

**NARCOANALYSIS AND THE RIGHT AGAINST SELF-  
INCRIMINATION: REVIEWING SELVI & ORS. V. STATE OF  
KARNATAKA (AIR 2010 SC 1974)**

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The case under consideration pertains to the constitutionality of involuntary administration of certain scientific techniques, namely narcoanalysis, polygraph examination and the Brain Electrical Activation Profile (BEAP) test for the purpose of improving investigation efforts in criminal cases. This issue has received considerable attention since it involves tensions between the desirability of efficient investigation and the preservation of individual liberties. It raises pertinent questions about the meaning and scope of fundamental rights enshrined in Articles 20 (3) and 21 which are available to all persons.

This case is a result of bench of criminal appeals wherein objections have been raised in respect of instances where individuals who are the accused, suspects or witnesses in an investigation have been subjected to these tests without their consent.

The issues involved in this case were as follows:

- I. Whether the involuntary administration of the impugned techniques violates the 'right against self-incrimination' enumerated in Article 20(3) of the Constitution?
- II. Whether the involuntary administration of the impugned techniques is a reasonable restriction on 'personal liberty' as understood in the context of Article 21 of the Constitution?

**Issue No. I** pertains to constitutionality of the impugned techniques under Article 20 (3) of the Constitution. The privilege against 'self incrimination' is a fundamental canon of Common law criminal jurisprudence.

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The characteristic features of this principle are-

- 1) The accused is presumed to be innocent,
- 2) That it is for the prosecution to establish his guilt, and
- 3) That the accused need not make any statement against his will.

These propositions emanate from an apprehension that if compulsory examination of an accused were to be permitted then force and torture may be used against him to entrap him into fatal contradictions. The privilege against self-incrimination thus enables the maintenance of human privacy and observance of civilized standards in the enforcement of criminal justice. Art. 20(3) which embodies this privilege reads,

“No person accused of any offence shall be compelled to be a witness against himself”.

On analysis, this provision will be found to contain the following components:<sup>3</sup>

It is a right available to a person “accused of an offence”;

It is a protection against such “compulsion” “to be a witness”;

It is a protection against such “compulsion” resulting in his giving evidence against himself.<sup>4</sup>

All the three ingredients must necessarily coexist before the protection of Art. 20(3) can be claimed. If any of these ingredients is missing, Art. 20(3) cannot be invoked.

In the Indian context, Article 20(3) should be construed with due regard for the inter-relationship between rights, since this approach was recognized in Maneka Gandhi's case<sup>5</sup>. Hence, we must examine the 'right against self-incrimination' in respect of its relationship with the multiple dimensions of 'personal liberty' under Article 21,

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<sup>3</sup> Shukla V.N., Constitutional Law of India (Eastern Book Co. ed 11th 2008).

<sup>4</sup> [www.legalserviceindia.com/article/19-Silence-Of-The-Lambs---Article-20\(3\)-In-Administrative-Proceedings.html](http://www.legalserviceindia.com/article/19-Silence-Of-The-Lambs---Article-20(3)-In-Administrative-Proceedings.html).

<sup>5</sup> (1978) 1 SCC 248.

which include guarantees such as the 'right to fair trial' and 'substantive due process'. It must also be emphasized that Articles 20 and 21 have a non-derogable status within Part III of our Constitution because the Constitution (Fourth-Fourth amendment) Act, 1978 mandated that the right to move any court for the enforcement of these rights cannot be suspended even during the operation of a proclamation of emergency.

The application of Narcoanalysis test involves the fundamental question pertaining to judicial matters and also to Human Rights. The legal position of applying this technique as an investigative aid raises genuine issues like encroachment of an individual's rights, liberties and freedom. In the present case Supreme Court, through K.G. Balakrishnan C.J., held;

It is quite evident that the narcoanalysis technique [and other impugned techniques] involves a testimonial act. A subject is encouraged to speak in a drug-induced state, and there is no reason why such an act should be treated any differently from verbal answers during an ordinary interrogation.....We see no other obstruction to the proposition that the compulsory administration of the narcoanalysis technique amounts to 'testimonial compulsion' and thereby triggers the protection of Article 20(3).<sup>6</sup>

