Abstract
One of the most fascinating issues arising in the arena of narco analysis test done is the interface with the fundamental rights of the common citizens of our country. The case note discusses about the recent decision given by the SUPREME COURT OF INDIA which casts light on precisely these issues and lays down the parameters for the future development of jurisprudence in this area. My interest in narcoanalysis test was revived when it caught the attention of media and critics thereby raising several issues regarding its validity as a scientific tool of investigation and its admissibility in court of law. The test led to the infringement of individual fundamental rights and people started questioning its value as evidence. 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 in our society is something which became clear after the judgment of Smt. Selvi and ors. Versus state of Karnataka. It is significant that, in recent years, there had been increasing and often unproductive recourse to coercive narco and brain-mapping tests in a number of high-profile cases, though this case, by making a landmark judgment in Indian judiciary also showed the sacrosanct nature of fundamental rights governing our country.

INTRODUCTION

As science has outpaced the development of law or at least the laypersons understanding of it, there is unavoidable complexity regarding what can be admitted as evidence in court. Narco analysis is one such scientific development that has become an increasingly, perhaps alarmingly, common term in India. Article 20(3) of the Constitution of India stipulates a prohibition that no person accused of an offence shall be compelled to be a witness against himself. This is a fundamental right of the accused. The provision is divided into several components to understand its true import.

The constitution neither has nor merely declared that such laws in force as are inconsistent with the fundamental rights shall be void, it has also provided against similar future legislature. Clause (2) of article 13 lays down: The state shall not make any laws which takes

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1 The concept of narcoanalysis in view of constitutional law and human rights by Sonakshi Verma accessed on 17th July 2010 available at http://www.rmlnu.ac.in/content/sonakshi_verma.pdf
away or abridges the right conferred by this part and any law made in contravention of this clause shall, to the extent of the contravention, be void.

In any criminal investigation, interrogation of the suspects and accused plays a vital role in extracting the truth from them. From time, immemorial several methods, most of which were based on some form of torture have been used by the investigating agencies to elicit information from the accused and the suspects. The article 20(3) of the Indian constitution gives protection

a) To a person accused of an offence

b) Against compulsion “to be a witness”;

c) Against himself

This principle is one of the fundamental canons of the British system of criminal jurisprudence and which has been adopted by the American system and incorporated in the Federal Constitution. The article 20(3) cannot be invoked unless all the above three ingredients exist. The article embodies the principle of protection against compulsion of self-incrimination. It is firmly established in India, that, unless the constitution itself so provides, a person cannot enter into a contract to give up or not to claim a fundamental right. Under the canons of common law criminal jurisprudence, a person is presumed to be innocent; the prosecution must establish his guilt. Secondly, a person accused of an offence need not make any statement against his will. These principles are embodied in clause 3 of article 20 which lays down that “No person accused of any offence shall be compelled to be a witness against himself” the privilege to an accused person contains three components, viz, that he has a right of protection against “compulsion to be a witness”, and against such compulsion resulting in his giving evidence “against himself”. In other words an accused person is protected against incriminating himself under compulsion, e.g., making “a statement which makes the case against the accused person at least probable considered by itself”. Compulsion in this context would means “duress”. In NANDINI SATPATHY CASE the court held that “relevant replies which furnish a real and clear link in the chain of evidence to bind down the accused with the crime become incriminatory and offend article 20(3) if elicited by pressure from the mouth of the accused”

4 M.P. Sharma v. Satish Chandra, AIR 1954 SC 300
7 Kameshwar v. State of Bihar, AIR1962 SC 1166
8 State of Bombay v. Kathi kalu oghad, AIR 1961 SC 1808,
9 AIR 1978 SC 1025
The Case At Hand

