

which do not receive any financial grants either from any State or Union Government but are directly or indirectly controlled by any State Government or Union Government, which shall include several Trusts, Wakf Boards, Religious Temples Trusts and Religious Endowments *etc.* and civil office shall also mean any office including any voluntary organization about whose functioning in the interest of public with or without State or Union budgetary allocation, an annual report is to be laid on the table of the either House of Parliament or on the table of the House of any State Legislature of any State.

On these similar lines, Article 191 of our Indian Constitution could be amended.

References:

1. Indian Parliament :- Select Speeches, Rulings and observations. by *Krishna Kant :Vice-President and Chairman of Rajaya Sabha*. Page:105.
2. Democracy The Global Perspectives by *Najma Heptulla* Conference of Presidents of the Parliaments of the Members States, of the Council of Europe and the G-8 Countries. Page:2.
3. Fifty Years of Indian Parliament by *G.C. Malhotra*: Editor: Secretary-General Lok Sabha: Published by Lok Sabha Secretariat New Delhi, 2002. Pages 35, 36, 38, 39, 44, 45, 49, 50, 53, 54, 66, 67, 79, 80, XVIII, XIX.
4. Law of Elections. by *Narendra Chapalgaonkar* Pages: 47, 48

NARCO ANALYSIS – RIGHT TO SELF INCRIMINATION VS PUBLIC INTEREST

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Narco Analysis figured prominently in the news recently yet again when it became eye of the storm and sparked off the debate when media played tapes of *Telgi*, accused subjected to Narco analysis procedure carried out by SIT on Dec 20, 21, 22, 2003 under permission from a Special Court dealing with cases under the Maharashtra Control of Organized Crime Act (MCOCA) located in Pune.

I interest in Narco Analysis 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

infringement of individual fundamental rights and questioned its value as evidence.

While Narco Analysis yielded an immense amount of information, it also triggered off many questions as several critics shared profound sense of skepticism over the administration of truth serum on the accused/ witness to extract truth. Doubting Thomasses had a field day.

The Narco analysis considered as tool or an Aid in collecting and supporting evidence. However doubts are raised whether it amounted to testimonial compulsion in judiciary and violation of human rights

individual liberties and freedom. Does application of Narco analysis test to extract truth amount to compulsion and violate Article 20(3)?

WHAT IS NARCO ANALYSIS TEST?

It is based on the principle that a person is able to lie by using his imagination and in Narco analysis this capacity for imagination is blocked or neutralized by leading him into semiconscious state and in this stage it becomes difficult for the person to lie and his answers would be restricted to facts he is already aware of.

The subject under investigation is injected with Sodium Pentothal or Sodium Amgtal. The dose varies depending on the person's sex, age, health and physical condition. The subject can answer specific but simple questions though not in a position to speak on his own. Since the semiconscious person is unable to manipulate, the answers given are believed to be spontaneous and true.

The interest in truth serum was generated when in 1922 Robert House discovered that a patient under the influence of drug administered "cannot create a lie" and there is no power to think or reason. The phrase "truth serum" appeared first time in the news in 1935. *Clarene W. Muenberger* started using barbiturate drugs on reluctant subjects which was only upheld in few cases. Soon it evolved into practice to extract truth from suspects using truth serums.

The questions that Narco analysis poses are many and varied. How truthful is truth serum? Is it just nothing but a drug induced confession? Doubts are raised whether the accused to undergo Narco analysis is violative of Article 20(3) of Constitution, which guarantees right against self incrimination. Article 20(3) of constitution states that "No person accused of any offence shall be compelled to be a witness against himself.

This privilege against self incrimination also provides the individual right to remain silent. However the judicial sanctions for these methods of truth extraction rests on the argument that guaranteed constitutional protection under Article 20(3) does not apply to investigation stage.

There have been several rulings of Courts from time to time upholding the validity of the Narco analysis test in collection of evidence and admissibility of evidence.

In case of *Ramachandra Vs State of Maharashtra*, the Bombay High Court recently ruled that subjecting the six of the accused in that multicore rupees fake stamp paper case to "certain physical tests involving bodily harm", such as Narco analysis lie detector tests did not violate any constitutional rights, specifically the right against self incrimination guaranteed by Article 20(3).

Article 20(3) deals with Right against self incrimination. The protection under Article 20(3) is available only against the compulsion of accused to give evidence against himself. But left to himself he may voluntarily waive his privilege by entering into the witness box or by giving evidence voluntarily on request and request implies no compulsion. Therefore, evidence given on request is admissible against the person giving it on administer the truth serum drug consent is prerequisite. Hence it cannot be considered as a compulsion.

