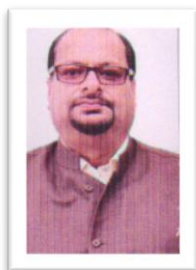


Narco-Analysis Test vis-à-vis Constitutional and Legal Rights of Accused



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Abstract

There has been much controversy over the concept of Narco-analysis as it is often called soft torture. It also goes in opposition to the maxim "nemo tenetur se ipsum accusare" i.e. no man, not even accused can be forced to answer any question, which may tends to prove him guilty of a crime, he has been accused of. The evidence given in Narco-analysis is not 100% accurate. It has both medical and non-medical uses and with the Government training interrogating agencies in a better manner, Narco-analysis can be used short of torture and violation of dignity

Keywords: Narco-analysis, Fundamental Rights, Indian Constitution.

Introduction

A person is able to lie by using his imagination. In the Narco Analysis Test, the subject's imagination is neutralised by making him semi-conscious. In this state, it becomes difficult for him to lie and his answers would be restricted to facts he is already aware of.

The search for effective aids to interrogation is probably as old as man's need to obtain information from an uncooperative source and as persistent as his impatience to shortcut any tortuous path. In the annals of police investigation, physical coercion has at times been substituted for painstaking and time consuming inquiry in the belief that direct methods produce quick results. Development of new tools of investigation has led to the emergence of scientific tools of interrogation like the narco analysis test. Such tests are a result of advances in science but they often raise doubts regarding basic human rights and also about their reliability. Legal questions are raised about their validity with some upholding its validity in the light of legal principles and others rejecting it as a blatant violation of constitutional provisions.

What is Narco- Analysis-

The term Narco-Analysis is derived from the Greek word narkō (meaning "anaesthesia" 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

In a Narco test the subject is administered a fixed quantity of Sodium Pentothal or Sodium Amytal which puts him/her in a state of Hypnotism. Such a test is generally conducted on a suspect who is not coming out with the truth. Once put to this test he is half sleep and answers the questions truthfully. Mr Telgi was also put to this test wherein he came out with the truth and named big politicians who were the beneficiaries of the Stamp Scam.

However this test cannot be taken as evidence in a court of law. But certainly it helps proceed in the right direction and collect evidence which can form the basis for prosecution in a court of law.

The narco analysis test is conducted by mixing 3 grams of Sodium Pentothal or Sodium Amytal dissolved in 3000 ml of distilled water. Narco Test refers to the practice of administering barbiturates or certain other chemical substances, most often Pentothal Sodium, to lower a subject's inhibitions, in the hope that the subject will more freely share information and feelings. A person is able to lie by using his imagination. In the narco Analysis Test, the subject's inhibitions are lowered by interfering with his nervous system at the molecular level. In this state, it becomes difficult though not impossible for him to lie .In such sleep-like state efforts are

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made to obtain "probative truth" about the crime. Experts inject the subject with Sodium Pentothal or Sodium Amytal. The dose is dependent on the person's sex, age, health and physical condition. A wrong dose can result in a person going into a coma, or even death.

The subject is not in a position to speak up on his own but can answer specific but simple questions. The answers are believed to be spontaneous as a semi-conscious person is unable to manipulate the answers. This test is capable of retrieving the facts/things which have been even forgotten by the subject.

Constitutional Safe guards-

Clause (3) of Article 20 declares that no person accused of an offence shall be compelled to be a witness against himself. This provision may be stated to consist of the following three components:-

- a. It is a right pertaining to a person accused of an offence.
- b. It is protecting against compulsion to be a witness; and
- c. It is a protection against such compulsion resulting in self incriminating evidence.

The person accused must have stood in the character of an accused at the time he made the statement. Compelling a person to undergo Narco-analysis will amount violation of the constitutional protection given to a citizen under Article 20 (3) of the Indian Constitution. Statement made or information given by an accused will be either exculpatory or inculpatory and it is only inculpatory statement which is hit by Article 20 (3) of the Constitution. Whether the accused has made an inculpatory or exculpatory statement will be known only after the test is conducted and not before. So, it becomes premature to say what will be the nature of statement or information, which the accused gives under narco analysis test.

