

Is Narco Analysis a Reliable Science? – Present Legal Scenario In India.

The term Narco-Analysis is derived from the Greek word *narkō* (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 Horsey. Narco analysis first reached the mainstream in 1922, when Robert House, a Texas obstetrician used the drug scopolamine on two prisoners.

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.

A Brief Outline of The Narco Analysis Test-

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 made to obtain "probative truth" about the crime. Experts inject a subject with hypnotics like Sodium Pentothal or Sodium Amytal under the controlled circumstances of the laboratory. The dose is dependent on the person's sex, age, health and physical condition.

The subject which is put in a state of Hypnotism is not in a position to speak up on his own but can answer specific but simple questions after giving some suggestions. 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.

Wrong dose can send the subject into coma or even result in death. The rate of administration is controlled to drive the accused slowly into a hypnotic trance. The effect of the bio-molecules on the bio-activity of an individual is evident as the drug depresses the central nervous system, lowers blood pressure and slows the heart rate, putting the subject into a hypnotic trance resulting in a lack of inhibition. The subject is then interrogated by the investigating agencies in the presence of the doctors. The revelations made during this stage are recorded both in video and audio cassettes. The report prepared by the experts is what is used in the process of collecting evidence. This procedure is conducted in government hospitals after a court order is passed instructing the doctors or hospital authorities to conduct the test. Personal consent of the subject is also required.

Other associated truth finding tests-

Apart from narco test there are also other two kinds of tests which are popularly used on the convict for extraction of truth, these are-

I. Polygraph or lie Detection Test:

It is an examination, which is based on an assumption that there is an interaction between the mind and body and is conducted by various components or the sensors of a polygraph machine, which are attached to the body of the person who is interrogated by the expert. The machine records the blood pressure, pulse rate and respiration and muscle movements. Polygraph test is conducted in three phases- a pretest interview, chart recording and diagnosis. The examiner (a clinical or criminal psychologist) prepares a set of test questions depending upon the relevant information about the case provided by the investigating officer, such as the criminal charges against the person and statements made by the suspect. The subject is questioned and the reactions are measured. A baseline is established by asking questions whose answers the investigators know. Lying by a suspect is accompanied by specific, perceptible physiological and behavioural changes and the sensors and a wave pattern in the graph expose this. Deviation from the baseline is taken as a sign of lie. All these reactions are corroborated with other evidence gathered. The polygraph test was among the first scientific tests to be used by the interrogators.

It was Keeler who further refined the polygraph machine by adding a Psycho-galvanometer to record the electrical resistance of the skin.

II. P300 or the Brain Mapping Test:

This test was developed and patented in 1995 by neurologist Dr. Lawrence A. Farwell, Director and Chief Scientist "Brain Wave Science", IOWA. In this method, called the "Brain-wave finger printing"; the accused is first interviewed and interrogated to find out whether he is concealing any information. Then sensors are attached to the subject's head and the person is seated before a computer monitor. He is then shown certain images or made to hear certain sounds. The sensors monitor electrical activity in the brain and register P300 waves, which are generated only if the subject has connection with the stimulus i.e. picture or sound. The subject is not asked any questions. Dr. Farwell has published that a MERMER (Memory and Encoding Related Multifaceted Electro Encephalographic Response) is initiated in the accused when his brain recognizes noteworthy information pertaining to the crime. These stimuli are called the "target stimuli". In a nutshell, Brain finger printing test matches information stored in the brain with information from the crime scene. Studies have shown that an innocent suspect's brain would not have stored or recorded certain information, which an actual perpetrator's brain would have stored. In USA, the FBI has been making use of "Brain mapping technique" to convict criminals.

Narco Analysis in India-

A few democratic countries, India most notably, still continue to use narco analysis. This has come under increasing criticism from the public and the media in that country. Narco analysis is not openly permitted for investigative purposes in most developed and/or democratic countries. 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. However, it raises serious scientific, legal, and ethical questions. These need to be addressed urgently before the practice spreads further. Narco analysis has become an increasingly, perhaps alarmingly, common term in India. It refers to the process of psychotherapy conducted on a subject by inducing a sleep-like state with the aid of barbiturates or other drugs. In a spate of high profile cases, such as those of the Nithari killers and the Mumbai train blasts, suspects have been whisked away to undergo an interview drugged with the barbiturate sodium pentothal.