In case *State Bombay Vs Kathikalu*, AIR 1961, it was held that to attract the protection of Article 20(3) it must be shown that the accused was compelled to make statement likely to be incriminative of himself. Compulsion means, duress which includes threatening, beating or imprisoning of wife, parent or child of a person. Thus where the accused makes a confession without any inducement, threat or promise, Article 20(3) does not apply.

In a well known case in *US, Solomon Vs US* 753 21522 which discussed in depth Narco analysis as investigative procedure established the truth serum is now generally accepted investigation procedure. However the experts cautioned that adequate safeguarding against unreliability should be taken.

In case of *Dinesh Dalmia Vs State of Madras* Crl July 2006, page 2401, it was held by Madras Court that scientific test of accused by conducting polygraphy, Narco analysis and Brain mapping test on accused to bring out truth would not amount to breaking his silence by force and intrusion of this constitutional right to remain silent under Section 45 of Evidence Act and under Article 20(3) of Constitution. Criminal proceedings taken to demystify the grey area of investigation and in this case when the accused refused to come forward with the truth, the scientific tests were restored to by investigating agency.

In case of *State of Maharashtra Vs Praful B Desai*, Supreme Court allowed the admissibility of evidence by video-conferencing, Fax, E-mail, Internet, Telephone. In this Judgment it is highlighted that judiciary is not merely limited to interpret and proclaim law but rather it moulds the devising principles in harmony with varying social needs.

Section 132 of Evidence Act does not exempt a witness from answering even incriminating questions. The privilege can be claimed only in a proceedings which is of criminal nature and before a court of law as Judicial tribunal which it empowers to take evidence. Hence this privilege does not extend to inquiry proceedings.

In case of *Mallay Vs. Hogan* 1964, L2 ED 25653 the Court ruled that "claim of witness of privilege against self incrimination has to be tested on a careful consideration of all the circumstances in the case and where it is clear that the claim is unjustified, the prosecution is unavailable."

Justice Douglas comment : As an original matter it might be debatable whether the provision of the amendment that no person shall be compelled in any case to be as a witness against himself" serves the ends of justice" 1952

Miranda 1966 3&4 US 436 Decision states " It is an act of responsible citizenship for individuals to give whatever information that may have to aid in law enforcement."

It is often observed that the law is what law does and not what law says. The First obligation of criminal justice system is to secure justice by seeking substantial truth through proof and care must be taken to preserve the dignity of individual and ends should justify the means. Freedom of the individual cannot be subjected to improper means however justified the ends are. Therefore there is a need to replace the third degree methods by better refined and sophisticated techniques. Thus we have to draw up clear lines between the whirlpool and rock where the safety of society and worth of human person may co-exist in peace. Hence those responsible for administering justice should strike a delicate balance between the two principles.

While the law continues to perform its traditional function there is a necessity to look at the scenario in the present day where multifaceted problems and issues the duties of state have to be expanded. Need for change is all the more relevant against the backdrop of alarming rise of terrorism, cyber crimes, economic offences and offences against the state. Further Law is not static it is dynamic. Hence it should keep changing according to requirement.

It is not out of context to state that while delivering the judgment in *Nandini Sapatthy* case in 1978, Justice *Krishna Iyer* cited the reference of *Olmstead Vs US* case in which it was observed "the quality of Nations civilization can be largely measured by the

methods it uses in the enforcement of its criminal law.” The use of degree of refined tools of evidence is the barometer of the advancement of civilization.

Roscoe Pound stated that the flexibility is the greatest virtue of law and thus its applicability should also be flexible rather than a rigid insistence of strict format. Justice of the situation shall have to be considered with a fair perception of such a concept rather than with a blinking light attention ought to be focused on a larger social perspective since law is meant for the society and if flexibility is its virtue, which law enjoys, its corresponding primary duty thus would be to change legal horizon and perspective with the appropriate socio-economic change. The law must follow the society rather than abandon the society and carry on its strict tract without any deviation or without being hindered of the social changes and thus resultantly face a social catastrophe”.

Oliver Wendell Holmes observed that the life of law has not been logic but has been experience

Since the Bombay High Court has allowed such procedures, its usage should be increasingly encouraged in grave offences. Narco analysis is particularly useful when there is a requirement to elicit require information for preventing any offences by terrorists. However its application must be assessed objectively so that it can be replaced by existing conventional methods of interrogation which brought shame, ignominy and disrepute to police leading to the erosion of credibility of criminal Justice system. Narco analysis can evolve as viable effective alternate to barbaric third degree methods. Care however must be taken to ensure that this procedure is not misused or abused by Investigating Officer and should be co-related with corroborative evidence.

