

# Truth telling: Techniques in a regime of terror

## NARCO ANALYSIS, BRAIN MAPPING, AND POLYGRAPH WITHOUT INFORMED CONSENT

In recent years, the peculiar nature of the Indian state's violence in custodial contexts has emerged even more starkly: so-called scientific techniques of investigation introduced ostensibly to replace the physical third degree actually manage to coexist quite compatibly with that technique. In 2008, a report noted that 16,836 custodial deaths took place in India between 1994–2008, an average of 1,203 persons per year, many of them a result of torture in police and/or jail custody (*Torture in India: A State of Denial*, Asian Center for Human Rights, June 2008). In the same year, Arun Ferreira, an alleged Maoist activist, wrote a note from the Central Jail, Nagpur about his experiences of the so-called scientific techniques: narco analysis, brain mapping, and polygraph, to underscore the violation of his constitutional rights (Ferreira, "My Tryst with Narco Analysis," May 7, 2010, [www.countercurrents.org/ferreira070510.htm](http://www.countercurrents.org/ferreira070510.htm)).

The Indian criminal justice system has increasingly used lie detectors, brain scans, and narco analysis in a range of cases often without the consent of the accused. In a context where physical and mental torture is normalized despite a strong formal regime of laws and powerful judicial pronouncements, these new techniques are indicative both of a liberal state's desire to modernize as well as a marker of its specifically post-colonial nature. These techniques represent the Indian state's attempt to modernize even while holding on to the old regime of terror represented by impunity toward custodial deaths and torture.

## OLD AND NEW FORMS OF TORTURE COMPARED

However, the state's attempt to portray these forms of "scientific investigation" as a preferred mode, when compared with the existing physical third degree, masks the violence of these new tech-

BY JINEE LOKANEETA

Jinee Lokaneeta is an assistant professor in political science at Drew University in Madison, New Jersey.

She is the author of *Transnational Torture: Law, Violence, and State Power in the United States and India*, published by the New York University Press in 2011.

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niques and makes them a peculiarly resistant strain. Because these techniques are presented as "scientific," medicalized procedures, launched to modernize India's police force, they are extended less scrutiny for the violence they themselves may contain. The Indian Supreme Court's landmark intervention to strike down the involuntary use of these techniques falls short of addressing this complexity and the context of the "regime of terror" in which these techniques function.

Polygraphs (or lie detectors) note the physiological changes in the body such as heart rate, blood pressure, breathing, and sweat patterns in response to certain questions. Brain mapping, or the P300 test, a more sophisticated lie detector, records the differences in the responses to the neutral words (no link to the crime), the probe words (readily available information about the crime), and the target (based on confidential information) in the form of electrical responses with an electroencephalo-

gram (EEG) or functional magnetic resonance imaging (fMRI). The aim is to detect whether a specific brain wave called "the 300" involuntarily spikes up when confidential information is spoken (Amar Jesani and PUDR, *Twenty Second Dr. Ramanadham Memorial Lecture* (Delhi: People's Union for Democratic Rights, 2008)).

## TRUTH SERUM EXPERIMENTS

In narco analysis, the most controversial technique, medical professionals use sodium pentothal to put a person in a trance so that certain questions can be asked to discover the "truth"; hence the common reference to a truth serum. Sodium pentothal is supposed to work by prohibiting the transmission of gamma amino butyric acid (GAABA) in the upper or cortical part of the brain that allows one to lie and enables a well-trained psychologist to ask certain questions and get "truthful" answers. These three methods have been used to aid criminal investigations to collect evidence and the results of brain mapping have been used to convict in at least one instance (Giridhardas, "India's Novel Use of Brain Scans in Courts Is Debated," *New York Times*, September 15, 2008).

The High Courts of many Indian states mostly upheld the constitutionality of these techniques in relation to the right against self-incrimination (article 20(3) of the Indian Constitution). The courts argued that the consent for these techniques need not be ensured under the Constitution because they were a natural part of the investigation; were better than the third degree being currently used in many police stations; and also justified the use of these techniques as necessary for the good of society (*Ramchandra Ram Reddy v. State of Maharashtra*, 2004; *Smt. Selvi and Ors. v. State of Koramangala Police Station*, 2004; *State of Andhra Pradesh v. Smt. Inapuri Padma and Ors.*, June 2008).

