

**DEVELOPMENT OF NARCO ANALYSIS TEST AS INVESTIGATION
TECHNIQUE IN THE CRIMINAL JUSTICE SYSTEM VIS A VIS
CONSTITUTIONAL CHALLENGES IN INDIA**

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Dynamic nature of society compels legal system of any country to undergo changes. Criminal justice system is no exception to this rule and it includes change in the way of collection of evidences during investigation. Introduction of technological advancement for the same purpose includes some techniques such as Narco Analysis Test. Article 20(3) of the Constitution of India states that 'No person accused of any offence, shall be compelled to be a witness against himself.' Irrespective of inclusion of this fundamental right against self-incrimination in supreme law of country i.e. Constitution of India, nowadays during investigation in criminal matters, Narco-analysis Test is one Deception Detection Test which is said to be useful to know the concealed information related to crime. This information, which is known only to accused, is sometimes crucial for criminal investigation. However, such information cannot be used as evidence but is merely corroborative evidence. At the same time this test put mental and physical pressure upon accused which can be violation of his human rights. Hence prima facie there is conflict between fundamental/human rights and criminal administration. The Fundamental Right guaranteed under Article 20(3) of Constitution of India acts as protective umbrella against testimonial compulsion for people who are accused of an offence and are compelled to be a witness against themselves. Supreme Court of India in 2010 through its decision made it clear that Narco-analysis test can't be conducted without the consent of the subject. This has changed the perspective of looking towards Narco-analysis test. This paper will be an attempt to explore the development of Narco Analysis Test in the criminal justice system in India as a tool of investigation and its conflict with constitutional challenge posed by Article 20(3) of Constitution of India.

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The term Narco-analysis is derived from the Greek word *narkō* meaning ‘anaesthesia’ and is used to describe a diagnostic and psychotherapeutic technique that uses psychotropic drugs, particularly barbiturates, to induce a state of unconsciousness in which mental elements with strong associated affects come to the surface, where they can be exploited by the therapist.² Narco-analysis poses several questions at the intersection of law, medicine and ethics. The term ‘Narco-analysis’ was coined by Horseley.³ It’s a procedure for reducing inhibition used by administering scopolamine barbiturates and methedrine or other drugs to facilitate questioning and analysis; process whereby a subject is put to sleep, or semi somnolent state by means of chemical injections and then interrogated while in this dreamlike state.⁴ This test involves the intravenous administration of a drug called sodium pentothal that causes the subject to enter into a hypnotic trance and become less inhibited and is resorted to make the subject more likely to divulge information in criminal investigation.⁵ The drug is injected slowly into a vein in order to induce a relaxed state of mind in which the suspect becomes more talkative and has less emotional control.⁶ The personnel involved in conducting a ‘narco-analysis’ interview include a forensic psychologist, an anaesthesiologist, a psychiatrist, a general physician or other medical staff and a language interpreter if needed.⁷ Additionally a videographer is required to create video-recordings of the test for subsequent scrutiny. In India, this technique has been administered either inside forensic science laboratories or in the operation theatres of recognised hospitals. While a psychiatrist and general physician perform the preliminary function of gauging whether the subject is mentally and physically fit to

² Barcelona Panda, “Narco-Analysis and its Evidentiary Value in India”(2011), available at http://www.supremecourtcases.com/index2.php?option=com_content&itemid=5&do_pdf=1&id=21437 (last visited on April 6, 2020)

³ Sonakshi Verma, “The Concept of Narco analysis in view of Constitutional Law and Human Rights”, available at www.rmlnl.ac.in/webj/sonakshi_verma.pdf (last visited on April 2, 2020)

⁴ Tapash Gan Choudhary, Gan Choudhary’s Medico-Legal Dictionary and Jurisprudence, 29 (Eastern Law House, 1st ed., 2016)

⁵ Id. at 1

⁶ John M. MacDonald, “Truth Serum”, 46 (2) Journal of Criminal Law and Criminology, 259 (1955), available at <http://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=4375&context=jclc> (last visited on February 12, 2020)

