



Detection of deception tests (ddt) using narcoanalysis, brain mapping and polygraph during the investigation as panacea for custodial torture.

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Introduction:

The law is a command of the sovereign to its subjects for whose violation there's a punishment. In any nation wedded to the principles of rule of law the primary duty is the protection and welfare of its subjects. In the concept of the welfare state the duty of state is not limited only to provide protection against wrongful acts to its citizen but also provide punishment to wrong doers. In India the constitution of India is sovereign which has guaranteed every citizen including a foreign nationals a right of life. Meaning thereby life and liberty of individual is considered the most precious. It is stated that with great powers of the dispensation of justice comes great responsibility not to punish an innocent. Under Indian Criminal Jurisprudence a man is presumed to be innocent till proven guilty by a competent court at the end of trial. In criminal law any offence against the citizen, his body, property or state is considered an offence against state only and therefore during trial it's a state who prosecutes the accused for the charges framed against him. These charges are framed on the bases of incriminatory material submitted by the law enforcement agencies. The burden of proof to prove a guilt of an accused in criminal trial is beyond all reasonable doubt. The failure of prosecution to prove its case beyond reasonable doubt tilts the verdict in the favor of the accused. It is stated that an experience has taught us that improper investigation always proves fatal to the case of prosecution which results in heinous criminals getting away from the clutches of law. It is stated that whenever such failure of prosecution or law enforcement agencies to book the criminal under the charges surfaces the state and its commitment to provide safety and security to its citizen becomes a laughing stock. It is stated that because of such incidents of public humiliation the investigating agencies whose job is to do a speedy investigation and collect material against the accused are under tremendous pressure. The rise of social media and Information Technology has given a voice to the expectations of society which wants speedy and swift justice and punishment to the law breakers but also wants to make sure that in process of no innocent may be punished. Its because of constant work pressure and intention to achieve goals by adopting short cut has given rise to the custodial deaths. Present chapter analyses the concept of custodial violence and how scientific methods can attribute to eliminating custodial torture.

1. What is Custodial torture?

The constitution of India guarantees everyone a right of life and liberty in form of a guarantee which says that No person shall be deprived of his life or personal liberty except according to procedure established by law. This guarantee is applicable to even the accused who have been arrested and are in police or judicial custody. No legislation in India defines what is a torture. Torture" has not been defined in the Constitution or in other penal laws. "Torture" of a human being by another human being is essentially an instrument to impose the will of the "strong" over the "weak" by suffering. The Cambridge dictionary defines the meaning of 'custody' to be the state of being kept in prison, especially while waiting to go court for trial[1] Custodial torture, therefore, means torturing or inflicting violence on an individual or group of persons while in the custody of the police or judiciary.

2. What is custodial death?

It is widely referred to as death that happens to a person who is under trial or has already been convicted of a crime. It can be due to natural causes like illness or may also happen due to suicide, in fighting among prisoners but in many instances, it is police brutality and torture that is the biggest contributor behind the death. In spite of the fact that every segment of society feels concerned about custodial violence, over the years it seems it will die along with devil on dooms day and till then it will remain as dark side of the criminal justice system.

3. Present status of custodial deaths in India.

In the financial year 2021–22, the National Human Rights Commission of India reported 2152 deaths had occurred in judicial custody and 155 deaths had occurred in police custody till 28 February 2022[2][3]. According to a report released by National Campaign Against Torture (NCAT), there were about 1606 deaths of accused in 2019 which took place in judicial custody and 125 died in police custody. The report says Of the 125 cases in police custody, 93 persons (74.4%) died due to alleged torture or foul play, while 24 (19.2%) died under suspicious circumstances in which the police cited suicide (16), illness (seven) and injuries (one). The reasons for the custodial death of five others (4%) were unknown, the report said. Torture methods used in 2019 included hammering iron nails in the body, applying roller on legs and burning, 'falanga' wherein the soles of the feet are beaten, stretching legs apart in opposite side, and hitting in private parts. The other methods of torture included electric shock, pouring petrol or applying chilli powder on private parts, beating while handcuffed, pricking body with needles, branding with a hot iron rod, beating after stripping, urinating in mouth, inserting a hard blunt object into anus, beating after hanging upside down with hands and legs tied, forcing to perform oral sex, pressing finger nails with pliers, beating with iron rods after accused is suspended between two tables with hands and legs tied, and kicking the abdomen of a pregnant woman.[4].

