

Lie Detector and Narco-Analysis Test Vis-À-Vis Right Against Self-Incrimination And Other Fundamental Rights

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EVIDENCE GATHERED BY ADMINISTERING NARCO-ANALYSIS TEST AND OTHER DDT'S IS SELF-INCRIMINATING EVIDENCE

The principle of self-incrimination was first introduced in the Fifth Amendment of the U.S. which states that "No person shall be compelled in any criminal case, to be a witness against himself".²

In the 1886 case of *Boyd v. United States*,³ the Supreme Court held that seizing or compelling production of a defendant's private papers to be used in evidence against him was equivalent to compelling him to be a witness against himself.³

If an accused compel to provide evidence, it absolutely prohibited prosecution for any criminal transaction.⁴

In India, this principle comes under Art.20 (3)⁵ which is a fundamental canon of common law criminal jurisprudence.⁶ This Article is absolute in nature which means it cannot be suspended even in emergency. By 44th Amendment in 1978 Art. 20 has been granted a non-derogable status.⁷

1. Narco-Analysis Test or Truth Serum Test :

In this test, the drug (sodium pentothal) is administered to a person to enter into a hypnotic stage. So that the person's mind becomes unconscious and he answers truly and gives complete information whatever he knows, to the investigating agencies or to whom, who asked the question.

After administration of above mentioned drug to an accused, he becomes under the control of the person who administered the drug. Administrator continuously gives liberal disruption (beats softly) which do not let him to sleep.

In summary, experimental and clinical findings

indicate that only individuals who have conscious and unconscious reasons for doing so are inclined to confess and yield to interrogation under drug influence. On the other hand, some are able to withhold information and some, especially character neurotics, are able to lie.⁸

2. Lie Detector Test or Polygraph Test:

In this test, some medical equipment are attached to the person's body. The heart rate, the skin conductance is continuously measured which to detect the deception. The changes in the heartbeat, blood pressure, and breathing rhythm are measured. Administrator detects deception and catch the accused for his lie by the observing the deviation in the above heartbeat, blood pressure etc.

3. Brain Mapping or P-300 Test:

It measures the changes in the electrical field potentials produced by the sum of the neuronal activity in the brain by means of electrodes placed on the surface of the skin covering the head and face. The changes directly related to specific perceptual or cognitive events are called event-related potentials.⁹

By administering the Narco-Analysis test on the accused without his consent to collect information which can lead to get evidences or to gather the evidences against an accused to prove guilty. The information that reveals from the accused by administering DDT's is a "testimonial compulsion" which violates Art. 20(3) of the constitution.

In *M.P. Sharma v. Satish Chandra*¹⁰, the court held that a compelled production against whom a FIR has been made is testimonial compulsion within the meaning of Art. 20(3) of the constitution. The Supreme Court also

stated that to draw or to create a limit on the Art. 20(3) to just for an oral evidence is to confine the contents of the constitution guarantee. While administering Narco-Analysis and other deception detectors on an accused, he asked to answer to the question which tends to criminate him or may tend to establish his guilty which completely comes under a self-incriminating evidence.

In *Nandini Satpathy vs Dani (P.L.) And Anr*¹¹, Supreme Court held that word 'compulsion' includes not only physical threats but also mental sufferings like torture. So, inject the drug in Narco Analysis Test, attach machines with the body of the accused in Polygraph Test and in Brain Mapping without the consent of an accused, includes torture as well as physical threats.

By conducting these impugned techniques without consent, compulsion takes place. Henceforth the information revealed by administering these techniques, includes a testimonial character.

In *Commonwealth v. Hipple*¹², the court held that when a suspect is forcibly subjected to a lie-detector and, while still under duress, confesses, the confession will be excluded. The confession that the accused confess is a type of self-incriminating.

In *State v. Hudson*, the court held the testimony of doctor, who administered Narco Test on the accused, is not admissible in court. The court observed that '*Testimony of this character-barring the sufficient fact that it cannot be classified otherwise than a self-serving declaration-is, in the present state of human knowledge, unworthy of serious consideration.*'¹³

In *D.K. Basu v. State of West Bengal*¹⁴, the court held that constitution entitles an accused to consult with his lawyer during the custody. Access to legal advice is a safeguard, so that an individual can be adequately apprised of his

constitutional and statutory rights. However involuntarily administration of any of the DDT's can lead to a situation where such legal advice becomes ineffective.

