

# CONSTITUTIONAL AND HUMANITARIAN APPRAISAL OF NARCO-ANALYSIS TEST

Written by Vaishali A. Sukhdeve

Assistant Professor (Law)

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**“It is better to risk saving a guilty man than to condemn an innocent one”**

-----Voltaire<sup>1</sup>

## **Abstract:**

The advancement of science and technology has proved to be a boon to the criminal justice system. Array of new techniques like Brain mapping, Narco-analysis, Hypnosis, P-300 and Polygraph tests have been emerged as the contemporary method of crime detection and investigation. These advanced crime detection tools have been emerged as the most powerful branch in criminal law helping the Law enforcement machinery. However, while exhausting these techniques in criminal justice, we cannot forget that it is being used on Human beings and science has no right to interfere with the human memory, which is his very personal property. Also when we analyze these tests from constitutional perspective, the rights of accused and long established criminal jurisprudence comes into picture. On one side, such tests are helpful for the judges as evidence without reasonable doubt, to arrive at a decision and inflict sentence to the accused. But on the other side, such techniques are considered as intrusion in the human mind which may violate his right to privacy as well as his right to physical and mental health. Such methods can be referred as a rape on human mind.

The most important function of scientific investigation is to translate suspicion into reasonable certainty of either guilt or innocence. The basis of criminal jurisprudence lies in the fact of proving the guilt of accused beyond all reasonable doubt and to protect the innocent from wrong conviction. The latest technique to elicit truth from accused is that of Narco

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<sup>1</sup> [www.brainyquote.com/quotes/keywords/human\\_rights.html](http://www.brainyquote.com/quotes/keywords/human_rights.html) visited on 14/03/2018.

analysis, a generally acceptable scientific evidence. However, such test has to satisfy the test of admissibility according to Indian Evidence Act, 1872. It is also considered as destroying the constitutional safeguard of self-incrimination provided under Article 20(3) and violation of right to privacy and right to fair trial as explicit under Article 21 of Indian constitution. Such provisions invoke that every accused/ suspect has right to life and personal liberty, which cannot be deprived except the procedure established by law and no person can be compelled to undergo any scientific test for collecting evidence for himself.

**Keywords:** Narco- analysis test, Human rights of accused, Article 20(3) and 21 of Indian Constitution.

### **Introduction:**

Article 3 of Universal declaration of Human rights and Article 21 of Indian constitution recognizes the right to life, liberty and security of a person as primary, inherent and inalienable to every human being irrespective of race, nationality, economic status or other man made discriminations. These rights are fundamental for living a dignified life in the contemporary society and every welfare State is mandated to protect such rights of each and every individual including that of accused who is considered as innocent until the guilt is proved. In India, the criminal justice system consists of the police machinery, prosecution and the judicial system. Nowadays police officials are utilizing the scientific techniques to investigate and detect a crime, reconstruct the crime scene, identify the alleged offender and establish vital links. The judiciary is also depended on such modern scientific technology for the physical evidences and determine the guilt or innocence of the accused. In some way, the present criminal justice system is influenced by the new emerging scientific techniques in criminal investigation.

Narco-analysis, which is basically a tool of psychiatric treatment, has now been used by the criminal investigating agencies as a scientific tool of interrogation and it helps a lot in crime prevention and detection. According to Indian police, if a criminal is subjected to narco-analysis test, then it would be easy to reveal about crime committed, where he had hidden the weapons used in committing the crime and what was the intention behind such act? This investigative practice might appear more humanitarian as compared to the third degree physical torture, but still it raises severe questions on the applicability of the human rights, right to life and personal liberty and most importantly right against self-incrimination.

**Narco-Analysis Test: An attempt to read human brain:**

While investigating the cases some hardcore criminals are difficult to deal with. In such cases, in order to procure evidence, the investigating officers end up with using third degree physical torture or other unfair means. In such cases in spite of using these methods, scientific techniques can come to the aid of criminal investigation. The Indian constitution permits the legislature to take necessary steps in making law for justice through science. According to Article 51-A (h), in Part IV-A, it shall be the fundamental duty of every citizen of India to develop a scientific temper, humanism, the spirit of inquiry and reform. The fulfillment of this duty is proving a boon for criminal justice system and a bane to the suspect who is subjected to such scientific tests either with or without his consent.

