



## THE CONCEPT OF NARCOANALYSIS IN VIEW OF CONSTITUTIONAL LAW AND HUMAN RIGHTS

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### INTRODUCTION

The scientific examination of a forensic scientist adjoin a missing link or strengthens a weakly in the chain of investigation by furnishing an impartial & establishes evidence, thereby helping the court to come to a conclusion regarding the criminals and their punishments. As science has outpaced the development of law or at least the laypersons understanding of it, there is unavoidable complexity regarding what can be admitted as evidence in court. Narco analysis is one such scientific development that has become an increasingly, perhaps alarmingly, common term in India. The term Narco Analysis is derived from the Greek word narkç (meaning “anesthesia” or “torpor”) and is used to describe a diagnostic and psychotherapeutic technique that uses psychotropic drugs, particularly barbiturates, to induce a stupor in which mental elements with strong associated affects come to the surface, where they can be exploited by the therapist. The term narco-analysis was coined by Horseley .Narco analysis poses several questions at the intersection of law, medicine and ethics. Is the procedure for narco analysis is violative of the rights against self incrimination, guaranteed under Article 20 (3) of Constitution? It figured prominently in the news recently when it became eye of storm and sparked off the debate when media played tapes of Telgi, accused subjected to Narco-analysis procedure.

### Narco Analysis from Constitutional & Legal Stand Points

Article 21, guarantees “*No person shall be deprived of his life and personal liberty except according to procedure established by law.*” The expression “life” in article 21 has been interpreted by the Supreme Court rather liberally and broadly. Over time, the Court has been giving an expansive interpretation to “life”. The Court has often quoted the following observation of Field, J.: “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<sup>1</sup>.” Similarly In **State of Punjab v. Mahinder Singh Chawla**<sup>2</sup> the Apex Court has held that the right to life includes right to health. Subjecting a person to an unsafe scientific test as part of investigation will amount to denial of right to health<sup>3</sup> Narco analysis is not a safe method of interrogation since the use of such drugs could lead the subject to various health Bhagwati, J., has observed that the right to life includes the right to live with human dignity and all that goes along with it, namely, the bare



necessaries of life such as adequate nutrition, clothing and shelter over the head and facilities for reading, writing and expressing oneself etc...<sup>4</sup> While police is entitled to arrest a criminal and interrogate him during the investigation of an offence, the law does not permit the use of third degree methods or torture of an accused in custody during interrogation and investigation to solve a crime. At a criminal trial the accused is entitled to a presumption of innocence and the prosecution is bound to prove all the ingredients of the charge beyond reasonable doubt.<sup>5</sup> The burden rests on the state to establish the constitutional validity of the impugned law. Section 45 of the Indian Evidence Act, 1872 allows experts' opinions in certain cases. It says: "When the court has to form an opinion upon a point of foreign law, or of science, or art, or as to identity of handwriting or finger impression, the opinions upon that point or persons especially skilled in such foreign law, or of science, or art, or as to identity of handwriting or finger impressions are relevant."

However this section is silent on other aspects of forensic evidence that can be admissible in court in criminal proceedings. It would be wrong to include Narco Analysis among these when it has not been specifically mentioned therein. Therefore it comes out of the term of "procedure established by law". The use of Sodium Amytal in Narco Analysis was prohibited because the results of the interview were not considered scientifically reliable. The court opined that subjects are susceptible to filling in gaps in stories with fabricated detail (hyper amnesia), or believing in false events (memory hardening), and hypnotic recall, where thoughts of non-existent events become embedded in the memory.

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The object of Article 21 is to prevent encroachment upon personal liberty by the executive, save in accordance with law<sup>7</sup>. Such tests generally don't have legal validity as confessions made by a semi-conscious person are not admissible in court. The court may, however, grant limited admissibility after considering the circumstances under which the test was obtained. The petitioners in one of the case said courts could not direct the prosecution to hold Narco analysis, brain mapping and lie detector tests against the will of the accused as it would be violative of Article 20 (3) of the Constitution. The main provision regarding crime investigation and trial in the Indian Constitution is Art. 20(3). It deals with the privilege against self incrimination. The privilege against 'self incrimination is a fundamental canon of Common law criminal jurisprudence. Art. 20(3) which embody this privilege read, "*No person accused of any offence shall be compelled to be a witness against himself*". Subjecting the accused to undergo the test, as has been done by the investigative agencies in India, is considered by many as a blatant violation of Art. 20(3) it was held that to attract of Constitution. The application of Narco-analysis test involves the fundamental question pertaining to judicial matters and also to Human Rights. The legal position of applying



