

# NARCO ANALYSIS AND PROTECTING THE RIGHTS OF THE ACCUSED

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## 1. INTRODUCTION

High profile criminal investigations in recent times have witnessed the emergence of a new investigative tool in India - Narco analysis. Being touted as an alternative to the 'third degree' interrogation methods, narco analysis has opened a Pandora's Box of legal and ethical questions exacerbated by the Supreme Court's refusal to comment on the legality of such investigative techniques.<sup>1</sup>

Though relatively new in the field of criminal investigation in India, narco analysis has been used in the field of psychiatry since long. Barbiturates, which have been in use since the beginning of the last century, came to be used in psychotherapy for narco analysis by 1930, along with other methods of therapy. Narco Analysis was hailed in the field of psychiatry as compared to other psychotherapeutic procedures as it saved time by helping the patient overcome reluctance in talking freely about their inner most feelings and experiences. By means of narco analysis it was possible to achieve a state of 'transference' in many patients whose previous state was either apathy, inaccessibility, or even negative transference.<sup>2</sup>

Narco Analysis has been used as a tool of criminal investigation long before its entry in India. Narco Analysis involving the use of the drug scopolamine on criminals in the United States was first reported in 1922. During and after the war years, United States armed forces and intelligence agencies continued to experiment with the truth drugs and this has been continued by the Central Intelligence Agency (CIA).<sup>3</sup>

The legal standpoint on narco analysis in India has not been clearly pronounced by the Courts. This paper addresses narco analysis in the Indian legal system. The major issues dealt with being, its constitutionality in relation to Article 20 (3) and 21 as well as its statutory sanction under the Code of Criminal Procedure. Also, the paper advocates the use of narco analysis as a feasible alternative to the use third degree methods in investigation. For the same, the researchers have proposed a model comprising guidelines that can facilitate its effective and legitimate use.

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1. *Supreme Court reserves verdict on Narco Analysis*, <http://www.indiaenews.com/india/20080124/93625.htm> Thursday jan 24 2008, last accessed 06-03-2008.
  2. Horsley, J.S. , "Narco Analysis", (1942) *British Medical Journal* 230.
  3. Lakshmanan, Sriram, "Narco Analysis and some hard facts", <http://flonnet.com/fl2409/stories/20070518002109700.htm>, last accessed 18-02-2008.

## **2. THE PROCEDURE**

The test of narco analysis involves the administration of small amounts of Sodium Penthatol and Sodium Amytal dissolved in distilled water and mixed with dextrose, intravenously over a period of three hours. The psychological effect is that the subject loses all inhibition and does not have the ability to manipulate answers easily. This is why it is believed that the information revealed during such a test is mostly the truth.

The subject is then interrogated by investigating officers in the presence of doctors and the same is recorded in audio and videocassettes. Also, experts prepare a report, which is used for the purpose of collecting evidence.

### **2.1 NARCO ANALYSIS VIS-À-VIS OTHER SCIENTIFIC TESTS**

As compared to other scientific lie detection tests such as the Polygraphy and the Brain Mapping, Narco Analysis is based on entirely different principles.

Where the lie detection tests are based on the monitoring of physiological/ autonomic responses while answering questions framed by the clinical psychologist, narco analysis is based on how sodium pentathol handles GAABA (gamma amino butyric acid), a neuro transmitter inhibitor and thereby reduces the inhibitory character of the individual.<sup>4</sup>

### **2.2 NARCO ANALYSIS: NOT A HEALTH HAZARD**

It can be seen from the procedure that narco analysis goes a step further than lie detection tests by the injection of a foreign substance. However this in no way makes narco analysis a health hazard, the following being reasons for the same:

The dosage of the serum is carefully regulated depending upon the age, sex, health and physical condition of the accused. The test is conducted by a team consisting of an anaesthetist who administers the drug and regulates its dosage, a physician who certifies the fitness of the subject before the administration of the test, and a clinical/ forensic psychologist who interrogates and interacts with the accused. Further more, the drug used in low concentration during narco analysis, does not have any adverse effect on the body.<sup>5</sup>

Sodium Amytal and Sodium Pentothal, commonly used for narco analysis, is also used by psychiatrists in treatment of patients to help them recall traumatic experiences

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4. Mohan, B.M., "Misconceptions about Narco Analysis", *Indian Journal of Medical Ethics*, Vol. IV No.1 January- March 2007, <http://www.ijme.in/151co07.html>, last accessed 16-02-2008.

