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SQUINTING AT THE NARCO-ANALYSIS AND THE BRAIN MAPPING TESTS THROUGH 'FLUID' CONSENT

Kanak Mishra*

Abstract

In today's scenario where science has reached its zenith, the law of the land does not wish to lag behind by keeping technology distant from the legal domain. Criminal investigation in India has time and again considered the admissibility of some of the most exceptional and technologically advanced forms of gathering evidence through the Narco-analysis test and brain mapping test. Both these tests involve cognitive sub-systems that play a significant role in determining the criminal intent of an individual. The study of the formation of criminal intent by the theory of culpability, however, is quite an abstract process. So, if it is feasible to read a person's mind through science and technology to gather all such information, without any overt efforts, then why not use this instead? The reasons attributed to the denial of the evidence obtained through these tests and arguments in favor of their admissibility are many. Therefore, the purpose of this scientific – legal paper shall be to deal with the intricacies of both these tests through the lens of 'fluid consent.'

INTRODUCTION

Science and technology have become the driving forces of the current epoch. Scientific advancement has also seeped into law, which is known to adapt to the changing social order. With the increase in population, the rate of crime is also consequently increasing, thereby multiplying the burden on law enforcement and courts. With a sudden surge in the crime rate over the years, the change in the types of crimes and criminal mindset can also be attributed to technology to an extent. However, the role of technology in determining criminal intent or human behavior is still deliberated with a pinch of salt. Scientific tests like Narcoanalysis and Brain Mapping, are increasingly being brought up time and again as a viable source of evidence in the name of the evolution of law and the changing societal

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order. These tests have time and again been brought under judicial scrutiny for being violative of fundamental freedoms enshrined in the constitution. The efficiency of drug-induced tests, along with its potential health effects, privacy violation issues, as well as torturous techniques, are also deemed to be a threat.

This paper aims to further the understanding of scientifically induced tests and the scope of its use and misuse. A rigorous effort has been made to interpret various landmark precedents of National and International value to analyze the constitutional and evidentiary value of these tests in the light of Articles 20(3) and 21 of the Constitution as well as Sections 27 and Section 29 of Indian Evidence Act, 1872.

Narco-Analysis Test

Narco analysis test is a type of deception detection test which is conducted by infusing the truth serum into the subject's body, causing a state of "hypnotic trance," and thereby "monitoring the blood pressure and heart rate continuously."[1] The word narco is derived from the Greek word 'narkc,' which means "anesthesia" or "torpor". Narco-analysis is the inducement of deep-sleep or the state of 'hypnosis' through injections of drugs on the patients.[2] The primary drug used in this test is Sodium Pentothal or Sodium Amytal (also known as the "truth serum"), which is heavily criticized for being hazardous and lethal.[3] The technique in which these drugs are administered, and the subject's consciousness is monitored continuously.[4] In this test, the subject goes through four stages out of which the second stage, i.e., the 'hypermnesia' stage that occurs after the first stage of 'hypnosis' is the most relevant one wherein it is believed that the subject becomes incapable of "suppressing the memories associated with the relevant facts." The inducement of this stage evokes a "re-integration of the disassociated personality" while the patient is in a dream-like state of mind. It is medically proven that the drugs given decrease the extent of anxiety and fear, which results in reduced pressure on the subject's 'ego'.[5] This makes

1 *Narco-analysis Test: An analysis of various Judgements of Indian Judiciary* | Semantic Scholar, (Jun. 19, 2020, 10:00AM), https://www.semanticscholar.org/paper/Narco-analysis-Test%3A-An-analysis-of-various-of-Barnwal-Ambedkar/54f79559f6e51bc2c4ab1e09582960274259dcd7.

2 J. S. Horsley, *Narco-Analysis*, 82 Journal of Mental Science 416 (1936), (Jun.19, 2020, 11:00AM), https://www.cambridge.org/core/article/narcoanalysis/01140C736B73C7A15E709FCF97047A33.