Neuroscience is an attempt to read human brain and mind through it, which involves neuro imaging which records different patterns of brain images taken under varying circumstances that may relate with different future behaviors and conditions. One of such tools of investigation includes Narco analysis test. The term Narco analysis is derived from Greek word “narke” which means anesthesia or torpor. This involves a diagnostics and psychotherapeutic technique that uses psychotropic drugs, namely barbiturates which induces a person in a sleeplike state and brings the inertness in which mental elements with strong associated effects come to the surface, where they are exploited by therapists.<sup>2</sup>

Narco-analysis is not openly permitted for investigative purposes in many developed and developing countries. In India, Narco-analysis Test is gradually being mainstreamed into criminal investigations, court hearings and forensic laboratories. In India this test is done by a team comprising of an anesthesiologist, a psychiatrist, a 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 will be further verified by subjecting the accused to other brain tests like polygraph and brain mapping tests.

However, such kind of tests raises severe scientific, legal and ethical issues, which need to be taken into consideration immediately before such practice spreads further. This tests were

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<sup>2</sup> Law of Forensic Science, Central Law Publications, 1<sup>st</sup> Edition Pg. 805.

used on the suspects of high profile cases like Godhra carnage case, Aarushi murder case, Fake stamp paper scam case(Telgi), Nithari killings and Mumbai train blasts case.

### **Constitutional appraisal of Narco-analysis test:**

#### **Article 20(3):**

Article 20(3) deals with the criminal investigation and trial of accused which has a strong nexus with Human rights jurisprudence. It deals with the privilege against self-incrimination, which exemplifies that the accused is presumed to be innocent, it is for the prosecution to establish his guilt and accused need not make any statement against his will. It is against the compulsion to be a “witness” in his own case. This privilege against self-incrimination provides for preservation of human privacy and observance of civilized standards in the enforcement of criminal justice system.

In the case of *State of Bombay vs. Kathi Kalu Oghad*<sup>3</sup>, the Hon’ble apex court consisting of eleven judges held that, “ It is well established that Article 20(3) is directed against self-incrimination by the accused person. Self-incrimination must mean conveying information based upon personal knowledge of the person giving the information and cannot include merely the mechanical process of producing documents in court which may throw light on any points in the controversy, but which do not contain any statement based on his personal knowledge.”

The investigating agencies subjecting the accused to undergo such Narco-analysis Tests is considered as a sheer violation of Article 20(3) of Indian Constitution. Such test is also against the legal maxim “*Nemo Tenetur se Ipsum Accusare*” which means that if the confession from the accused is derived from any physical or moral compulsion, whether it may be under hypnotic state of mind, it should stand to be rejected by the court. This implies that the admissibility of Narco-analysis test is questionable and challengeable as a forensic evidence in court of law.

**Right to silence:** The right against forced self- incrimination widely known as right to silence is enshrined not only in Indian Constitution under Article 20(3) but also in the Code of Criminal

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<sup>3</sup> AIR 1961 SC 1808

Procedure. In Code of Criminal Procedure (Cr.P.C) Section 161(2) states that every person is bound to answer truthfully all questions put to him by a police officer other than the questions the answers to which, would have a tendency to expose that person to a criminal charge, penalty or forfeiture". In this mode also the enactment of Cr.PC has safeguarded the right against self-incrimination. <sup>4</sup>

In *Nandini Sathpathy vs. P.L. Dani*<sup>5</sup>, Right to silence has been granted to the accused, wherein it was interpreted that no one can forcibly extract statements from the accused, who has right to keep silent during the course of interrogation . By the administration of these kinds of tests, forcible intrusion into one's mind is being resorted to, thereby nullifying the validity and legitimacy of right to silence.

**Right to privacy:** In Indian Constitution, protection of life, liberty and freedom has been thoroughly interpreted under Article 14, 19 and 21 to encompass the generic term of right to privacy. The right to be left alone or right of a person to be free from unwarranted publicity is right to privacy. No one has the right to publish anything without the consent of the individual whether truthful, admiring 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 *Govind vs. State of M.P*<sup>6</sup>, it was held that the test directly intrudes on the mental process of the subject who lacks control over the questioning. There is the risk that unconscious mind may reveal personal information that is irrelevant to the investigation. It is therefore imperative to establish standards of confidentiality and other safeguards, as privacy can be violated only by "procedure established by law". No such safeguards exist in India and therefore Narco-analysis particularly if performed without consent amounts to a violation of privacy.

In *Ram Jawaya Kapur vs. State of Punjab*,<sup>7</sup> it was held that the executive power cannot intrude on either constitutional rights and liberty, or for that matter any other rights of the

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<sup>4</sup> Law of Forensic Science, Central Law Publications, 1<sup>st</sup> Edition Pg. 809.