The situation while whole country was under covid pandemic lockdown was no different for accused languishing in police custody. India: Annual Report on Torture 2020 released by the National Campaign Against Torture (NCAT) reported that despite the virtual shutdown of the country including a complete lockdown from 24 March to 31 July 2020, India witnessed an increase in custodial deaths during the year and over one suicide every week because of alleged torture in police custody. On 17 September 2020, the Ministry of Home Affairs informed the Lok Sabha that 113 persons died in police custody from 1 April 2019 to 31 March 2020 . The highest number of custodial deaths were reported from Gujarat and Uttar Pradesh with 11 custodial deaths each. According to the report on average daily one accused commits suicide because of torture while in police custody. [5] In FY 2020-21 total 1940 custodial deaths were reported. In FY 2021-22 total 2544 custodial deaths were reported.[6]

4. Indian laws dealing with custodial violence

The legislature has kept this possibility of custodial violence in mind while drafting laws that provide safeguards to citizens and place limits on the powers of the authorities. Some of these safeguards are as under:

- (i) **Article 20 of the Constitution:** Article 20(1) of the Indian Constitution guarantees an individual right against conviction of an offence. This includes principle of non-retrospectivity of law. '*Nullum Crimen Sine lege*' meaning thereby 'No crime, no punishment without previous law. Article 20(2) also provides a protection of an individual against double jeopardy. ('*Nemo Debet Pro Eadem Causa Bis Vixari*') no person shall be prosecuted and punished for the same offence more than once. The Art. 20(3) protects individual from self-incrimination. The article says that no person shall be compelled to be a witness against himself. This stops the authorities from threatening, torturing and coercing the accused to provide evidence.
- (ii) **Article 21 of the Constitution:** The ambit of this article is quite extensive. It states that no person can be deprived of life and liberty except according to the procedure established by law. Hence it guarantees to safeguard against any form of torture, assault, or injury.

- (iii) **Article 22 of the Constitution:** Article 22(1) and Article 22(2) are there to ensure certain checks exist in law to prevent abuse of power by authorities. Article 22(1) provides that no person shall be arrested without being informed about the grounds of arrest nor shall he be denied access to a lawyer. Article 22(2) provides that every person who is arrested shall be produced before the magistrate within 24 hours of such arrest excluding the time taken for the journey from the police station to the magistrate.
- (iv) **The Code of Criminal Procedure (CrPC) 1973:** Section 41 of the Code of Criminal Procedure, 1973 was Amended in 2009 to include safeguards under 41A, 41B, 41C, and 41D so that procedures for arrest and detention for investigation purposes have reasonable grounds and the procedures to be documented. Also, family members, friends, and the public to be informed of the arrest, and legal representation to be allowed for the arrested individual.
Section 163 of the CrPC prohibits the investigating officers from inducing, threatening, or promising under Section 24 of the Indian Evidence Act (1872). Section 164(4) of the CrPC provides that confessions be recorded and signed in a proper manner and confirmation by a magistrate that the confession has been made voluntarily. Section 49 states that more restraint than necessary cannot be exercised to prevent one's escape.
- (v) **Indian Penal Code (IPC) 1860:** Section 220 provides for the punishment for an officer who maliciously confines any person. Section 330 of the IPC provides that whoever causes hurt to extract information or confession which may lead to detection of offence shall be liable to be punished with imprisonment which may extend to 7 years and a fine. Section 331 states the same about grievous hurt but with imprisonment which may extend to 10 years and a fine. Section 348 of the IPC prohibits wrongful confinement and any such confinement for extorting any confession or information for detecting crime. Such confinement is punishable with imprisonment of up to three years and also liable to a fine.
- (vi) **Indian Evidence Act 1872:** Section 25 states that no confession made to a police officer can be used to prove any offence against the suspect. Section 26 makes confessions made during custody inadmissible unless made in the presence of a magistrate.
- (vii) **Police Act 1861:** Section 29 of the Act provides that if a police personnel inflicts violence on a person in his custody, he shall be liable to a penalty not exceeding 3 months of pay or imprisonment not exceeding 3 months or both.

Although above referred legislation prohibits and resists the police officers from applying torture unfortunately India has a grim record in police brutality and custodial violence. Between 2001 and 2018, 1727 persons died in police custody, but only 26 policemen were convicted for such deaths. [7]

5. **Inefficient ways of investigating of a crime a major contributor custodial torture.**

Change is the only constant and sin as a notion evolves throughout time. Constant change is a characteristic of this phenomenon. As science and technology progress, so too have the types and methods of crime. In the contemporary era of information technology, crimes of a particularly severe character, such as murder, drug trafficking, international fraud, forgery, terrorism, and cybercrime, have achieved pan-global proportions. Nowadays, criminals may carry out their horrible acts anywhere in the world because to their intelligence, inventiveness, and precise preparation. However, India's system for criminal investigation and prosecution is lagging behind.