3 Linda M. Keller, *Is Truth Serum Torture?*, SSRN JOURNAL (2004), (Jun.19, 2020, 11:00AM), http://www.ssrn.com/abstract=599143.

4 Bannur Muthai Mohan, *Misconceptions about narco analysis*, IJME (2007), (Jun. 19, 2020, 11:20AM), http://ijme.in/articles/misconceptions-about-narco-analysis/?galley=html.

5 George H. Dession et al., *Drug-Induced Revelation and Criminal Investigation*, 62 The Yale Law Journal 315 (1953), (Jun.17, 2020, 12:00PM), www.jstor.org/stable/793442.

it easier for the subject to 'relive' that particular crime scene or traumatic situation. And it is only after this stage that a series of explanations, persuasions, and other forms of psychoanalysis procedures are performed that can stimulate the flow of associations in the brain of the subject to obtain oral responses.[6] The process of conducting a Narco-analysis test resembles that of psychotherapy. It is conducted under the supervision of registered medical practitioners "consisting of a physician, an anesthetist, and a clinical psychologist or a psychiatrist."[7] The responses of the subject and video-recorded and sent along with a brief report to the concerned authorities for the formal process of collection of evidence.

Brain Mapping Test

This test is also famously known as the P300 Waves test. Its close variants are the lie detector test, also known as the Polygraph test. Brain-mapping, on the other hand, evaluates the physical fluctuations in the brain of the subject to detect the possibility of a potential lie. This test does not require the subject in an unconscious state and nor does it necessarily require the presence of medical professionals. Unlike narco-analysis, no verbal exchanges between the subject and the interrogator take place during the tests.[8] Such tests work on the principle of 'target stimuli,' wherein upon certain audio-visual display, the neurons of the subject get triggered, and this produces a 'different' response from what a reasonable person in an ordinary course of nature would produce. A guilty person would thus pay more attention to the critical stimuli rather than the control stimuli, and this behavior would help in the detection or evaluation of lie by the experts.[9] The critical stimuli being the 'target word,' that gets invoked by the brain upon a visual or verbal representation of the crime, whereas the control stimuli being the neutral words for the purpose of psychotherapy.

Despite many successful criminal guilt determinations, the polygraph or P300 Waves tests have been under constant doubt for the way an accused can prep themselves before partaking the test. Considering the logic of determining guilt through the polygraph test is the amount

6 Horsley, *supra* note 2.

7 A.S. Dalal & Arunava Mukherjee, *Constitutional And Evidentiary Validity Of New Scientific Tests*, 49 Journal of the Indian Law Institute 529 (2007), (Jun 19, 2020, 01:00PM), https://www.jstor.org/stable/43952091.

8 Court equates brain-map, narco-test - Indian Express, (Jun 19, 2020, 02:00 PM) http://archive.indianexpress.com/news/court-equates-brainmap-narcotest/615711/.6,19]]}}}],"schema":"https://github.com/citation-style-language/schema/raw/master/csl-citation.json"}

9 William M. Waid & Martin T. Orne, *The Physiological Detection of Deception: The accuracy of polygraph testing can be affected by such variables as attentiveness, drugs, personality, and the interaction between examiner and subject*, 70 American Scientist 402 (1982), (Jun. 19, 2020, 03:00 PM), https://www.jstor.org/stable/27851548.

