

EDITORIAL

Police investigation and unethical “scientific interrogation”

JINEE LOKANEETA

Shraddha Walkar's horrific murder has rekindled the urgent issue of domestic violence and violence against women in India [1]. With women's bodies often becoming part of a larger ideological and political narrative, Walkar's brutal murder was given a communal turn due to the interfaith nature of the relationship. The most visible manifestation of this was the attack by members of the Hindu Sena on the accused, Aaftab, while being taken from the forensic lab to Tihar jail [2], in the name of “protecting their women”. The other line of attack was on live-in relationships as somehow being responsible for this violence. As feminist Urvashi Butalia [3] says, rather than acknowledging that mistakes in relationships can occur tragically, in all contexts, irrespective of who chooses the partner — the woman or her family — and across religion, class, or caste, there is a tendency to start challenging women's choices and imposing a “lesson”: “Do not make your own decisions, abide by what the family says, we know better than you what you want”. She also notes the UN Office on Drugs and Crimes estimate that nearly six out of every ten women (58%) who are intentionally killed, worldwide, are murdered by intimate partners or family members [3]. Marital rape is not even legally considered rape in India, and violent lynchings are often the response to women's choices.

Instead of Shraddha Walkar's murder leading to a revisiting of the challenges of dealing with violence against women, the news cycle has been dominated by an obsession with the alleged murderer in the case, and an unprecedented focus on a combination of polygraphs, narcoanalysis and brain scanning (which is being considered). Briefly, lie detectors or polygraph tests involve the use of an instrument to detect physiological changes such as heart rate, blood pressure, breathing, and sweat patterns when relevant questions related to a crime are asked. In brain scanning, responses to stimuli are recorded by the electro encephalogram (EEG) to determine experiential knowledge of the crime. The most controversial technique is narcoanalysis, which uses drugs like sodium pentothal to elicit specific information. The popularity of such truth serums is often attributed to Robert House, who in the 1920s discovered its potential to ostensibly get to the truth [4]. The current use of such a drug is followed by a trained psychologist asking certain questions to get “truthful” answers; and the entire process is often videotaped [5].

In this case, Aaftab has been subjected to the polygraph six times and narcoanalysis once [6]. Neither the police nor the forensic scientists have directly revealed the results of the tests, and narcoanalysis reports are still awaited several days after it was carried out; the polygraph results have been submitted to the Delhi police. The media has reported the details of confessions that have emerged from these tests regarding disposal of the body and other evidence [7]. A number of outlets covered the history of these techniques and even mentioned the inadmissibility of the evidence and the need to ensure consent. Yet all of them collectively created an impression of the “usefulness” of these techniques while rarely [8] focusing on the lack of reliability or validity of the techniques or indeed the coercive aspects of their use, particularly in narcoanalysis.

Past history: truth machines in India 1.0

The three techniques (polygraphs, narcoanalysis and brain scanning) became visible in India only during the 2000s (though lie detectors had been in use since the 1970s), at the same time that the human rights movements and institutions started focusing on custodial torture and deaths in the post-emergency period, and especially in the 1990s. In many sensational cases such as the 2008 Aarushi-Hemraj double murder case, the 2006 Mumbai blast case, or the 2006 Nithari killings in Noida, narcoanalysis gained prominence [9]. As these investigation techniques became really pervasive, Amar Jesani's Ramanadham Memorial Lecture in 2009 [5:p 8-31], together with the important position statement by Peoples' Union for Democratic Rights (PUDR) [5:p 4-7] and debates with forensic scientists in this journal were important responses [10].

Author: **Jinee Lokaneeta** (jlokanee@drew.edu), Professor, Political Science and International Relations, Drew University, Madison, NJ 07940, USA, and Visiting Professor, National Law University, Dwarka, New Delhi, 110 078 INDIA.

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Jesani, in his Ramanadham Memorial lecture, characterised narcoanalysis as a form of “pharmacological” torture, “even if it does not spill blood, break bones and is done in sterile, air-conditioned operation theatres” [5:p 26]. His critique was two-fold, targeting both the scientific veracity of these methods and the ethical concerns in their use. Though persons become more excited and lucid on injecting sodium pentothal during narcoanalysis, it does not necessarily lead them to speak the truth. Jesani suggests that the person could equally be responding to hypnotic suggestions by the interrogator [5:p 25].

