

respond to the colour test; (ix) isolated cases of presence of foreign matter; (x) labelling errors including nomenclature mistakes such as Rx, NRx, XRx, Red Line, Schedule H caution, colour, etc.

Summarised from: Website of the Central Drugs Standard Control Organisation, government of India: Guidelines for taking action on samples of drugs declared spurious or not of standard quality in the light of enhanced penalties under the Drugs and Cosmetics (Amendment) Act, 2008. <http://cdsco.nic.in/Guidelines%20under%20new%20penal%20provisions.pdf>

**** According to Section 17 of the Act:**

“A drug shall be deemed to be misbranded (a) if it is so coloured, coated, powdered or polished that damage is concealed or if it is made to appear of better or greater therapeutic value than it really is; or (b) if it is not labelled in the prescribed manner; or (c) if its label or container or anything accompanying the drug bears any statement, design or device which makes any false claim for the drug or which is false or misleading in any particular.”

One wishes that recycling expired drugs were mentioned as a misdemeanor less opaquely and more explicitly. Top selling products such as “Fair and Lovely” and its clones would certainly be misbranded cosmetics, defined likewise in the Act, under Section 17-C.

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Supreme Court judgment on medical interrogation: on the just use of science and the ethics of doctors' participation in criminal investigation

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In early May 2010, a three-member bench of the Supreme Court of India, headed by the outgoing chief justice, delivered a path-breaking judgment (1). It declared illegal, and a violation of human rights, the use of medical techniques such as narcoanalysis and various methods of “lie detection” (hereafter known as medical tests) in the investigation of individuals suspected of a crime, without their consent as well as other extensive safeguards.

Over the years, the *Indian Journal of Medical Ethics* has consistently criticised and opposed the participation of health professionals in carrying out the death penalty; in torture and in the police interrogation of people accused of a crime. *IJME* has opposed the use of scientifically questionable medical tests as methods of criminal investigation. The court's judgement is a welcome response to a worrisome practice.

In no time in the country's history have the use of medical tests, and the participation of doctors in police investigation, ever been as extensive (at the drop of a hat, tests such as polygraph, narcoanalysis and brain mapping have been ordered on thousands of individuals suspected of crimes including terrorism), as prominent (newspapers have carried front page reports, and the electronic media have run clips of people getting interrogated inside operation theatres) and as universally acceptable (even politicians have demanded that their rivals be put under narcoanalysis), as in the last few years. In a time of jingoism and political-ideological hype on terrorism, the irrationality of public opinion and swaying from professional commitment by individual health professionals, though highly reprehensible, can still be explained. However, what was more disgraceful and shameful was the fact that, barring a few who stuck their necks out, the community of health professionals in general maintained a stoic silence. The same was true for medical journals (barring a few) and medical associations that are supposed to provide leadership to the profession.

We hope the Supreme Court's judgment will make the profession do some introspection. Indeed, not only do we all need to introspect on where we are failing as a profession, we also need to prepare ourselves for the next phase of our campaign to uphold professional ethics. This is because while this is a very good judgment to protect the human rights of those accused of crimes, it falls short on protecting the professional ethics of doctors, and in providing good guidance on the future use of medical techniques in interrogation.

But before we look at the judgment's shortcomings let us first celebrate the areas in which it has strengthened human rights in the country.

Invoking the Constitution and human rights

Writing in *Frontline*, V Venkatesan (2) notes that, after a long time, in the matter of national security the Supreme Court has made a sincere effort to articulate the constitutional principles involved rather than pass the buck to the legislature. As in matters related to anti-terror laws (such as the Terrorist And Disruptive Activities Act), in the present case, too, the issue here was related to “national security”, curbing terrorism, finding terrorists, and so on, for which the use of certain medical tests was deemed necessary. The judgment, while applying the judges’ minds to the technicalities of the issues involved, deals comprehensively with the deeper constitutional issues, providing connections between Article 20 (conviction may be only for the violation of a law in existence at the time of the offence committed; a person may be prosecuted and punished for a charge only once, and people accused of a crime shall not be compelled to give witness against themselves) and Article 21 (life or personal liberty may not be taken away except in accordance with a procedure established by law) of the Constitution. It also reasserted that these articles have a non-derogable (inviolable) status and cannot be suspended even during the operation or proclamation of an emergency.