Suppose an involuntarily conduction of any one of the DDT's is ordered by the court, then what will be the use of such legal advices when an accused cannot prevent the extraction of information which may prove to be inculpatory by itself or lead to the subsequent discovery of incriminate evidences. The objective of providing access to legal advice are frustrated.

In *Selvi & Ors v. State of Karnataka & Anr*¹⁵, the Supreme Court held that the compulsory administration of DDT's namely, Narco-Analysis, Brain Mapping and Polygraph Test bears a "testimonial" character. Hence the involuntarily conduction of these DDT's on an accused is the violation of the Art. 20(3) of the constitution.

Conduction or administration of these DDT's must be on voluntarily basis. Otherwise the information reveals by conducting these DDT's is a self-incriminating in nature which violates the Art. 20(3).

If these DDT's applies without the consent of an accused, it results the violation of Art. 20(3) and creates conflicts in the judiciary. It also strikes down many criminal procedures which is followed and every innocent accused, who has been prosecuted for years for the act which was not done by him, demands order to perform these DDT's on him so that he can acquit.

Recently a petition was filed by an accused to perform or administer Narco-Analysis Test to prove his innocence. The accused is prosecuting sexual abuse under the Protection of Children from Sexual Offences (POCSO) Act. The Supreme Court held that no accused can seek voluntarily to undergo DDT's to prove his innocence.¹⁶

A man, who is suffering from disease, allows

to inject the drug or medicines to being cured. But in Narco Analysis Test, court allows to perform this technique not to cure the accused but to get the valuable information without considering the life of an accused which is not justified.

In *Underwood v. State (Ga.)*¹⁷ When a police officer, without having any search warrant or warrant, forcibly gets the key from the pocket of the person, who was charged of keeping liquor in his place, and unlock his room, found a whiskey. The court held that the evidence of whiskey is inadmissible in any court of law because it was the result of compelling a person to incriminate himself. The court gets the power to provide justice from the constitution and the constitutional provisions are against the self-incrimination.

Here the DDT's are the keys for the investigating agencies to gather the evidences against the accused to prove guilty and these are forcibly (without the prior consent of an accused) ordered by the court to perform or administering on accused. So the evidences gathered or collected by the investigating agencies or the relevant authorities by conducting these DDT's by compelling an accused which incriminate him, must be inadmissible in the court. Hence conduction or administration of DDT's on an accused to reveal the information which incriminate that accused is unconstitutional in nature.

Even in *State of Bombay v. KathiKaluOghad and Ors*¹⁸ the Supreme Court held that the protection under Art. 20(3) operates not only when a person has been accused of an offence but also before the initial stages means before the initial trial.

All of the three techniques or tests include or require contact and invasion of the body. In Narco-Analysis, the intrusion or forcibly injects of the drug by the administrator and continuously gives disruptions or beats softly are enough to

explain the word "compelling". All of these tests are conducted by the use of the body of the accused which caused pain or threat to the body. So the Art. 20(3)¹⁹ of the constitution violates by conducting or administering of these test on an accused.

Premise and Inference Model:

Premise: The information which is collected or gathered by the investigating agencies, is done by administration or by conduction of any one of the DDT's.

Premise: The administration of DDT's is performed or ordered by the court to perform without the consent of an accused.

Inference: Information revealed by administration of DDT's bears "Testimonial Compulsion".

Premise: Information revealed by administration of DDT's bears "Testimonial Compulsion".

Premise: According to Art. 20(3) of the constitution, which states that no person shall be compelled to provide self-incriminating evidence.

