

## **Use of narco analysis, brain-mapping unconstitutional: Court**

J. Venkatesan

*It amounts to **unwarranted intrusion into personal liberty**, says three-judge Bench*

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*None should be forcibly subjected to such techniques*

*Test results by themselves cannot be admitted as evidence*

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New Delhi: **In a major blow to investigating agencies, the Supreme Court on Wednesday held unconstitutional and violation of the 'right to privacy' the use of narco analysis, brain-mapping and polygraph tests on accused, suspects and witnesses without their consent.**

A three-Judge Bench of Chief Justice K.G. Balakrishnan and Justices R.V. Raveendran and J.M. Panchal, in a 251-page judgment, said: **"We hold that no individual should be forcibly subjected to any of the techniques in question, whether in the context of investigation in criminal cases or otherwise. Doing so would amount to an unwarranted intrusion into personal liberty."**

The judges said: "The compulsory administration of the impugned techniques violates the right against self-incrimination. The test results cannot be admitted in evidence if they have been obtained through the use of compulsion. Article 20 (3) of the Constitution [No person accused of any offence shall be compelled to be a witness against himself] protects an individual's choice between speaking and remaining silent, irrespective of whether the subsequent testimony proves to be inculpatory or exculpatory."

The Bench said: "Article 20 (3) aims to prevent the forcible conveyance of personal knowledge that is relevant to the facts in issue. The results obtained from each of the impugned tests bear a testimonial character and they cannot be categorised as material evidence."

Narco analysis technique involves the intravenous administration of sodium pentothal, a drug which lowers inhibitions on part of the subject and induces the person to talk freely. The other two techniques measure changes in aspects such as respiration, blood pressure, blood flow, pulse and galvanic skin resistance. The truthfulness or falsity on part of the subject is assessed by relying on the records of the physiological responses.

### **Legality examined**

The Bench, in a batch of appeals and petitions, examined the legality in the administration of these scientific techniques.

Writing the judgment, the CJJ said: "It is our considered opinion that subjecting a person to the impugned techniques in an involuntary manner violates the prescribed boundaries of privacy."

**Forcible interference with a person's mental processes is not provided for under any statute and it most certainly comes into conflict with the right against self-incrimination.**

The results obtained through the involuntary administration of either of these tests come within the scope of 'testimonial compulsion,' thereby attracting the protective shield of Article 20 (3).

The Bench held that if these techniques were used compulsorily it would violate Article 20 (3).

The Bench made it clear that even when the subject had given consent to undergo any of these tests, the test results by themselves could not be admitted as evidence because "the subject does not exercise conscious control over the responses during the administration of the test. However, any information or material that is subsequently discovered with the help of voluntarily administered test results can be admitted, in accordance with Section 27 of the Evidence Act."

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## SC rules against forced Narco, Polygraph & Brain-mapping tests

### Narco-analysis test

Narco-analysis is also known as the truth serum test. The subject is administered a chemical in controlled laboratory circumstances under supervision of doctors. This puts the subject in a state of hypnosis. It is believed that during the test inhibitions are reduced and answers cannot be manipulated. The dose of the chemical depends on the person's sex, age, health and physical condition. An overdose can result in a person going into a coma, or even death.



### Polygraph test

A polygraph (also known as a lie detector) is an instrument that records several physiological parameters like blood pressure, pulse, breathing, and skin conductivity while the subject is asked a series of questions, with the assumption that misleading answers will produce physiological responses that can be differentiated from those associated with non-misleading answers.



### Brainmapping test

This test is done to find out if a suspect's brain recognizes things related to a crime. The subject is first interrogated to find out whether he is concealing any information. Sensors are then attached to the subject's head. He is then shown certain images or made to hear certain sounds. The sensors monitor electrical activity in the brain and register "P300" waves, which are generated only if the subject has a connection with the stimulus provided (images or sound).



KNN Infographics

New Delhi: The Supreme Court on Wednesday said it would be failing in its duty if it permitted any citizen to be forcibly subjected to narco-analysis, brain mapping and polygraph tests in violation of his privacy. Notwithstanding the fact that its judgment would benefit hardened criminals who had no regard for societal values, the court had a constitutional right to protect the rights of citizens.

A three-judge Bench headed by Chief Justice of India K.G. Balakrishnan said: "One of the main functions of constitutionally prescribed rights is to safeguard the interests of citizens in their interactions with the government. As guardians of these rights, we will be failing in our duty if we permit any citizen to be forcibly subjected to these tests."