of attention a subject pays to the critical stimuli, it seems easy to tailor the test to be less detectable, be it by consuming drugs or any other form of medication. Constructing various scenarios to cover up the actual situation, preparing answers to the questions that are most likely to be asked, tackling body movements, gestures and expressions accordingly, all way in advance, are some other ways in which a P300 Wave test or a lie-detector test may lose its value as a legitimate form of evidence.[10] A Polygraph and Lie-Detection report[11] which came up as an opposition to employee screening in the U.S. completely debunks the accuracy of such tests and points out that "the physiological responses measured by the polygraph are not uniquely related to deception," i.e., some other responses also accompany the same which are consciously made by the subjects. An example of such a response could be that of fear, which might arise out of the related questions asked by the interrogator. Also, it is not just the mere process or technique of the tests which should be under consideration. Still, even the slightest chance of error while and after the performing of the transaction of the polygraph test too should be given relevance. In a U.S. case of Daubert v. Merrell Dow Pharmaceuticals Inc.[12], it was noted that even though the attribution of accuracy can be given to the brain-mapping tests for sixty to seventy percent, yet, there remains a substantial amount of accuracy which might get hindered due to the type of environment under the test, the qualifications of the examiner and involvement of a subject with the crime.

Thus, on the face of it, both the tests, be it the Narco-analysis test, or the Brain mapping test, seem problematic enough to be taken as a primary piece of evidence. However, the following section shall hopefully be able to determine if these tests can be taken up as a piece of secondary or corroborative evidence. The upcoming section deals with some of the most prominent arguments proposed by various jurists and scholars trying to locate the specificity of scientific tests. The next section shall be an attempt to introduce a detailed understanding and analysis of the arguments pinned in the previous section.

The Argument Proposed on the Violation of Article 20(3) - The Right against Self-Incrimination

The primary issue with the narco test is a constitutional one, which is that the involuntary administration of the truth serum, leading to testifying against oneself in a hypnotic state, is violative of the right against self-incrimination. Article 20(3) of the Constitution of India

10 *Id.*

11 "*The Polygraph and Lie-Detection: Committee to Review the scientific evidence on the Polygraph*", WASHINGTON D.C.: NATIONAL ACADEMIES PRESS 2003, 212-213.

12 *Daubert v. Merrell Dow Pharmaceuticals Inc.*, 509 US 579 (1993).

holds the right against self-incrimination to be a fundamental right. This right ensures that any accused should not be made to make any statement against their will. Hence, it is pertinent to evaluate how the concept of 'will or consent' comes into play under the Narco-analysis test.

The landmark Indian judgement of Selvi v. State of Karnataka[13] provides a detailed analysis against the use of the narco-analysis test. Still, unfortunately, while explaining the rule against self-incrimination, the court draws out comparisons with foreign[14] and Indian[15] judgements which deal with confessions and admissions to the police only. The court, despite discussing the difference between the words voluntary and compelled, missed considering the disputed territory of how 'consent' works under the Narco Analysis Test.

The jurisprudence on the matter of the validity or admissibility of the Narco-Analysis Test in India has been severely restricted only to the admissions and confessions to the police. The cases cited above acknowledged that while undergoing the Narco Analysis procedure, the subject is compelled to make an involuntary admission under the influence of heavy drugs (while the subject is in a hypnotized state) that severely block the brain's ability to engage in the standard cognitive process but failed to acknowledge the concept of fluid consent.

Selvi[16] case had its flaws, but it was also an incredibly transformative judgement because of the way it dealt with the idea of the 'state.' It shows the gradual shift of the Supreme Court from viewing any case at hand only through the lens of crime control, to now liberally understanding the domain of criminal psychology alongside valuing the due process of law.[17] Thus, by collating the two ideas of crime and the right to life of an accused, the judgement indeed laid down an improved framework of the modern criminal investigation. While the case, firmly established that determining the guilt of the accused solely based on either the Narco Analysis Test or brain mapping test would be violative of the right to self-incrimination under Article 20(3) of the Constitution, it also grappled with the issue of violation of Article 21, i.e., the Right to Life and personal liberty of the individual. The right to life angle of the case, discussed in detail the scope of the word 'compelled' in Article 20(3). The reasoning in the case describes that when an accused is either coerced or

13 *Selvi and Ors. v. State of Karnataka*, (2010) 7 SCC 263 (India).