The Apex court has rightly held so because the application of the impugned techniques goes against the maxim Nemo Tenetur se Ipsum Accusare that is, 'No man, not even the accused himself can be compelled to answer any question, which may tend to prove him guilty of a crime, he has been accused of'. If the confession from the accused is derived from any physical or moral compulsion (be it under a hypnotic state of mind) it should stand to be rejected by the court. The main issue thus is the question of its admissibility as a scientific technique in investigations and its ultimate admissibility in court as forensic evidence.<sup>7</sup>

Section 45 of the Indian Evidence Act, 1872 does allow experts' opinions in certain cases. It reads:

When the court has to form an opinion upon a point of foreign law, or of science, or art, or as to identity of handwriting or finger impression, the opinions upon that point or persons specially skilled in such foreign law,

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<sup>6</sup> See para 130, 221, 165, 221.

<sup>7</sup> Supra at 1.

or of science, or art, or as to identity of handwriting or finger impressions are relevant.

However this section is silent on other aspects of forensic evidence that can be admissible in court in criminal proceedings. The right against forced self-incrimination, widely known as the Right to Silence is enshrined in the Code of Criminal Procedure (Cr. P.C.) and the Indian Constitution.

In the Cr. P.C., the legislature has guarded a citizen's right against self-incrimination. S.161 (2) of the Code of Criminal Procedure states that every person "is bound to answer truthfully all questions, put to him by [a police] officer, other than questions the answers to which, would have a tendency to expose that person to a criminal charge, penalty or forfeiture".

It is well established that the Right to Silence has been granted to the accused by virtue of the pronouncement in the case of Nandini Sathpathy v. P.L. Dani<sup>8</sup>, no one can forcibly extract statements from the accused, who has the right to keep silent during the course of interrogation (investigation). By the administration of these tests, forcible intrusion into one's mind is being restored to, thereby nullifying the validity and legitimacy of the Right to Silence. Studies done by various medical associations in the US adhere to the view that truth serums do not induce truthful statements and subjects in such a condition of trance under the truth serum may give false or misleading answers.

A special Court dealing with cases under the Maharashtra Control of Organized Crime Act (MCOCA) in Pune had allowed the Special Investigation Team (SIT) probing the multi crore fake stamp paper scam to put Abdul Karim Telgi through an array of scientific tests, in order to aid investigation and facilitate the collection of evidence. The Karnataka Forensic Science Laboratory (KFSL) in Bangalore conducted a polygraph test, brain mapping, and a narcoanalysis procedure on Telgi. The Narcoanalysis test yielded an immense amount of information but doubts were raised about its value as evidence. The use of drugs on Telgi in order to extract the truth created a controversy<sup>9</sup>. The aforesaid controversy is also considered by the Karnataka High Court in case of Smt. Selvi v. State by Koramangala Police Station<sup>10</sup> and the Karnataka High Court has also

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8 AIR 1978 SC 1025.

9 [www.tribuneindia.com/2004/20040323/main1.htm](http://www.tribuneindia.com/2004/20040323/main1.htm).

10 2004 (7) Kar LJ 501.

considered the need for Brain Mapping Test and Narco Analysis Test and the Karnataka High Court has also considered the submissions made on behalf of the accused that to appear for undergoing Narco Analysis Test would violate his fundamental rights under Article 20(3) of the Constitution of India and would compel the accused to give evidence against himself, which is prohibited under Article 20(3) of the Constitution of India.

One view was that the test should be looked as a tool or an aid in collecting and supporting evidence and it did not amount to testimonial compulsion. The Narcoanalysis report said that the entire procedure was recorded on video and audio, and that it would be available for scrutiny by the court. The report also said that, “the questions were designed carefully and were repeated persistently in order to reduce the ambiguities during interrogation”. The new trend of using scientific tests in investigation was welcomed by the police for having immense potential for the greater good of society. The intention of using Truth Serum was to help investigators with leads and to corroborate evidence that had already been gathered.