5. *Santokben Jadeja v. State of Gujarat*, 2007 CriLJ 4566, para 30.

they are otherwise unable to remember. Anaesthesiologists have opined that these drugs have no side effects since the drug dissipates in the body within five minutes.<sup>6</sup>

## **2.3 VERACITY OF THE RESULTS**

However, doubts have been raised regarding the truthfulness of the information elicited during the test. Critics of the procedure allege, that since these drugs induce the subject into a delusive state, the subject is prone to divulge information as a result of hallucinations, which in turn don't necessarily point to the truth.<sup>7</sup>

It is submitted that such an allegation is the result of a misunderstanding of the process involved in narco analysis. The procedure is based on the simple truth that the ability to lie depends upon the imaginative power and it is this ability of the individual, which is neutralized by the drugs. At this point there arises a need to clarify that narco analysis does not lead to the individual synthesising new information, but merely aids the subject in overcoming a mental barrier. Dr. J.S Horsley most effectively concludes that by means of narco analysis it is possible to effect a transference in many patients whose previous state was apathy, inaccessibility, or even negative transference.<sup>8</sup> One of the first papers to be published on the use of narco analysis to obtain truthful information from criminals was by a Texas physician, Dr. Robert Ernest House, called the "father of truth serum" and was published in 1922 in the Texas State Journal of Medicine.<sup>9</sup> Dr. House declared before an assembly of law enforcement officers in Houston, Texas, in September, 1924 that –

"In the state induced by the drug, the individual will reply to questions with childlike simplicity and with childlike honesty, without evasiveness, guile, deceit or fraud, as the answer to a query that is stored in his mind as memory."<sup>10</sup>

Hence, a person will find it difficult to lie during such a procedure and his answers will be limited to facts he is already aware of.<sup>11</sup> Furthermore, the interrogators adopt a method of asking questions in a certain pattern, repeating them at regular intervals to see if similar answers are elicited. Hence, repeated questioning further reduces the ambiguities.<sup>12</sup>

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6. O'Connor, James V, *Truth Serum as Behavior Modification*, The New York Times, Sunday, July 22, 2001, [http://query.nytimes.com/gst/fullpage.html?res=9403E1DF143AF931A15754C0A9679C8B63&sec=&spon=&page\\_wanted=all](http://query.nytimes.com/gst/fullpage.html?res=9403E1DF143AF931A15754C0A9679C8B63&sec=&spon=&page_wanted=all), last accessed 09-03-2008.
  7. <http://www.lawyerscollective.org/content/human-rights-0>, last accessed 16-02-2008.
  8. Horsley, J.S. , "Narco Analysis", (1942) *British Medical Journal* 230.
  9. House, Robert E., "The Use of Scopolamine in Criminology", (1931) 2 *American Journal Of Political Science* 328-38; Moenssens, Andre A., "NarcoAnalysis in Law Enforcement", (1961)52 *The Journal of Criminal Law, Criminology and Police Science* 453-458.
  10. Address by Dr. R.E.House delivered at The 10th Annual Convention of the International Association for Identification, Houston, Texas, (1925) 6 *Finger Print And Identification Magazine* 3-7.
  11. *Narco Analysis Test Constitutional Imperatives*, <http://www.syamlaw.ac.in/phpmyfaq/index.php?sid=30548&lang=en&action=artikel&cat=3&id=4&artlang=en>, last accessed 16-02-2008.
  12. Lakshmanan, Sriram, "Narco Analysis and some hard facts", <http://flonnet.com/fl2409/stories/20070518002109700.htm>, last accessed 18-02-2008.

