Introduction

As science has outpaced the development of law there is unavoidable complexity regarding what can be admitted as evidence in court. Narco-analysis is one such scientific development that has become an increasingly common term in India. Recent times have witnessed a spate in the use of modern scientific techniques such as the lie detector, brain-mapping and narco-analysis, for use in criminal investigation. Although the legal and ethical propriety of their use has been in doubt, they may in fact be a solution to many a complicated investigation. This article is outlined in a manner to study the evidentiary value of this test under the light of the Evidence Act.

Narco-analysis as an evidence in investigations

What is narco-analysis? The term “narco-analysis” was introduced in 1936 for the use of narcotics to induce a trance-like state wherein the person is subjected to various queries. The term “narco-analysis” is derived from Greek word “ανέκοντα” (meaning anaesthesia or torpor) and is used to describe a diagnostic and psychotherapeutic technique that uses psychotropic drugs, particularly barbiturates, to induce a stupor in which mental elements with strong associated affects come to the surface, where they can be exploited by the therapist. The term “narco-analysis” was coined by Horselle. The narco-analysis test is based on the principle that a person is able to lie using his imagination and, under the influence of certain barbiturates, this capacity for imagination is blocked or neutralised by leading the person into a semi-conscious state. It becomes difficult for the person to lie and his answers would be restricted to facts he is aware of. The statements made by the accused are recorded on audio and video cassettes, and the report of the expert is helpful in collecting evidence.

When it has been used? The first narco-analysis was done in the Forensic Science Laboratory, Bangalore in 2001 on an individual associated with offences committed by Veerappan. For conducting the test, NHRC has laid down certain guidelines to the effect that the test should only be administered if the consent of the subject is obtained before a Magistrate and therefore, the police cannot by themselves conduct the test whenever they deem appropriate.

These techniques are equally relevant in cases where conventional forms of crime have assumed immense proportion, say in the form of public outcry, or to make up for shortfalls in investigative processes, say, the instance of Abdul Karim Telgi in the stamp paper scam and several other suspects in the Aarushi murder case. They differ from usual investigative techniques in that they involve a certain degree of cooperation from the accused. Such cooperation need not be voluntary and in fact is often coercive in nature.

The law on the status of scientific tests for evidentiary purposes still is not absolutely clear. Recently, a Sessions Court in Faizabad in Uttar Pradesh accepted the report of a narco-analysis test, stating that it is evidence which can be relied upon, to reject a bail application in respect of a murder case. Fortunately, it was expressly treated as evidence only with respect to the bail application to indicate something of the nature of a prima facie case, and not for proving the statements of the accused against him to convict him.

It is interesting to note that the Forensic Science Laboratory in Gandhinagar in fact refused to conduct the test on a suspect when he did not give his consent. The Magistrate nevertheless ordered the laboratory to conduct the test. In 2006, in Krushi Coop. Bank case, however, the Supreme Court stayed the order of a Metropolitan Judge to conduct narco-analysis.

Utility in investigative processes

The scientific tests may be employed in two ways, that is, they may directly be used as evidence in court in a trial or they may be used merely as clues for investigation. Where the tests involve the making of a statement, they may be directly adduced in evidence, provided they do not amount to a confession because proof of a confession before a police officer or in the custody of a police officer is prohibited. However, if the statements are merely admissions, they may be adduced in evidence. Alternately, where no statement has been made or the statement cannot be adduced without an interpretation of the report prepared at the end of the test, the results of the test as interpreted by an expert may be furnished to the court.

A third alternative is whereby the statements may be used as proof of the specific knowledge of the accused with regard to those facts. Information about which has resulted in subsequent discoveries during the course of the investigation. Lastly, they may be used merely as clues for the investigation, where the statements are not adduced at
all in evidence. However, the evidence gathered from the investigation is independently used in evidence, without the statements.