The judgment distinguishes between the use of medical examination for collection of “physical evidence” and for collection of “testimonial evidence”. The former may be collected without the consent of the accused; consent is required to collect testimonial evidence except of certain types. The Code of Criminal Procedure (CrPC), 1898, did not provide explicit power for conducting medical examinations of people accused of a crime without their prior consent. However, on the basis of recommendations made by the 37th and 41st Reports of the Law Commission, in 1973 the CrPC was overhauled and in Sections 53 and 54, introduced a provision for medical examination of arrested persons irrespective of their consent. This was used in the Supreme Court case as an argument by the respondents (the government) to support the conduct of medical tests like narcoanalysis and lie detector tests. The explanations to Sections 53, 53A and 54 were amended in 2005 to clarify the scope of a medical examination. Despite these clarifications, the police and the courts continued to order these medical tests. The Supreme Court judgment clearly limits the scope of such involuntary medical examinations. It states that the involuntary medical examination of suspects is permissible only for the collection of physical evidence (such as blood and DNA samples, and fingerprints). Only two specific kinds of testimonial evidence, namely, specimen signatures and samples of handwriting, may be collected without consent.

The judgment asserts that it is essential that statements made by the accused are reliable and voluntary in order to safeguard the integrity of the criminal procedure. This implies that all “testimonial evidence” collected from the accused must be voluntary. *The use of any medical examination and/or testing – without the consent of the accused – for the purpose of obtaining testimonial evidence would violate the integrity of the criminal procedure.* Indeed, the use of any method – including medical tests - to make an accused to testify against his or her will, i.e. involuntarily, would also violate the constitutional safeguard in Section 20 that people cannot be compelled to bear witness against themselves.

There are other additional gains for human rights in this judgment. While the polygraph tries to elicit testimonial evidence using the indirect method of measuring the physiological response to various questions, and narcoanalysis uses mind-altering drugs to make people speak against their will, other tests measuring electrical activity of the brain do not require a person to even speak. These tests rob a person of the right to remain silent, and also intrude into a person’s thinking. The judgment declares that results obtained from such medical tests should “be treated as personal testimony”. Indeed, the judgment clearly upholds the constitutional right to privacy, including the right to remain silent, as inviolable. At the same time, it extends this right to “cognitive privacy”. This is very important as many new methods being developed in the neurosciences are for what might be described as “peeping into”, or reading, minds. So the right to privacy ought to protect not only the body, but also the mind and its right to think.

In the past, we have argued in *IJME* that the use of these medical tests violated the rights to due process and fair trial and, most important, they amounted to the use of torture. The Supreme Court judgment upholds these arguments. It states:

...the term ‘cruel, inhuman or degrading treatment or punishment’ should be interpreted so as to extend the widest possible protection against abuses, whether physical or mental, including the holding of a detained or imprisoned person in conditions which deprive him, temporarily or permanently, of the use of any of his natural senses, such as sight or hearing, or of his awareness of place and the passing of time.

It also takes this logic further and says that “proving the occurrence of ‘cruel, inhuman or degrading treatment’ would require a lower threshold than that of torture”.

Unresolved issues of professional ethics

The Supreme Court dealt with several appeals together in order to arrive at this judgment on the use of medical tests. The appellants had done a thorough job. In addition to raising the issue of human rights violations, they also submitted articles from *IJME* declaring the participation of medical professionals in the conduct of such tests unethical. However, the Supreme Court did not consider it fit to get involved in the matter, stating: “...we do not have the expertise to mould the specifics of professional ethics for the medical profession.” After declaring itself incompetent to deal with this issue, it went on to explain: “...furthermore, the involvement of doctors in the course of investigation in criminal cases has long been recognised as an exception to the physician-patient privilege”.

This attitude of the Court is not new. For that matter, courts as well as lawmakers in India have treated medical ethics as expendable and subject to the needs of the medical profession's service to the state. The same attitude prevailed in 1995 when the Supreme Court ordered that at the time of the actual execution of the death penalty by hanging, doctors should periodically examine the condemned prisoner while he/she was hanging, so that the body could be brought down as soon as the doctor found the prisoner dead (3). The overwhelming concern of the court here was "humanitarian," a peculiar kind of humanitarianism which held that it was humane to order a person killed by hanging but found it barbaric to keep his body hanging for half an hour so that he was definitely dead when brought down and examined by the doctor in order to issue a death certificate. The court did not ask what the doctor's ethical obligation was when the hanging prisoner was found alive. Was there no ethical obligation to make efforts to save the prisoner?

There is no ambiguity in the current standards of medical ethics about the need for doctors to take the accused's informed consent for conducting tests such as narcoanalysis and brain mapping. It was not an ambiguity in ethics but ambiguity in the law or erroneous interpretation of the law by the courts that resulted in judgments permitting the police to go ahead with these tests without the consent of the accused. The same is true in the case of examining a condemned prisoner while he or she is hanging - doctors were not required to conduct such examinations but for the order of the Supreme Court.

More important, why is the medical profession in India meekly accepting a court-assigned role that is fundamentally in violation of medical ethics? For instance, for the last 40 years the medical profession in the United States has refused to administer the lethal injection to execute the court-ordered death penalty. This has forced authorities to train their own non-medical staff to administer a lethal injection. Why has the profession in India surrendered its ethics without even an argument?

