

## The Accused Right of Self Incrimination and Narco Analysis

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### Abstract

Narco Analysis has been a debated issue in India on the point of its validity. The issue revolves around Narco Analysis, Polygraph tests, Brain Mapping etc. and to what extent these can be used and under what circumstances such experiments should be permitted to ascertain the truth and facts of the case for the convenience of criminal investigation. In India there is no specific statute that regulates such experiments. Even the Indian Evidence Act is silent on the subject. An important question arises as to whether the application of a scientific method like the lie detector, p-300, truth serum and so on are violative of Article 20(3) of the Indian Constitution which states that one cannot be compelled to be a witness against himself.

The aim of the article is to make a study of Narco Analysis and its direct impact on the right of the accused against self-incrimination. What will be the consequences if after applying Narco Analysis the accused confesses his offence as under Article 20(3) of Constitution he has the "Right to Silence". This is cleared by the court in *Selvi v. State of Karnataka*, *Santokben Sharmabhai Jadeja v. State of Gujarat*, where the court tried to make it clear as to when and under what circumstances such tests can be conducted on the accused. But still there is a lack of proper guidelines to be followed whilst conducting Narco Analysis which is addressed in this paper with the help of a comparative study of the legislations on this matter in various other countries.

**KEYWORDS-** Narco-Analysis, Constitutional Protection, Article 20 (3)

### PRIVILEGE AGAINST SELF-INCRIMINATION ARTICLE 20(3)

The privilege against self-incrimination is a fundamental rule of the criminal law. These privileges include characteristics which include -: (i) the accused is presumed to be innocent, (ii) the burden of proof is on the prosecution, and (iii) the accused is free to not make any statements against his will.<sup>1</sup> These privileges are granted to the accused in order to save him from any kind of the force and torture which can be used against him or which may trap him into fatal contradictions. This privilege thus ensures the privacy and some standard in the enforcements of criminal justice. Article 20(3) of the Constitution provides that "no person accused of any offence shall be compelled to be a witness against himself". Therefore this article guarantees the right to a person who is accused of an offence, and grants him protection from being forced to testify against himself, in such a way that it cannot be used as evidence against him.

Who is an accused: - any person against whom a formal allegation or charge relating to the commission of an offence has been levelled which in the normal course may result in the criminal proceeding. If a First Information Report is filed against a person, and investigation ensues so as to prove his guilt, that person can claim protection under this Article.<sup>2</sup>

Compulsion to be a witness: - to be a witness simply means making any oral as well as written statements inside or outside the court by a person accused of an offence. In the case of **State of Bombay v. Kathi Kalu Oghad and others**<sup>3</sup> (AIR) an accused person cannot be said to be compelled to be a witness against himself just because he made a statement during police custody. To bring the statement in violation of article 20(3) that statement shall be incriminatory in character.

<sup>1</sup>M.P Jain, Indian Constitutional Law 1065 (5TH.Ed 2008).

<sup>2</sup>MAMTA RAO, CONSTITUTIONAL LAW 211 (1st ed. 2013).

<sup>3</sup>State of Bombay v. Kathi Kalu Oghad, (1961) AIR SC 1808.

Compulsion of giving evidence against himself: - accused is also protected not to give the evidence against himself. In *Kalawati v. State of Himachal Pradesh*,<sup>4</sup> it was held that confession is made by an accused against himself without any inducement, threat or promise does not come under article 20 (3). Only the evidence where the accused is compelled to furnish comes within the inhibition of Art 20(3).

### PROVISION UNDER OTHER LEGISLATIONS AFFECTING ARTICLE 20(3)

The Code of Criminal Procedure and Indian Evidence Act provides for certain sections which empower the police for proper investigation and mentions the responsibilities of the citizens to co-operate with the police authorities. For the proper protection of the right to self-incrimination certain sections under the both these codes should be considered carefully. There are some sections under the Indian Evidence Act, 1872 which should be kept in mind when considering Article 20(3) of the Constitution. They are as follows;

#### Section under Indian Evidence Act 1872

1. Section 24. Confession caused by inducement, threat or promise when irrelevant in criminal proceedings- a confession made by the accused person is irrelevant in a criminal proceeding, if the making of the confession appears to the court, to have been caused by inducement, threat or promise, having reference to the charge against the accused person.
2. Section 25. Confession to the police officer not to be proved- No confession made to a police officer shall be proved as against a person accused of any offence.
3. Section 26. Confession by the accused while in custody of the police not to be proved against him- No confession made by any person whilst he is in the custody of the police officer, unless it be made in the immediate presence of the magistrate shall be proved against this person.
4. Section 27. How much of the information received from the accused may be proved- Provided that when any fact is discovered as a consequence of information received from a person accused of an offence, in the custody of a police officer, so much such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved.