Narco-analysis vis-à-vis the Evidence Act A. Expert evidence and criteria for appreciation The Evidence Act permits evidence of the opinion of persons (called experts under the Act itself) especially skilled upon a point of foreign law, science, art, or as to identity of handwriting or finger impressions, the opinions upon that point.18 Expert evidence is appreciated based on several factors such as the skill of the expert19 and the exactness of the science.20 If the science itself is imprecise, expert opinion is only of corroborative value and insufficient to secure a conviction by itself.21 The question which then arises is regarding the credibility of the evidence gathered from the narco-analysis tests, which is studied from a twofold perspective, firstly, as perceived by the scientific community, and secondly, as perceived by the courts.22

Acceptability of narco-analysis: US courts The Ninth Circuit Court had excluded a recording of an interview conducted under the influence of sodium pentathol23 and psychiatric testimony in support of it.24 The use of sodium amytal (a successor of sodium pentathol) or truth serum narco-analysis was prohibited by the New Jersey Supreme Court in State v. Pitts25 on the ground that the results of the tests are not scientifically reliable and that it was possible for the subjects to fill lacunae in stories (known as hyperamnesia) or to believe in false events, or to do a hypnotic recall, whereby thoughts of non-existent events are believed by the subject.

B. Admissions and confessions In the lie detector test, the accused is not obliged to make a statement, as he may choose not to answer the question at all.26 However, the statements in fact made under the scientific tests may be classified into admissions or confessions,27 as they suggest an inference as to a fact, including a blanket denial of any knowledge of the crime, or the statement may substantively admit to the commission of the crime itself. Confessions made to the police by way of such statements are inadmissible in evidence as no confession made to a police officer28 or in the presence of a police officer is admissible,29 unless made in the immediate presence of a Magistrate. The only event in which they may be admissible is when they are made before a Magistrate. Before a confession is made before a Magistrate, the Magistrate is to explain to the subject that he is not bound to make such a confession and the Magistrate may only record it if he believes that it is being made voluntarily.30 The narco-analysis test, on the other hand proactively involves the making of statements by the accused. However, a Magistrate would not record the statements as they are involuntary and induced31 and also not reliable.32 They may be useful for investigative purposes as the latter inherently entail a significant bit of trial and error work, but they may not be perfectly accurate all the time to be recorded as evidence and relied for conviction.

Admissions made to police officers are admissible in evidence. This causes problems with the lie detector and brain-mapping tests as the police may prefer a longer investigation. Admissions nevertheless, are caught by the general rule stating that no statement made in course of an investigation, even if reduced to writing, is to be signed by the maker.33 Further, even if the statement is oral, and the factum of its being made to a police officer is proved, it cannot be used as evidence.34

The last way of offering any statement in evidence, whether confession or not, is by adducing it alongside a discovery made pursuant to the statement. This makes it a cakewalk for the investigation as it can conduct narco-analysis and discover all the incriminating material that is required, and offer the statement in conjunction with the recovery. However, a recovery under Section 27 will not be admissible if compulsion has been used in obtaining the information leading to it.35 The possibility of the element of compulsion under the narco-analysis test has been recognised if the statements made under its influence are sought to be adduced in evidence and if they are incriminatory, in which case they are to be excluded. This conclusion shall restrict the application of Section 27 of the Evidence Act which allows adducing statements made to police officers if they are supported by subsequent discoveries such that statements made under the influence of narco-analysis shall be excluded as coerced. However, whether the discoveries made pursuant to those statements shall also be excluded has not been assessed by the judiciary.

Illegally obtained evidence: still admissible In R. v. Leatham36 we find the oft-quoted statement of Crompton, J., “accept matters not how you get it; if you steal it even, it would be admissible.” What is a matter of concern is that courts in India and elsewhere have chosen to apply this remark to a wide range of situations where the right to a person’s liberty and privacy is at stake.