## Unjustified intrusion

**Irrespective of the need to expedite investigations in sensitive cases, no person, who was a victim of an offence, could be compelled to undergo any of these tests. Such forcible administration would be an unjustified intrusion into mental privacy and could lead to further stigma for the victim.**

**“It must be borne in mind that in constitutional adjudication our concerns are not confined to the facts at hand but extend to the implications of our decision for the whole population as well as future generations.”**

The Bench said: “Forcing an individual to undergo any of these techniques violates the standard of ‘substantive due process’ which is required for restraining personal liberty. Such a violation will occur irrespective of whether these techniques are forcibly administered during the course of an investigation or for any other purpose since the test results could also expose a person to adverse consequences of a non-penal nature.”

## Inhuman treatment

On the contention that these techniques could be read into the statute within the ambit of ‘medical examination’ in the Criminal Procedure Code, the Bench said such an expansive interpretation was not feasible. **“It would also amount to cruel, inhuman or degrading treatment with regard to the language of evolving international human rights norms. Furthermore, placing reliance on the results gathered from these techniques comes into conflict with the right to a fair trial. Invocations of a compelling public interest cannot justify the dilution of constitutional rights such as the right against self-incrimination.”**

The Bench said: “It is also quite conceivable that a person could make an incriminating statement on being threatened with the prospective administration of any of these techniques. Conversely, a person who has been forcibly subjected to these techniques could be confronted with the results in a subsequent interrogation, thereby eliciting incriminating statements. While the scheme of criminal procedure as well as evidence law mandates interference with physical privacy through statutory provisions that enable arrest, detention, search and seizure, among others, the same cannot be the basis for compelling a person ‘to impart personal knowledge about a relevant fact’.”

The Bench said: “It is also quite conceivable that an individual may give his/her consent to undergo the said tests on account of threats, false promises or deception by the investigators. For example, a person may be convinced to give his/her consent after being promised that this would lead to early release from custody or dropping of charges. However, after the administration of the tests the investigators may renege on such promises. In such a case, the relevant inquiry is not confined to the apparent voluntariness of the act of undergoing the tests, but also includes an examination of the totality of circumstances. **The questionable scientific reliability of these techniques comes into**

**conflict with the standard of proof 'beyond reasonable doubt' which is an essential feature of criminal law."**

### **"Only an aid"**

The former CBI Director, R.K. Raghavan, welcoming the judgment, said: "These tests are a dubious tool in the hands of the investigator. It [test] has been more romanticised than the real benefit in the investigation. Within my knowledge, it has not served any useful purpose in any major investigation. It is only an aid."

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The Supreme Court's judgment holding forced narcoanalysis unconstitutional represents a turning point in its history.

### **Right to privacy**

**In the context of Article 21 of the Constitution (which guarantees that no person shall be deprived of his life or personal liberty except under the procedure established by law), the court held that a person's right to make a statement or remain silent involves the exercise of the right to privacy. Thus, compelling a person to make a statement would amount to a contravention of Article 21 as well. It thus broadened the understanding of the terms "privacy" and "personal liberty" under Article 21.**

**Terming as circular logic the argument that not having these tests would lead to the police using conventional third degree methods, the court refused to uphold the constitutionality of the tests on this ground. In holding that the tests amounted to "cruel, inhuman or degrading treatment", thus contravening Article 21, the court stated that the threshold for proving the same was lesser than that of proving "torture".**

THE Supreme Court's approach to matters of national security has long been guided by "minimalism" - a doctrine that enables the court to settle pending disputes rather than articulate deeper constitutional principles. When confronted with competing claims of national security and Fundamental Rights, the court has played the role of a mediator rather than a guardian of Fundamental Rights. In doing so, it has shown more concern for procedural safeguards and compliance rather than addressing substantive issues.

Whenever anti-terror laws have been challenged before it, the Supreme Court has deferred to the legislative branch. It has, to cite a few instances, upheld the validity of the Preventive Detention Act, 1950, the Terrorist and Disruptive Activities (Prevention) Act, 1985 and 1987, and the Prevention of Terrorism Act, 2002.

The court's attitude to cases of national security represents a paradox. In most other cases, the court has sought to maximise liberty. Many legal scholars, therefore, wonder whether the court is guilty of an opportunistic role reversal, smacking of judicial escapism.

These scholars were in for a surprise on May 5 when the court, in *Selvi vs State of Karnataka*, abandoned its exceptionalism in the adjudication of terror-related cases.

No to narcoanalysis

Selvi's daughter Kavita had married Shivakumar of a different caste against the wishes of her family. Shivakumar was brutally killed in 2004, and Selvi and two others became the suspects. Since the prosecution's case depended entirely on circumstantial evidence, it sought the court's permission to conduct polygraphy and brain-mapping tests on the three persons. The court granted permission and the tests were conducted. When the results of the polygraphy test indicated signs of deception, the prosecution sought the court's permission to perform narcoanalysis on the three persons. The magistrate directed the three to undergo narcoanalysis. All of them challenged this decision in the Karnataka High Court, but failed to get relief. They then went in appeal to the Supreme Court.

