Admissibility and Evidentiary value of DNA, Narco Analysis. Research upon their constitutionality.

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ABSTRACT

Any suit or criminal proceeding is instituted for the purpose of claiming some right for one self or denying some right of the other person or to impute liability upon the other person. It is the duty of the party taking matter to the court to prove such liability or right.

Such right or liability or the nature and the extent cane be proved by the party concerned by proving certain facts, these facts are known as Fact in Issue.

Evidence act 1872 provides for the admissibility or legal relevancy of fact from section 6-58, however evidence act is silent about the reliability of fact and leaves it upon the judicial officer to apply his judicial mind as per the case and circumstances.

With the modern methods available viz Lie detection test, Narco analysis test e.t.c, it has become easier for the authorities to establish relation of one person to other or in simple words it can be said that to determine the liability of a person in relation to case. However the admissibility and evidentiary value of the above mentioned methods needs to be checked as it may amount to infringement of the right guaranteed under Article 20(3) of Indian Constitution whereby an accused person cannot be compelled to be witness against himself.

In this research paper I have tried to discuss the current scenario related to admissibility and evidentiary value of lie detection test, narco analysis test, e.t.c

Keywords: Lie detection test, Narco Analysis, Reliability.

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1. **Introduction**

As we all know crime is and has been an inevitable part of human society since time immoral and is increasing day by day in this modern society and it needs to be controlled. We have many scientific methods available to establish identity of a person. This paper discusses about the constitutionality, reliability, admissibility and evidentiary value of such modern techniques viz DNA test, Narco analysis, Brain Mapping e.t.c. Their status in civil law is different from that in criminal law.

2. **DNA, Narco Analysis e.t.c NEED OF AN HOUR?**

As per criminal jurisprudence any crime is a wrong against the whole society and society has pre decided to adhere such acts by virtue of concept of collective abhorrence. It thereby casts a duty upon the government to control, investigate crime and prosecute criminals and to make sure that guilty person does not go unpunished so as to reform him and to segregate him from the society for the betterment of society. All this process is the consequence of a fair, proper criminal trial in judicial courts. In country like India, where considerable chunk of population is uneducated, social setup is heterogenous, rampant poverty and unemployment, role of money and muscle power, the eye witness which plays a considerable role to ensure conviction of accuses often turns hostile for one reason or the other, thus weakening the prosecution case and the benefit of doubt easily goes to the criminals.  

3. **Different types of techniques available are:**

   3.1 **Narco – Analysis Test**

   Narco-Analysis is a process whereby a subject (person) is interrogated under the influence of drug. It is proved by medical research that such chemical injection drives a person in the state where he loses control on his mind so that he cannot conceal any fact, but will tell what he knows to be true. Basically he loses that much control over his mind which had it been there would help in concealment of fact.

   3.2 **Lie Detection Test**

   In this test, suspect is connected to a machine which monitors blood pressure, pulse rate, nervous system and muscle movement. Such examination is performed on the basis of supposition that there is an intimate contact between mind and body. This test is conducted in two stages; where initially the suspect is asked general question i.g what is your name? where do you live? What do you do for living? And his blood pressure

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2 Dr. N.V. Paranjape “Studies in jurisprudence and Legal Theory” Central Law Agency.
4 Ibid.
& pulse rate is monitored, and then gradually he is asked the question which is related to relevant facts of the case and then his pulse rate and blood pressure is monitored. The principle behind this test is that when a person lies his blood pressure & pulse rate administers a change and the person gets caught.

### 3.3 DNA Test

DNA stands for Deoxyribo Nucleic Acid. DNA basically is the hereditary material in all known living organisms containing the genetic instructions used in their development and functioning.\(^6\) It is a material found in cells. Each person’s DNA is different, except for identical twins. DNA test helps to determine whether an individual is a biological parent or the other individual or not? The way to collect DNA evidence is by taking the blood, hair, skin tissue, saliva, urine and semen sample of a person. DNA test also helps to establish guilt of a person in sexual assault cases.