Narco Analysis from Constitutional & Legal Stand Points-

The main provision regarding crime investigation and trial in the Indian Constitution is Art. 20(3). It deals with the privilege against self-incrimination. It has its equivalents in the Magna Carta, the Talmud, and the law of almost every civilized country. The privilege against self incrimination is a fundamental canon of

Common law criminal jurisprudence.

The characteristic features of this principle are-

- The accused is presumed to be innocent,
- That it is for the prosecution to establish his guilt, and
- That the accused need not make any statement against his will.

-These propositions emanate from an apprehension that if compulsory examination of an accused were to be permitted then force and torture may be used against him to entrap him into fatal contradictions. The privilege against self-incrimination thus enables the maintenance of human privacy and observance of civilized standards in the enforcement of criminal justice.

Art. 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 will be found to contain the following components:

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

All the three ingredients must necessarily coexist before the protection of Art 20(3) can be claimed. If any of these ingredients is missing, Art. 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 been done by the investigative agencies in India, is considered by many as a blatant violation of Art. 20(3) of Constitution. 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 main issue thus is the question of its admissibility as a scientific technique in investigations and its ultimate admissibility in court as forensic evidence.

Section 45 of the Indian Evidence Act, 1872 does allow experts' opinions in certain cases. It reads:

"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.

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".

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*, 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.

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.

Some Notable Events & Cases of Narco Analysis in India-

I. In a 2006 judgment (Dinesh Dalmia v State), 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." There are two fallacies in this reasoning. First, if narco analysis is all that it is made out to be by the Bangalore FSL, the accused will involuntarily answer questions posed to him during the interview. The second fallacy is that it is incorrect to say that the accused is merely taken to the lab against his will. He is then injected with substances. The breaking of one's silence, at the time it is broken, is always technically 'voluntary.' Similarly, it can be argued that after being subject to electric shocks, a subject 'quite voluntarily' divulges information. But the act or threat of violence is where the element of coercion is housed. In narco analysis, the drug contained in the syringe is the element of compulsion. The rest is technically voluntary.

II. In 2004, the Bombay High Court ruled in the multi-crore-rupee fake stamp paper case that subjecting an accused to certain tests like narcoanalysis does not violate the fundamental right against self-incrimination. Article 20(3) of the Constitution guarantees this: "No person accused of any offence shall be compelled to be a witness against himself." Statements made under narco analysis are not admissible in evidence. However, recoveries resulting from such drugged interviews 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 constitutes 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. The State police departments are responsible for generating demand for the process. The decision to conduct narco analysis is usually made by the Superintendent of Police or the Deputy Inspector General handling a case.

A high-ranking official in the Karnataka Police told The Hindu that police departments in India have poor skills when it comes to collection, collation, and presentation of evidence before the courts. Consequently, when there is enormous pressure on a police department to solve a case, sending suspects to narco analysis not only buys time but also gives the impression that something concrete has been done about the case.

III. In January 24th, 2008, a bench of Chief Justice K.G. Balakrishnan reserved its ruling after hearing arguments for three days from various parties, including Solicitor General Goolam E. Vahanvati and senior advocate Dushyant Dave, appointed by the bench as amicus curiae to assist the court in the case. The bench, which also included Justice R.V. Raveendran and Justice J.M. Panchal, heard the arguments by counsel of various people, including Santokhben Jadeja from Gujarat, popularly known as 'Godmother', and some accomplices of fake stamp paper case accused Abdul Karim Telgi. Telgi and his accomplices are facing probe by various states' police and other investigative agencies for their alleged criminal acts.

These accused people have challenged the legality of the use polygraph, brain mapping and narco-analysis by the investigative agencies to probe the crime.

During the arguments, Vahanvati justified the use of these three tests, saying they have the legal mandate under Section 53 of the Criminal Procedure Code (CrPC), which lists a host of various modern techniques like DNA fingerprinting and collection of blood samples as perfectly legal tools to probe a crime. He said the term 'such other tests' occurring in the explanatory note of the Section 53 includes these three tests too.