14 *Brown v. Walker*, 161 US 591 (1896).

15 *Nandini Satpathy v. P.L. Dani*, 0139 MANU SC 1978 (India).

16 *Selvi v. State of Karnataka, supra* note 14.

17 Gautam Bhatia, *Privacy and the Criminal Process: Selvi v State of Karnataka* (2018),(Jun. 18, 2020, 2:00 PM), https://papers.ssrn.com/abstract=3166849.

is made to confess against himself, then it would amount to being compelled. Such coercion would be the exact opposite of the word 'voluntary' and, thus, would be a violation of the right against self-incrimination. This reasoning of the court sufficiently addresses the inherent opposition between the terms - coercion and voluntariness, but it fails to engage in the scientific conundrum about the concept of consent revocation while a person is undergoing any drug-induced test.

In the famous Canadian case of Horvath v. R,[18] it was held that statements extracted through narco tests would be inadmissible as evidence because a person cannot be said to have made a statement of his own will when hypnotized. This case, unlike the Selvi[19] case, recognizes that although before the commencement of the test, the subjects are made to sign certain documents affirming their consent for the test, how does one evaluate if the consent seizes to exist in due course of the test? How does the law then grapple with this scientific mystery of consent when a person is heavily drugged? Does it distinguish between conscious consent against subconscious admissions that may not have been made if conscious?

The Argument Proposed Under Article 21- The Right to Life

Both these scientific tests violate Article 21, i.e., "Protection of life and personal liberty" on two grounds. Firstly, conducting such tests without the permission of the court would be violative the procedure established under law.it is because, the ambit of Article 21, i.e. Right to life, includes the "substantive due process of law".[20] Secondly, in Maneka Gandhi v. Union of India[21], Subba Rao, J. opined that an essential element of personal liberty is 'privacy'. Hence it is not just the liberty of an individual that is infringed but also their privacy when they are forced to undergo such tests without their consent.

Arguments Proposed for the Inclusion of Narco-Analysis Test Results as Evidence

Furnishing the test results derived by Narco analysis and brain mapping tests as corroborative evidence is premised on the idea of a valid 'consent.' The first argument given by scholars is generally that when a subject is made to undergo scientific tests, no compelled testimony seems to be extracted, which the Nandini Satpathy v. P.L. Dani[22] case describes in detail.

18 *Horvath v. R*, 385 C.C.C. 44 (1979).

19 *Selvi v. State of Karnataka, supra* note 14.

20 *Id.*

21 *Maneka Gandhi v. Union of India*, 0133 MANU (SC 1978) (India).

22 *Nandini Satpathy v. P.L. Dani,* 0139 MANU (SC 1978) (India).

As at the beginning of the test, the subject consents out of their own free will, to get exposed to the conditions mentioned above, the argument of compelled testimony cannot be raised. This argument was rejected by the court in Selvi[23] by reasoning that a compelled testimony is the one which is extracted not just by exercising physical threats or violence per se but also by intimidation methods, tiring interrogative process, psychic torture, environmental coercion, etc.

Scholars' second argument is that, even during the various stages of the test, no force is applied onto the subject, and it is only the drugs that are infused to merely block a certain thought process of the brain, in which case no scope of a hindrance with the personal knowledge of the subject remains. This argument was clarified by the court in the case of State of Bombay v. Kathi Kalu Oghad[24] wherein the court differentiated between "to be a witness" and to "appear as a witness." Thus, the 'Personal knowledge' that can be attributed to a person by 'being a witness' either orally or in writing is the same when extracted from a subject in a hypnotic trance under narco test and brain mapping tests. And would, therefore, amount to a compelled testimony.

