30 billion world population*”. Hence, in the instant case, it was categorically held by the Court that the DNA evidence is admissible in the court proceedings.

However, it is indispensable that the DNA Evidence must be procured with great caution and care in order to ensure no contamination or tampering with the samples has taken place. Further, in case of any inconsistency found with the same, the Court may make the DNA evidence inadmissible in favor of defendant, as the reliability of the sample may be called into question, which most certainly decreases its evidentiary value as compared to other evidence(s).

The apparent dearth or even absence of specific or centralized legislations concerning the provisions of DNA Fingerprinting in Indian Legal system, coupled with the lack of specific provisions in Evidence Act or Code of Criminal Procedure<sup>8</sup>- are perhaps indicative of the inadequacies of the modern laws related to scientific advancement, and bring to the fore the

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<sup>7</sup> Pantangi Balarama Venkata Ganesh vs. state of Andhra Pradesh, 2003 crlj 4508(AP)

<sup>8</sup> Ashok Bhan, “DNA and the Indian System”, The Statesman, 07/06/2018, available at <https://www.thestatesman.com/supplements/law/dna-indian-system-1502645292.html>

loopholes in the process of the collection of such DNA Evidence by the investigation officers. In this context, it is pertinent to note that, according to the provisions of the Criminal Procedure Code<sup>9</sup>, for instance, the investigation officer is authorized to request the medical practitioner to help in examination of the accused. However, CrPC does not permit these authorities to collect the semen or blood samples for DNA profiling purposes. The additions in the *Criminal Code* by virtue of the *Amendment Act* of CrPC in 2005<sup>10</sup>, *Section 53A* was added which conferred upon the medical practitioners the power to extract samples for DNA profiling. However, the implementation of the same may be said to be more or less dubious as the opinions of various high courts and supreme court greatly vary on the subject matter, and, the constitutionality of such provisions is constantly under the scanner. This is possibly because it is often alleged that the police officers may misuse this provision as per their discretion<sup>11</sup>.

In the case of *Shreemad Jagadguru Shankaracharya v State of Karnataka*<sup>12</sup>, however, it was held that the said provision is necessary and well within the ambit of the Constitution, provided specifically for the proper and smooth functioning of systemic operations.

While the Indian Judiciary does not negate the scientific accuracy provided by the DNA fingerprinting, the accuracy and efficiency in collection or procurement of the samples has been called into question far too many times, especially in the recent past.

Further, the admissibility of DNA samples can go against public policy and the ethos of the Constitution for it often entails forcing the suspects to provide the sample, which may be viewed as a violation of their Constitutional rights. The choice to not give any evidence in the form of samples, however, can be used against them<sup>13</sup>, thereby problematizing their stance. Hence, it can effectively be inferred that there is an urgent need to incorporate DNA profiling into the Indian Legal System, *and* modernize the various statutes in order to close such loopholes and provide better access to justice.

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<sup>9</sup> The Code of Criminal Procedure, 1973 (2 of 1974), s.53

<sup>10</sup> The Code of Criminal Procedure (Amendment) Act, 2005 (25 Of 2005)

<sup>11</sup> Editor, "Constitutionality of Sec 53A Upheld" SCC Online, 17/12/2014, available at <https://www.scoonline.com/blog/post/2014/12/17/constitutionality-of-section-53-a-crpc-upheld/>

<sup>12</sup> *Shreemad Jagadguru Shankaracharya v State of Karnataka*, 2014 SCC Online Kar 5639

<sup>13</sup> The Constitution of India, art 20(3)

### III. Need Of the Hour: Effective Incorporation of DNA

#### Fingerprinting in the Indian Legal System

With the ever-evolving world and the advent of new technological advancements, it has become the need of the hour, for our society to move forward by embracing and incorporating modern technology in our lives as well as in the legal system. To reiterate, it is extremely importance to integrate DNA fingerprinting in our current legislations in order to provide justice and efficiently combat the existing issues in the current legal system of India.

The aforesaid existing issues sometimes, render impossible the prevalence of justice amidst the growing challenges that are a corollary of the dynamic technological advancements in the world. For instance, in order for a male child to succeed to his family's estate, he needs to be legitimate son of his father and, legitimacy is determined by Section 112 of Evidence Act<sup>14</sup>, which when incorporated was fair for the time being, but with the rapid liberalization and advancements in scientific methods to determine the legitimacy of a child, the provision seems rather antiquated and obscure. This dilemma was faced in the case of *Gautam Kundu vs. Bengal*<sup>15</sup>, wherein the Division Bench of the Hon'ble Supreme Court held that,

- “(1) That courts in India cannot order blood test as a matter of course.  
(2) There must be a strong prima facie case, in that the husband must establish non -access in order to dispel the presumption arising under section 112 of the Evidence Act.  
(3) No one can be compelled to give sample of blood for analysis.”

Nevertheless, in another case<sup>16</sup>, a Full Bench of the Hon'ble Supreme Court overruled the judgment in the *Gautam Kundu*<sup>17</sup> case and it was established that the Court does not have the authority to direct blood tests. Further, it was held that in interest of a child's future, the Court may issue such orders with specific cautions.