Similarly, P Chandra Sekharan, president of the Forensic Science Society and former Director of the Forensic Sciences Department of Tamil Nadu, confirmed that: “The outcome under a “sleep-like state”...could be contaminated by deception, fantasy, garbled speech and so on.” Sodium pentothal, a drug used in this test, helped a person to extract repressed feelings, memories and thoughts. It only revealed “psychological truth” and not the “probative truth,” which the police looked for [11].

The powerful narratives of narcoanalysis by Arun Ferreira [12], and later by those implicated in the 2006 Mumbai blast case, Abdul Wahid Shaikh and others [13], really made the critique of narcoanalysis visible for those concerned with human rights.

In addition to emphasising the medical effects of narcoanalysis, PUDR characterises “Narco-analysis...as a form of torture” because the test appeared as a violation of the self-incrimination clause of the Indian Constitution (Article 20 (3)) [5:p 7], which gives the accused the right to remain silent during the course of investigation. Narcoanalysis negates such protections.

Jesani also noted the important ethical concerns, especially the role of doctors in the process. Since the drug can have dangerous side effects, small doses have to be tested on a person to check for “allergic anaphylactic reaction,” and careful and constant monitoring is required to avoid sudden lowering of blood pressure, “cessation of respiration or apnea, constriction of the larynx, or a laryngeal spasm” [5:pp 27-28]. According to Jesani, participation in such a dangerous procedure, without informed consent, is a serious violation of medical ethics as reflected in the World Medical Association’s 1975 Tokyo Declaration against the participation of doctors in torture [5:p 30].

The first decade of the 2000’s saw widespread euphoria regarding these techniques with plans of expanded use, despite the serious constitutional and human rights concerns. However, a turning point appeared to be the intervention of the Indian Supreme Court.

Indian Supreme Court: ambiguity in the Selvi case

These drug or machine-based investigating techniques were often considered as humane alternatives to physical third degree — something that even the High Courts occasionally accepted in the 2000s. “Such tests are conducted under strict supervision of the expert. It cannot be said that there is any violation of the fundamental rights guaranteed to a citizen of India.” [14]

But in a landmark judgment, the Indian Supreme Court, in May 2010, declared the involuntary use of the polygraph, brain scanning, and narcoanalysis unconstitutional [15]. The Court declared their *involuntary* use as both a violation of Article 20 (3), and of the right against self-incrimination, as well as of “substantial due process” under Article 21, suggesting the integral relationship between the two Articles, which had been completely ignored by the High Courts. Consent had to be ensured in the use of these techniques dismissing the assumption that they were a natural part of investigation. Yet, the Supreme Court did not reject the techniques themselves. As the Supreme Court writes, “... we do leave room for the voluntary administration of the impugned techniques in the context of criminal justice, provided that certain safeguards are in place.” [15] It is this ambiguity in the Supreme Court’s position that reveals why the Indian police tends to turn to narcoanalysis and other “truth” techniques.

In the Aaftab case, the forensic science lab officials noted all efforts to keep him safe whether it was to ensure that he didn’t eat anything after 10 pm before the narco test, to be done on an empty stomach the next day [16]. FSL Assistant Director Sanjeev Gupta repeatedly told *The Tribune* [17] that narco testing is done only when all parameters are completed. If considered necessary, post narco testing is done as another session. This statement that “all parameters are complete before narco is done” is meant to indicate the ensuring of the safest of circumstances. Unlike with other prisoners and under trials who may languish in jails and lockups without medical facilities, here the state shows utmost care in presenting their methods as very humane.