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## SUPREME COURTS LANDMARK AND FLAWED DECISION

In May 2010, in a landmark decision, the Supreme Court of India declared the involuntary use of these techniques as both a violation of article 20(3)—right against self-incrimination—as well as of “substantial due process” under article 21. The Court said: “the compulsory administration of the impugned techniques violates the ‘right against self incrimination, ... and amount to cruel, inhuman or degrading treatment’” (*Smt. Selvi & Others v. State of Karnataka*, 2010). However, the Supreme Court in striking down the involuntary use of these techniques has made an important but inadequate intervention. First, the Court has not struck down these techniques themselves. The 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.”

Second, even though the Court rejected admissibility of even the consent-based test results as evidence in a criminal case, it did allow for admitting “information or material that is subsequently discovered with the help of voluntarily administered test results” based on section 27 of the *Indian Evidence Act*; a section that has been a source of earlier abuse (*Smt. Selvi & Others v. State of Karnataka*, 2010). Finally, the Court did not clarify the role of medical professionals in the investigations. While stating clearly that these techniques could not be allowed under section 53 of the *Criminal Procedure Code* that permits the use of some force during medical investigations, the Court does not go beyond that critique. This limitation is especially significant because the High Courts repeatedly

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referred to the safety of these techniques as being linked to the presence of medical personnel (Jesani, “Editorial” (July-September 2010), vol. 7, no. 3 *Indian Journal of Medical Ethics*).

## GAINING CONSENT À LA THIRD DEGREE

Arun Ferreira’s note on these techniques makes the difficulty in ensuring meaningful consent, emphasized by the Supreme Court in its decision, particularly visible. Ferreira was picked up in May 2008 under the *Unlawful Activities Prevention Act* (UAPA) as a suspected Maoist activist. These techniques were used on him in two locations: Mumbai and Bangalore. His experience is a reminder that not only do physical third degree and other forms of excessive violence continue in cases where scientific techniques may not be used; they may also actually complement these techniques in certain cases.

For example, Ferreira writes about how in the course of prolonging the trance like situation in narco analysis, the doctor would physically beat the suspects to stop them from becoming unconscious. As Ferreira puts it, “Dr. Malini regularly scolded, slapped, and physically tortured the subject to jerk them out of the troughs” (“My Tryst with Narco Analysis,” 4). The difficulties in following safeguards are further illustrated in the way consent was gained in Ferreira’s case in 2008. From procuring a manufactured letter of consent (in

Mumbai), a court order dictating consent (in Bangalore) to consent resulting from a threat of assumption of guilt, all suggest that voluntariness is difficult to ascertain in practice.

## CRUEL AND DEGRADING TREATMENT

Undoubtedly, the complete disregard for consent was a major source of concern for the human rights groups and scholars before the Supreme Court decision, but the overemphasis of the Court on consent seems a little arbitrary considering that these techniques are being used in custodial situations and have particularly less meaning for the marginalized sections of society. Further, the opinion 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’” (*Smt. Selvi & Others v. State of Karnataka*, 2010). Yet the justices restrict themselves to saying, “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” (*Smt. Selvi & Others v. State of Karnataka*, 2010). Thus, the Court fails to go the additional step of striking down the impulse behind these techniques altogether, focusing primarily on their involuntary use.

## RELIANCE ON TRUTH TELLING

In India, the turn toward these techniques is particularly significant in light of its attempt to represent itself as not only a growing economic power but also one with strong legal and constitutional traditions defining its democratic nature. There has been much criticism of the Indian state’s consistent refusal (and delay) to ratify the UN Convention against Torture though an anti-torture bill is currently in process. Considering the high levels of custodial torture and deaths in the Indian context, the Indian state cannot deny the numbers; the

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“truth telling” techniques are encouraged as a step forward toward replacing the traditionally brutal third degree. However, the reality is that the techniques are actually compatibly coexisting with a “regime of terror.”