It is stated that an improper investigation always proves fatal to the case of prosecution which results in heinous criminals getting away from the clutches of law. whenever such failure of prosecution or law enforcement agencies to book the criminal under the charges surfaces the state and its commitment to provide safety and security to its citizen becomes a laughing stock. It is stated that after applying all possible methods of eliciting the truth but nothing is achieved fruitful and when all efforts to find evidence are lost in vein and especially investigating agency who is often under work pressure built up by expectations of society resorts to brutality as tool for investigation. In other words When police grow increasingly frustrated with the trajectory of their interrogation, they resort to torture and violence. The possibility of inefficient ways of investigation can not be ruled out as the biggest contributor of rise in custodial violence and custodial death.

6. Need for Scientific methods of investigation:

Forensic science's usage in police investigations is a need in the present day. Of course the guilty party must pay for their wrongdoing, but justice also requires that no innocents be harmed in the process. Investigations into crimes and criminal prosecutions in India fall short of expectations. The number of criminals and the number of crimes committed each year are both continuously increasing since many offenders could not be prosecuted for even the most horrific crimes and a tiny proportion of cases result in acquittals. This is largely attributable to antiquated investigation methods, which leave many openings for the accused to avoid punishment. Therefore, scientific methods of study are crucial for accurate results. The third degree tactics utilised by British era investigators are unacceptable to today's crime fighting authorities, courts, and general public. The use and abuse of the so-called "third degree" by law enforcement to coerce confessions remains a problem.[8] Accused dying in police custody due to police atrocities have become quite recurring phenomenon.[9] The Supreme Court made it clear in *D. K. Basu v. State of West Bengal* [10] that law enforcement agencies must act within the law's parameters and that the development of scientific methods of investigation and interrogation of the accused is necessary. Custodial deaths and torture are nothing more than attacks on the rule of law.

One of the scientific approaches to elicit the truth from the accused without causing him any harm could be application of Scientific Detection of deception tests.

7. Detection of deception tests (DDT) by Narcoanalysis, Brain mapping and polygraph.

(i) **Narcoanalysis:** The term "Narco- Analysis" has a root in the Greek language [10], it is derived from the Greek word "Narke" which means "Anaesthesia or Torpor. The word was used to describe a diagnostic psychotherapeutic method which uses psychotropic drugs to induce a stupor (stupor signifies a suspension or great diminution of sensibility, a state in which all the functions are deadened or dazed) in which mental element with a strong associated-affects come to the surface where they can be exploited by the therapist. In between 1903 to 1915 investigators used mild type of anesthesia. Commonly used in obstetrical practices for extracting the truth or obtaining the confession from suspects, investigators used alcohol as a truth serum which depressed the central nervous system (CNS) because they believed on. Time-honored aphorism in *Vino Veritas* which means 'when there is wine there is the truth'. Alcohol produces a remarkable candor or freedom from inhibitions, and under the influence of this, a person loses his or her tongue and eliminates repressive Influences. First of all, in year 1922, it was Robert House who discovered that a patient under the influence of a drug administered cannot create a lie and there is no power to think or reason.[11] In the Narco-Analysis test, the subject's inhibitions are lowered by interfering with his nervous system at the molecular level. In such sleep-like state efforts are made to obtain the truth about the crime. In this process the subject under investigation is injected with hypnotics, like, Sodium Pentothal or Sodium Amytal. The dose so injected depresses the Central Nervous System, lowers blood pressure, and slows the heartbeat. The subject is then interrogated by investigating agency in the presence of the doctors under video and audio recording. The report prepared by the expert is used in the process of collecting evidence.

(ii) **Brain Mapping :**The use of brain mapping technology is a promising new frontier in the forensic science field. Late Positive Complex, P3, and P300 are other names for brain mapping. It's a factor in calculating general brain activity. The accused will not be given any opportunity to ask questions during this evaluation. The suspect is forced to sit in an evoked potential recording equipment while being shown evidence or subjected to noises from the location of the crime. If the suspect was there at the crime scene, only then do his brain's sensors pick up the event-associated potentials in the form of Brain Mapping. Brain Mapping is quite precise. When a person is subjected to a brain mapping session, their brain is mapped in reaction to an external stimulation. The brain emits a specific electromagnetic wave called P300 when it detects a person or a sound. A series of sensors are placed on the subject's head, and they are asked to sit in front of a computer screen. In order for the sensors to capture the P300 wave, which is generated in the brain only when there is a connection between the visuals and the sounds presented to the individual, both must be meaningful to him. When testing whether a person has a certain piece of information stored in their brain, scientists employ a method called "brain fingerprinting," which relies on electroencephalography (EEG). In this method, a suspect is given questions regarding a crime in the hopes of eliciting a "P300 response," which shows familiarity with the specifics of the crime, and electrical brainwaves and brain reaction are measured and recorded. There have been concerns raised about the technique's accuracy and reliability. The findings of a study comparing brain fingerprinting with polygraphy were inconsistent, demonstrating that both methods use "a mix of tried and true procedures and dangerously overstated advantages." [13].