As per Section 24 any confession made by the accused is irrelevant in a criminal proceeding if it is caused by inducement, threat or promise. This is a protection granted to the accused person where he is not bound by law to confess his guilt by any way of inducement, threat or promise by the police authorities. However it is important to know that if the statement is not made by the accused under the impression of the inducement, threat or promise then that statement can be considered as admissible as evidence and is only not considered if it violates article 20(3) of the Constitution. These sections protect the accused against becoming the victim of his own mistake or the streamlining of others to self-incriminate in crime. The purpose of Section 26 is very clear as it made confessions free and voluntary and the accused is not under any pressure.

Section 27 is closely connected to Article 20(3) of the Constitution. It is made clear by the Supreme Court through various case laws that a statement made under section 27 of Indian Evidence Act is admissible as evidence and it is not in any way contradicting Article 20(3) of the Constitution. For the protection of Article 20(3), the person accused of an offence, merely giving a statement while in the police custody which helps the police authorities in the discovery of something relevant is not to be considered as a sort of compulsion to be a witness against himself and thus can never offend right of self-incrimination.<sup>5</sup>

Sections in the Criminal Procedure Code, 1973

<sup>4</sup>*Kalawati v. State of Himachal Pradesh*, (1953) SC 131

<sup>5</sup>Indian Evidence Act 1872.

Section.162(2) States that “every person is bound to answer truthfully all questions, put to him by the officer, other than the questions the answers to which would have a tendency to expose that person to a criminal charge, penalty and forfeiture”.

Section.163 No inducement to be offered.

Section.164 Regarding of the confessions and the statements.

Section.313 Power to examine the accused.

Section.315 Accused person to be the competent witness.<sup>6</sup>

Besides, the provisions of the Constitution of India and the Indian Evidence Act 1872, there are provision in the Criminal Procedure Code to protect the right of the accused. Under the provisions of the Criminal Procedure Code, the police officers have the power to investigate the matter with different approaches but at the same time the power of the police cannot extend in such a way that it directly or indirectly contradicts the provision provided by different laws for the protection of the accused in a criminal offence. A balance is crucial to maintain between the laws of investigation and the protection against self-incrimination.

### **NARCO ANALYSIS AND SELF –INCRIMINATION**

The term narco analysis comes from the Greek word ‘narkc ’which means anaesthesia or torpor and used to describe a diagnostics and psychotherapeutic technique drugs, particularly barbiturates to induce a stupor in which mental elements with strong associated effects coming to the surface, where they can be exploited by the therapist.<sup>7</sup> Narco analysis test is made upon the accused in order to attain the relevant information in connection to the offence committed by him. The accused is protected by the Article 20(3) of the Constitution to reveal the personal information which would go against him. He has the right to remain silent and not to give any incriminatory statement against him. There are certain relevant points to be noted under narco analysis and its effect on right of self-incrimination.

Validity of the test: - Scientific techniques used to conceive the knowledge about crime committed by accused are generally not valid as the confession made by the person in semi-conscious stage.<sup>8</sup> Scientific studies show that it is not a pure proof so the person after narco analysis can give false and misleading answers and even lie under the influence of the truth serum. Court cannot solely rely on this test but prefer it in some cases. The reason behind this is though the confession made before police is inadmissible but the information is admissible through which a weapon and object used for the commission of crime is discovered.

### **CONFLICTS BETWEEN RIGHT OF SELF- INCRIMINATION AND NARCO ANALYSIS**

Article 20(3) protects the accused. The question arises whether the involuntarily administration of the techniques violates the ‘right against self- incrimination’ enshrined in Article 20(3) of the Constitution. On the one side these tests help the investigative authorities and on the other side it is considered as a blatant violation of Article 20(3) of the Indian Constitution. For seeking protection under this article person shall be (i) accused of an offence (, ii) There should be no compulsion on accused to give testimony (iii) and to give evidence against him. The effects of these tests can be better understood under two headings:

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<sup>6</sup>Criminal Procedure Code 1973.