### 4. Constitutionality, Reliability, Admissibility of NARCO Test

A person may have undergone the Narco test voluntarily i.e without being ordered by court or involuntarily i.e after being ordered by the court.

**Voluntarily undergone Narco Test**:- It is constitutional as the person has benefit under Article 20(3) of Indian Constitution against self-incriminating evidence which means a person cannot be compelled to give such evidence which has a possibility of inflicting a person into a crime.\(^7\)

Regarding the admissibility of voluntary Narco Test it has been held by Supreme Court though constitutional but it is not admissible, except in cases when it amounts to discovery statement of some fact.

The question now comes into the mind that why not admissible?

It is not admissible because of following reasons:-

- No reliability of that test’s result.
- Integrity of expert who has conducted the test is also not beyond doubt, and any person shall not be punished in such cases.
- Right to have legal adviser of subject (person upon whom test is being conducted) becomes useless. As whatever advice he may take by he won’t have control over his sense and any advice would become null.
- It disturbs the procedural purity between prosecution and defence.

Since the voluntary narco test is not admissible question of it reliability does not come up.

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\(^6\) Available at [https://www.javatpoint.com/dna-full-form](https://www.javatpoint.com/dna-full-form) visited on (10.09.2019)

4.1 Narco test and Article 20(3) of Indian constitution.

Accused has the right of freedom of choice, and any compulsion to undergo narco test is violative of Article 21 of Indian constitution. Further Article 20(3) of Indian constitution is to be interpreted in light of Article 21 of Indian constitution only as it is extension of Article 21 of Indian constitution only, which implies that mental information will be protected by Article 20(3) of Indian constitution.

A question arises that at what stage benefit of Article 20(3) of Indian constitution is available. Protection of Article 20(3) of Indian constitution will be available not only at the stage of inquiry and trial but also at the stage of investigation. Therefore should not be allowed even at investigation stage.

A contention was raised that let us conduct the test even by compulsive means and let us have the information and if information is found to be inculpatory i.e against the maker then it shall not be used. If this contention is allowed then its effect would be that that the compulsive Narco test e.t.c. will be considered/ become constitutional.

WHEREAS Article 21 of Indian constitution says that right to mental privacy is absolute, therefore this contention is violative of Article 20(3) of Indian constitution as well.

Supreme court has held that though the physical privacy related facts can be obtained from the accused under compulsion however the things which are related to mental privacy cannot be obtained by compulsive means as mental privacy relates to things which fall within the domain of one’s personal knowledge, and a person cannot be compelled to reveal things related to his personal knowledge.\footnote{Selvi and others v/s State of Karnataka and others 5th May, AIR 2010 SC}

Moreover any element of compulsion be it physical or mental will also result into violation of right to dignity and physical integrity. Narco test e.t.c takes away the freedom of choice of the subject (person upon whom test is being conducted) of the test and thus it violates the right to dignity and personal liberty of the individual.\footnote{ibid}

If obtained under compulsion it also violates the right to fair trial, for example the right to access to legal adviser will become meaningless, as despite any legal advice the subject (person upon whom test is being conducted) will not have any control on his responses.

Moreover reliability of the test is also questionable and credibility of the expert who conducted the test is also not beyond doubt. The court also held that the test disturbs
parity of procedural safeguards between the prosecution and the defence i.e if prosecution can get Narco test conducted then defence may equally demand it.

Supreme court speaking through Sinha J. regarding Article 20(3) of Indian constitution held that it has also to be interpreted in the broad spirit of Article 20(3) of Indian constitution. Article 20(3) protects the accused from any compulsion to be witness against himself and the word to be witness includes any information given by the accused based upon his personal knowledge, and here the element of mental privacy is protected.\textsuperscript{10}

Under article 20(3) the obtainment of physical privacy related things, such as blood sample, finger prints, eyes et.c would not be prohibited.

Article 20(3) of Indian constitution gives the protection to the accused at the very stage of investigation and thereafter at the stage of inquiry and trial as well.