Dr. B.M. Mohan<sup>13</sup>, asserts that the feedback from investigating agencies indicate towards a success rate of 96-97% in these tests.<sup>14</sup> These statistics, in favour of narco analysis are an important consideration while determining its feasibility.

The question of the veracity of the answers elicited during narco analysis is a subject matter of scientific research and enquiry. Though sections of the scientific community have affirmed the increasing veracity and reliability of the results of this process, this is beyond the scope of this academic writing, which seeks to address and establish the legality of the process as an investigative tool in criminal justice dispensation.

### **3. CONSTITUTIONALITY OF THE PROCEDURE: VIOLATION OF ARTICLE 20 (3)?**

One of the biggest legal controversies, which surround narco analysis, is its alleged violation of the Right Against Self incrimination<sup>15</sup> guaranteed under Article 20 (3) of the Indian Constitution.

#### **3.1 TESTIMONIAL COMPULSION UNDER ARTICLE 20(3)**

Article 20 (3) of the Indian Constitution gives the accused the immunity from “being compelled to be a witness against himself”. It is now settled<sup>16</sup> that the words “to be a witness” includes oral as well as written testimony. The statements made by the accused during narco analysis must amount to a testimony in order to attract Article 20 (3).

The ambit of protection of the Right Against Self incrimination enshrined under Article 20 (3) has been clearly laid down by the Supreme Court in the case of *Nandini Satpathy v. P L Dani*<sup>17</sup>. Here, disagreeing with the narrow construction of the expression ‘accused of an offence’ by Courts in other cases<sup>18</sup>, the Supreme Court clearly laid down that the protection under Article 20 (3) begins to operate at the pre-trial stage.

“Any giving of evidence, any furnishing of information, if likely to have an incriminating impact, answers the description of being witness against oneself. Not being limited to the forensic stage by express words in Article 20(3), we have to

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13. Mohan, B.M., “Misconceptions about Narco Analysis”, *Indian Journal of Medical Ethics*, Vol. IV No.1 January- March 2007.

14. *Ibid*.

15. No person accused of an offence shall be compelled to be a witness against himself.

16. *State of Bombay v. Kathi Kalu Oghad*, [1962] 3 SCR 10; *Dalmia, R.K. v. Delhi Administration*, AIR 1962 SC 1821(1870).

17. (1978)2 SCC 424.

18. *R.N.Bansilal v. M.P. Mistry*, AIR 1961 SC 29; *State of Bombay v. Kathi Kalu Oghad*, AIR 1962 SC 1808; *R.C.Mehta v. State of West Bengal*, AIR 1970 SC 940; *Bhagwandas Goenka v. Union of India*, Cr.Appeals 131 & 132 of 1961, dated September 20,1963.

construe the expression to apply to every stage where furnishing of information and collection of materials takes place. That is to say, even the investigation at the police level is embraced by Article 20(3).”

Hence, Article 20 (3) may be attracted even at the interrogation stage. In this context, the Supreme Court held that the protection under Article 20 (3) extends to any ‘compulsory process’ for gathering evidence against the accused. Further, ‘compelled testimony’ resulting in violation of Article 20 (3), was defined by the Apex Court as ‘...any mode of pressure, subtle or crude, mental or physical, direct or indirect, but sufficiently substantial, applied by the policeman for obtaining information from an accused strongly suggestive of guilt’

Hence through this landmark case, the Supreme Court widened the scope of ‘compelled testimony’ under Article 20(3) to not just evidence admitted in Court but also state Compulsion in this context could mean both physical and mental. The critics of the procedure argue that narco analysis amounts to Mental Compulsion.

Mental compulsion results when “the mind has been so conditioned by some extraneous process as to render the making of the statement involuntary and therefore extorted”.<sup>19</sup>

At the same time, the Court also acknowledges the fact that a voluntary statement by the accused can be invaluable in solving a crime and emphasizes the need for safeguards to ‘erase involuntariness’ and ensure free will of the accused to make statements during investigation. It has also been held in the case of *Kalawati v. H.P. State*<sup>20</sup> by the Supreme Court that Article 20(3) does not apply at all to a case where the confession is made by an accused without any inducement, threat or promise.

