

Human Rights & Medical Personnel

By

Justice K. KANNAN,

Judge, [High Court of Punjab and Haryana, Chandigarh](#)

Introduction

Torture and human rights violations do not begin and end merely with physical violence and blood. The perpetrators of human rights violations have also the most unlikely collaborators in doctors, who are believed to have the kindest countenance to human sufferings. The doctors are involved in administration of drugs to induce a state of stupor in suspected criminals to splutter the hidden truth; they plant devices on human bodies to study brain, heart and intestines; monitor human response to questioning in police interrogation; they examine breath, blood, urine, semen, DNA to detect or determine commission of crimes; they also administer drugs on human subjects, particularly to the vulnerable sections without consent or with consent that is close to deception and exploitation for testing the efficacy of drugs. The purpose of the essay is to highlight the frontiers of human rights violations where the medical personnel dangerously tread. Many of the examples and cases of human rights violations through medical personnel examined here have been taken from foreign countries, not because they do not happen in India but our courts are less responsive to invasion of privacy and the public adopt too paternalistic a view on doctor's goodness to venture an objective inquisitorial exercise concerning the medical personnel.

Human rights and International Conventions concerning medical personnel

The U. N. Universal Declaration of Human Rights clearly stipulates "No one shall be subjected to torture or cruel, inhumane or degrading treatment or punishment. The World Medical Association's (WMA) "Declaration of Tokyo" in 1975 states: "The physician shall not countenance, condone or participate in the practice of torture or other cruel, inhuman or degrading procedures, whatever the offence of which the victim of such procedure is suspected, accused or guilty, and whatever the victim's belief or motives, and in all situations, including armed conflict and civil strife." The International Committee of the Red Cross (ICRC), Amnesty International, Human Rights Watch, et al, indicate that medical personnel have on many occasions failed to maintain medical records, conduct routine medical examinations, provide proper care of disabled and injured detainees, accurately report illnesses and injuries, and falsified medical records and death certificates. It is suspected the world over that medical system has failed to protect detainee's human rights, violated the basic principles of medical ethics and ignored the basic tenets of medical professionalism. Medical personnel and medical information have also been used to design and implement psychologically and physically coercive interrogations. Recently, it is complained by some sections of the press that the so-called concerted actions against terrorism, have resulted in torture of particular individuals and groups by the police with the active assistance of the medical professional. Of them, persons in

detention accused of crimes and undergoing trial are the most vulnerable sections against whom such violations take place with crude abandon.

H u m a n rights violations under military regime

An extreme case in recent history occurred in Nazi death camps, where doctors supervised killings and selected which people went into the camps and which were killed. Physicians who interviewed Nazi doctors said most were normal people who went home on weekends to be fathers and husbands. They were not killers before serving in the death camps and did not continue killing afterward. Those who interviewed U. S. soldiers about atrocities in Vietnam said there's an internalization of the ethos of the organization that then prompts actions the person would not ordinarily perform¹. Since the September 11 attacks, terrorism has been linked inextricably to the public mind (in the west) to people from middle-eastern and Muslim backgrounds, generating the type of extreme prejudice that, in a poorly monitored detention environment such as Abu Ghraib and Guantanamo ², offers moral license for torturers³. The result is that human rights are allowed to be overlooked and even violated in order to gain information to win the war against terrorism⁴. In other words, the end - to- win the war on terrorism - justifies any means, including techniques used to gain invaluable information. As a result, military medical personnel are placed in a position of a "dual loyalty" conflict⁵. They have to balance the medical needs of their patients, who happen to be detainees, with their military duty to their employer⁶.

H u m a n Rights and human experimentation

Prior to World War II, there were no international efforts to regulate human experimentation. National activities were few and far between. One exception was a Directive on Human Experimentation issued in December 1900 by the then Prussian Minister of Religious, Educational and Medical Affairs. This was followed by a Circular on innovative therapy and scientific experimentation promulgated by the then Reich Minister of the Interior in February

¹ A. Powell, "Why Good Doctors Do Bad Things," *Harvard Gazette* (March 3, 2005): 1-3, at <<http://www.news.harvard.edu/gazette/2005/03.03/ll-abu.html>>

² Prison camps in Iraq under the military control of USA and its allies.