<sup>7</sup>Narco Analysis Test With Special Emphasis On Its Constitutional ...<http://www.lawteacher.net/free-law-essays/human-rights/narco-analysis-test-with-emphasis-on-Constitution-law-essays.php>

<sup>8</sup>Sonakshi Verma , Concept of Narco Analysis in View of Constitutional Law and Human Rights [http://www.rmlnlu.ac.in/webj/sonakshi\\_verma.pdf](http://www.rmlnlu.ac.in/webj/sonakshi_verma.pdf)

With the consent: - In narco analysis the question of compulsion does not arise as the consent of the person who is going for these tests is always taken prior to the test. If person is giving the consent there should not be any problems in conducting these tests. So, on this basis we can say that narco analysis does not violate the accused's right of self-incrimination unless it includes some sort of compulsion. But sometimes it may also happen that under the influence of police authority person may agree to go for the test. So the consent given by the accused should be the free consent.

Without the consent: - without the consent of the accused the test is legally not accepted as cleared by the court while various interpretations. In *Selvi v. State of Karnataka* it was held that narco analysis, brain mapping and polygraph tests without the consent of accused is unconstitutional and a violation of the right to privacy.<sup>9</sup> So it is very much clear that without the consent of the accused, narco analysis cannot be conducted. Supreme Court said that no individual should be forcefully subjected to any of the techniques in a question whether in the context of the investigation in criminal cases or otherwise. Doing so would amount to an unwarranted intrusion into personal liberty.

However what would be the consequences be if a person under the test makes a self-incriminatory statement. He has the right under the Constitution not to give any statement that would be incriminating against himself. But under the application of these tests, when he is in a semi-conscious state, he won't be able to hold statements which are incriminatory in nature. Only after the test can one know whether the information furnished by the accused in course of the application of narco analysis is incriminatory or not. Without the application of scientific tests, he can properly exercise his right provided by the Constitution under Article 20(3) Constitution. So it is the duty of the court to allow these sort of test only after considering the facts and circumstances of the case where it is very much necessary to apply this test for receiving the relevant information from the accused, that would help to do justice. But the accused's right of self-incrimination shall not be hampered. The test shall be conducted through the proper direction given by the court and in the presence of the lawyer of the accused and registered doctors.

Article 20(3) is ruled by the very popular maxim *nemo tenetur seipsum accusare* which means no one can be compelled to incriminate himself.<sup>10</sup> It is fundamental rule of criminal jurisprudence that the state should establish through the evidence; the fault of an accused who should always be deemed to be innocent till he is proven guilty. He cannot be forced to get himself in trouble by giving any self-incriminating evidence. Court should take the helps of these tests only in required cases and with the precaution that the Constitutional right of the accused provided in Article 20(3) can be secured properly.

### Case laws and incident highlights the Narco-Analysis

In India, narco analysis was first time used in Godhra carnage case in the year of 2002. It was again in question in one of the famous case Arun Bhatt kidnapping case.<sup>11</sup> In this case the accused came before the Supreme Court and NHRC against the implementation of these scientific tricks. Basically, it has been observed through different cases that the advocates, media, doctors have a separate belief on the admissibility of narco analysis test. Some of them support this method for the criminal administration of justice in a better and quick way. They believe it to be a safeguard from police torture and different method of physical violence, on the other hand some are equally against it, raising questions regarding basic human rights of a person and is termed as third degree because it also involves the risk effects on minds.

In *Dinesh Dalmia v. State the Madras*, the High Court at the time of the hearing held that the scientific test such as polygraph, brain mapping, and narco analysis conducted on accused to bring out the truth would not amount to breaking of his right to remain silent. A contention

<sup>9</sup>*Selvi v. State of Karnataka* AIR (2010) AIR SC 1974

<sup>10</sup>MAMTA RAO, CONSTITUTIONAL LAW 210 (1<sup>ST</sup>.Ed 2013)