<sup>5</sup> AIR 1978 SC 1025

<sup>6</sup> AIR 1975 SC 1378

<sup>7</sup> AIR 1955 SC 549

person and it has also been observed that in absence of any law an intrusion of Fundamental right must be struck down as unconstitutional.

It is necessary to examine the right against self-incrimination with the multiple dimensions of personal liberty under Article 21 which include guarantees such as the right to fair trial and substantive due process. Not only does an accused person have right to refuse to answer any question that may lead to incrimination, there is also a rule against adverse inferences being drawn from the fact of his silence.

Section 313(3) of Code of Criminal Procedure places a critical limitation on the power of the court to put questions to the accused so that the later may explain any circumstances appearing in the evidence against him. The right against self-incrimination broadly corresponds that of ensuring reliability of the statements made by an accused and ensuring that such statements are made voluntarily.

Recently on 2<sup>nd</sup> May, 2017, Hon'ble Justice Pinaki Chandra Ghose, in the case of State of U.P vs Sunil<sup>8</sup>, it was held that-

“After careful perusal of the evidence and material on record, we are of the considered opinion that the following question would play a crucial role in helping us reaching an upright decision: Whether compelling an accused to provide his fingerprints or footprints etc. would come within the purview of Article 20(3) of the Constitution of India i.e. compelling an accused of an offence to be a “witness” against himself? It would be relevant to quote Article 20(3) of the Constitution of India which reads as follows: “Article 20: Protection in respect of conviction for offences. (1) .. (2) .. (3) “No person accused of any offence shall be compelled to be a witness against himself.” While dealing with this case, the court relied on the previous judgements like State of Bombay Vs. Kathi Kalu Oghad & Ors., and Selvi Vs. State of Karnataka.

In Selvi Vs. State of Karnataka,<sup>9</sup> a three-Judge Bench of this Court while considering testimonial character of scientific techniques like Narco analysis, Polygraph examination and the Brain- Electric activation profile held that these kinds of tests are inadmissible, since under

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<sup>8</sup> <https://www.supremecourtcases.com/index-practicallawyer> last visited on 15/03/18.

<sup>9</sup> (2010) 7 SCC 263.

the influence of these tests, the examinee is forced to impart some personal knowledge to the investigation authorities, he is forced to be a witness against himself. The court held such tests as violative of Article 20(3) of the constitution, thereby going a long way to protect the rights of accused.

It further held that in the Indian context, Article 20(3) should be construed with due regard for the inter-relationship between rights, since this approach was recognised in Maneka Gandhi's case, (1978) 1 SCC 248. Hence, we must examine the 'right against self-incrimination' in respect of its relationship with the multiple dimensions of 'personal liberty' under Article 21, which include guarantees such as the 'right to fair trial' and 'substantive due process'. It must also be emphasized that Articles 20 and 21 have a non-derogable status within Part III of our Constitution because the Constitution (Forty-Fourth amendment) Act, 1978 mandated that the right to move any court for the enforcement of these rights cannot be suspended even during the operation of a proclamation of emergency.

In another case of Prakash vs. State of Karnataka<sup>10</sup>, it was held that where there is no direct witness to prove the prosecution case, conviction of the accused can be made on the basis of circumstantial evidence provided the chain of the circumstances is complete beyond all reasonable doubt. It was observed by this Court as follows: "It is true that the relevant circumstances should not be looked at in a disaggregated manner but collectively. Still, this does not absolve the prosecution from proving each relevant fact".<sup>11</sup>

### **Humanitarian aspect of Narco test:**

The right against self-incrimination and right to fair trial has been recognized in international human rights instruments like Universal declaration of Human Rights and International Covenant on Civil and political rights. Article 14(3)(g) of International Covenant on Civil and political rights 1966, to which India is also signatory, also provides that an accused has a right not to be compelled to testify against himself or to confess guilt.

Narco-analysis which constraints the rational thinking and also has potential side effects, can be considered as a form of torture. The UN Convention defines torture as having

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<sup>10</sup> (2014) 12 SCC 133.