Fluid Consent

With respect to both the arguments stated above, it can be said that the idea of consent in the case of scientific tests such as these becomes hugely debatable. While the subject may give their consent at the beginning of the procedure, the point at which their consent would seize during the test is not taken into consideration. This amounts to a flawed understanding of how consent works, and a subsequent continuation of the test would then be tantamount to a clear violation of privacy. Both the arguments as proposed by given by multiple scholars and jurists time and again do not take the 'fluidity of consent' into consideration. Their understanding of consent is limited to a static concept, that is incapable of changing once given. This is extremely problematic and deserves more attention. Thus, an understanding of consent as a fluid consent would help such scientific tests gain a heightened degree of certainty.

23 *Selvi v. State of Karnataka, supra* note 14.

24 *State of Bombay v. Kathi Kalu Oghad,* 0134 MANU 43-44 (SC 1961) (India).

The Argument Proposed for Section 27 of the Indian Evidence Act, 1872[25]

Also, no rational nexus can be attributed to the argument of constructive custody during the Narco test, wherein the team comprises of "one anesthetist, one physician, and one clinical/ forensic psychologist."[26] The concept of custody under Section 27 of the Indian Evidence Act, 1872 includes Constructive custody[27] , too, in which the accused is not physically present in the court. Still, his freedom is monitored by the legal authority in some way or the other outside the court.

Extraction of any admission through scientific tests in the presence of the above-stated team members can be attributed as a 'legal authority outside the court' because the ultimate aim of the medical professionals conducting the scientific tests on the subject would be to extract the admission or involvement in any crime. This would amount to constructive custody under Section 27 of the Indian Evidence Act, 1872, and would also be violative of Article 20(3) of the constitution and hence should be admissible as evidence.

The Argument Proposed for Section 29 of the Indian Evidence Act, 1872[28]

It is also argued by some that the hypnotic state of the subject can be compared to that of a drunk person. And in such a situation, Section 29 of the Indian Evidence Act, 1872 comes to the rescue, which states that merely "because a person is drunk and is made to answer questions which he need not have answered", then such evidence cannot be dismissed as

25 Section 27 in The Indian Evidence Act, 1872 (India). How much of information received from accused may be proved.—Provided that, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved.

26 Mohan, *supra* note 4.

27 *Aghnoo Nagesia v. State of Bihar,* AIR 119 (1966) (India).

28 Section 29 in The Indian Evidence Act, 1872 (India). Confession otherwise relevant not to become irrelevant because of promise of secrecy, etc.—If such a confession is otherwise relevant, it does not become irrelevant merely because it was made under a promise of secrecy, or in consequence of a deception practised on the accused person for the purpose of obtaining it, or when he was drunk, or because it was made in answer to questions which he need not have answered, whatever may have been the form of those questions, or because he was not warned that he was not bound to make such confession, and that evidence of it might be given against him.or when he was drunk, or because it was made in answer to questions which he need not have answered, whatever may have been the form of those questions, or because he was not warned that he was not bound to make such confession, and that evidence of it might be given against him., , https://indiankanoon.org/doc/962897/ (last visited Jun 19, 2020

being irrelevant altogether. The underlying argument being that in the hypnotic stage of the Narco-analysis test, the state of the subject resembles the inebriated state. Hence, such evidence cannot be considered as inadmissible on the lines of Section 29.

This analogy is seriously flawed as it equates drunkenness with the hypnotic state of a subject while undergoing a scientific test. The difference between the two lies in the fact that while the former would amount to 'extorting communication,' the latter would constitute 'using the body for extracting evidence.'[29] This difference was laid down in two U.S. cases of *Armando Schmerber v. California*[30] and *United States v. Holt*.[31]