The other view held by Defence Lawyers and Human Rights activists was that Narcoanalysis test was a very primitive form of investigation and third degree treatment. Narcoanalysis is considered as an invasive procedure, with subjects being lulled into conversational mode by being injected with an anaesthetic. It was said that there were legal lapses in interrogation with the aid of drugs. According to defence lawyers, Narcoanalysis report had no evidential value as the test violated Art.20 (3) of the Constitution.

The Bombay High Court in a significant verdict in the case of, Ramchandra Reddy and Ors. v. State of Maharashtra<sup>11</sup>, upheld the legality of the use of P300 or Brain finger-printing, lie-detector test and the use of truth serum or narcoanalysis. The court upheld a special court order given by the special court in Pune as mentioned above, allowing the SIT to conduct scientific tests on the accused in the fake stamp paper scam including the main accused, Abdul Karim Telgi. The verdict also said that the evidence procured under the effect of truth serum is also admissible. In the course of the judgment, a distinction was drawn between “statement” (made before a police officer) and testimony” (made under oath in court). The Judges, Justice Palshikar and Justice Kakade, said that the lie-detector and the brain mapping tests did not involve any “statement” being made and the statement made under narcoanalysis was not

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11 MANU/MH/0067/2004.

admissible in evidence during trial. The judgment also held that these tests involve “minimal bodily harm”.

Following the same, in the case of Santokben Jadeja v. State of Gujarat<sup>12</sup> it was clearly said that in the criminal jurisprudence accepted in India, a person facing an investigation is constitutionally conferred with the right viz. right to remain silent, leaving it for the Investigating Agency to investigate the factual allegations resorting to only those methods which are specifically permitted under various statutory provisions. It is submitted by him that the accused cannot be compelled to be a witness against himself/herself by conducting such Narco Analysis Test and the same would offend the constitutional protection guarantee under Article 20(3) of the Constitution of India. Also in the year 2002 the Law Commission of India considered in detail the provisions of Article 20(3) of the Constitution of India in the context of right of silence given to the accused and has considered whether there is any need or desirability or constitutional permissibility to amend the Criminal Procedure Code so as to temper with the right conferred upon the accused against self-incrimination and the Law Commission of India has filed its Report before the Central Government and the Law Commission has examined the history behind conferment of such a right upon an accused and also examined the pari materia provisions in United Kingdom, Australia, USA, Canada, China and India and after a detailed and a careful consideration, the Law Commission of India found that no amendment in Criminal Procedure Code is necessary and any changes in law relating to silence of the accused, if made, will be ultra-virus to Articles 20(3) and 21 of the Constitution of India.

Looking at the words of Section 53(1)<sup>13</sup> of the Cr. P.C., they say that the medical evidence obtained can be through the use of reasonable force. Here the dilemma starts as to what is the reasonable force. It appears that under the old Code, there was no specific provision authorising the police officer under which an arrested person could

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12 MANU/GJ/7362/2007.

13 Examination of accused by medical practitioner at the request of police officer:

(1) When a person is arrested on a charge of committing an offence of such a nature and alleged to have been committed under such circumstances that there are reasonable grounds for believing that an examination of his person will afford evidence as to the commission of an offence, it shall be lawful for a registered medical practitioner, acting, at the request of a police officer not below the rank of sub-inspector, and for- any person acting in good faith in his aid and -under his direction, to make such all examination of the person arrested as is reasonable necessary in order to ascertain the facts which may afford such evidence, and to use such force as is reasonably necessary for that purpose.

be subjected to medical examination without his consent. Therefore with an intention to remove that lacuna this new provision was incorporated in the new Criminal Procedure Code, with the sole intention of facilitating effective investigation. Section 53 authorises investigating machinery to get an arrested person examined by a medical practitioner. When we talk about narco analysis and brain mapping, they definitely fall within the definition of a compelled testimony. Now looking at the courts have to say, in *Nandini Satpathy v. P.L. Dani*<sup>14</sup>, defining 'compelled testimony' the bench said that:

The phrase 'compelled testimony' must be read as evidence procured not merely by physical threats or violence but by psychic torture, atmospheric pressure, environmental coercion, tiring interrogative prolixity, overbearing and intimidatory methods and the like - not legal penalty for violation. So, the legal perils following upon refusal to answer, or answer truthfully, cannot be regarded as compulsion within the meaning of Article 20(3).