### **3.2 ‘INFORMED CONSENT’- a prerequisite**

It is at this point that the concept of ‘informed consent’ of the accused should come into play, by becoming a prerequisite for carrying out the procedure on the accused. ‘Informed Consent’ means that the accused should be made well aware of the technicalities of the procedure, the effect of the narcotics under whose influence he/she shall be interrogated as well as the physical, psychological and legal ramifications of undergoing the procedure, this knowledge becoming the basis on which he renders his voluntary consent. This is to say that the consent of the accused to undergo narco analysis will extend to answering the questions in the uninhibited state of mind induced by the narcotics used in the procedure thereby rendering the making of any statement during the process completely voluntary and hence in no way extorted.

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19. *State of Bombay v. Kathi Kalu Oghad*, [1962] 3 SCR 10, Para 17.

20. AIR 1953 SC 131.

Public Prosecutors and Forensic experts assert that the procedure is never carried out without the consent of the accused, a form to that effect being required to be signed by him.<sup>21</sup>

However, a contrary approach to the necessity of consent of the accused was adopted by the Indian Judiciary in other cases.<sup>22</sup> The reasoning behind this approach of the Courts is that narco analysis is a part of routine investigation procedures.

‘Investigation’ as defined under Section 2 (h) of the Code of Criminal Procedure includes all the proceedings under the code for the collection of evidence conducted by police officers or any person (other than a Magistrate) who is authorised by a Magistrate in that behalf. Hence, it was laid down that a statutory right is derived in virtue of these provisions to carry out narco analysis as part of the investigation irrespective of the consent of the accused.

It is submitted that, this ambiguity must be cleared by making ‘informed consent’ of the accused a prerequisite for the procedure to be administered.

It may well be argued that when no other scientific test viz. blood, semen etc. require consent, of what special significance is consent in context of a narco analysis test? Narco analysis takes scientific investigation a step further by eliciting information by injection of a narcotic substance. Even other similar tests viz. Polygraph and Brain Mapping tests merely monitor the responses during interrogation. This is to say that narco analysis is a big leap as far as investigative techniques are concerned and consent plays a vital role in ensuring that the procedure does not violate the constitutional right against self incrimination of the accused.

### **3.3 A COMPARISON WITH THE STANCE ON SELF INCRIMINATION IN THE UNITED STATES**

Since Narco Analysis as an investigative procedure has been in the United States well before its introduction in India, a worthwhile reference can be made to the Courts’ stance on Self Incrimination in the United States.

The landmark Indian Case of *Nandini Satpathy v. P.L. Dant*<sup>23</sup> draws from the case of *Miranda v. Arizona*<sup>24</sup>, the US standpoint on the Right against Self Incrimination.

The question regarding the point at which the protection against Self Incrimination begins to operate has arisen in the United States also, i.e whether the protection

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21. Lakshmanan, Sriram, “Narco Analysis and some hard facts”, <http://flonnet.com/fl2409/stories/20070518002109700.htm>, last accessed 18-02-2008.

22. *Dinesh Dalmia v. State*, 2006CriJ2401, Para 14; *Santokben Jadeja v. State of Gujarat*, 2007 CriLJ 4566, Para 9.

23. (1978)2 SCC 424.

24. 384 US 7 436 (1966).

only begins to apply if the statements are admitted as incriminatory evidence or whether it is operative at the pre trial interrogation stage itself.

Advocates for a broad view of the right against self-incrimination argue that the Fifth Amendment should apply outside the trial setting and the United Supreme Court has also held the same.<sup>25</sup> In *United States v. Hubbell*<sup>26</sup>, the Supreme Court affirmed that the Fifth Amendment was violated outside of a trial setting also. The Court held that the 'compelled testimony' envisaged under the Fifth Amendment encompassed compelled statements that lead to the discovery of incriminating evidence even though the statements themselves are not incriminating and are not introduced into evidence.