Inference: The administration of these impugned techniques violates Art. 20(3). Hence it is also unconstitutional in law

ADMINISTRATION OF DECEPTION DETECTION TESTS VIOLATES RIGHT TO LIFE AND PERSONAL LIBERTY

The forcefully administration or conduction of DDT's, namely Narco-Analysis Test or Truth Serum Test, Brain Mapping or P-300 Test and Polygraph Test or Lie Detector, violates Art. 21²⁰ of an individual which is guaranteed us by the constitution. Or compulsory or involuntarily administration of any one of these techniques is not justified to intrude in any individual's privacy. These techniques cannot be administered or performed just because of public outrage or public demand. Constitutional rights cannot be

dissolved or violated because of public outrage.

Forcing or without consent of an individual to perform any of the DDT's or impugned techniques violates or restrains personal liberty of an individual. These techniques could also expose person to adverse consequences of a non-penal nature.²¹

Administration of drug (Sodium Pentathol) in Narco-Analysis is dangerous for the life of the accused. As the medical also believes that overdose of this drug can lead to the death of an accused. Sometimes its harmful effects can also be seen even the dose of drug is given in the limited quantity.²² This drug is also used in voluntary Euthanasia, where doctor gives this drug to the patient who is suffering from a deadly disease in the stage where it cannot be cured. So it is not justified to perform Narco Test on an accused where even the court also don't know that he is guilty or innocent. Any accused during the prosecuting, is innocent until guilty proved. Conduction of these DDT's on an accused is an unjustified treatment and also cruel in nature. Hence it violates the Art. 21 of the constitution.

In *State of Punjab v. Mohinder Singh Chawla*²³, Supreme Court held that right to health also comes under the fundamental canon of Art. 21 i.e. Right to life and personal liberty.

The conduction of these impugned techniques also violates individual's privacy which is recently added in the fundamental rights by the Supreme Court in the case *Justice K.S. Puttaswamy v. Union of India*²⁴. In this case, Supreme Court held that the right to privacy is protected as an intrinsic part of the right to life and personal liberty under Article 21 **and as a part of the freedoms guaranteed by Part III of the Constitution.**

According to the Part 3, Art. 7 of the International Covenant on Civil and Political Rights (ICCPR) states that, 'No one shall be subjected to torture or to cruel, inhuman or

degrading treatment or punishment'.²⁵

The administration of Narco Test or truth serum test is a torture. UN definition of torture clearly explains that the conduction or administration of Narco Test on suspect without his consent amounts to mental suffering or coercion or torture.²⁶

Right to a Fair Trial

Every individual have a right of fair trial, which means the proceeding against an accused should be fair and certain. So the court has no right to order to perform these techniques on an accused without his consent by taking his life in danger.

In *Rattiram v. State of M.P.*²⁷, the court held that conducting a fair trial is the cornerstone of democracy in any criminal offences and it is a heart of criminal jurisprudence. Hence, the administration of DDT's without the consent of the accused violates the right of fair trail which is a fundamental canon under Art.21.

Premise and Inference Model:-

Premise: In Narco-Analysis Test, the drug (sodium pentothal) is injected in the suspect's body without his prior consent to enter into the hypnotic stage.

Premise: Inducing Sodium pentothal in suspect's body is dangerous for life. It is used in euthanasia which results in silent death.

Inference: The administration of Narco Analysis Test or other DDT's violates fundamental Art. 21 and Art. 7 of ICCPR.

NEED TO MAKE RELIABLE LAWS REGARDING THE CONDUCTION OF THESE IMPUGNED TECHNIQUES

As we discussed above that how the administration of these impugned techniques violates an individual's right against self-incrimination which is Art. 20(3) and right to life and personal liberty which is Art. 21 of the constitution and some other laws regarding the

criminal proceedings & internal laws.

The author also know the benefits and importance of application of these techniques on an accused in the cases where the investigation agencies fails to provide the enough evidences, so that the court can give justice. With these things, the court also have to keep in their mind that maintaining law and order is also that much important as the use of these scientific techniques.

Hence there is a need to make reliable laws regarding the use of these impugned techniques.