What is compulsion in the context of Article 20(3) had come up for consideration in the case of *State of Bombay v. Kathi Kalu Oghad*<sup>15</sup>, wherein the Supreme Court has held that compulsion in the context, must mean what in law is called 'duress'.

In the Dictionary of English Law by Earl Jowitt, 'duress' is explained as follows:

Duress is where a man is compelled to do an act by injury, beating or unlawful imprisonment (sometimes called duress in strict sense) or by the threat of being killed, suffering some grievous bodily harm, or being unlawfully imprisoned (sometimes called menace, or duress per mines). Duress also includes threatening, beating or imprisonment of the wife, parent or child of a person.

The compulsion in this sense is a physical objective act and not the state of mind of the person making the statement, except where the mind has been so conditioned by some extraneous process as to render the making of the statement involuntary and, therefore, extorted.

It is submitted that in Narco-analysis Test, nothing is extracted from the body of accused nor anything is compared nor tallied since what is obtained is statement or

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14 AIR 1978 SC 1025.

15 AIR 1961 SC 1808.

information given by the accused. Such statement made or information given by an accused will be either exculpatory or inculpatory and it is only inculpatory statement which is hit by Article 20(3) of the Constitution. Whether the accused make inculpatory or exculpatory statement will be known only after the test is conducted and not before that. So, it is premature to say the nature of statement or information, which the accused give under Narco-analysis Test.

The right guaranteed under Article 20(3) of the Constitution is in the protection of human rights and dignities, which may need consideration in the light of other equally important provisions of the Constitution. 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 weighs more than the fundamental duty casted on the State. Section 53 of the Criminal Procedure Code has been brought on statute book to have efficient and scientific investigation. It is intended to help the investigation of the crime on the scientific lines so as to enable collection of evidence to prove the guilt or innocence of the persons accused of committing the crime as the modern community requires modern scientific methods of crime detection, lest the public go unprotected. Further, in the process of obtaining information, i.e., collection of evidence during investigation, if any legal or fundamental right of the accused is infringed or violated, nothing prevents them from resorting to the safeguards provided to them under various laws. Narcoanalysis tests severely impact the right against self-incrimination and have the potential to impact the fairness of a trial. They foster laxity in the investigation standards of the police who may increasingly rely on the seemingly facile nature of the test.

It is pertinent to note that Article 20(3) protects a person who is 'formally accused' of having committed an offence or even a suspect or a witness who is questioned during an investigation in a criminal case. However, Article 20(3) is not applicable when a person gives his/her informed consent to undergo any of the impugned tests. It has also been described earlier that the 'right against self-incrimination' does not protect persons who may be compelled to undergo the tests in the course of administrative proceedings or any other proceedings which may result in civil liability. Similarly, Article 20(3) will not apply in situations where the test results could become the basis of non-penal consequences for the subject such as custodial abuse, police surveillance and harassment among others. In view of the non applicability of Art.20 (3) to these cases, it becomes necessary to determine the validity of the impugned techniques in light of right to privacy guaranteed under Art. 21.

**Issue No. II** pertains to the constitutional Validity of these tests under Article 21 of the Constitution. Article 21 lays down that:

'No person shall be deprived of his life and liberty except according to procedure established by law'.

By interpretative process courts in India have carved out Right to Privacy as a necessary corollary of Art. 21.<sup>16</sup> Since administering the impugned tests entails the physical confinement of the subject, it is important to consider whether they can be read into an existing statutory provision. This is so because any form of restraint on personal liberty, howsoever slight it may be, must have a basis in law.