The court held that the rationale behind Article 20(3) is to ensure the reliability of statement of the accused and for that purpose it is necessary to ensure that the statement be made voluntarily as any statement made under compulsion is more likely to be untrue and to mislead the court.\textsuperscript{11}

Even if such information is found to be true the issue is whether the law will permit physical and mental compulsion and consequential violation of right to dignity and personal liberty of an individual.

The court also held that it cannot allow the argument that: First, the information shall be allowed to be obtained under compulsion and then if it is found to be inculpatory then only the prohibition of Article 20(3) of Indian constitution shall apply. The court held that the prohibition applies at the very stage of investigation and if the above argument is allowed then it will result into an impairment/disturbance of the right of accused.

It was also held that Narco test takes away the freedom of choice hence it is compulsive in its very nature.

It is duty of investigating officer to give sufficient warning to the accused that he is not duty bound to undergo narco analysis test.

The court concluded that any involuntary Narco test will be illegal or unconstitutional, however voluntary test is not illegal and unconstitutional still the reliability of test and the real voluntary character of test (freedom of choice) is lost is in issue. Therefore the

\textsuperscript{10} State of Bombay v/s Kathi Kalu Oghad 11 JB. AIR 1961 SC 1808: (1962) 3 SCR 10

\textsuperscript{11} ibid.
result of voluntary narco analysis e.t.c is not admissible in evidence except for discovery statement under section 27 of Indian Evidence Act.

Further it was contended that Section 53, 53A, 54 of Criminal Procedure Code allow taking of physical information from accused, therefore it is contended that you can also take mental information.

On this point Supreme Court has held that Section 53, 53A, 54 of Criminal Procedure Code all are related to medical test of accused i.e related to physical privacy. On the other hand Narco analysis e.t.c are related to the test of mind and therefore these tests cannot be included even by implication in the above sections and not even by the principle of “essdum generis”.

5. WHEN DNA TEST IS TO BE ORDERED?

DNA test has various purposes of which some are to establish the relation between two persons which may also be called as to establish the paternity or that the concerned person is biological child of other person or not. In criminal cases it is used to establish the guilt of person, so answer to above noted question varies with nature of case.

Supreme court speaking through R.M Lodha J. has held that Right to privacy is not an absolute fundamental right and whenever it comes into conflict with some other interest then in proper cases it can be curtailed. The court held that approach of the court will be different in criminal and in civil cases.12

In Criminal Cases the detection of crime and the culprit is in the societal interest, and therefore when it is opposed to societal interest then private interest can be curtailed. Thus in criminal matters the court can be more readily as a matter of routine order the compulsorily giving of the samples.13

In Civil Cases however it is a conflict between two private interest:-

- Right to privacy of the respondent.
- Right to declaration of the paternity of the petitioner.

These two interests will be seen at par to each other and one cannot curtail the other. However if the court finds that non ordering of DNA test would result into destitution and vagrancy of the child and it would cause extreme hardship to the child and also that the conduct of respondent is not free from doubt, then the court may order for DNA testing.

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12 Bhabani Prasad Jena v/s Orissa State Commission for Women, 2 JB, AIR 2016 also known as Nandlal Case.
13 ibid
Prevention of destitution, vagrancy and bastardisation of a child is part of larger societal policy. In light of such interest of the child and the society the right to privacy of the respondent can be curtailed and he can be compelled to give samples.\textsuperscript{14}

**CONCLUSION & SUGGESTIONS:**

This paper can be concluded on the note that the evidentiary value of every scientific technique available varies from case to case, nature of test, whether the integrity of test conductor can be relied upon or not and so on. A judge must play pro-active role while dealing with such cases and shall apply his mind judiciously.

Also the person conducting test must conduct it with utmost care and attention so that there remains no chance of discrepancy, it will ensure that the innocent does not get punishment for the offence he has never committed. Moreover the guidelines issued by the various High Courts from time to time needs to strictly complied with to ensure fairness and accountability in medical procedure.

\textsuperscript{14} ibid