this technique as an investigative aid raises genuine issues like encroachment of an individual's rights, liberties and freedom. In case of *State Bombay v. Kathikalu*<sup>8</sup>, it must be shown that the accused was compelled to make statement likely to be incriminative of himself. Compulsion means duress, which includes threatening, beating or imprisonment of wife, parent or child of person. Thus where the accused makes a confession without any inducement, threat or promise art 20(3) does not apply. The privilege against self-incrimination thus enables the maintenance of human privacy and observance of civilized standards in the enforcement of criminal justice. It also goes against the maxim *Nemo Tenetur se Ipsum Accusare* that is, '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 accused of.' If the confession from the accused is derived from any physical or moral compulsion (be it under hypnotic state of mind) it should stand to be rejected by the court. The right against forced self-incrimination, widely known as the Right to Silence is enshrined in the Code of Criminal Procedure (CrPC) and the Indian Constitution. In the CrPC, the legislature has guarded a citizen's right against self-incrimination. S.161 (2) of the Code of Criminal Procedure states that every person "*is bound to answer truthfully all questions, put to him by [a police] officer, other than questions the answers to which would have a tendency to expose that person to a criminal charge, penalty or forfeiture*". Arguments have been made that narco analysis constitutes mental torture and thus violates the right to life under Article 21 as it deals with right to privacy. Again, law against intrusion in privacy of individual would not allow brain fingerprinting evidence to be given in court. It is well established that the Right to Silence has been granted to the accused by virtue of the pronouncement in the case of *Nandini Sathpathy vs P.L.Dani*<sup>9</sup> no one can forcibly extract statements from the accused, who has the right to keep silent during the course of interrogation (investigation). By the administration of these tests, forcible intrusion into one's mind is being restored to, thereby nullifying the validity and legitimacy of the Right to Silence. She claimed that she had a right of silence by virtue of Article 20(3) of the Constitution and Section 161 (2) of Cr. P.C. The Apex Court upheld her pleas. Moreover, the tests like Narco analysis are not considered very reliable. Studies done by various medical associations in the US adhere to the view that truth serums do not induce truthful statements and subjects in such a condition of trance under the truth serum may give false or misleading answers. In USA, in the case of *Townsend v. Sain*<sup>10</sup> it was held that the petitioner's confession was constitutionally inadmissible if it was adduced by the police questioning, during a period when the petitioner's will was overborne by a drug having the property of a truth serum. Collecting evidence and helps in investigation does not amount to testimonial compulsion. Thus it does not violate the constitutional provision regarding protection against self-incrimination. In *M.P.Sharma v. Satish Chandra*<sup>11</sup> the Apex Court observed that since the words used in Article 20(3) were "to be a witness" and not "to appear as a witness" the protection is extended to compelled evidence obtained outside the Courtroom. The same point was reiterated in Kathi Kalu Oghad's case. The term



“Right to Privacy” is generic term encompassing various rights recognized to be inherent concept or ordered liberty. The right to be left alone on right of a person to be free from unwarranted publicity is Right to Privacy<sup>12</sup>. This Right to Privacy is implicit in the right to life and liberty guaranteed to the citizens of India by article 21 of the constitution of India. None can publish anything covering the above matters without his consent whether truthful or otherwise and whether laudatory or critical. If done so, it will be violating right to privacy of person concerned and would be liable in an action for damages. In Indian constitution protection of life, liberty and freedom has throughout interpreted and article 14, 19, 21 are best example for any constitution against right to privacy. The Division Bench also observed that the tests involve “minimal bodily harm” which is also not correct because laxity in administration of drug can be fatal. In Nuremberg Trial when Rudolph Hess, the most notorious war criminal, ever claimed that he was suffering from amnesia the prosecutor did not perform Narco analysis test on him for the possibility of the test to be fatal. In the Code Criminal Procedure “injury” is defined in Sections 44, 323, 324, 328 and the punishment for which may extend to 10 years, imprisonment. Hence, administration of narcotic drug amounts to causing injury. Furthermore, the reliability of scientific tests is not free from doubt. It is necessary to recall background of article 20(3) of the constitution. One of the fundamental canon of British and American system of criminal jurisprudence has been the accused should not be compelled to incriminate himself. One of extension of doctrine was with regard to the production of documents by an accused in respect to subpoena or other form of legal process. In *R v. Purnell*<sup>13</sup> We know of the instance herein this court has granted a rule to inspect books in a criminal prosecution nakedly considered”.