(iii) **Polygraph:** A polygraph, is often incorrectly referred to as a lie detector test. The polygraph is an excellent scientific instrument for investigating crimes. It is a tool used in psychological or physiological investigations. This device captures the subject's physiological responses to queries about the crime, such as blood pressure, pulse rate, respiration rate, and skin conductivity, while the subject is being asked questions. The belief underpinning the use of the polygraph is that deceptive answers will produce physiological responses that can be differentiated from those associated with non-deceptive answers; however, there are no specific physiological reactions associated with lying, making it difficult to identify factors that separate those who are lying from those who are telling the truth. [14] All autonomic nervous system alterations that occur during interrogation may be measured by polygraph testing. When a person attempts to lie, their autonomic nervous system responds in ways that they have no control over. An arterial pulse wave, a venous pulse wave, and the apex beat of the heart may all be recorded at the same time by a polygraph. According to the Encyclopedia of Science and Technology, a "Lie Detector" is a gadget designed to detect a certain automatic physiological reaction that every individual displays while lying but never when speaking the truth.

8. Can Narco- analysis, brain mapping, and polygraph tests be performed without the consent of the person suspected?

The Indian Constitution provides immunity to an accused against self-incrimination under Article 20(3) – *‘No person accused of an offence shall be compelled to be a witness against himself’*. It is based on the legal maxim *"nemo tenetur prodere accusare seipsum"*, which means *"No man is obliged to be a witness against himself."*

Narcoanalysis, Polygraph and Brain mapping tests can not be conducted without the consent of a person suspected of an offence and against his will, as it is violative of the "right against self incriminalization" guaranteed under Article 20(3) and 21 of the constitution of India and also violative of section 161(2) of the code of criminal procedure.

9. When testing is not violative to doctrine of self-incrimination as provided under Art.20(3) of Constitution of India?

A free consent for testing given by the suspect/accused free from any fear or favor or any threat, coercion or promise is an essential for the voluntary testing. In *Selvi Vs state of Karnataka*. [15] honorable Supreme court of India held that no one may be legally compelled to undergo the challenging examinations, whether for the sake of criminal case investigation or otherwise. But a window was kept open for the "voluntary administration" of tests by law enforcement agencies. Hence when the subject gives consent to undergo these tests without there being any fear or favor, threat or coercion then in such circumstances it is "voluntary" and does not violate the doctrine of self-incrimination.

10. Effect of the statement made as compulsory testing Vs. A statement made under Voluntary testing.

A confessional statement when made by an accused under threat or inducement or promise, is inadmissible in evidence similarly a statement made out by interfering with the nervous system of the accused under the impression of the prohibited drugs and putting him in a semi-unconscious state, is also not valid or admissible in evidence in light of the decision of the Hon'ble the supreme court of India in *Selvi v. State of Karnataka*. As a result, the court ruled that no one may be exposed to the challenging tests in any criminal proceedings or otherwise. Nonetheless, a window was kept open for the administration of tests on a case-by-case basis. In the event that proper precautions are taken. Even if the participant was conscious and opted for voluntary testing and was able to regulate their answer throughout the test, the findings themselves would not be admissible as evidence. However, the court ruled that evidence gathered via a voluntary test might be included as evidence under section 27 of the Indian Evidence Act should any relevant material or information be later uncovered using such evidence. So, the court ruled against using test findings as evidence. However, testing involving transactions and derivatives was declared acceptable. Therefore With informed consent, however, any information or material discovered during these tests can give a lead to the investigation and pursuant to information such received any recovery or discovery would be admissible and relevant under section 27 of Indian Evidence act.

11. Conclusion:

In the conflict of between interest of an individual who is an accused in trial and interest of society to punish the accused for the crime committed by him and from the view point of the state who wants to punish the guilty but does not wants an innocent to be punished and does not wants to adopt cruel methods such as torture to elicit the truth in order to prepare case against accused, scientific methods for detection of deception like Narcoanalysis, Brain mapping and polygraph may be applied by convincing the accused for voluntary testing then applying third degree torture. The right against self-in cremation provided by art. 20(3) of the Constitution may be violated by the compulsory administration of such tests for the sake of criminal justice, but this does not include voluntary administration of tests. The findings themselves would not be admissible as evidence. However, evidence gathered via a voluntary test might be included as evidence under section 27 of the Indian Evidence Act should any relevant material or information be later uncovered using such evidence. However, testing involving transactions and derivatives was declared acceptable. Meaning thereby test results under voluntary testing still be very important lead to the investigation agencies for the detection of deception. This may also help the state to curb the menace of custodial violence and the demand of society may also be satisfied by witnessing a real culprit of an offense getting punished and seeing an innocent getting free from charges, adopting scientific methods will indeed strengthen the administration of criminal justice system and will be the silver bullet to the monster of Custodial violence.

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