The Indian judiciary has finally recognized and condemned the abusive nature of narcoanalysis, brain-mapping, and polygraph tests specifically, the Supreme Court’s recent decision in *Smt. Selvi & Ors. v. State of Karnataka* prohibited all involuntary administration of such tests, holding them to be “cruel, inhuman and degrading treatment” The Supreme Court’s decision is in line with Constitutional requirements and international human rights law. In sharp contrast, the Supreme Court raised serious concerns about the validity, reliability, and indeed usefulness of narcoanalysis, brain mapping, and polygraph tests. The Court emphasized how each of the tests could lead to the discovery of false and even misleading information. In questioning the scientific reliability of narcoanalysis, the Court for example stated: “*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.*” The Court also noted that some subjects of narcoanalysis “can become extremely suggestible to questioning” while others might “concoct fanciful stories.” Similarly, for different forms of brain mapping, which rely on a subject’s familiarity with certain stimuli to assess potential involvement in crime, the tests can falsely implicate a subject because of the subject’s prior exposure to test stimuli such as through media reports, revelation of facts to the subject by investigators, or the subject’s relation to the crime as a bystander witness. For polygraph tests, the Court noted that distorted physiological responses could result from “nervousness, anxiety, fear, confusion or other emotions… the physical conditions in the polygraph examination room… the mental state of the subject…[or] ‘memory-hardening’, i.e. a process by which the subject has created and consolidated false memories about a particular incident.”

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10 *Smt. selvi & ors. v. state of Karnataka*, criminal appeal no. 1267 of 2004, Supreme Court of India.
11 *ibid.*
12 *Supra* note 1, at 16, 47, 73.
13 *Ibid.* at 47.
14 *Ibid.* at 47.
The High Court’s Stand before the Judgment

During the past decade, High Courts across the country continued to uphold the use of such tests. The Supreme Court’s analysis aptly demonstrates how those decisions strained legal reasoning and logic by relying on the purported scientific nature of narcoanalysis tests despite the fact that scientific evidence had long discredited the tests purported scientific validity.

The Supreme Court’s decision disagreed with the reasoning of the various High Court judgments in three main areas:

a) The reliability/unreliability of the tests;

b) Self-incrimination protections;

c) Substantive due process rights.

The Supreme Court’s decision is in line with Constitutional requirements and international human rights law. However, the Court also ruled that information “subsequently discovered” from the result of a “voluntary” test can be admitted as evidence.

While the High Court’s addressing this issue gave scant attention to potential rights violations under Article 21 of the Constitution, the Supreme Court found that narcoanalysis violated individuals’ right to privacy and amounted to cruel, inhuman or degrading treatment. Article 21 protects the right to life and personal liberty, which has been broadly interpreted to include various substantive due process protections, including the right to privacy and the right to be free from torture and cruel, inhuman, or degrading treatment. The majority of High Courts did not even address the issue of the right to privacy, and those that did only made blanket assertions that the right is not absolute or that narcoanalysis and other tests did not infringe on the right.

Similarly, the High Courts did not address the issue of whether narcoanalysis amounted to torture or cruel, inhuman or degrading treatment, despite the fact that at least some of the petitioners raised this issue.

Again, the Supreme Court departed sharply from the stance of the lower courts. First, the Court found all three tests to amount to an invasion of privacy by intruding into a “subject’s mental privacy,” denying an opportunity to choose whether to speak or remain silent, and physically restraining a subject to the location of the tests. Second, the Court declared all

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17 In State of Andhra Pradesh v. smt. inapuri Padma and ors., case no. 459 of 2008; Delhi (sh. shailender sharma v. state, crl. wp no. 532 of 2008); Gujarat (santokben sharmanbhai jadeja v. state of Gujarat, special criminal application no. 1286 of 2007)


21 Rojo George v. Deputy Superintendent of Police, Crl WP No 6245 of 2006, at 12; also, supra note 4.


23 Supra note 1, at 169,192.
three tests to amount to cruel, inhuman or degrading treatment because of the mental harm likely suffered and the potential physical abuse by police or prison officials that could result from the responses given. As the Court stated, “forcible intrusion into a person’s mental processes is... an affront to human dignity and liberty, often with grave and long-lasting consequences.”