However, the case of *Miranda v. Arizona*<sup>27</sup> also clearly lays down that volunteered statements are not barred by the Fifth Amendment, which enshrines the Right Against Self incrimination.

Hence it can be seen clearly that the position on Self incrimination as laid down in the *Nandini Satpathy* case<sup>28</sup> is identical to the stance of the United States Supreme Court- i.e. the protection is operative at the interrogation stage itself even without the submission of the statements as evidence in Court.

### **3.4 RIGHT TO PRIVACY UNDER ARTICLE 21**

Human rights activists argue that narco analysis is an infringement upon an individual's basic right to privacy. In the case of *Kharak Singh v. State of UP*<sup>29</sup>, Subba Rao J. was of the opinion that privacy was an essential ingredient of personal liberty under Article 21. Further, in the case of *Gobind v. State of Madhya Pradesh*<sup>30</sup>, the Supreme Court held the right to privacy to be included in the right to personal liberty guaranteed under Article 21. However, the Court also held that the right to privacy is not an absolute one and that it can be restricted on the basis of a compelling State interest. This is to say that just as the Right under Article 21 is subject to restrictions, so is the Right to Privacy. However, such restriction must be under a procedure established by law.

In this context, State's responsibility towards public safety, justice dispensation and prevention of crimes does qualify as compelling State interest. Narco analysis plays a vital role in the realization of this State interest. It may be argued that the procedure

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25. Strauss, Marcy, "Torture", (2003-04) 48 *N.Y.L.Sch.L.Rev.*201.

26. 520 U.S. 27 (2000).

27. 384 US 7 436 (1966).

28. (1978)2 SCC 424.

29. AIR 1963 SC 1295.

30. 1975 (2) SCC 148.

of narco analysis amounts to an invasion of privacy since it involves eliciting personal information from the accused known only to him. However, it must be noted that the procedure is one with the requisite sanction under the existing laws of the land (as will be proved subsequently) and assumes the character of a restriction imposed by law on the said Right.

#### **4. STATUTORY SANCTION ESTABLISHED**

Having established the constitutionality of narco analysis, we shall now proceed to examine whether the procedure derives sanction from the existing laws of the land.

Recently, the Solicitor General of India Ghoolam E Vahanvati, arguing before a bench presided by the Chief Justice of India K.G.Balakrishnan, hearing petitions against the procedure of narco analysis, justified its use as a tool of investigation.<sup>31</sup> He asserted that the procedure of narco analysis finds legal sanction under the newly amended Section 53 of the Criminal Procedure Code. In 2005, an Explanation clause was added to Section 53 of the Criminal Procedure Code, the relevant part of which reads as follows:

Explanation— In this section and in Sections 53-A and 54,—

(a) examination” shall include the examination of blood, blood stains, semen, swabs in case of sexual offences, sputum and sweat, hair samples and finger nail clippings by the use of modern and scientific techniques including DNA profiling and such other tests which the registered medical practitioner thinks necessary in a particular case;.....(emphasis supplied)

It is submitted that the expression ‘such other tests’ signifies a provision for recognising newly developed techniques in forensic science and permitting the same in investigative procedures. M R Shah J. in the case of *Santokben Jadeja v. State of Gujarat*<sup>32</sup> observed that:

“Section 53 of the Criminal Procedure Code has been brought on the statute book to have efficient and scientific investigation. It is intended to help in the investigation of the crime on scientific lines so as to enable collection of evidence to prove the guilt or innocence of the persons accused of committing the crime as the modern community requires modern scientific methods of crime detection, lest the public go unprotected.”

Hence it can be concluded that purpose behind specifically including the phrase ‘such other tests’ in addition to those already specified (DNA profiling, testing of

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31. <http://www.hindu.com/2008/01/23/stories/2008012356001300.htm>, last accessed 06-03-2008.