Conclusion

The formulation of these tests was done by the scientists to make efficient the process of a criminal investigation by providing the most relevant-direct evidence. So, no malafide intention can be attributed to the interrogators, to be able to reject the admissibility of the test. The types of drugs administered in the process and the authenticity and accuracy of such a test are the two aspects that are the most contested in the case of scientifically obtained evidence. It is not an unfamiliar fact that the drugs administered for the tests, do cause pain. These drugs are also harmful as they restrict a person's ability to suppress their memories and hence, would amount to torture (as and when India ratifies UNCAT) in violation of Article 1 of the U.N. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT) if done without the consent of the subject.[32] Conducting the test in the absence of the subject's consent would amount to a violation of Article 21 and 20(3) of the Constitution of India. Additionally, it is also pertinent to note that irrespective of the subject's consent at the beginning of the test, the consent can be revoked at any point during the test, and this prima facie makes the scientific tests violative of privacy. The arguments advanced in favor of scientific tests based on Sections 27 and 29 of the Indian Evidence Act of 1872 cannot be sustained because of the concept of constructive custody and the difference between the state of drunkenness and hypnosis, respectively.

29 The Legal Blog, Narco-analysis & Polygraph Tests: Constitutional Validity, (Jun. 19, 2020, 07:00PM). http://www.legalblog.in/2011/05/narco-analysis-polygraph-tests.html (Jun. 19, 2020, 07:00PM).

30 *Armando Schmerber v. California*, 384 757 (1966).

31 *United States v. Holt,* 218 245 (1910).

32 Narco-Analysis and the Indian Criminal Justice System: | Economic and Political Weekly, (Jun. 19,2020, 07:00PM), https://www.epw.in/journal/2008/36/commentary/narco-analysis-and-indian-criminal-justice-system.html.

The drugs administered during Narco-analysis and other like scientific tests work on the highest cognitive level of the brain. If the doses are given in the wrong proportion, then the tests could turn out to be lethal. Additionally, some or the other uncertainties always loom such technological procedures. Hence, it is pertinent to allow the Narco-analysis test and the brain mapping test only with a pinch of salt. Both these tests can be used cautiously, as a last resort, in determining guilt only as corroborative evidence and not as a primary piece of evidence.[33] Corroborative evidence derived through either the Narco-analysis test or brain-mapping test would indeed prove out to be very useful in the cases wherein the accused wants to plead innocence, especially in the cases of high-profile criminal investigations and terrorism-related matters.[34] It is essential to realize that while the results of such tests are admissible as corroborative evidence in the court, it is not the most sound form of evidence. Law enforcement authorities should be extremely cautious in running after these tests for extracting evidence. This is because such tests are still novel in a developing country like India. Hence, only those cases that are at the forefront of media coverage get to see the application of Narco-analysis or brain-mapping tests. It takes a reasonable person to determine the hue and cry created by the media in prominent cases. The Arushi murder case was an apt example of the extent to which media trials can affect the verdict of a case.[35]

Law, as we know, is not limited to the legislation itself, it is a 'living process,' which evolves. Hence, it is imperative to imbibe all sorts of technological advancements into the law, as long as fundamental principles of law, or the rights of individuals are not sacrificed. But considering the ways in which these tests undermine the concept of fluid consent, its application with or without consent of the subject should be resisted. A viable option would be to encourage the use of these tests only after exploring the alternatives that value the subject's static as well as fluid consent. So, by the end of this paper, I believe that I have addressed some pertinent concerns regarding the two scientific tests, namely, the narco-analysis test and the brain mapping test, which would hopefully be used and not misused in the future.

33 South Asia Human Rights Documentation Centre, *Narcoanalysis: A Dangerous Mirage*, 42 Economic and Political Weekly 2857 (2007), (Jun. 19, 2020, 08:00PM), https://www.jstor.org/stable/4419780.

34 Rights activists hail Indian truth drug ban, The National, (Jun. 19, 2020, 08:00 PM), https://www.thenational.ae/world/asia/rights-activists-hail-indian-truth-drug-ban-1.524656.

35 Tribune News Service, *Lessons From Arushi Case Tribune india News Service,*(Jun. 19, 2020, 09:00 PM), https://www.tribuneindia.com/news/comment/archive/lessons-from-aarushi-case-481820 .