The Apex Court in the present case held;

The definition of torture indicates that the threshold for the same is the intentional infliction of physical or mental pain and suffering, by or at the instance of a public official for the purpose of extracting information or confessions. 'Cruel, Inhuman or Degrading Treatment' has been defined as conduct that does not amount to torture but is wide enough to cover all kinds of abuses. Hence, proving the occurrence of 'cruel, inhuman or degrading treatment' would require a lower threshold than that of torture..... it is quite conceivable that the administration of any of these techniques could involve the infliction of 'mental pain or suffering' and the contents of their results could expose the subject to physical abuse. When a person undergoes a narcoanalysis test, he/she is in a half-conscious state and subsequently does not remember the revelations made in a drug-induced state. In the case of polygraph examination and the BEAP test, the test subject remains fully conscious during the tests but does not immediately know the nature and implications of the results derived from the same. However, when he/she later learns about the contents of the revelations, they may prove to be incriminatory or be in the nature of testimony that can be used to prosecute other individuals. We have also highlighted the likelihood of a person making incriminatory statements when he/she is subsequently confronted with the test results. The realisation of such consequences can indeed cause

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16 See In R. Raj Gopal v. State of Tamil Nadu, (1994) 6 SCC 632 ; Civil Liberties v. Union of India, AIR 1997 SC 568.

`mental pain or suffering' for the person who was subjected to these tests. The test results could also support the theories or suspicions of the investigators in a particular case. These results could very well confirm suspicions about a person's involvement in a criminal act. For a person in custody, such confirmations could lead to specifically targeted behaviour such as physical abuse. In this regard, we have repeatedly expressed our concern with situations where the test results could trigger undesirable behaviour..... It is undeniable that during a narcoanalysis interview, the test subject does lose `awareness of place and passing of time'. It is also quite evident that all the three impugned techniques can be described as methods of interrogation which impair the test subject's `capacity of decision or judgment'. Going by the language of these principles, we hold that the compulsory administration of the impugned techniques constitutes `cruel, inhuman or degrading treatment' in the context of Article 21. It must be remembered that the law disapproves of involuntary testimony, irrespective of the nature and degree of coercion, threats, fraud or inducement used to elicit the same. The popular perceptions of terms such as `torture' and `cruel, inhuman or degrading treatment' are associated with gory images of blood-letting and broken bones. However, we must recognise that a forcible intrusion into a person's mental processes is also an affront to human dignity and liberty, often with grave and long-lasting consequences. (Italics and underline supplied)

It is submitted that the decision of the Apex Court on this point is in tune with the International Law and the precedents laid by Supreme Court pertaining to Right of Privacy. The judicial expansion of the idea of `personal liberty', the status of the `right to privacy' as a component of Article 21 has been recognised and re-inforced by the Supreme Court time and again. In *R. Raj Gopal v. State of Tamil Nadu*<sup>17</sup>, the Apex Court dealt with a fact-situation where a convict intended to publish his autobiography which described the involvement of some politicians and businessmen in illegal activities. Since the publication of this work was challenged on grounds such as the invasion of privacy among others, the Court ruled on the said issue. It was held that the right to privacy could be described as the `right to be let alone and a citizen has the right to safeguard the privacy of his own, his family, marriage, procreation, motherhood, child-bearing and education among others. No one can publish anything concerning the

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17 (1994) 6 SCC 632.

above matters without his consent whether truthful or otherwise and whether laudatory or critical'. However, it was also ruled that exceptions may be made if a person voluntarily thrusts himself into a controversy or any of these matters becomes part of public records or relates to an action of a public official concerning the discharge of his official duties.

In *People's Union for Civil Liberties v. Union of India*<sup>18</sup>, it was held that the unauthorised tapping of telephones by police personnel violated the 'right to privacy' as contemplated under Article 21. However, it was not stated that telephone-tapping by the police was absolutely prohibited, presumably because the same may be necessary in some circumstances to prevent criminal acts and in the course of investigation. Hence, such intrusive practices are permissible if done under a proper legislative mandate that regulates their use. This intended balance between an individual's 'right to privacy' and 'compelling public interest' has frequently occupied judicial attention. Such a compelling public interest can be identified with the need to prevent crimes and expedite investigations or to protect public health or morality.

Narcoanalysis falls within the scope of Article 21 by virtue of the invasion of the body and mind, which constitutes an invasion of privacy. The test directly intrudes on the mental processes of the subject, who lacks control over the questioning. There is a risk that the unconscious mind may reveal personal information that is irrelevant to the investigation. It is therefore imperative to establish standards of confidentiality and other safeguards, as privacy can be violated only by "procedure established by law". No such safeguards exist in India and therefore narcoanalysis particularly if performed without consent amounts to a violation of privacy.<sup>19</sup>

Regrettably, in *Rojo George v. Deputy Superintendent of Police*<sup>20</sup>, the Kerala High Court disagreed and held that narcoanalysis test does not amount to deprivation of personal liberty or intrusion into privacy. Notably, the Court did not substantiate its position and declined to address the intrusion into mental privacy but narrowly restricted the scope of privacy to bodily integrity. The Court also rejected the contention that narcoanalysis can be potentially hazardous and can violate the right to health.