As I have argued in my book, *The Truth Machines* [18], these techniques found much acceptance because they were seen as replacing physical torture and comfortably fit the Indian state narrative of modernising that addresses the ills of policing with a technical solution. However, as the Mumbai blast case accused, including Abdul Wahid Shaikh noted, narco testing often accompanied physical torture [13]. As one of the convicted in the Mumbai case said, ‘The camera was switched on and first she asked how many bombs were prepared. I answered that I am not concerned and I am falsely involved. She slapped me strongly and started pinching my left ear with pliers, because of which I suffered much... She then asked me what comes after six and I answered “seven.” She asked me on what TV operates and I answered that it operates on electricity. She again slapped me strongly and caught my ear with pliers and told me to say “by remote.”’ [19] Thus, the testimony showed the use of both physical torture and an attempt to manipulate the answers.

Some contradictions in the Supreme Court's decision on these techniques can only be explained if one considers it as an expression of an unrelenting faith in science. The Court states, "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.'" [15] Yet the judges claim: "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." Similarly, although the Court rejected its admissibility as evidence of even consent-based test results in a criminal case, it did allow for the admitting of "information or material that is subsequently discovered with the help of voluntarily administered test results." [15] This argument is based on section 27 of the Indian Evidence Act that has long been a source of abuse since it even allows evidence gained as a result of physical torture. Thus, in upholding the voluntary use of these techniques, the Supreme Court ends up reflecting a general faith in and openness to the reliability of these scientific techniques despite noting their inconsistent results.

Forensic techniques: standards for reliability and validity

To some extent, the ambiguity in the Supreme Court's jurisprudence is linked to the lack of standards for forensic evidence that remains an unaddressed issue in India. Rastogi et al [20] from Project 39A, of National Law University, Delhi, who have done path-breaking work on forensics in India point to how questions of reliability and validity have been neglected in India. As they put it, "There is a lack of a strong regime to regulate our forensic science laboratories and forensic medicine departments. Further, Indian law and practice are not designed for a meaningful examination of expert evidence. Neither the text of Section 45 of the Indian Evidence Act which deals with expert evidence nor its judicial interpretation provide any guidance on examining the scientific validity of forensic evidence. With lawyers, prosecutors, and judges unaware about the scientific basis of forensic techniques or their limitations, forensic reports receive little or no scrutiny beyond the traditional 'chain of custody' arguments." [20]. Recently, the Supreme Court had to reiterate the 2014 ban on the two-finger test, which "re-victimises and re-traumatises women", as unacceptable both for its patriarchal assumptions and for its lack of scientific validity [21].

Yet, what is surprising in the Selvi case is that the lack of reliability and validity of narcoanalysis really did not seem to bother the Supreme Court. Even if one were not just to focus on the coercive aspects of the techniques, especially narcoanalysis which is invasive and known to have harmful effects, and when consent within custody seems difficult, the reliability and validity of this technique has been rejected world-wide. Even the most innovative of agencies reluctant to give up techniques within its arsenal — the United States Central Intelligence Agency (CIA) — ended up stating very clearly in its report to the Church Committee in the 1970s, "No such magic brew as the popular notion of truth serum exists." [22]

In 2013-14 and 2016, I interviewed police, forensic psychologists, lawyers and activists from five Indian cities to understand the relationship between the law, science and policing [18]. I realised that just focusing on consent and admissibility may not be adequate, since the primary purpose of these techniques is not about what the scientific aspects can ensure, but that the forensic labs and hospitals create yet another site of confessions — either through the fear generated by the machines or the drugs and experts. That is one of the reasons the post narco session and six polygraph tests become significant in the Walkar case. As a forensic psychologist said to me, and the police agreed, that narco calms the public as the investigation seems to be progressing and as it involves those donning white coats and termed as psychologists who almost merge with the machines, giving a sense that this might get to the truth. In the process, the quest for other evidence, other forensic techniques, or more traditional modes of questioning and interrogation is given up, as the sole emphasis is on persuading the body to confess against oneself [23]. And because of inadmissibility of the evidence in the direct sense, the coercive aspects are no longer relevant and appear more humane than physical third degree.

If narcoanalysis is both coercive and unreliable, and its results inadmissible, its use in this horrific case only reveals a greater popular need for its existence, and for the police to once again focus on the need for information from the body's confessions rather than other means of investigation, indicating a serious crisis in police investigations in India.

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