<sup>11</sup>Narco Analysis Test With Special Emphasis On Its Constitution Law <http://www.lawteacher.net/free-law-essays/human-rights/narco-analysis-test-with-emphasis-on-Constitution-law-essays.php>

made by the investigating agencies is that narco analysis test is just used as an aid to collect evidence and it also helps the police for investigation. Thus it cannot be testimonial compulsion under article 20(3) of the Indian Constitution.<sup>12</sup>

In *Selvi v. State of Karnataka*, the Supreme Court of India held that during the course of the test, the accused person is not in a conscious stage, so the test cannot be admitted as evidence although the accused has given his consent for the same. Thus the court held that the information made by the accused cannot be admissible unless it is properly scrutinized and scanned by the judiciary.<sup>13</sup>

In *Rojo George v. Deputy Superintendent of Police*, the court allowed the narco analysis on the basis that the demand of time is to investigate the accused through scientific methods as the criminal was using modern techniques of committing the crime. The traditional method here will not be successful. And the court also held that this technique, if used in the presence of the expert then the question of the investigating authority while conducting the test is violating the fundamental right of any citizen of India cannot be raised

In *Santokben Sharmabhai Jadeja v. State of Gujarat*, the court held that after exhausting all the other way of investigation, if there is no possibility to find out the truth and as investigation is not getting the fruitful result, they are absolutely in the dark then it is the necessity to conduct such tests. And if any relevant information furnished by the accused which helps the investigating agency for the further assistance of the investigation, then there will not be any violation of Article 20(3) of the Constitution.<sup>14</sup>

### **Comparative Study on Right To Self-Incrimination**

#### **U.S.A–V Amendment of the US Constitution**

The fifth amendment of the U.S.A Constitution provides “ no person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land and naval forces, or in the militia, when in actual service in time of the war or public danger ; nor any person be subject for the same offence to be twice put in jeopardy of life and limb; NOR SHALL BE COMPELLED IN ANY CRIMINAL CASE TO BE A WITNESS AGAINST HIMSELF, nor the deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use without just compensation.

So, by the judicial interpretations in USA right to self- incrimination is protected and given a wide connotation. The privilege against self-incrimination not only applies to the witnesses but also parties in the case. Evidence here means any documentary and oral evidence and it extends to all information furnished by the person including answers which by themselves support a criminal sentence. The language of the fifth amendment of US Constitution which relates to the fundamental right very much analogous the same language as in Article 20(3) of our Constitution. There is also a protection granted to the accused person that he is not bound to give any unfavourable inference against him. In the case of *Adamson v. California* (1947 332 US 46), the question relating to right to remain silent came to arise. Although the majority of the judges didn't refer to the V amendment of the US Constitution but the minority laid down as referring to the Fifth Amendment that the right to remain silent was absolute in US. Later on in another case, *Griffin v. California* (1965) 380 US 609, the court stated that the defendant has an absolute right not to take the stand in his own behalf and that no adverse inference is drawn if the defendant exercises his right to silence. The police is under a duty to warn the suspect that he has the right to remain silent.

#### **CANADA**

Section 11(c) of the Canadian Charter of Rights and Freedom-

<sup>12</sup>Dinesh Dalmia v. State, (2006) Cri. LJ 2401

<sup>13</sup>Selvi v. state of Karnataka, AIR (2010) SC 1974

<sup>14</sup>Santokben Sharmabhai Jadeja, v. State of Gujarat, (2008) Cr. LJ 3992

As per this section any person charged with an offence has a right not to be compelled to be a witness in proceedings against him in respect of an offence.

Section 7 says that every person has right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of the fundamental justice.

Section 11(d) codifies the common law presumption innocence and right to fair trial.

One of the most popular cases, *R v. Noble*<sup>15</sup>, where the majority held that right to remain silent is an absolute right and thus if the accused become silent, any adverse inference against him cannot be considered. The same right which is provided in the Indian Constitution is also provided by the country of Canada. Right to Life, Liberty and Security as provided by Article 20 of the Constitution is also provided by the section 7 of the Canadian Charter of Rights and Freedoms in order to provide the protection to the accused person.

## **GERMANY**

The German Federal Code is similar to the Fifth Amendment US Constitution. Section 136 of the Code states that “at the commencement of the first examination, the accused shall be informed of an offence with which he is charged and of the applicable penal provision. He shall be informed not to make any statement which goes against him. He shall be informed to consult the council of his own choice for his defence.