32. 2007 CriLJ 4566.



blood samples, etc.), was to accommodate future advancements in the field of forensics like Narco Analysis. Therefore Narco Analysis as an investigative tool finds legal sanction in the existing provisions of the Criminal Procedure Code.

## **5. HUMAN RIGHTS-some ethical questions answered**

Human rights activists world over have been avidly protesting against the use of third degree methods to extract information. The researchers submit that narco analysis is the most feasible alternative to these 'third degree' methods employed by the police officials during interrogation. However, the human rights activists have labelled even narco analysis as a 'psychological third degree' method of interrogation or in other words as a form of 'torture'.<sup>33</sup> It is important to mention at this juncture that though the term 'torture' is a widely used one in today's context of Human rights violations, there is yet to arise a comprehensive definition of the term.<sup>34</sup>

Third degree methods undoubtedly involve an element of coercion.<sup>35</sup> It is submitted that for narco analysis to constitute a third degree method of interrogation, it must be fundamentally coercive in nature. However, the obtaining of 'informed consent' from the accused negates the element of any possible coercion in the process of administering Narco analysis.

Hence it can be safely concluded that narco analysis as an investigative process finds legal sanction in the Indian laws and does not violate the basic rights of the accused.

## **6. CONCLUSION**

In order to ensure the effective and legitimate use of narco analysis, there arises a need for certain rigid guidelines according to which the process may be put to use.

### **6.1 A MODEL- guidelines for effective and legitimate use**

To this end, the following model is proposed:

- I. Firstly, narco analysis is to be treated as a 'last resort' investigative technique. This technique is not to be viewed as a replacement of the existing methods of investigation recognised by the criminal procedural laws. The purpose is instead to renew and channelise investigations which have reached an impasse in spite

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33. Strauss, Marcy, "Torture", (2003-04) 48 *N.Y.L.Sch.L.Rev* 213; Mukal, Akshaye, "The Legal Questions Raised over Truth Serum Use", *The Economic Times*, 25 July 2002 (human rights community have decried narco analysis as tantamount to torture); "A Shot at Justice: Truth Drug for Godra Accused", *The Indian Express*, 23 June 2002.

34. Strauss, Marcy, "Torture", (2003-04) 48 *N.Y.L.Sch.L.Rev.* 213.

35. Vadackumchery, James, *Crime Law and Police Science*, (1st edn, Concept Publishing Company, New Delhi 2003), 274-275.

of all efforts and exhaustion of all possible alternatives. The decision as to whether Narco Analysis is warranted or not, should be made by the Trial Court by examining the progress of the investigation and whether there has been an exhaustion of traditional means of investigation. The decision of the Court will again be subject to the accused rendering his/her informed consent. Such a measure in place will prevent the police and investigative agencies from shirking their responsibilities of following traditional means of investigation. The absence of such a measure exposes Narco Analysis to the dangers of abuse and exploitation. It is suggested that taking into regard such factors, Narco Analysis should be permitted only once in an investigation. This will ensure that the investigative agencies are more prudent while applying for this procedure, a limited and single opportunity. However, the accused should be given the right to apply to the Trial Court for Narco Analysis to be carried out on him. Such an application should be counter signed by his lawyer to ensure that there is no possibility for the State's investigative agencies to indirectly coerce the accused into applying against his will. This right would further the purpose of Narco Analysis serving as an aid to the accused and helping in the vindication of the innocent. It is submitted that the Trial Court should decide upon such an application on the same grounds used in case of an application for the procedure by the prosecution.

II. The existence of Narco analysis as a procedure that does not violate rights of the accused, hinges on the 'Informed consent' of the accused. The National Human Rights Commission has suggested guidelines for lie detector tests<sup>36</sup> which we recommend be extended to the process of narco analysis also.<sup>37</sup> The guidelines are as follows-

1. The accused should be informed of the physical, emotional and legal implications of such a test.
2. Most importantly, the accused should be made aware that the statements made by him during the course of the test will hold no evidentiary value whatsoever in a Court of Law. To this extent he should be made aware of the relevant provisions of law under the Code of Criminal Procedure and the Constitution safeguarding him against the same.
3. The final option of undergoing the test should be given to the accused and such consent should be recorded before a judicial magistrate in writing upon a consent form signed by the accused and counter-signed by his lawyer.