At a criminal trial the accused is entitled to a presumption of innocence and the prosecution is bound to prove all the ingredients of the charge beyond reasonable doubt<sup>14</sup>. The burden rests on the state to establish the constitutional validity of the impugned law Section 45 of the Indian Evidence Act, 1872 allows experts’ opinions in certain cases. It says: “When the court has to form an opinion upon a point of foreign law, or of science, or art, or as to identity of handwriting or finger impression, the opinions upon that point or persons especially skilled in such foreign law, or of science, or art, or as to identity of handwriting or finger impressions are relevant.” However this section is silent on other aspects of forensic evidence that can be admissible in court in criminal proceedings. It would be wrong to include Narco Analysis among these when it has not been specifically mentioned therein. Therefore it comes out of the term of “procedure established by law”. The use of Sodium Amytal in Narco Analysis was prohibited because the results of the interview were not considered scientifically reliable.

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memory. Therefore the test results should not be regarded as conclusive evidence there should be a need of corroborating statements made during Narco Analysis with other evidences that have been procured<sup>15</sup>.

### **International Perspective**

It is explicitly proclaimed in Article Ten of the Universal Declaration of Human Rights, the Sixth Amendment of the US Constitution, and Article Six of the European Convention of Human Rights. Moreover, article 14.3(g) of the U.N. Covenant on Civil and Political Rights, 1966, provides: "In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:(g.) "Not to be compelled to testify against himself or confess guilt."

Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950, provides: "In the determination of his civil rights and obligations, or of any criminal charges against him everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

It was further explained that although not specifically mentioned in Article 6 of the Convention, there can be doubt that the right to remain silent under the police questioning and the privilege against self-incrimination are generally recognized international standards which lie at the heart of the notion of a fair procedure under Article 6. By providing the accused with protection against improper compulsion by the authorities these immunities contribute to avoid miscarriages of justice and to securing the aim of Article 6. It is a general immunity, possessed by all, from being compelled on pain of punishment to answer questions and the answer, may incriminate them. The Preamble of the International Covenant on Civil and Political Rights (ICCPR) states the following: The States party to the present Covenant, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world, Recognizing that these rights derive from the inherent dignity of the human person, Recognizing that, in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights, Considering the obligation of States under the Charter of the United Nations to promote universal respect for, and observance of, human rights and freedoms, Realizing that the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the present Covenant.

Part 3, Article 7 of the International Covenant on Civil and Political Rights (ICCPR) states the following, "No one shall be subjected to torture or to cruel, inhuman



or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation” The use of the truth serum test is considered as a torture in the international regime. The UN definition of torture clearly implies that the tests performed for obtaining information from suspects, amounts to severe mental suffering or coercion, hence, leading to torture. It has been evidently stated by the UN Committee against Torture that an authorized mode of application of ‘moderate physical pressure’ breaches the convention against torture. Amnesty International declares the administration of Sodium Pentathol or any other truth serum for procuring information as amounting to torture on the grounds that it is cruel, inhuman and a degraded treatment. Hence, this process should be prohibited. Such a process also outlaws the international standards of interrogation. The use of evidence obtained under duress has been prohibited by The Human Rights Committee by stating-“the law must prohibit the use of admissibility in judicial proceedings of statements or confessions obtained through torture or other prohibited treatment.” The Committee has further stated that, “the law should require that evidence provided by ... any... form of compulsion is wholly unacceptable.” Use of drugs has been documented as a form of torture in a number of countries, including Chile and the former Soviet Union. It has also been noted that under US case laws confessions made under the influence of truth serums are also not “voluntary” and are consequently inadmissible as evidence. India has still not ratified The UN Convention against Torture, though it has signed the same.

### **Narco Analysis in India**

A few democratic countries, India most notably, still continue to use Narco analysis. Narco analysis is not openly permitted for investigative purposes in most developed and democratic countries. My interest in narco analysis test was revived when it caught the attention of media and critics thereby raising several issues regarding its validity as a scientific tool of investigation and its admissibility in court of law infringement of individual fundamental rights and questions its value as evidence. In India, the Narco analysis test is done by a team comprising of an anesthesiologist, a psychiatrist, a clinical/ forensic psychologist, an audio-videographer, and supporting nursing staff. The forensic psychologist will prepare the report about the revelations, which will be accompanied by a compact disc of audio-video recordings. The strength of the revelations, if necessary, is further verified by subjecting the person to polygraph and brain mapping tests. Narco analysis is steadily being mainstreamed into investigations, court hearings, and laboratories in India. The judgment of an eleven-judge bench in the case of *State of Bombay v KathiKalu Oghad*<sup>16</sup> where it was observed that self-incrimination means conveying information based upon personal knowledge of the person and cannot include merely the mechanical process of producing documents in court. It has been held in *Ram JawayyaKupar's*<sup>17</sup> case that executive power cannot intrude on either constitutional rights and liberty, or for that matter any other rights of a person and it has also been observed that in absence of