<sup>11</sup> <https://indiankanoon.org/doc/158349506/> last visited on 14/03/18.

four components like a. it produces physical or mental suffering and is degrading. b. it is intentionally inflicted. c. it is intended for purposes such as getting information, confessions etc. d. it is inflicted by an official. Narco-analysis satisfies all four components. In India, narco-analysis are merely replacing physical third degree interrogation with a psychological third degree mode. Freedom from torture is fundamental human right that must be protected in all circumstances, Narco-analysis is a method of torture which dehumanizes both the victim and the perpetrator and is an atrocious violation of human dignity.<sup>12</sup>

In Nandini Satpathy's case,<sup>13</sup> Honble Justice V.R. Krishna Iyer, laid down that, "... Article 20(3) is a human article, a guarantee of dignity and integrity and of inviolability of the person and refusal to convert an adversary system into an inquisitorial scheme in the antagonistic ante-chamber of a police station. And in the long run, that investigation is best which uses stratagems least, that policeman deserves respect who gives his fists rest and his wits restlessness. The police are part of us and must rise in people's esteem through firm and friendly, not foul and sneaky strategy."

It was further held that, "It cannot be denied that during a narcoanalysis interview, the test subject does lose 'awareness of place and passing of time'. It is also quite evident that all the three impugned techniques can be described as methods of interrogation which impair the test subject's 'capacity of decision or judgment'. Going by the language of these principles, we hold that the compulsory administration of the impugned techniques constitutes 'cruel, inhuman or degrading treatment' in the context of Article 21. It must be remembered that the law disapproves of involuntary testimony, irrespective of the nature and degree of coercion, threats, fraud or inducement used to elicit the same. The popular perceptions of terms such as 'torture' and 'cruel, inhuman or degrading treatment' are associated with gory images of blood-letting and broken bones. However, we must recognise that a forcible intrusion into a person's mental processes is also an affront to human dignity and liberty, often with grave and long-lasting consequences".

#### **Narco test contrasting to medical ethics:**

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<sup>12</sup> Law of Forensic Science, Central Law Publications, 1<sup>st</sup> Edition Pg. 825.

<sup>13</sup> (1978) 2 SCC 424, at p. 442



Medical council of India added to its Code of Medical Ethics through Principle 4(a) that it is contravention of medical ethics for health personnel, particularly for physicians to apply their knowledge and skills in order to assist in the interrogation of prisoners and detainees in manner that may adversely affect the physical or mental health or condition of such prisoners or detainees and which is not in accordance with the relevant international instruments.

Thus physician shall not aid or abet torture nor shall be party to either infliction of mental or physical trauma in clear violation of human rights. In spite of this, medical practitioners are participating in pharmacological torture by conducting so called truth serum tests.

While administering Narco-analysis test, it is always not possible to determine the correct dose of the drug, which varies according to the physical constitution of the subject, but also his mental attitude and will power. A wrong dose can send a subject into coma or even cause death, thus resulting in legal complications. The person to administer them has to be highly qualified physician.

Studies done by various Medical associations in USA adhere to the truth serums do not induce truthful statements and subjects in such conditions of trance under the truth serum may give false or misleading answers.<sup>14</sup>

#### **Admissibility and reliability of Narco-analysis test in courts:**

Narco-analysis test is a restoration of memory which the suspect had forgotten. Such tests have been criticized for its unreliability. Scientific studies have established that the test is not infallible and even induces confessions from innocent persons, as the suspect is in a highly suggestible state and inclined to give false or misleading answers to questions that may be improperly put forth. Thus doubts are created whether such tests amount to testimonial compulsion in judiciary and violation of human right, individual liberty and fundamental freedoms. Studies have suggested that the memories can be planted in the subject's brain during questioning, a person may create a belief that he has actually committed a crime, even though

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<sup>14</sup><http://www.lawyersclubindia.com> last visited on 12/03/18.

in reality he may be an innocent. This shows that there is a high risk of “gross miscarriage of justice through undue dependence upon unreliable statements”.<sup>15</sup>

These brain tests are usually used to deduce the behavior of the accused and to corroborate it with the other evidences collected by investigating officers. Hence such tests generally don't have legal authenticity as the confessions are made in semi-conscious state of mind are not directly admissible in court of law. The court may permit partial admissibility after considering the circumstances like voluntary confessions or compulsion if any is made on the accused while administering such tests.

In narco-analysis test the drugs produce a state of intoxication, which is remarkably similar to alcohol intoxication. Section 85 of Indian Penal Code 1860, lays down about the act of a person incapable of judgement by reason of intoxication caused against his will. Thus law itself presumes that the intoxicated person is not capable of knowing the nature of the act or that he is doing right or wrong.

Section 25 of the Indian Evidence Act also provides that no confession made to a police officer shall be proved as against a person accused of any offence. Also as per section 27 only that part of confessional statement made before the police by the accused is admissible which resulted in the discovery of fact and rest inculpatory part of the statement cannot be proved in trial.