Again section 243(4) of German Federal Code states that at the hearing, the defendant shall be informed that he may choose to respond to the charges or not to make any statement on the charges at all. Thus in Germany also accused is prohibited not to make the statement which may incriminate.

## **CHINA**

It is interesting to know that under China Criminal Procedure Law, there is an absence of the privilege of self-incrimination. The concept of confession depends upon the desire of the accused but certain sort of leniency benefits is given to those who confess the guilt. There is very rigid principle on this very particular law. The defendants are urged, often tortured to confess so that the criminal cannot escape punishment. There is no obligation on the police to inform the accused to consult the counsel of his own choice. Under article 93 of China’s Criminal Procedure Law, when interrogating a criminal suspect the investigators shall first ask the criminal suspect whether or not he has committed any criminal act, and then they will let him state the circumstances of his guilt or explain his innocence : than they may ask him questions. The criminal suspect must answer the investigator’s question truthfully. But he does have the right to refuse to answer any questions that are irrelevant to the case.

In 1998 China participated in United Nations International Covenant on Civil AND political rights which guarantees the right of self-incrimination.

## **GUIDELINES TO BE FOLLOWED FOR CONDUCTION OF TEST**

The society is dynamic. It changes according to the time. The traditional way of committing crime is now not followed by the offender. With the changes, the legal system should also be in tune with the progress and improvements that takes place with science to deal with the large number of the criminal activities in the modern days where the methods used by the criminals are very refined and modern. The traditional means of criminal investigation may not be enough to receive the relevant result. These methods can help the police for the quick investigation without any delay. There are number of cases where the police have been accused of undue delay in the investigation. The modern method like narco analysis will act as an advantage to the investigation procedure. But it is very much important that for the application of these scientific techniques proper guidelines needs to be framed by the

<sup>15</sup>*R. v. Noble*, (1997) (1) CSR. 874.

government in considering the rights of the accused. The guidelines are mentioned by the various committees and commission for the administration of the narco analysis. The National Human Right Commission laid down the certain guidelines to be followed for the administration of the polygraph tests. They are as under:

1. Without the consent of the accused no Lie Detector Test should be directed to be applied over the accused. It is solely on the wish of the accused to go through the test.
2. In case the accused is volunteering for a lie detector test then he should be provided with a lawyer and the physical, emotional and legal consequences should be well informed to him by the police and his lawyer.
3. The consent of the accused for the application of the test should be recorded before the magistrate.
4. At the time of the hearing before the magistrate, the person suspected to have agreed should be duly represented by the lawyer.
5. During the hearing of the person in question, he should clearly mention that the statement that is made shall not be confessional statement to the magistrate but only the status of statement made to the police.
6. The magistrate shall consider all the issues relating to the duration, detention and the nature of the interrogation.
7. The test should be conducted by the independent authority, e.g. the hospital and must always be conducted in the presence of the lawyer.
8. A full medical as well as factual description of the means of the information received must be taken on record.<sup>16</sup>

### Criticism

The ambiguity related to the narco analysis in India is still prevailing. The question, under which circumstances the test shall apply is yet not specified systematically. The risk of health is involved in the test as the dose of the chemical required varies from person to person and may lead into fatalities.<sup>17</sup> The reliability of the test is also questioned because the information received by the person is only in the semi-conscious stage. The investigation agencies generally conduct the investigation proceeding only when the person is in the sound and fit but in the narco analysis test the person is in the semiconscious phase. The complexity in the test creates hurdles for the application of the test.

### CONCLUSION

The society is changing very rapidly. The police needs modern analytical tools for the investigation process. The criminals today are using modern tricks to commit crimes and it is not possible for the police authorities to deal with these innovative criminals. The very old acts may need to be amended like Indian Evidence Act 1872, Criminal Procedure Code and Article 20(3) of the Indian Constitution. The relevancy of these tests is only possible when it gets space in the act specifically. The Indian judiciary however put efforts to allow the test conditionally and after following the certain guidelines laid down by certain committees and commissions in order to bring a qualitative change in the system of criminal justice. The Central government is required to formulate the policy on the stand of scientific methods.<sup>18</sup> In fact, some section of Criminal Law should be revised to give room to narco analysis test for the admission of evidence, so that the proper use can be made by the investigating authorities. However the rights of accused which are granted under different laws cannot be abrogated by making the amendments.

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