The Irony of the modern law jurisprudence is that there are many learned counsels engaged to defend the rights of the

accused while there is none to defend the public cause and interest.

It is a travesty of fate that renowned group of criminal lawyers are hired to defend the individual rights of the accused as in case of *Abu Salem's* case, *Rabul Mahajan's* case, etc. while the voice of an over burden reluctant public prosecutor becomes a cry in the wilderness.

In Krushi and Charminar Bank Scam, thousands of depositors loss their life time earnings and savings meant for educating the kith and kin, to perform marriage of their children and Pensionery benefits vanished overnight shattering their dreams and pushing them to the brink of bankruptcy and suicides. Yet when the M.D. of Krushi Bank was nabbed, he refused to undergo Narco analysis procedure.

In such instances, if the right against self incrimination is upheld against the public interest and it would weaken the evidence and thereby denial of justice to the public. Murderers, money launderers, terrorists are allowed to walk away scott free exploiting the loopholes in the legal system. Ironically in all these issues we apply criminal procedure only to protect the individual freedom of the accused while rights and lifes of many people have been sacrificed. How can the right to incrimination against self will be upheld over the public interest? How can a choice be given to goon & culprits to protect his rights when the rights of thousands is violated. The ground norms of social justice according to *Jerry Bentham* utilitarian theory “The greatest good of greatest numbers” be applied while delivering the justice. In the interest of greatest good of members in the society, such crimes may be categorized, and should be tried by adopting special methods, and applying special rules in the interest of public or to safeguard the rights of common man.

The present criminal justice system is obsessed with individual liberty and freedom

and in this context a safe passage for goons and criminals due to weakness in the criminal justice system leading to dilution of evidence. It is based on the well known judicial dictum that "let hundred guilty go unpunished rather than an innocent is punished". This undue emphasis on individual freedom even in a criminal case and its over cautious implementation is facilitating the escape of terrorists and criminals.

Does jurisprudence guarantee individual rights against the state and public? Are there no rights of the public guaranteed against the individual?

Oliver Gold Smith observed in his masterpiece essay "The poor weep unheeded persecuted by every subordinate species of tyranny and every law which gives security to the others become an enemy to them. The world has disclaimed them and society has turned its back upon their distress and exposed them to nakedness and hunger.

The slightest misfortune of the greatest are exaggerated, elaborated with eloquence and hold upto our attention while miseries of the common people go unheeded."

It is apt to quote *J. Sabyasachi Mukberji* in *Beerbachan Singh Vs Satpal Singh* 1990 "A Judge does not preside over a criminal trial merely to see that no innocent man is punished, a judge also presides to see that a guilty man does not escape".

Both are public duties "justice cannot be made sterile on the plea that it is better to let hundred guilty escape than punish an innocent. 1990- CrJ – J.562, AIR 1990, S.C 209.

Fundamental rights themselves have no fixed content most of them are empty vessels into which each generation must pour its content in the light of its experience" – *Keshavananda Bharati Vs Kerala* 1973.

It was held by Supreme Court in *Keshavananda Bharathi* Case, the constitution,

principle are like hollow blocks and they have to be filled according to needs of the society.

In the present society corporate crimes have become a common phenomenon and the goons and criminal are exploiting the loopholes in the criminal laws by virtue of their money, muscle power and political connections.

To serve justice to the poor and to bring back the peace and tranquility in society, Narco analysis test has to be made compulsory in cases where the interest of public is involved and to uphold the lofty ideals and fundamental rights cherished in the constitution. It is the need of the hour to amend or to enact new laws for such different cases like this so that justice is delivered in a fair manner.

It was observed in *Keshavanand Bharati's* case that it could be termed as one launching pads on the trace of adopting the law to radical technological advancement in the delivery of justice.

Since the validity of the test and admissibility of Narco analysis is upheld taking into consideration the circumstances under which it was obtained, there is a little possibility of miscarriage of justice when administered as per procedure prescribed and observing the due safety precautions, the apprehension on the part of counsels of accused and critics is unwarranted.

The provision of administering Narco analysis test when made compulsory for the accused/witness in grave offences will pave the way for improving the quality of criminal justice through strengthening of evidence system. This move will brings about a qualitative change in the criminal justice and the erstwhile death chambers of police stations are replaced by operation theatres administering truth serum on the criminals and thereby offering a ray of hope that justice at last will prevail.