Sections 24 to 27 of the Indian Evidence Act would bar statement from being admissible in evidence if there is slightest doubt about coercion or intimidation or any type of fear that statement was not free or that immediate before such test the subject was harassed by the police or was coerced, then such statement would be meaningless.

Section 45 of the Indian Evidence Act 1872, does allow expert's opinions in certain cases like foreign law, arts, science or as to identity of handwriting or finger impressions. But this section is silent on other aspects of forensic evidences that can be admissible in criminal proceedings.

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<sup>15</sup> [www.lawteacher.net](http://www.lawteacher.net) last visited on 14/03/18.

These provisions of Indian Evidence Act represent the basic value of a civilized society and so are given paramount importance.

In *Selvi and Others v. State of Karnataka*<sup>16</sup>, it was reported that, it was necessary to be aware of the limitations of the 'narcoanalysis' technique. It does not have an absolute success rate and there is always the possibility that the subject will not reveal any relevant information. Some studies have shown that most of the drug-induced revelations are not related to the relevant facts and they are more likely to be in the nature of inconsequential information about the subjects' personal lives. It takes great skill on part of the interrogators to extract and identify information which could eventually prove to be useful. While some persons are able to retain their ability to deceive even in the hypnotic state, others can become extremely suggestible to questioning. This is especially worrying, since investigators who are under pressure to deliver results could frame questions in a manner that prompts incriminatory responses. Subjects could also concoct fanciful stories in the course of the 'hypnotic stage'. Since the responses of different individuals are bound to vary, there is no uniform criteria for evaluating the efficacy of the 'narcoanalysis' technique. Since a person subjected to the narcoanalysis technique is in a half-conscious state and loses awareness of time and place, this condition can be compared to that of a person who is in a hypnotic state.

In *Horvath v. R*, [1979] 44 C.C.C. (2d) 385, the Supreme Court of Canada held that statements made in a hypnotic state were not voluntary and hence they cannot be admitted as evidence. It was also decided that if the post-hypnotic statements relate back to the contents of what was said during the hypnotic state, the subsequent statements would be inadmissible.

### **Findings and Suggestions:**

With the interference of science, tests like narco-analysis has taken an atrocious form in the criminal investigations. While walking on the path of technology, we cannot forget that we are human beings and not machines. Memory of human being is his own natural property and science has no right to interfere with it. Narco-analysis test also attacks on the dignity and integrity of human being. It is a process in which once the confession of the suspected person is recorded into a compact disk and submitted along with FIR and charge sheet to court, it

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<sup>16</sup> (2010) 7 SCC 263

becomes a public property and can be accessed by the parties involved, affecting the name, fame and reputation of the person involved. Thus process itself involves harassment and maltreatment to an individual wherein he has no freedom to use his reason. He is denied with the right to freedom and expression and therefore it is violation against human dignity and personal integrity.

In spite of various judgements of Honble Supreme court and guidelines given by the National Human Rights Commission, the Narco analysis test is been conducted, which poses a serious concern on the mental and physical well-being of an accused who might be an innocent.

**Suggestions:**

1. It is very essential that the Parliament should enact the legislation containing the provisions regarding administering the narco analysis test, wherein main emphasis should be given on courts permission and written consent of the accused undergoing such a test should be made compulsory.
2. It is essential to formulate a mechanism that narco analysis should be conducted only in specialized cases, where the evidence can't be traced through traditional techniques.
3. It is also suggested that before undergoing such test, National Human rights commission and State Human rights commission should also be consulted with, so that there is no misuse and abuse of these tests.

**Conclusion:**

Legal system keeps on evolving day by day, to suit the exigencies of gradually changing society. As rightly said by Robert Kennedy "Every society gets the kind of criminal it deserves. What is equally true is that every community gets the kind of law enforcement it insists on"<sup>17</sup>. Therefore, it is necessary for the Criminal Justice System to match up with development and scientific advances to counter the criminal activities in contemporary era. In such circumstances the modern method of Narco-analysis can be a boon for criminal investigation. Although it should not be made a regular practice and should be used only in rarest of rare matters. The traditional method of investigations may not be able to lead to accurate results,

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<sup>17</sup> [https://www.brainyquote.com/quotes/robert\\_kennedy\\_last](https://www.brainyquote.com/quotes/robert_kennedy_last) visited on 15/03/18

but if proper techniques are used by the investigating officers on crime scene and the prosecution in the court of law, then scientific methods may have minimal need. But in present scenario, when Narco-analysis is gaining judicial recognition and supports despite being considered as doubtful and less reliable, thoughtful appraisal and reconsideration have to be done as to its admissibility, legality and constitutional validity from humanitarian approach as well.