In **Selvi v. State of Karnataka** [1], a three judge bench of the Supreme Court declared Narco-analysis to be anathema to Article 20 (3), and went ahead to find it a violation of rights that find genesis in the 'Substantive Due Process' guarantee emanating from Article 21. In this case Supreme Court relied on American Jurisprudence, and the American notion of substantive due process, to declare that the process was unconstitutional, and was hit by Article 20 (3) and Article 21 of the Indian Constitution.

Narco analysis has witnessed a mixed response from judiciary, ranging from outright disapproval to reluctant and latent encouragement. In **M.C. Sekharan v. State of Kerala** [2], the Kerala High Court took an caustic approach towards the process, declaring unequivocally that it is against the fundamental human rights of an accused. However, from 2004 to 2009 various High Courts have been apathetic in commenting on the civil liberties' aspect of Narco-analysis while some have decreed it a permissible practice, in conformity with Fundamental Rights guaranteed by Indian Constitution.

In **State of Bombay v. Kathikalu Oghad** [3], the court decreed that the right against self-

incrimination was omnipresent i.e. it was not only restricted to examination in court, but applied to the process of investigation as well. Similarly, in **Nandini Satpathy v. P.L. Dani** [4], the Supreme Court observed that the right against self-incrimination was available to the accused from the commencement of the investigation. Further, Section 161 of the Code of Criminal Procedure, 1973, which deals with the procedure pertaining to investigation of accused and witnesses by the police, explicitly protects this right. [5].

In United States the Supreme Court declared that Narco-analysis was unconstitutional, in violation of the Due Process of Law and not having a 'compelling state interest' to justify it. [6].

The reasoning given by the Supreme Court that the right against self-incrimination is a right guaranteed to the individual facing investigation or trial, hence it ought to be his discretion as to whether he wishes to answer a particular question posed to him or not is acceptable but the reasoning of the Supreme Court relating to "Substantive Due Process" is not agreeable because the framers of Indian Constitution substituted 'procedure established by law' in place of 'due process of law' to avert the judiciary from becoming a forerunner of principles of individual liberties that may potentially threaten welfare measures of the state, as had been the American experience.

The practice of Narco-analysis was seen as unconstitutional in American Jurisprudence about 50 years back. With recognition of the same by the Indian Supreme Court, a new milestone in the civil liberties' movement in India has been achieved. In short, while the decision is a landmark in its own rights and the nobility of the Court is unquestionable, the application of Article 21 is not in conformance with the true principles of our Constitution.

The element of criminal instinct is present in the nature of human being since the birth of cosmos. An efforts has been made to discover the root cause of crime but the search, so far has been in vain. The revolution in scientific technology is waving like fast flowing air and water in the modern world of advancement. The field of law is also under the shadow of scientific advancement. Judicial system, particularly the criminal justice system, is not untouched with the advancement of science. A volcano has emerged in the age old laws of crime detection with the introduction of new techniques of crime detections like Brain Mapping, Narco-analysis, Hypnosis, P-300 and Polygraph test. The most important function of scientific investigation is to convert suspicion into reasonable certainty of either guilt or innocence. The foundation of criminal justice system is to prove the guilt of accused beyond all reasonable doubts and to protect the innocent from wrongly conviction. The latest techniques to elicit truth from suspect have become a topic of debate in context of its admissibility that is Narco-analysis. Such evidence must satisfy the test of admissibility according to the Indian Evidence Act, 1872. But the problem is admissibility of evidence given under

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neuroscience which are considered as Rape of mind of person. As it has destroyed safeguards exist in Article 20(3) of Constitution of India. Right to Privacy [7] is available under Constitution of India as no person can be compelled to undergo any scientific test for collective evidences against him or herself.

India still continues to use Narco-analysis. This has come under increasing criticism from the public and the media in the country. In India, the Narco- analysis test is done by a team comprising of an anaesthesiologist, a psychiatrist, a clinical/forensic psychologist, an audio videographer, and supporting nursing staff. The forensic psychologist will prepare the report about revelations, which will be accompanied by a compact disc of audio video recordings. It raises serious scientific, legal and ethical questions. These need to be addressed urgently before the practice spreads further.

Article 20(3) of the Indian Constitution is the syncretistic result of the Anglo-saxon jurisprudence and India's reality, culture and ethos, proving once again the cosmological nexus of human right jurisprudence the world over [8]. The main provision regarding crime investigation and trial in the Indian Constitution is Article 20(3). [9] It deals with the privilege against self-incrimination. It has its equivalent in the Magna Carta, the Talmud, and the law of almost every civilized country. The main feature of this principle are-

1. The accused is presumed to be innocent.
2. That it is for the prosecution to establish his guilt.
3. The accused need not make any statement against his will.