'If these tests are properly considered to be steps in the aid of investigation and not for obtaining incrimination statements, there is no constitutional infirmity whatsoever,' said Vahanvati. 'These tests are scientific methods in furtherance of investigation. All these tests are considered to be the part of the process of collection of some subsequent evidence.'

'These tests may provide some clues to the investigative agency to collect some evidence but the statements given by the accused against themselves during these tests are not of any evidentiary value,' clarified the law officer.

But Dave during his arguments, contended that parliament never intended to include these tests as tools for probe as Section 53 was last amended in 2005, when a list of various modern scientific techniques was included in it as legal tools for investigation. Dave also contended that the use of these three tests as tools of investigation is not validated by Article 20(3) of the constitution, which says: 'No person accused of any offence shall be compelled to be a witness against himself.'

IV. In Shashi murder case, Court allows narco-analysis. Vijaysen Yadav, the main accused in the disappearance and murder case of Faizabad law student Shashi, has gone through polygraph and narco-analysis test from January 12 to 26. Faizabad Chief Judicial Magistrate Shailesh Tiwari permitted the police on Friday to conduct the tests at the Central Forensic Laboratory in Bangalore.

In his order, the CJM said the tests on Vijaysen will be conducted in judicial custody and prohibited investigating Officer Sharat Chandra Pandey from intervening in any matter during the process of tests. The court also asked him not to accompany Vijaysen to Bangalore.

V. The Bombay High Court recently in a significant verdict in the case of, Ramchandra Reddy and Ors. v. State of Maharashtra, upheld the legality of the use of P300 or Brain finger-printing, lie-detector test and the use of truth serum or narco analysis. The court upheld a special court order given by the special court in Pune as mentioned above, allowing the SIT to conduct scientific tests on the accused in the fake stamp paper scam including the main accused, Abdul Karim Telgi. The verdict also said that the evidence procured under the effect of truth serum is also admissible. In the course of the judgment, a distinction was drawn between "statement" (made before a police officer) and "testimony" (made under oath in court). The Judges, Justice Palshikar and Justice Kakade, said that the lie-detector and the brain mapping tests did not involve any "statement" being made and the statement made under narco analysis was not admissible in evidence during trial. The judgment also held that these tests involve "minimal bodily harm".

VI. Narco-analysis of Moninder Singh Pandher, had started on Tuesday, January 09, The narco-analysis test of the prime accused in the Noida serial murder case Moninder Singh Pandher was conducted at the Directorate of Forensic Laboratory. Pandher and Koli have been accused of serial killing of women and children in Nithari village, in Noida, Uttar Pradesh. The Noida police had brought Pandher and his servant Surendra Koli to DFS on January 5 for forensic tests. The tests are expected to go on for approximately eight hours, the sources said.

VII. A court in Kerala recently pronounced that no court order is required to do a narco analysis, Disposing of a petition filed by the CBI seeking permission of the court, the magistrate said that filing this type of a plea would only delay the investigation. The court said nobody could stand in the way of the investigating agency conducting tests recognized as effective investigation tools. When the technicalities of the test itself are not clear and uniform, it becomes difficult to accept the stand taken by the court.

The Degree of Admission of These Truth Finding Tests in Court-

Lawyers are divided on whether the results of Narco Analysis and P300 tests are admissible as evidence in courts. "Confessions made by a semi-conscious 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 assess its admissibility," advocate P. R Vakil told rediff.com. "Under certain circumstance, a person may hold a certain belief. By repeatedly thinking about an issue in a particular way, he begins to believe that what he is thinking is right. But it need not necessarily be the truth," Vakil explained." 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."

Criminal lawyer Majeed Memon said, "If the courts give permission to conduct these tests, then only it can decide the admissibility of the test results and other related evidence. Such reports can be used as

evidence or to support other evidence." Another criminal lawyer Sham Keswani has a different view. "Such tests don't have any legal validity. They can only assist the police investigation." But, in case a person is not affected by the chemical, he might take some wrong names (to mislead investigators). The results of such tests can be used to support other evidence," he said.

Conclusion-

Law is a living process, which changes according to the changes in society, science, 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. The criminal justice system should be based on just and equitable principles. 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. In a situation where narco analysis is gaining judicial acceptances and supports despite being an "unreliable & doubtful" science, we have to seriously rethink about its legal and constitutional validity from human rights perspective.