The Supreme Court, in a remarkable shift from its minimalist approach, held that compulsory brain-mapping and polygraph tests and

narcoanalysis were in violation of Articles 20(3) and 21 of the Constitution. The key sentence is in Paragraph 220 of the judgment:

"In constitutional adjudication, our concerns are not confined to the facts at hand but extend to the implications of our decision for the whole population as well as future generations."

While deciding Selvi's appeal, along with some 10 similar appeals, the Supreme Court Bench comprising Chief Justice K.G. Balakrishnan and Justices R.V. Raveendran and J.M. Panchal relied heavily on the court's judgment in Nandini Satpathy vs P.L. Dani in 1978. In that case, decided by a three-judge Bench headed by Justice V.R. Krishna Iyer, narcoanalysis was not an issue as it was not in use then as an investigative tool.

#### Nandini Satpathy case

Nandini Satpathy, the former Chief Minister of Orissa, was directed to appear at the Vigilance Police Station, Cuttack, in connection with a vigilance case against her. Nandini Satpathy was given a long list of questions in writing about her alleged acquisition of assets disproportionate to her known sources of income. She exercised her right under Article 20(3) of the Constitution and refused to answer the questions. Article 20(3) guarantees that no person accused of any offence shall be compelled to be a witness against oneself.

The Deputy Superintendent of Police, Vigilance, Cuttack, filed a complaint against Nandini Satpathy under Section 179 of the Indian Penal Code (refusing to answer a public servant authorised to question) before the Sub Divisional Judicial Magistrate, Cuttack. When the magistrate issued her summons of appearance she challenged it before the High Court, saying the umbrella of Article 20(3) and the immunity under Section 161(2) of the Criminal Procedure Code (CrPC) were wide enough to shield her in her refusal. Section 161(2) of the CrPC does not bind a person to answer questions where the answers had a tendency to expose the person to a criminal charge or to a penalty or forfeiture.

When the High Court rebuffed her, Nandini Satpathy appealed to the Supreme Court.

Justice Krishna Iyer, who allowed her appeal and quashed the magistrate's proceedings against her, said in his judgment that the very act of directing a woman to come to a police station in violation of Section 160(1) of the CrPC may make for tension and negate voluntariness. Besides, it was likely that some of the questions posed to her were self-incriminatory.

It was in this case that the Supreme Court laid down that the prohibitive sweep of Article 20(3) went back to the stage of police investigation.

Justice Krishna Iyer held that an accused person was entitled to keep his or her mouth shut if the answer had a reasonable prospect of exposing him or her to guilt in some other accusation, actual or imminent, even though the investigation under way was not with reference to that. However, Justice Iyer said an accused was bound to answer where there was no clear tendency to criminate. He also held that the observance of the right against self-incrimination was best promoted by conceding to the accused the right to consult a legal practitioner of his or her choice.

In its May 5 judgment, the Supreme Court revisited the issues raised in the Nandini Satpathy case in the light of the challenge to the involuntary administration of narcoanalysis, polygraph examination and the Brain Electrical Activation Profile (BEAP) tests for improving investigation efforts in criminal cases.

Narcoanalysis involves the intravenous administration of sodium pentothal, a drug that lowers a person's inhibitions and induces him or her to talk freely. Empirical studies suggest that the drug-induced revelations need not necessarily be true.

Polygraph examination and the BEAP tests serve the respective purposes of detecting lies and gauging the subject's familiarity with information relating to a crime. These techniques, wherein inferences are drawn from the physiological responses of the subject, are essentially confirmatory in nature. Their reliability has been questioned repeatedly in empirical studies. In the context of criminal cases, the reliability of scientific evidence bears a causal link with several dimensions of the right to a fair trial, including the need for the requisite standard of proving guilt beyond reasonable doubt and the right of the accused to present a defence.

An essential safeguard

The "right against self-incrimination" is now viewed as an essential safeguard in criminal procedure. Its underlying rationale corresponds broadly with the objectives of ensuring the reliability of statements made by an accused and ensuring that such statements are made voluntarily.

The Supreme Court said that even if involuntary statements were proved true, the law should not incentivise the use of interrogation tactics that violated the dignity and bodily integrity of the person being

examined. In this sense, the "right against self-incrimination" was a vital safeguard against torture and other "third-degree methods" that could be used to elicit information. The frequent reliance on such "short-cuts" would compromise the diligence required for conducting meaningful investigations, the court said.

The Supreme Court made a distinction between "physical evidence" and "testimonial evidence". While bodily substances such as blood, semen, sputum, sweat, hair and fingernail clippings could be readily characterised as physical evidence, the same could not be said for the techniques in question. Taking this logic forward, the court broadened the understanding of "testimonial evidence" to include not only statements or gestures but also physiological responses, which are "communicative" in nature as well.