⁷ Id. at 1

undergo the test, the anaesthesiologist supervises the intravenous administration of the drug. It is the forensic psychologist who actually conducts the questioning. Since the test is meant to aid investigation efforts, the forensic psychologist needs to closely cooperate with the investigators in order to frame appropriate questions. The use of Narco-analysis test is not a recent development. Earlier versions of the Narco-analysis technique utilised substances such as scopolamine and morphine. Dr. Robert E. House, an observant physician practising in Ferris, Texas, presented a paper in 1922 where he stated that drug administration quite similar to the Narco-analysis test on person revealed that information from person which he didn't revealed in normal stage. During World War II, this general technique of delving into a subject's inner consciousness through the instrumentality of narcotic drugs was widely used in the treatment of war neuroses (sometimes called 'Battle shock' or 'shell shock').⁸

Supreme court of India observed⁹ that the behaviour exhibited by the subject during Narco-analysis test has certain specific characteristics, namely:-

1. It facilitates handling of negative emotional responses (i.e. guilt, avoidance, aggression, frustration, non-responsiveness etc.) in a positive manner.
2. It helps in rapid exploration and identification of underlying conflicts in the subject's mind and unresolved feelings about past events.
3. It induces the subject to divulge information which would usually not be revealed in conscious awareness and it is difficult for the person to lie at this stage
4. The reversal from this stage occurs immediately when the administration of the drug is discontinued.

It is been always an issue of dispute that whether science is boon or bane. Like any other field of life, investigation procedure in criminal matters is influenced by some scientific techniques which are administered on accused for the purpose of improving investigation efforts in criminal cases. Narco-analysis test is one of the main scientific tools of interrogation that are used to extract confessions from the suspects of criminal activities. This psychoanalytical test is also used to interpret the behaviour of the

⁸ C.W. Muehlberger, "Interrogation under Drug-influence: The so-called Truth serum technique", 42(4) The Journal of Criminal Law, Criminology and Police Science 513-528, 513-514 (Nov- Dec. 1951)

⁹ Id. at 1

accused and corroborate the observations of the investigating officers. After a long line of decisions by various High Courts in India leaning in favour of investigating agencies and holding that statements made by person in a state of stupor or the data collected by this test could be admissible, the Supreme Court of India has pulled the curtains down in *Selvi v. State of Karnataka*¹⁰ holding that Narco-analysis test is constitutionally impermissible as constituting the violation against the fundamental right against self-incrimination that is protected against through Article 20(3) of the Constitution of India. Technological development in the world led to the aggravated forms of self-incriminating techniques. While inquiring effect of these techniques in relation with Article 20(3), the question arises that whether the results derived from the Narco-analysis test amounts to 'testimonial compulsion' thereby attracting the bar of Article 20(3)? Testimonial compulsion refers to coercion which procures the positive volitional evidentiary acts of the person. For this purpose, it is necessary to survey the precedents which deal with what constitutes 'testimonial compulsion' and how testimonial acts are distinguished from the collection of physical evidence. Apart from the apparent distinction between evidence of a testimonial and physical nature, some forms of testimonial acts lie outside the scope of Article 20(3). For instance, even though acts such as compulsorily obtaining specimen signatures and handwriting samples are testimonial in nature, they are not incriminating by themselves if they are used for the purpose of identification or corroboration with facts or materials that the investigators are already acquainted with.

In *Selvi's case*¹¹, Supreme Court held that, the results of the Narco-analysis test should be treated as testimonial acts for the purpose of invoking the right against self-incrimination. Therefore, it would be prudent to state that the phrase 'and such other tests' (which appears in the Explanation to Sections 53, 53-A and 54 of the CrPC) should be read so as to confine its meaning to include only those tests which involve the examination of physical evidence. The Narco-analysis test includes substantial reliance on verbal statements by the test subject and hence its involuntary administration offends the 'right against self-incrimination'.