And how long will the courts in India continue to assert or believe that they have the power to make doctors get involved in criminal investigation without any concern for their medical ethics simply because of their understanding – which is contested – that in *all* situations such involvement "has long been recognised as an exception to the physician-patient privilege"? While upholding constitutional provisions and human rights in this case, the Supreme Court could also have used this opportunity to align medical ethics with human rights.

Use and misuse of medical science:

Law and science have two different methodologies and understandings of evidence. Medical science with its paraphernalia of techniques and tests is increasingly being called upon by the law for assistance. So a plethora of medical practitioners and scientists are invited as expert witnesses. Many of them have their own agendas and allegiances – so much so that in the US, there has been great concern about "junk science" being paraded in the courts to get favourable judgments. The Supreme Court judgment shows a remarkable knowledge about the way that laws on the use of scientific evidence have evolved in the US; indeed, the court evaluated medical tests being used for criminal investigations using criteria laid down by judgments in US courts.

The judgment is equally remarkable for not making any assessment, or even firm critical statement, on whether the lower courts in India were misled by junk science, promoted by forensic scientists and the police for over a decade. While the 251–page – long judgment describes the criteria used by US courts in assessing such medical technologies, it does not put together our own criteria for the assessment of such technologies so that in the future judges of Indian courts are not misled by junk science. It could have also pointed to the need to educate and train judges in India on how to assess the claims of science and its technologies so that serious mistakes could be avoided in the future.

Torture with and without consent: the issue of compensation

To be dispassionate may be a scientific and legal virtue, but by showing concern for those who suffered because of the fault lines in our system, we do not become less objective. It is disquieting that the judgment says nothing about the thousands of suspects or accused who have been subjected to cruel and "degrading treatment by way of medical tests under court orders" of courts for over a decade. The issues were known as early as 1997 – to be precise since May 16, 1997, when the National Human Rights Commission (NHRC) received a complaint against the use of such medical tests. The complaint was rejected by a member of the Commission. It was the persistence of the petitioner, demanding another review every time his petition was rejected, that ultimately prompted the NHRC to frame and make available, to all police, security and legal authorities, its famous eight point guidelines on March 16, 2001 (4). These guidelines made it mandatory to obtain the informed consent of the accused, using a prescribed procedure. They also provided for additional rules to safeguard the accused. They also refused to allow the testimony obtained under these tests *even after proper consent* for use as evidence against the accused. At the end of the 251-page-long judgment, the Supreme Court's operational order has only restated and upheld the NHRC guidelines.

However, between March 16, 2001 when the NHRC released its guidelines, and May 5, 2010, when the Supreme Court judgment was delivered, thousands of people were put through what the judgment itself terms torture or cruel and degrading treatment in

this period, without their consent and on the explicit orders of the courts and/or the arbitrary decisions of investigating agencies. Do they not deserve compensation – or at the very least an apology – for what was done to them? Do they not deserve this irrespective of whether they are “good” people or “bad” people? Our concern and commitment to justice are better expressed when, in addition to taking care to stop injustice and torture in future, we also acknowledge past injustices and make some humane gesture towards the victims.

References

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Opportunities for internships in ethics

Centre for Studies in Ethics and Rights (CSER) was set up in January 2005 by the Anusandhan Trust (AT) to undertake research in ethics and human rights.

CSER is engaged in research and training in ethics, rights and capacity building of voluntary organisations/NGOs. It organises training programmes in various fields, including bioethics, ethics in clinical trials and programme management. Our priority areas include professional ethics, research bioethics, public health ethics, development ethics, law, human rights and ethics, comparative ethics, and exploring linkages between the discourses in ethics and rights in the Indian context.

CSER faculty members include social scientists, medical professionals, bioethicists and public health practitioners. These include Dr Amar Jesani, Dr Nobhojit Roy, Dr Padma Prakash, Ms Padma Deosthali, Ms Sandhya Srinivasan, Ms Pranoti Chirmuley and Ms Neha Madhiwalla.

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The internships are for a minimum of six weeks and can extend to six months. An intern from Mumbai and outstation who has an accommodation facility in Mumbai will get Rs. 8000/- as stipend. Any Intern from outstation who does not have any accommodation in Mumbai will get Rs.12, 000/- as stipend. CSER will offer partial support. CSER will cover the costs of any local travel and related expenses incurred by the intern while doing project-related work.

Interested applicants can email Mr Shinde [mahendra.cser@gmail.com or (call +91-22-2668 1568)], with updated resumes, areas of interest and contact details. A faculty member will follow up with the applicant. Interns will be selected based on their interests, skills, experience and requirement of the centre.