The vast strides that have been made in the field of technology in the recent past have brought people closer like never before. As long as criminals and terrorists seek to misuse technology in pursuance of their evil motives, the Governments the world over will continue to use technology to invade our private spaces, which incidentally, are rapidly shrinking. This brings us to the question; does it take a thief to catch a thief? Should States imperil the liberty and the right to privacy of entire populations in order to apprehend a miniscule number of dangerous deviants? The decision of the Supreme Court in Malkani case37 is argued to be disappointing because it left the police free to steal evidence and the Court to admit the stolen evidence. Jurists have criticised Ray, J.’s opinion by noting that he had refused to attach the respect due to the means by which the end could be achieved; this makes the judiciary system and the police system partners in crime.38

Till today, due to the lack of a final and clear-cut judgment on the same, illegally or falsely obtained evidences are still
Arguments against giving evidentiary value to narco-analysis  The Constitution of India has clearly stated that a person cannot be compelled to be a witness against himself, and therefore, any statement given during the narco-analysis test cannot be considered evidence in the constitutional framework of the country. In fact, studies have shown that sometimes the subject (person undergoing the test) gives false statements during the test. If the test was given evidentiary value, the police would harass innocent persons under the garb of tackling terrorism. The principle of the Indian legal system is based on the fact that until proved guilty, a person is innocent and we cannot convict an innocent even if we need to surrender hundred criminals. With such objectives in mind subjecting a person to narco-analysis without his consent will be surely undermining his individual rights which are absolutely negating the principle of a right based society.

Narco-analysis is carried out only after a detailed medical examination of the accused. If the accused is found medically fit to undergo the procedure, then only will it be done, otherwise not. However, it has been argued in various cases that sodium pentathol or sodium amytal is a barbiturate and thus has ill effects on the body.

The use of evidence obtained under duress has been prohibited by the Human Rights Committee by stating: the law must prohibit the use of admissibility in judicial proceedings of statements or confessions obtained through torture or other prohibited treatment. The Committee has further stated that, the law should require that evidence provided by any form of compulsion is wholly unacceptable.

In India Article 20(3) and Section 161(2) of the Code of Criminal Procedure protect the accused from self-incrimination. Article 20(3) and Section 161(2) of the Code of Criminal Procedure states, No person accused of any offence shall be compelled to be a witness against himself and No person shall be bound to answer truly all questions relating to such an offence. In Nandini Sathpathy v. P.L. Dani, it was held that no one could forcibly extract statements from the accused that have the right to keep silent during the course of interrogation or investigation. However Article 20(3) can be waived of by a person himself.

Section 45 of the Evidence Act, 1872 does allow experts opinions in certain cases. However, this section is silent on other aspects of forensic evidence that can be admissible in court in criminal proceedings.

To judge whether statement given is confession or not, is by adducing it alongside a discovery made pursuant to the statement. Some writers are in opinion that in cases where an incriminatory set of statements is additionally backed by discoveries which are sufficient to incriminate the accused independently of the statements, then the discoveries too should be excluded from evidence. This is because the discoveries, which comprise all the evidence that is required for conviction, directly follow from incriminatory statements of the accused. However, where the discoveries are not sufficient to result in incrimination, but only amount to evidence of some facts against the accused, they may be admissible in evidence, as they are merely the equivalent of admissions as they require collection of additional evidence.

Arguments for giving evidentiary value to narco-analysis  In United States v. Solomon there was a detailed discussion on the topic of narco-analysis. In this case the expert opinion given to the Court established that truth serum is generally accepted as an investigative technique. It need not be said that prevention of crime and punishment for the crime are the duties of the State. Fetters on these duties can be put only in extreme cases where the protection of fundamental rights weigh more than the fundamental duty cast on the State moreover every person is required to furnish information regarding offences.

Protection against self-incrimination was instrument for the protection of the innocent and not intended for the acquittal of the guilty. The framers of the Bill of Rights believed the rights of society were paramount to the rights of the criminal. Believing in the same principle in a spate of high-profile cases, such as those of the Nithari killers, the Mumbai train blasts, Aarushi murder case, Malegaon blasts and the most recent Mumbai blasts case suspects have been made to undergo narco-analysis, drugged with the sodium pentathol.