¹⁰ Id. at 1

¹¹ Ibid

Some other fundamental rights were also considered by Court in Selvi's case. While discussing applicability of Article 21 of Constitution of India¹² in relation to Narco-analysis test, Court stated that one thing is necessary to ensure that entire practice of due process under Article 21 has been conformed to fundamental fairness is by judging the way evidence has been obtained. One principle of ensuring fundamental fairness is that the accused shall not be convicted upon coerced or involuntary confession.¹³ It will lead to restrain on personal liberty. Hence involuntary administration of Narco-analysis test is incompatible with such due process. Article 21 has been judicially expanded to include a 'right against cruel, inhuman or degrading treatment', which requires Court to determine whether the involuntary administration of the Narco-analysis test violates this right whose scope corresponds with evolving international human rights norms. Right to privacy, both in a physical and mental sense is another dimension of personal liberty under Article 21.¹⁴ An individual's decision to make a statement is the product of a private choice and there should be no scope for any other individual to interfere with such autonomy, especially in circumstances where the person faces exposure to criminal charges or penalties. In light of the conjunctive reading of Article 20(3) of the Constitution of India and Section 27 of the Indian Evidence Act, 1872¹⁵, that if the fact of compulsion is proved, the test results will not be admissible as evidence and if the investigators are allowed to compel individuals to undergo these tests, it would also affect some of the key components of the 'right to fair trial'. The scientific validity of the Narco-analysis test has been questioned time and again and it is argued that its result is not entirely reliable. Furthermore, during the hypnotic stage, individuals are prone to suggestibility and there is a good chance that false results could lead to a finding of guilt or innocence.

After referring to various international documents, Supreme Court gave a human right perspective to Selvi's case. But simultaneously Court left the room open for voluntary administration of these tests. In a country like India where investigators are equipped with so much power, researcher is doubtful about means of obtaining consent of test

¹² The Constitution of India, Art. 21

¹³ District Registrar and Collector v. Canara Bank, AIR 2005 SC 186

¹⁴ Justice K.S. Puttaswamy(Retd.) and Anr. v. Union of India and Ors., (2017) 10 SCC 1

¹⁵ Indian Evidence Act, 1872, S. 27

subject to prove that consent was voluntary. Also consequences of tests will be similar irrespective of whether they were administered voluntarily or involuntarily.

Abdul Karim Telgi who was mastermind of India's largest case of fraud in the country's history, Rs. 3,000 Cr. stamp paper scam was subjected to Narco-analysis test. While undergoing the test he named prominent people with whom he had had monetary transactions; explained his *modus operandi*, revealed places where he operated, his business associates, how he started his racket, the number of bank accounts he had, and what he owned. This whole information was self-incriminatory and hence there was violation of his fundamental right under Article 20(3). About Narco-analysis report, Raja Thakare, lawyer for the SIT stated that "a substantial amount of information tumbled out of Telgi, but to reveal names at this stage would seriously hinder the investigation process". Further he added "the test results are not enough evidence to convict people. It should be looked at as a tool or an aid towards guiding us in the right direction or supporting evidence".¹⁶ This instance shows the limitations on using the results of Narco-analysis test in investigation process. Under the Indian Evidence Act, scientific opinion cannot be a conclusive proof of the crime¹⁷ and is used only for the purpose of collecting further evidence. Hence use of results of these scientific tests is at the discretion of investigation agencies. Already there are doubts and concerns over the reliability of Narco-analysis test and moreover it is irrelevant whether results of these tests lead to truth or not. The criminal justice system is all about "search for the truth"¹⁸ but not on the path which is against core values of Indian Constitution.

Selvi's case has made it clear that Narco-analysis test can't be conducted without consent of the accused but researcher put forth certain situation where Narco-analysis test should be conducted without consent of the accused in exceptional circumstances. One may also argue that though the compulsory administration of the Narco-analysis test amounts to a seemingly disproportionate intrusion into personal liberty but researcher submits that their investigative use is justifiable since there is a compelling

¹⁶Anupama Katakam, "The Truth Serum trial", 21(5) Frontline 18, 22 (2004) available at <http://www.frontline.in/static/html/fl2105/stories/20040312004303900.html> (last visited on February 10, 2020)

¹⁷State of Haryana v Bhagirath,(1999) 5 SCC 96

¹⁸ Ramchandra Reddy and Ors. v. State of Maharashtra, CrI. WP No. 1924 of 2003

public interest in eliciting information that could help in preventing criminal activities in the future. Such utilitarian considerations hold some significance in light of the need to combat terrorist activities and terrorist trials. Such exigency justifies some intrusions into civil liberties. The textual basis for these restraints could be grounds such as preserving the 'sovereignty and integrity of India', 'the security of the state' and 'public order' among others. According to researcher it is justifiable to use Narco-analysis test for eliciting information which could help in saving the lives of ordinary citizens at large and to give justice to victims of terrorist acts. That would be to reconcile the constitutional challenge involved in Narco-analysis test through Article 20(3) and its use in criminal investigation.