As noted earlier, the “regime of terror” in India is characterized by custodial torture in routine interrogations, but in addition includes extra judicial killings of mafia, militants, and activists, and undemocratic extraordinary laws such as *Terrorism and Disruptive Activities (Prevention) Act* (TADA), and *Prevention of Terrorism Act* (POTA) in the past, and UAPA today. In such a context, disallowing only the involuntary use of these “scientific” techniques becomes even more inadequate because they appear as benign merely being used to gain efficiency in criminal investigations. This is the case despite the fact that both the reliability of and safety in using these techniques is highly suspect.

### EXTRAORDINARY LAWS AND STATE VIOLENCE


The Supreme Court has presently ruled out the possibility of involuntarily using these techniques even against “suspected terrorists” basically stating that

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“compelling state interest” could only be a legislative decision, not a judicial one (*Smt. Selvi & Others v. State of Karnataka*, 2010). This is reminiscent of other extraordinary laws such as POTA and TADA, which were also introduced by Parliament and upheld by the Indian Supreme Court in the past. Thus, it is important to note that the Court did not strike down the techniques by themselves despite their inherently coercive nature. Therefore, it is too soon to evaluate whether the Court will reject them if a law is actually introduced. This is because, in any case, terror suspects are subject to more stringent laws that dilute

the protections against torture. They are subject to other due-process violations and volition is even less visible.

Furthermore, in many of these investigations, the premise is often to use information for intelligence purposes not as evidence, and section 27 would be particularly open to abuse in such contexts. Or else, the evidence could be creatively used in gaining information in extraordinary cases but used to convict in routine cases—a phenomenon Ujjwal Singh calls “the interlocking of the ordinary and extraordinary” (Singh, “State and Emerging Interlocking Legal Systems” (2004), vol. 39 *Economic and Political Weekly*, 149-154). This may explain the particularly egregious way in which these techniques were applied to Ferreira, though it is important to note in his narrative that this was commonly the case.

Thus, the Indian state’s relationship to violence is reflected in both these realities: a continued inability to contain high rates of custodial torture (and deaths) and the introduction of “scientific techniques” ostensibly to replace the former without recognizing the compatibility between the two and the possibilities of violence within the new techniques themselves. 

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tantamount to dishonouring the death of a brave police officer.

### SUBVERSION OF DEMOCRACY

Indeed, every single institution of Indian democracy was subverted and sacrificed at the altar of national security. The National Human Rights Commission (NHRC) watched on helplessly as the police ignored its guidelines on encounter killings—namely, that a First Information Report (FIR) is registered against a police party who conducts the encounter and that a magisterial inquiry is held. Then, when asked to conduct its own inquiry, the NHRC chose to rely on the statements of four senior police officers of the Delhi Police to proclaim their innocence. The Supreme Court ruled out

any further investigation preferring to uphold the morale of the police force, which apparently would flag if the police were caught killing innocents, rather than seeking the truth. For almost two years, dozens of RTIs seeking the post-mortem reports of the three killed were rejected on spurious grounds with the argument that release of this information would impede investigations!

When the post-mortem reports were finally released, perhaps mistakenly by the NHRC, it came to light that the two youth killed had suffered non-firearm injuries, hinting at torture—but even more startling was the revelation that they had only sustained gunshots in their back region—an obvious impossibility if one were to believe the police story of

exchange of fire. The gunshot wounds suggested that they had been shot in the back from very close range, with the younger Sajid probably made to crouch when the bullets were emptied into his head.

The Delhi Police will, however, not be held accountable in any court of law. Despite severe pressure from human rights and Muslim groups, the government refused to order an inquiry, especially after the clean chit, helpfully handed out by the NHRC. As the Indian state slouches toward a national security framework, entire sections of its population are pushed out of the ambit of civil rights and marked as suspects. In this netherworld of counter terrorism, guilt is established rather easily. 