As it is clear that the administration of lie detector or polygraph test and brain mapping or p-300 test is very less harmful rather than the use of Narco-Analysis or Truth Serum Test. So that the use of Polygraph Test and Brain mapping can be administered successfully by the specialist without any physical and mental disruptions but only when the law allows to do it. Many agencies performed polygraph test to interrogate. Like, FBI and CIA and many police departments of US use polygraph examination to interrogate suspects screen new employees.²⁸ Hence first essential is to make laws with clear guidelines.

ALTERATIONS REQUIRED DURING THE PROCESS OF REVELATION OF INFORMATION IN THESE TECHNIQUES (SUGGESTIONS)

Some alterations are required in the process of getting information during the administration of these impugned techniques, to remove the testimonial character. Alteration should be in a way as follows:

1. Need to make laws for Administering Brain Mapping and Polygraph Test :-

Only Brain Mapping or P-300 Test and Polygraph Test or Lie Detector should be allowed to perform after making proper laws. Because Narco-Analysis Test is too dangerous for the life of an accused. Or, Even if laws are made to perform the Narco-Analysis Test, these laws are unconstitutional in nature due to the

violation of Art. 21. It does not mean that other two techniques doesn't violate Art. 21. But in the above two techniques sufficient measures can be taken to prevent any injury either physical or mental. So making laws for the administration of other two techniques are justified. These are taken as reasonable restriction.

2. Condition for administration of Narco Test and to examine the consent:-

Narco-Analysis Test should be rarely applied only when the accused gives his consent for the same. For example, it should be used on the matter of terrorism for national security. Compulsory²⁹ administration should be prohibited. The consent should be voluntarily in nature and relevant authorities should be appointed to check, whether the consent is given by coercion or voluntarily. After administration of Narco-Analysis test on an accused, the first question should be asked to check the voluntariness of the accused to perform this test. If he denies, immediately the procedure should be stopped.

3. Process to remove the Testimonial Character:-

To remove the testimonial character from the information that may be given by the accused during the Narco Test, ask only circumstantial information related to the crime. For example, in case of murder, question should be asked like "where is the weapon, which was used in the murder". No direct information should be asked which incriminates the accused himself. Direct information means the information which is directly shows the guilty part of the suspect or the accused, in other words which incriminate himself. Example, the question like "who put the weapon in that place" and "who did that act" is come under the direct information.

So, the circumstantial information will be the enough clues for the investigating agencies to gather or collected further evidences.

In this way the word "compulsion" is

removed by the above mentioned process name and the word “Testimonial Compulsion” is removed by applying this process during the administration of these DDT’s or impugned techniques.

4. The information collected during the administration of these impugned techniques should be presented before the court by the investigating agencies in the form of statement that generally made in the police custody.
5. The information collected on the basis of the circumstantial information, which reveal during the administration of impugned techniques, by the investigating authorities should be presented before the court as evidences.

CONCLUSION

These scientific techniques are very useful in the cases where the proceedings are struck down due to the lack of evidences. As we know that everything has two sides, one side defines its pros and the other side defines its cons. So the use of these impugned techniques must be administered in the constitutional bounding means without violating any constitutional right of an individual. The author tried his best to remove the ambiguities and to alter the procedures, so that the use of these techniques does not violate individual’s constitutional rights.

The main problem that the author detects by observing theoretical and practical aspects during the administration of these techniques is to have “Testimonial Compulsion” or “Testimonial Character” in the formation that reveals from the accused by the investigating authorities. These techniques help to increase the rate of prosecution and the rate of acquittal of an accused.

Simply make these techniques prohibited or unconstitutional is not justified without solving the ambiguities and the complex situations in these techniques. But unnecessary

use of these techniques is also not reasonably justified. Every individual have a right of fair trial so the court should use these techniques reasonably without violating the jurisprudence of fair trial.

Without making proper laws, these techniques can’t be used in any aspects. Simply by making interpretations that the administration of these techniques doesn’t violate the right against self-incrimination, is not justified because by using these techniques other fundamental rights of an individual is also violated. Hence reasonable laws are required to overcome from these problems.

(Endnotes)

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- 19 Supra note 1.
- 20 Supra note 2.
- 21 Selvi & Ors vs State of Karnataka & Anr on 5 May, 2010, supra note 15.
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