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18 AIR 1997 SC 568.

19 See *Govind v. State of M.P.*, AIR 1075 SC 1378.

20 2006 (2) KLT 197.

As narcoanalysis involves the involuntary injection of mind-altering drugs into one's body, there necessarily arises a question of whether this may constitute torture. The most commonly cited definition of torture is found in Article 1(1)<sup>21</sup> of the United Nations Convention against Torture (CAT). Mental suffering is a component of this definition. In the narcoanalysis context, this suffering is (1) intentionally inflicted with the purpose of obtaining a confession (2) at the instigation of a public police official. Thus the narcoanalysis test clearly falls within these boundaries of torture as defined here. Unfortunately, there is no such definition of torture under Indian law and the country has not yet ratified the CAT.

The United Nations Committee Against Torture<sup>22</sup>, while assessing France where truth serums are used in criminal investigation, condemned the use of drugs to extract information, as "although the objective is to lay bare the truth, the truth cannot be sought by any means whatsoever".

## CONCLUSION

The judgment of the Supreme Court in the present case is laudable as it conclusively determines that involuntary administration of the impugned techniques violate the constitutional protection guaranteed under Articles 20 (3) and 21. It is, however, submitted that Supreme Court has still left the scope for erosion of these fundamental rights by allowing the use of these impugned techniques with consent. How can a wrong done against the constitutional principle i.e. right to privacy can become right when done with consent? Consent could only come to the rescue of prosecution when use of the impugned voluntary administration of these techniques is done under the procedure established by law. All the arguments brought forth by the Supreme Court against the forcible use of narcoanalysis, polygraph and brain mapping should also hold good when used with the consent. Would not subjecting a person to these impugned techniques even with consent violate the prescribed boundaries of

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21 Torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

22 <http://www2.ohchr.org/english/bodies/cat/>

privacy?<sup>23</sup> Unfortunately, the lack of a clear judicial opinion on the issues of consent and violation of right against self-incrimination makes it difficult to determine the exact legal position of narcoanalysis in India. There is consensus among the High Courts that narcoanalysis may be used as an investigative tool only and not as a source of evidence. In other words, as it has also been urged that administering these techniques does not cause any bodily harm and that the extracted information will be used only for strengthening investigation efforts and will not be admitted as evidence during the trial stage. But this is of little solace because improvements in fact-finding during the investigation stage will consequently help to increase the rate of prosecution as well as the rate of acquittal.

It is submitted that in the present case the issue of voluntary administration of the impugned techniques was not before the court, therefore, it should not be taken as a part of the ratio of the judgment that voluntary administration of the impugned techniques is constitutional permissible. Since one cannot reliably measure human emotions (especially when one has an interest in hiding his/her emotions), the idea of valid detection of truth or falsehood through measuring respiratory rate, blood volume, pulse rate and galvanic skin response is a mere pretence. Since Psychologists cannot ascertain what emotions one has, polygraph professionals are not able to do that either. Polygraphy has also been faulted for failing to trap known spies such as double-agent Aldrich Ames who passed two polygraph tests while spying for the Soviet Union. Viewed in this background, a careful and detailed reading of the discussion of the Supreme Court in several paragraphs, especially in paragraphs 169, 170, 193, 194, 196, 217, 218 and 220 of the judgment in the present case runs in favour of the total ban of these tests.

It will only be the innocent and illiterate population of our country who will be caught in net otherwise affected by this rider. It is for the Supreme Court to re-examine the issues in all its perspectives and give a clear cut verdict in the public interest.

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23 See AR Lakshmann (Dr), J, "The Supreme Court Ruling on the use of Narco Analysis is an incomplete exercise", Lawyers Update, February 2011 issue, p.12.