any law ant intrusion in fundamental rights must be struck down as unconstitutional. Lie detection test comes under the general power of investigation (Sections 160-167, Cr.P.C.).But it must be realized that it is prerogative of the person to allow himself/herself to be put to polygraph test or not and it should not be left to the discretion of police. Unless it is allowed by law it must be seen as illegal and unconstitutional<sup>18</sup>. But if it is conducted with free consent' of the person it may be permitted. 'Free consent' means it is voluntary and is not given under coercive circumstances. Voluntariness can be understood by the example- If a person says, "I wish to take a lie detectors test because I wish to clear my name". It shows his/her voluntariness but it is still to be shown that whether this voluntariness was under coercive circumstances or not. If a person is told by police "If you want to clear your name take a lie detector test" or" take a lie detector test and we will let you go" then it shows that police has linked up the freedom to go with the lie detector test and as such it cannot be held voluntary. These kinds of statements are held to be self incriminatory.

### **Admissibility in the court**

While Narco analysis yielded an immense amount of information, it also triggered off many question as several critics shared profound sense of skepticism over the administration of serum on the witness to extract truth. Narco analysis is considered as a tool or aid in collecting and supporting evidence. However doubts are raised whether it amounted to testimonial compulsion in judiciary and violation of human right, individual liberty and freedom. Lawyers are divided on whether the results of Narco analysis and P300 tests are admissible as evidence in courts, as they claim that confessions made by a semiconscious person is not admissible in court. A Narco analysis test report has some validity but is not totally admissible in court, which considers the circumstances under which it was obtained and assessed its admissibility. Results of such tests can be used to get admissible evidence, can be collaborated with other evidence or to support other evidence. But if the result of this test is not admitted in a court, it cannot be used to support any other evidence obtained the course of routine investigation. In India, narco-analysis was first used in 2002 in the Godhra carnage case. It was also in the news after the famous Arun Bhatt kidnapping case in Gujarat wherein the accused had appeared before NHRC and the Supreme Court of India against undergoing the narco-analysis. It was again in the news in the Telgi stamp paper scam when Abdul KarimTelgi was taken to the test in December 2003. Though in the case of Telgi, immense amount of information was yielded, but doubts were raised about its value as evidence. The Bombay High Court, in a significant verdict in the case of *Ramchandra Reddy and Others v State of Maharashtra*<sup>19</sup> (5 march 2011), upheld the legality of the use of P300 or Brain Mapping and narco analysis test. The court also said that evidence procured under the effect of narco analysis test is also admissible. However, defence lawyers and human rights activists viewed that narco analysis test was a very primitive form of investigation and third degree treatment, and there were legal lapses interrogation with the aid of drugs. Narco analysis is in the limelight in the context of infamous Nithari village (Noida) serial killings. The two



main accused in the Nithari serial killings Mohinder Singh Pandher and SurendraKohli have undergone narco analysis tests in Gandhinagar in Gujarat. However, the final judicial pronouncement on the constitutional status of narcoanalysis is yet to come, but it seems in the offing, as in 2006 the Supreme Court of India stayed the order of a metropolitan judge to conduct narcoanalysis on K. Venkateswara Rao in the Krushi Cooperative Urban Bank case. The issue required to be settled by a court decision because Mr. Rao refused to sign the consent form and the Forensic Science Laboratory at Gandhinagar declined to conduct a narco-analysis test with a duly filled and signed consent form. The Supreme Court verdict is awaited<sup>20</sup>.