Judiciary and the State Government seem to have supported this practice. Furthering its support the Supreme Court has held that the right to life includes right to health but subjecting a person to a scientific test as part of investigation will not amount to denial of health. Therefore it will not amount to denial of reasonable and just procedure.
In today’s complex social milieu with proliferating crimes against the society and the integrity of the country, it is necessary to keep in mind the interest of the society at large and the need for a thorough and proper investigation, as against individual rights, while ensuring that the individual constitutional rights are not infringed. If these tests are properly considered to be steps in the aid of investigation and not for obtaining incrimination statements, there is no constitutional infirmity whatsoever. Section 53 of the Criminal Procedure Code accords the requisite statutory sanction for conducting these tests. The use of such other tests in Section 53 CrPC includes in its ambit polygraph, brain-mapping and narco-analysis.

The Bombay High Court, in a significant verdict in Ramchandra Ram Reddy v. State of Maharashtra59, upheld the legality of the use of P300 or brain-mapping and narco-analysis test. The Court also said that evidence procured under the effect of narco-analysis test is also admissible. As crimes going hi-tech and criminals becoming professionals, the use of narcoanalysis can be very useful, as the conscious mind does not speak out the truth, unconscious may reveal vital information about a case.60 The judgment also held that these tests involve minimal bodily harm. Surender Koli, main accused in the Nithari case, was brought to Forensic Science Laboratory in Gandhinagar in January 2007 for narco-analysis. Polygraph test was conducted on Moninder Singh Pandher and his servant Surender Koli, accused of serial killing of women and children in Nithari, to ascertain the veracity of their statements made during their custodial interrogation. Various confessional statements were made by the accused under the effect of the drug, he could remember the names of the females he had murdered and revealed his urge to rape them after murdering them.

Post Selvi case: highlighting the present position In Selvi v. State of Karnataka61, the Supreme Court rejected the High Courts’ reliance on the supposed utility, reliability and validity of narco-analysis and other tests as methods of criminal investigation. First, the Court found that forcing a subject to undergo narco-analysis, brain-mapping, or polygraph tests itself amounted to the requisite compulsion, regardless of the lack of physical harm done to administer the test or the nature of the answers given during the tests. Secondly, the Court found that since the answers given during the administration of the test are not consciously and voluntarily given, and since an individual does not have the ability to decide whether or not to answer a given question, the results from all three tests amount to the requisite compelled testimony to violate Article 20(3).

The Supreme Court found that narco-analysis violated individuals’ right to privacy and amounted to cruel, inhuman or degrading treatment. Article 21 protects the right to life and personal liberty, which has been broadly interpreted to include various substantive due process protections, including the right to privacy and the right to be free from torture and cruel, inhuman, or degrading treatment.

However, any information or material that is subsequently discovered with the help of voluntary administered test results can be admitted, in accordance with Section 27 of the Evidence Act. The Supreme Court left open the possibility for abuse of such tests when it provided a narrow exception, almost as an afterthought, namely, that information indirectly garnered from a voluntary administered test can be admitted as evidence. The power of the police to coerce suspects and witnesses into doing or not doing certain things is well known. It is highly probable that the same techniques will be applied to get suspects or witnesses to confess or to narco-analysis and other tests, resulting in a mockery of the essence of the Supreme Court’s judgment.

Criticism of narco-analysis test as an evidence Narco-analysis has been criticised on the ground that it is not hundred per cent accurate. It has been found that certain subjects made totally false statements. It is often unsuccessful in eliciting truth as such it should not be used to compare the statement already given to the police before use of drug. It has been found that a person has given false information even after administration of drug. It is not much help in case of malingers or evasive, untruthful person. It is very difficult to suggest a correct dose of drug for a particular person. The dose of drug will differ according to will power, mental attitude and physique of the subject. Successful narco-analysis test is not dependent on injection.

For its success a competent and skilled interviewer is required who is trained in putting recent and successful questions. Narco-analysis test is a restoration of memory which the suspect had forgotten. This test result may be doubtful if the test is used for the purposes of confession of crimes. Suspects of crimes may, under the influence of drugs, deliberately withhold information or may give untrue account of incident persistently. Narco-analysis is not recommended as an aid to criminal investigation. In medical uses like in treatment of psychiatric disorder narco-analysis may be useful. Unless the test is conducted with the consent of the suspect it should not be used in criminal investigation.