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36. <http://nhrc.nic.in/Documents/sec-3.pdf> , last accessed 10-05-2008.

37. Narco analysis takes scientific investigation a step further by eliciting information by injection of a narcotic substance. Polygraph on the other hand just monitors the responses during interrogation. Hence, if the polygraph test itself warrants informed consent, it becomes necessary for the same logic to be extended to narco analysis.

4. As proposed earlier, it is premature to conclude that the test should necessarily result in the accused incriminating himself. On the contrary, the process has an equal probability of vindicating the falsely accused by channelising the investigation in the right direction. According to Dr. B.M. Mohan, the Director of Forensic Science Laboratories (Bangalore), about 25 per cent of the total number of individuals subjected to narco analysis turned out to be “innocent”.<sup>38</sup>
- III. The pattern of questioning the accused during the process must involve open questions which allows the subject to reveal all that he remembers thereby leaving no room for the investigating officers to lead the subject with specific and suggestive questions<sup>39</sup> thereby taking advantage of the mental state of the accused who is under the influence of narcotics. This questionnaire is prepared by the officials at the Forensic science laboratory, a State run organization. In order that the mental state of the accused is not taken advantage of, the lawyer of the accused must be required to inspect the questionnaire for the nature and pattern of questions. Also, the lawyer of the accused must be present during the procedure to oversee the interrogation and ensure that the authorities are not taking undue advantage of the mental state of the accused. Hence, the lawyer of the accused plays an important role in ensuring that the guidelines for the effective and legitimate use of narco analysis are complied with, since, non-compliance of the same can damage the case for the accused.
- IV. Most important of all, at no point during the trial should the prosecution or defence be allowed to mention that the evidence being presented has been gathered from the leads given by the accused during narco analysis i.e no reference should be made to the results of narco analysis though the Court maybe aware that the procedure has been carried out. If such a reference is made, the Court should declare the evidence inadmissible. This measure will ensure no room for bias in the judges’ minds by guaranteeing that the Judge is at no point made aware of the results of the procedure. If at any stage of the trial, the prosecution makes any reference to the results of the procedure (whether directly or indirectly), it would tantamount to indirect violation of the accused’s right against self incrimination. Where such a situation arises, the accused can claim protection under Article 20(3) of the Constitution.
- V. In context of the increasing incidence of organized crimes and terror attacks, many analysts of interrogation techniques have hypothesized the ‘ticking bomb scenario’. For example, Alan Dershowtiz describes the scenario thus, “a

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38. Mohan, B.M., “Misconceptions about Narco Analysis”, *Indian Journal of Medical Ethics*, Vol. IV No.1 January- March 2007, <http://www.ijme.in/151co07.html>, last accessed 16-02-2008.

39. Kebbell, Mark R, Gilchrist, Elizabeth, “Eliciting Evidence From Eyewitnesses In Court”, Adler, Joanna R, (ed.), *Forensic Psychology Concepts Debates and Practices*, ( 1st edn, Willian Publishing, UK 2004), 82-83.

captured terrorist knows the location of a ticking bomb that threatens hundreds of innocent lives; there is no time for reflection; a decision must be made”.<sup>40</sup> In such an adverse scenario should an exception be provided to the above-prescribed process of narco analysis by doing away with consent of the terrorist if he refuses to render it? In other words, should the State be given the power to impose narco analysis on the accused in such cases for the sake of public safety?

As discussed earlier in the paper, according to the guidelines laid down by the Supreme Court in *Nandini Satpathy v. P.L. Dani*<sup>41</sup>, Narco Analysis without informed consent of the accused would tantamount to ‘compelled self incrimination’, even if the result is not admitted as evidence in a Court of law. The Court in the above case made the observation that – “relevant replies which furnish a real and clear link in the chain of evidence indeed 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” .