Article 20(3) which embody this privilege reads-" No person accused of any offence shall be compelled to be a witness against himself." On analysis, this provision is found to contain the following components-

1. It is right available to a person "accused of an offence".
2. It is a protection against such "compulsion" "to be a witness".
3. It is a protection against such "compulsion" resulting in his giving evidence against himself.

All these three ingredients must necessarily coexist before the protection of Article 20(3) can be claimed. If any of these ingredients is missing, Article 20(3) cannot be invoked.

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. Subjecting the accused to undergo the test, as has done by the investigative agencies in India, is considered by many as a blatant violation of Article 20 (3) of the Constitution. It also goes against the maxim *Nemo Tenetur Se Ipsum Accusare* [10] that is : if the confession from the accused is derived from any physical or moral compulsion it should stand to be rejected by the court. The main issue thus is its admissibility in courts as forensic evidence. It is well

established that the right to silence has been granted to the accused by virtue of the case **Nandini Sathpaty v. P.L.Dani** [11], no one can forcibly extracted statement from the accused, who has the right to keep silent during the course of investigation. By the administration of this test, forcibly intrusion into one's mind is being restored to, thereby nullifying the validity and legitimacy of the Right to Silence and Right to Privacy.

In 2006 Dinesh Dalmia case [11] the Madras High Court held that subjecting an accused to Narco-analysis is not tantamount to testimony by compulsion. The court said about the accused: " he may be taken to the laboratory for such tests against his will, but the revelation during such tests is quite voluntary". In Narco- analysis, the drug contained in the syringe is the element of compulsion. The rest is technically voluntary.

In 2004, the Bombay High Court ruled in famous Telgi case that subjecting an accused to certain tests like Narco-analysis does not violate the fundamental right against self-incrimination. Statements made under Narco-analysis are not admissible in evidence. However, recoveries resulting from such drugged interview are admissible as corroborative evidence. This is, arguably, a roundabout way to subverting the right to silence-acquiring the information on where to find the weapon from the subject when, in his right senses, he would not turn witness against himself. Arguments have been made that Narco-analysis constitute mental torture. It works by inhibiting the nervous system and thus lowering the subject's inhibitions. It is not difficult to interpret this as a physical violation of an individual's mind-space.

Conclusion-

It is now a well established fact that conducting Narco-analysis test in any form is unconstitutional. But surprisingly it is still being practiced in India without much hesitation. Courts in India also view that the Narco-analysis test must be carried on with the consent of the accused or witness. Can it be ever imagined that any accused would give his consent to such test freely if he is fully aware of the side effects and discomfiture of the test over his body and mind? It is not expected from a person to give his assent to the Narco test being fully aware of the side effects. It is said that often the truth extracted from the accused through Microanalysis is 'Manufactured truth'. Even if the accused has given his free consent; the question arises as to whether a person can waive his fundamental rights enshrined under Article 20 and 21.

When we test the validity of Narco test on the touchstone of constitution, long established criminal jurisprudence and right of the accused then problem arises. On one hand evidences are authentic, easy for the judges to inflict death sentence, guilt is proved beyond all reasonable doubts and law should change according to the need of time on the path of progress. But on the other hand it is rape of the mind of the accused. It infringes the right of accused of protection against self-incrimination? No doubt it has

benefits and that is why passive admission to it is given by all our judiciary. But question is can we withdraw fundamental principles of criminal jurisprudence

- a. Right of accused against self-incrimination.
- b. Right to remain silent.

Everything will be reversed which has been established for last 100 years in criminal law. With the passage of time this evidence will again be misused by lawyers then what method judiciary will discover? This is a big question mark before our Indian Legal System.

This test needs to be blended with the essence of Article 20 (3) in such a manner that no questions are raised as to its constitutional soundness. For this purpose, it is essential that the Government should come out with certain guidelines which are to be strictly followed while conducting it and resorting to such tests in demanding cases.

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- 6 Stroble v. California, 343 U.S. 181 & Blackburn v. Alabama, 361 U.S. 199.
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- 9 Article 20(3) states: "No person shall be compelled to be a witness against himself in any criminal case".
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