Furthermore, in the case of *Bhabani Prasad Jena v. Convener Secretary, Orissa State Commission for Women and Another*<sup>18</sup>, the Apex Court held that the matter of DNA test in case of child parentage is very delicate and sensitive. Further, two views of DNA fingerprinting were

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<sup>14</sup> Indian Evidence Act, 1872 (1 of 1872), s. 112

<sup>15</sup> *Gautam Kundu vs. Bengal*, (1993) 3 SCC 418

<sup>16</sup> *Sharda v Dharmpal*, (2003) 4 SCC 493

<sup>17</sup> *Ibid.* 14

<sup>18</sup> *Bhabani Prasad Jena v. Convener Secretary, Orissa State Commission for Women and Another* (2010) 8 SCC 633

put forth by the Supreme Court in the instant case, the first being, giving the truth about parentage of the child and the second view being, violating the right to privacy which can have a devastating effect on the child, such as the test can culminate in the bastardization of the innocent child which can adversely affect the mental health of the child and may even lead to ostracization in especially conservative societies. Despite the adverse effects, however, Courts are of the view that when required, the Courts may order DNA tests to be done in the interest of the children, as was the case in the matter of *State Through C.B.I vs Amaramani Tripathi*<sup>19</sup>, wherein the court decided the legitimacy of the child on the basis of DNA report, rather than Section 112 of Evidence Act<sup>20</sup>.

The DNA analysis of a child's parentage can provide unchallengeable results which hold far more evidentiary value than those under the provisions of Section 112, as the question of parentage can lead to various disputes such as civil disputes related to inheritance or maintenance disputes as under Section 125 of CrPC<sup>21</sup>.

#### **IV. Arguments against the Inclusion of DNA Fingerprinting in the Indian Legal System**

Incorporation of DNA Fingerprinting in the Legal System of India, however, has undeniably raised a lot of objections in relation to violation of legal and fundamental rights as giving DNA sample for fingerprinting can be interpreted as violation of the Right to privacy<sup>22</sup> as well as the Right against self-incrimination<sup>23</sup>. Owing to this, most judges continue to remain reluctant in granting admissibility to the evidence extracted using the DNA Fingerprinting and rely mostly on material evidence or witness statements. However, fundamental rights are not absolute rights and are subjected to exception such as for public good as was held in the case of *Govind Singh v. State of Madhya Pradesh*<sup>24</sup>. Further, in various other cases, the Courts have held that DNA examinations or medical examinations can be made without violating the fundamental rights of a citizen, but the same remains open for debates and discussions in the public domain. It can be inferred that this vague situation will most likely persist unless a specific law is passed in this regard, clearly clarifying the provisions related to DNA profiling.

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<sup>19</sup> State Through C.B.I vs Amaramani Tripathi Appeal (crl) 1248 of 2005

<sup>20</sup> Ibid. 13

<sup>21</sup> The Code of Criminal Procedure, 1973 (2 of 1974), s. 125

<sup>22</sup> The Constitution of India, art 21

<sup>23</sup> The Constitution of India, art 20(3)

<sup>24</sup> Govind Singh v. State of Madhya Pradesh, AIR 1961 MP 320, 1961 12 STC 825 MP

In this frame of reference, it is apposite to note that huge developments in DNA Fingerprinting have taken place, most recently in the year 2011, when in a case, the Supreme Court ordered probe in the matter when young man claimed to be the son of the former Chief Minister of Uttar Pradesh, Mr. N.D. Tiwari, a contention which the latter vehemently rejected. The Court ordered Mr. Tiwari to undergo a DNA test to determine the paternity of the young boy. The advocates of Mr. Tiwari contended that undergoing forced DNA test would amount to be an outright violation of the Right to Privacy of Mr. Tiwari. To which, the Court responded that the DNA test shall be conducted but, the results stay sealed and kept out of public record<sup>25</sup>.

## V. Legality of Forensic Techniques in India

In order to ascertain the legality of forensic techniques such as DNA Fingerprinting in India, these techniques have to undergo the litmus test, which entails the following: -

### 1) *Constitutional Validity of DNA Fingerprinting*

As aforementioned, the constitutional validity of DNA Fingerprinting can be challenged on the basis of Right to privacy as well as Right against Self Incrimination. In response to which, in the matter of *State of Bombay Vs Kathikalu*<sup>26</sup>, it was categorically held that providing DNA samples and reports are not providing Evidence against themselves, but essentially entails providing relevant facts under the Evidence law<sup>27</sup>. Hence, it is does not fall within the purview of the Right against self-incrimination.

### 2) *Evidentiary Value of the Forensic Information given by the Expert*

As per the provisions of *Section 45 of the Indian Evidence Act*, it is a general rule that the person having a special skill or expertise in a special field (here, DNA Expert) shall be admissible in the court. The expert can run tests on the DNA fingerprint in question and can help with the issues and/or relevant facts. In the case of *Madan Gopal Kakkad vs. Naval Dubey and Another*<sup>28</sup>, it was held that the opinion given by an expert is admissible, and further, in case of *Machindra vs. Sajjan Galpha Rankhamb*<sup>29</sup>, it was held that the opinion of the expert should be supported with convening reasons.