Conclusion It has become absolutely necessary for the State Governments to work with the Central authorities to enhance the investigative capabilities of their police departments. The Indian criminal justice system has an alarmingly low conviction rate and the situation needs to be rectified with emphasis on real science and state-of-the-art technology. The Central Government must make a clear policy stand on narco-analysis. The legal system should imbibe developments and advances that take place in science as long as they do not violate fundamental legal principles and are for the good of the society. Narco-analysis for criminal interrogation has proved to be a valuable technique, which profoundly affects both the innocent and the guilty and thereby hasten the cause of justice which has seen in various
cases like the Aarushi murder case, Nithari killings case, Telgi scam and Mumbai blasts case.

Courts in India have taken into account an incomplete consideration of the law, which is the reason for their conclusion in favour of the tests. While the tests may be a practical necessity, the sanction of the law for some of them is difficult to find, and extensive safeguards need to be laid out to prevent their abuse. It is time for our legislature and judiciary to act immediately for the sake of justice and fair procedure to bring narco-analysis within the scope of Article 20(3) of the Constitution.

The manner in which modern-day criminals make use of science and technology in perpetrating their criminal activities with relative impunity has compelled rethinking on the part of the criminal justice establishment to seek the help of the scientific community to come to the help of the police, prosecutors and the courts. The criminal procedure, rules of evidence, and the institutional infrastructure designed more than a century ago, are now found inadequate to meet the demands of the scientific age. The absence of a national policy in criminal justice administration in this regard, is felt to be a serious drawback. The Evidence Act may need to be amended to make scientific evidence admissible as "substantive evidence" rather than "opinion evidence" and establish its probative value, depending on the sophistication of the scientific discipline concerned.

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- Teena Thacker, "Sees Narco-Analysis As Torture", http://www.expressindia.com/latest-news/UN-Sees-narcoanalysis-as-torture/321986/; See also, Selvi v. State, supra, n. 7, 18, stating that experts or doctors are more willing to cooperate with the police in investigation if there is an order of a Magistrate to that effect. However, the case does not stipulate the consent of the subject as a mandatory prerequisite for administration of the test.
- Sections 25-26 of the Evidence Act, 1872.
- Section 17 of the Evidence Act, 1872 defines admission as a statement, oral or documentary or contained in electronic form which suggests any inference as to any fact in issue or relevant fact.
- Section 27 of the Evidence Act, 1872.
- Section 45 of the Evidence Act, 1872.
- See, Shashi Kumar Banerjee v. Subodh Kumar Banerjee, AIR 1964 SC 529, wherein the Supreme Court held that an expert's evidence as to handwriting being opinion evidence can rarely, if ever, take the place of substantive evidence.
- Section 24 of Evidence Act.
- Ibid.
- (1861) 8 Cox CC 498 : (1861-73) All ER Rep Ext 1646 : 121 ER 589.
- Supra, n. 37.
- Article 20(1) of the Constitution of India.
- â€œNarco-Analysis Test has No Evidentiary Valueâ€• Indian Express, 27-9-2009 www.indianexpress.com/.../narco-analysis.../522000/.
- Rojo George, supra, n. 7.
- Harold I. Kaplan, MD and Benjamin J. Sadows, Comprehensive Text Book of Psychiatry (6th Edn., Chapter 32.6).
- Supra, n. 22.
- 753 F 2d 1522 (9th Cir 1985).
- Selvi, supra, n. 7.
- Dr. R.E. House, â€œFirst Annual Meeting of the Eastern Society of Anesthetistsâ€• 1925; Herzog A.W., â€œMedical Jurisprudence Indianapolisâ€• 1931.
- Ibid.
- See, supra, n. 7.
- WP (Cri) No. 1664 of 2004, para 26 (Kant).
- Ibid, paras 161 & 165.
- The Constitution of India, Article 21.
- Ibid.
- Supra, n. 60.
- Supra, n. 22.