The Supreme Court’s Analysis

The Supreme Court overruled various High Courts in declaring that the administration of Narcoanalysis, brain mapping, and polygraph tests violated subjects’ rights against self-incrimination in contravention of Article 20(3) of the Indian Constitution. According to that article, “No person accused of an offence shall be compelled to be a witness against himself”. The High Courts had used various arguments to uphold the constitutionality of narcoanalysis and other tests under Article 20(3). For example, the Karnataka High Court equated the compulsion requirement of Article 20(3) with ‘duress’ involving serious physical harm or threat, and found that the mild pain from the administration of an injection necessary to induce the narcoanalysis test did not reach the requisite level of hurt to constitute compulsion. Using a similarly narrow view of ‘compulsion’, the Madras High Court found that because compulsion generally means using physical or other so-called third degree methods of interrogation, even though a subject may be forced to undergo narcoanalysis in the first place, the statements made during the resulting tests themselves are voluntary. Further, the High Courts of Karnataka, Bombay and Delhi found that the administration of narcoanalysis itself could not violate Article 20(3) because statements could not be known to be incriminating until after the administration of the test. According to these judgments, only if an incriminating statement was in fact made and then admitted as evidence could a potential violation occur. The Delhi High Court went further to state that statements made during narcoanalysis could be admitted as evidence in court as corroborative evidence.

The Supreme Court rejected these arguments. First, the Court found that forcing a subject to undergo narcoanalysis, brain-mapping, or polygraph tests itself amounted to the requisite compulsion, regardless of the lack of physical harm done to administer the test or the nature of the answers given during the tests. Secondly, the Court found that since the answers given

24 Ibid, at 205.
25 In the case, Smt. Selvi & Ors. v. State of Karnataka, at 165, 223.
27 Supra note 11, at 10.
31 Supra note 1, at 158, 165.
during the administration of the test are not consciously and voluntarily given, and since an individual does not have the ability to decide whether or not to answer a given question, the results from all three tests amount to the requisite compelled testimony to violate Article 20(3).  

Even if a person voluntarily agreed to undergo any of the tests at the outset, the responses given during the tests are not voluntary.

Overall, the Supreme Court rightly rejected the High Courts’ reliance on the supposed utility, reliability and validity of narcoanalysis and other tests as methods of criminal investigation. This de-mystification of the techniques allowed the Court to carry out a thorough analysis of the various constitutional rights at stake, namely rights against self-incrimination and substantive due process rights, a study that the High Courts were unable or unwilling to do.

**Has This Case Still Left Many Questions Unanswered With Respect To Article 20(3)?**

The Supreme Court decision in *Smt. Selvi & Ors. v. State of Karnataka* is a welcome development. Serious concerns still remain, however, as to whether the spirit of the judgment will be respected by law enforcement authorities. The Supreme Court left open the possibility for abuse of such tests when it provided a narrow exception, almost as an afterthought, namely that information indirectly garnered from a “voluntary administered test” – i.e. discovered with the help of information obtained from such a test – can be admitted as evidence. While this exception is narrow in the sense that it can apply only when a fully informed individual gives truly voluntary consent to undergo any of the tests, the granting of the exception does not harmonize with the Court’s clearly stated belief that information obtained even during a voluntarily administered test is not voluntarily given. The exception, based on the assumption that voluntarily taken tests will be truly “voluntary”, is problematic. The power of the police to coerce suspects and witnesses into “voluntarily” doing or not doing certain things is well-known. It is highly probable that the same techniques will be applied to get suspects or witnesses to “agree” to narcoanalysis and other tests, resulting in a mockery of the essence of the Supreme Court’s judgment. It is widely agreed, for example, that the *D.K. Basu* guidelines prescribing the treatment of persons in custody are implemented mainly in the breach; they merely adorn signboards inside police stations, a farcical, one-point ‘compliance’ with Supreme Court’s comprehensive list of directives.

34 *Super* note 1, at 205.
This limited exception for admitting into evidence “fruits of the poisonous tree”\textsuperscript{36} casts a shadow on the Court’s otherwise progressive judgment. A fresh look at the exception is therefore in order.

\textbf{Conclusion}

To conclude, the use of narco-analysis as an investigative tool or as evidence is violative of the right to life, liberty and the right against self-incrimination. Viewed from the point of view of criminal trials, the unreliability of the procedure and the impact of the drugs on the psyche may result in miscarriage of justice and conviction of innocent persons. The logic of ‘minimal bodily harm’ being permissible for extraction of information offered for upholding narco-analysis has grave implications as to the use of coercive third-degree methods specially in the context of growing curbs on rights in the name of tackling terrorism. The democratic rights movement must take up a sustained campaign against the use of invasive methods like narcoanalysis and brain-mapping.

\textsuperscript{36} \textit{Supra note} 1, at 118. The Court was referring to confessions made before police officers, which are not ordinarily admissible as evidence