#### **Criticism of narco-analysis test-**

Narco-analysis has been criticized on the ground that it is not 100% accurate. It has been found that certain subjects made totally false statements. It is often unsuccessful in eliciting truth as such it should not be used to compare the statement already given to the police before use of drug. It has been found that a person who has given false information even after administration of drug. It is not much help in case of malingerers or evasive, untruthful person<sup>21</sup>. It is very difficult to suggest a correct dose of drug for a particular person. The dose of drug will differ according to will power, mental attitude and physique of the subject. Successful narco-analysis test is not dependent on injection. For its success a competent and skilled interviewer is required who is trained in putting recent and successful questions. Narco-analysis test is a restoration of memory which the suspect had forgotten. This test result may be doubtful if the test is used for the purposes of confession of crimes. Suspects of crimes may, under the influence of drugs, deliberately withhold information or may give untrue account of incident persistently<sup>22</sup>. Narcoanalysis is not recommended as an aid to criminal investigation. In medical uses like in treatment of psychiatric disorder the narcoanalysis may be useful. Unless the test is conducted with the consent of the suspect it should not be used in criminal investigation<sup>23</sup>. Conclusiveness and inability of narco tests has been clearly elucidated in the case of State v. Pitts the use of Sodium Amytal in Narco-Analysis was prohibited because the results of the interview were not considered scientifically reliable. The court opined that subjects are susceptible to filling in gaps in stories with fabricated detail (hyper amnesia), or believing in false events (memory hardening), and hypnotic recall, where thoughts of non-existent events become embedded in the memory. Therefore the test results should not be regarded as conclusive evidence there should be a need of corroborating statements made during Narco Analysis with other evidences that have been procured.

#### **Right to self incrimination: Is it against public interest:**

The other view regarding the legal validity of Narco analysis test is that it is used as an aid for collecting evidence and helps in investigation and thus does not amount to testimonial compulsion. Thus it does not violate the constitutional provision regarding protection against self-incrimination. Supporters of narco-analysis test are





of view that Narco-analysis is particularly useful when there is a requirement to elicit required information for preventing any offences by terrorist. However its application must be assessed objectively so that it can be replaced by existing conventional method of interrogation which brought shame, ignominy and disrepute to police leading to erosion of credibility of criminal justice system. Narco-analysis can evolve as viable effective alternate to barbaric third degree methods. Care however must be taken that this procedure is not misused or abused by investigating officer and should be correlated with corroborative. In case of *Dinesh Dalmia v State of Madras*<sup>24</sup> it was held by Madras Court that scientific test of accused by conducting polygaphy. Narco-analysis and brain mapping test on accused to bring out truth would not amount to breaking his silence by force The irony of the modern law jurisprudence is that there are many learned counsels engaged to defend the rights of the accused while there is none to defend the public cause and interest. In Krushi and Charminar Bank Scam, evidence thousands of depositors lost their life time earnings and savings meant for education the kith and kin, to perform marriage of the children and pensioner benefits vanished overnight shattering their dreams and pushing them to the brink of bankruptcy and suicides. Yet when the M.D of Krushi Bank was nabbed, he refused to undergo Narco analysis procedure. In such instances, if the right against self incrimination is upheld against the public interest and it would weaken the evidence and thereby denial of justice to the public. Murderers, money launderers, terrorist are allowed to walk away Scott free exploiting the loopholes in the legal system. Ironically in all these issues we apply criminal procedures only to protect the individual freedom of the accused while rights and lives of many people have been sacrificed. The present criminal justice system is obsessed with individual liberty and freedom and in this context a safe passage forgone and criminals due to weakness in the criminals due to weakness in the criminal justice system leading to dilution of evidence. Since the validity of the test and admissibility of Narcoanalysis is upheld taking into consideration the circumstances under which it was obtained, there is a little possibility of miscarriage of justice when administered as per procedure prescribed and observing the due safety precautions, the apprehension on the part of counsels of accused and critics is unwarranted. The provision of administering Narcoanalysis test when made compulsory for the accused /witness in grave offences will pave the way for improving the quality of criminal justice through strengthening of evidence system. This move will bring about a qualitative change in the criminal justice and the erstwhile death chambers of police stations are replaced by operation theatres administering truth serum on the criminals and thereby offering a ray of hope that justice at last will prevail.

### **Conclusion**

Law is a living process, which changes according to the changes in society, science, and ethics and so on. The Legal System should imbibe developments and advances that take place in science as long as they do not violate fundamental legal principles and are for the good of the society. A few democratic countries, India most notably, still continue to use narco analysis. The issue of using Narco analysis test as



a tool of interrogation in India has been widely debated. The extent to which it is accepted in our legal system and our society is something, which will be clearer in the near future. There have been orders of various High Courts upholding the validity of Narco analysis. These judgments are in stark contrast with the earlier judgments of the Supreme Court interpreting Art. 20(3). The veracity lies in the fact that Narco analysis is still a nascent interrogation technique in the Indian criminal justice system without any rules or guidelines. There have been orders of various High Courts upholding the validity of narco analysis. These judgments are in stark contrast with the earlier judgments of the Supreme Court interpreting Art. 20(3). The Central government must make a clear policy stand on narco analysis because what is at stake is India's commitment to individual freedoms and a clean criminal justice system.

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