The court held that in a polygraph test and a brain-mapping test, the subject makes a mental effort, which leads to a physiological response. Thus the person ends up imparting personal knowledge about relevant facts, which brings these techniques within the purview of the ban imposed by Article 20(3) of the Constitution. Therefore, the court held that the results of these tests should be treated as testimonial acts for the purpose of invoking the right against self-incrimination.

## **Right to privacy**

**In the context of Article 21 of the Constitution (which guarantees that no person shall be deprived of his life or personal liberty except under the procedure established by law), the court held that a person's right to make a statement or remain silent involves the exercise of the right to privacy. Thus, compelling a person to make a statement would amount to a contravention of Article 21 as well. It thus broadened the understanding of the terms "privacy" and "personal liberty" under Article 21.**

The judgment read Article 20 into Article 21. In the process it declared the impugned tests to be unconstitutional even in respect of civil proceedings.

Another far-reaching ruling of the court is that the presumption of a person being in a custodial environment would apply irrespective of whether he/she has been formally accused or is a suspect or a witness. The court thus plugs the loopholes that the police use to contravene provisions relating to custodial interrogation.

In the Nandini Satpathy case, the court had ruled that an accused had a right to legal counsel, but such right did not extend to counsel being present during interrogation. In the Selvi case, the court

stated that the tests negated the right to counsel since counsel would not be able to advise his/her client when the tests were being conducted.

This, in the opinion of Mrinal Satish, a visiting professor at the National Law School of India University, Bangalore, extends the right to counsel to not only providing advice before interrogation but to being present at the time of interrogation. This is a welcome move, says Satish on the Legal Developments blog and adds that it will definitely have interesting implications in the context of the interrogation of suspects.

The court rejected the argument of "compelling public interest", especially against terror suspects. It held Articles 20 and 21 to be non-derogable and under the Constitution they could not be suspended even during a state of emergency. Thus, it held that the impugned tests could not be conducted on terror suspects against their consent.

**Terming as circular logic the argument that not having these tests would lead to the police using conventional third degree methods, the court refused to uphold the constitutionality of the tests on this ground. In holding that the tests amounted to "cruel, inhuman or degrading treatment", thus contravening Article 21, the court stated that the threshold for proving the same was lesser than that of proving "torture".**

The court made it clear that even when a person gives consent to undergo any of these tests, the results by themselves cannot be admitted as evidence because the person does not exercise conscious control over the responses during the administration of the test. However, any information or material that is subsequently discovered with the help of voluntarily administered test results can be admitted in accordance with Section 27 of the Evidence Act, it held. For this purpose, the court made it mandatory to follow strictly the guidelines laid down by the National Human Rights Commission (NHRC) in 2000 for administering the polygraph test. It wanted similar safeguards to be adopted for conducting the narcoanalysis technique and the BEAP test.

NHRC guidelines

The NHRC's guidelines are as follows:

(i) No lie detector tests should be administered except on the basis of consent of the accused. An option should be given to the accused whether he wishes to avail himself of such test. (ii) If the accused volunteers for a lie detector test, he should be given access to a lawyer, and the physical, emotional and legal implication of such a test should be explained to him by the police and his lawyer.

(iii) The consent should be recorded before a judicial magistrate.

(iv) During the hearing before the magistrate, the person alleged to have agreed should be duly represented by a lawyer.

(v) At the hearing, the person in question should also be told in clear terms that the statement that is made shall not be a "confessional" statement to the magistrate but will have the status of a statement made to the police.

(vi) The magistrate shall consider all factors relating to the detention, including the length of detention and the nature of interrogation.

(vii) The actual recording of the lie detector test shall be done by an independent agency (such as a hospital) and conducted in the presence of a lawyer.

(viii) A full medical and factual narration of the manner of the information received must be taken on record.

Chief Justice Balakrishnan, who authored the judgment, close to his retirement on May 11, cited Justice Aharon Barak of the Supreme Court of Israel, in defence of the Bench's ruling against coercive methods to obtain information from suspects. He cited Justice Barak as having said: "... This is the destiny of democracy, as not all means are acceptable to it, and not all practices employed by its enemies are open before it. Although a democracy must often fight with one hand tied behind its back, it nonetheless has the upper hand. Preserving the 'Rule of Law' and recognition of an individual's liberty constitutes an important component in its understanding of security."

Justice Balakrishnan, in his interviews to the media, has generally been supportive of special legislation aimed at countering terrorism. So observers hope that the judgment in the Selvi case is not just a flash in the pan but represents a real shift in the court's attitude to terror adjudication.

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**For Full Judgment please click the link below:**

**Smt.Selvi & others Vs. State of Karnataka:**

**<http://www.indiankanoon.org>**