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<sup>25</sup> PTI, "ND Tiwari has to undergo DNA Test: SC", *The Economic Times*, 14/03/2011, available at <https://economictimes.indiatimes.com/news/politics-and-nation/n-d-tiwari-has-to-undergo-dna-test-sc/articleshow/7702007.cms?from=mdr>

<sup>26</sup> *State of Bombay Vs Kathikalu* AIR 1961 SC 1808

<sup>27</sup> *Indian Evidence Act, 1872* (1 of 1872), s. 9, 11.

<sup>28</sup> *Madan Gopal Kakkad vs. Naval Dubey and Another* 1992 AIR SCW 1480

<sup>29</sup> *Machindra vs. Sajjan Galpha Rankhamb* Criminal appeal number 1794 of 2013, D.O.J April 19, 2017. J.P.C Ghose and R.F.Nariman

### 3) **Judicial Stance on DNA Fingerprinting**

Presently, barring certain provisions such as Sections 53, 53A, 54, 164(A) of CrPC, India does not have concrete legislations, rules or regulations that govern DNA fingerprinting or any science and technology to that extent. Hence, it has been left to the discretion of the judiciary to permit or disallow the entry of DNA Fingerprinting into our legal system. This ambiguity around DNA Fingerprinting often leads to uncertainty, giving rise to loopholes in the system and inconsistencies among the different judicial branches in the country. It can be inferred from the judgment in the case of *State of Bombay Vs Kathikalu*<sup>30</sup>, that presently, the Indian judiciary is leaning towards deploying DNA Fingerprinting in the legal system and has even adopted it at various levels. The legislative machinery in the country, however, seems to be lagging behind amidst the ever-growing scientific and technological innovations.

## VI. DNA in Criminal Cases

The argument that DNA fingerprinting violates the “Right against Self-incrimination” has been rebutted by the Constitution Bench of the Supreme Court in the case of *Selvi v. State of Karnataka*<sup>31</sup>, in which the court made the following observation: -

*“The matching of DNA samples is emerging as a vital tool for linking suspects to specific criminal acts. It may also be recalled that as per the majority decision in Kathi Kalu Oghad (AIR 1961 SC 1808), the use of material samples such as fingerprints for the purpose of comparison and identification does not amount to a testimonial act for the purpose of Article 20(3). Hence, the taking and retention of DNA samples which are in the nature of physical evidence does not face constitutional hurdles in the Indian context.”*

In the instant case, the Supreme Court clearly established that DNA fingerprinting does not violate the “Right against Self-Incrimination”. In fact, on the contrary, the Constitution provides for the fundamental duty of every citizen of India to develop the scientific temper, humanism and the spirit of inquiry and reform.<sup>32</sup>

## VII. Conclusion

It is evident that, special legislations are required to be focusing on admissibility and rules or regulations regarding DNA fingerprinting in our legal system in order to ensure that it is not

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<sup>30</sup> State of Bombay Vs Kathikalu AIR 1961 SC 1808

<sup>31</sup> Selvi v. State of Karnataka (2017) 7 SCC 263

<sup>32</sup> The Constitution of India, art 51A(h)

subjected to the critical scanner of legality or public policy in the future. Arguably, there still is ambiguity in the Indian Legal System regarding the scientific and technological advancements. The Indian Legal System sure has come a very long way since the stringent provisions of law were first passed, yet it still has a very long way to go ahead to incorporate within it, the recent technological advancements. Hence, there is an apparent need to make DNA fingerprinting more accessible and more importantly, admissible in the Courts of law. While there has been a sharp rise in the number of judgements in matters of parentage where DNA profiling was used as the means to ascertain the true parentage. Further, it can be put forth that, it is one of the most effective scientific methods for giving results on the parentage of the child. Further, it can be made use of in cases to establish certainty around a particular crime, for instance, it can come to the rescue of those being falsely accused in case and/or those erroneously convicted, for witnesses can lie or evidences can be planted, but scientific proofs are hard to negate. Further, there is an immediate need for India as a nation, to create and maintain DNA database of every person in order to serve as an adequate platform to run the DNA fingerprint against, in order for it to work, because without that DNA is just a mobile without network.

DNA Fingerprint and profiling can solve numerous cases if executed accurately and properly while providing speedy justice to the victims, but it needs to be ensured that it is properly regulated in order for the citizens to benefit from it because if unregulated, it can be used against its intended purpose- as it can be misused by corrupt DNA experts or medical practitioners as the DNA reports can tilt the case in favor of any party when intended, it is proving to be one of the most powerful tools in the pocket of an Advocate or an Officer. It can be said with certainty that proper legislations around DNA fingerprinting will bring forth a new dawn in the era of the Indian Legal System.