Hence, once again it is reiterated that imposing Narco Analysis on the accused without his consent would be a blatant violation of Article 20(3). The issue in consideration here is whether in cases like the ‘ticking bomb scenario’, the fundamental rights can be dispensed with in interest of national security.

Numerous questions arise that make it impossible to even determine the exact scenario that Dershowitz imagines<sup>42</sup>. First, how are we to be certain that the terrorist knows the location of the bomb? How are we to be certain that there is a bomb? Moreover, how many lives need to be placed in jeopardy before the “ticking bomb” scenario comes into play? Also should “ticking bomb” be viewed literally? For, example, what if a suspect knew about the planned release of smallpox as a weapon?<sup>43</sup> Even if we could determine the number of lives at risk and the level of certainty that a crime has occurred or is about to occur, and that the suspect in custody has critical information, how do we assess the level of exigency and the inability to obtain the information through traditional means? Must the bomb literally be ticking- what if the information pertains to a plot to plant a bomb within a week or a month?<sup>44</sup> Of course, the longer the time period, the greater the chance that

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40. Dershowitz, Alan M, “Is it Necessary to Apply “Physical Pressure” to Terrorists – and to Lie About It?”, (1989)23 *Isr.L.Rev.*192.

41. (1978) 2 SCC 424.

42. Strauss, Marcy, “Torture”, (2003-04) 48 *N.Y.L.Sch.L.Rev* 201.

43. *Ibid.*

44. Kremnitzer, Mordecai, “The Landau Commission Report : Was the Security Service Subordinated to the Law, or the Law to the needs of the Security Service?”, (1989) 23 *Isr. L. Rev.* 216,264, (Landau Commission states that it maybe justifiable to employ special investigative tools like torture, etc to discover a bomb about to go off in a crowded building, and that there is no significant difference between a bomb set to explode in five minutes and one set to detonate in five days).

traditional methods of law enforcement will detect the plot. But the question is where should we draw the line?<sup>45</sup>

Hence it is submitted that no matter how much one tries to confine exceptional circumstances in which Narco Analysis should be imposed upon the accused, the temptation to broaden these circumstances is inevitable. If exceptions are provided, thereby allowing the imposition of Narco Analysis without the consent of the accused, it would in all probability lead to the exploitation of such an exception. Professor Kadish most eloquently summarizes such a danger in the words - "The legitimisation of repugnant practices in special cases inevitably loosens antipathy to them in all cases".<sup>46</sup>

Through this article, the researchers have attempted to establish the legal and constitutional validity of narco analysis as an investigative tool. Also, the suggested model seeks to lay out a path ahead for ensuring the legitimate and effective use of the procedure.

## **6.2 NEED FOR AN AMENDMENT IN THE CODE OF CRIMINAL PROCEDURE**

The Indian Legislature has given recognition to scientific tools of investigation like narco analysis in the form of the recent amendment to Section 53 of the Code of Criminal Procedure, in 2005. However, as has been highlighted in the model, there are many prerequisites for narco analysis to become an effective tool of investigation. The Code of Criminal Procedure in its present form does not provide for these prerequisites especially that of informed consent. In fact no provision in the Code of Criminal Procedure necessitates the consent of the accused before an investigation.

Hence, the researchers strongly advocate an amendment to the Code of Criminal Procedure on the lines of the proposed model. Mere recognition under the phrase 'such other tests' will not suffice considering the increasing use and relevance of the procedure in the present scene of criminal investigation.

Law is a living process and hence, the laws of a country should evolve according to changing needs and demands of the society it seeks to protect, foster and nurture. The criminal justice system in India just like other legal systems should embrace and imbibe developments and advances that take place in science as long as they do not violate fundamental legal principles and serve the good of the society.

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45. Strauss, Marcy, "Torture", (2003-04) 48 *N.Y.L.Sch.L.Rev* 201.

46. Kadish, Sanford, "Torture, State and the Individual", (1989)23 *Isr.L.Rev.*345,352.