³ D. Silove, Review of *Combating Torture: A Manual For Action* (Amnesty International, London, 2003) in *The Lancet* 363 (2004): 1915-1916. Sensing the public outcry against the methods of interrogation, among the first orders, on assuming office of Presidency in January 2009, Barack Obama directed the closure of prison camps at Guantanamo Bay. He also ordered a review of military trials for terror suspects and a ban on harsh interrogation methods.

⁴ These measures include: "sleep deprivation, prolonged isolation, painful body positions, feigned suffocation, and beatings. Other stress-inducing tactics have allegedly included sexual provocation and displays of contempt for Islamic symbols." See M. G. Bloche and J. H. Marks, "Doctors and Interrogators at Guantanamo Bay," *New England Journal of Medicine* 353 (2005): 6-8. See also, Physicians for Human Rights, "Break Them Down: Systematic Use of Psychological Torture by U. S. Forces," *Physicians for Human Rights Report*, Cambridge, Massachusetts, 2005.

⁵ Some Pentagon officials have argued that medical personnel advising interrogators were not bound by ethical strictures because they were not treating patients but rather were acting as behavioral scientists. See N. Lewis, "Interrogators Cite Doctors' Aid at Guantanamo," *New York Times* (June 24, 2005)

⁶ Peter A. Clark, Medical Ethics at Guantanamo Bay and Abu Ghraib: The Problem of Dual Loyalty, 34 *J.L. Med. & Ethics* 570 (2006)

1931. Just over five years later, in April 1936, the Bureau of the Medico-Scientific Council of the People's Commissariat for Health of the Russian Socialist Federated Soviet Republic (RSFSR), the main constituent Republic of the then Union of Soviet Socialist Republics, issued an Advisory Resolution on the procedures for testing new medicinal substances and methods which may present a hazard for the health and life of patients. In 1946 the American Medical Association published its first principles of human experimentation, while in 1953 the US Department of Defence issued its then "top-secret" Memorandum on the use of human volunteers in experimental research. In the same year, the Clinical Center of the US National Institutes of Health issued a policy document on clinical research, while the United Kingdom Medical Research Council issued a Memorandum on clinical investigations. On 16 December 1966, the International Covenant on Civil and Political Rights was adopted by the United Nations General Assembly, which came into force ten years later, on 23 May 1976. Article 7 was influenced by the events that led to the Nuremberg Code, as well as by other inhuman practices during World War II. It lays down that "no one shall be subjected without his free consent to medical or scientific experimentation." This Article is clearly binding on the many countries which have ratified the Covenant. Reference should also be made to the Declaration on the Human Rights of Individuals who are not nationals of the country in which they live, proclaimed by the General Assembly on 13 December 1985. Article 6 lays down that "no alien shall be subjected without his or her free consent to medical or scientific experimentation"⁷.

Conventions apart, human experimentation developed in the shadow of horrific examples of abuse such as Nazi experimentation on human beings⁸ that resulted in the Nuremberg trials.

⁷ The Evolution of Research Ethics: The Current International Configuration by Sev S. Fluss in 32 J.L.Med & Ethics 596

⁸ A history of German politics in the 1920's, 30's, and 40's set the stage for the government-sponsored eugenics (so-called "racial hygiene") movement. Early racial hygiene proponents had little association with anti-Semitism, but this changed when racial hygiene extremists merged with National Socialism. Biology became prominent in Nazi ideals, with Nazi leaders referring to National Socialism as "applied biology," reflecting its social Darwinist racial hygiene origins. This "scientific" basis attracted many physicians to Nazism. The National Socialist Physicians' League was formed in 1929 "to coordinate Nazi medical policy, and purify the German medical community of Jewish Bolshevism." By 1942 about half of all physicians in Germany (more than 38,000) were members of the Nazi party. Hitler was even referred to as the "great doctor of the German people". Nazi racial hygiene goals were carried out through three medical programs. The Sterilization Law permitted forced sterilization of those with mental disease, epilepsy, Huntington's chorea, or other various "genetic" diseases.

The Nuremberg Laws excluded Jews from citizenship and prevented marriage or sexual relations between Jews and non-Jews. Perceived as necessary for the public health, these laws were overseen by physicians. Euthanasia, genocide, and experimentation were also conducted by physicians, who reportedly volunteered for these assignments, feeling them vital to the government's war effort and "racial cleansing" plans. The crimes included human experiments to test the effects of: high-altitude; freezing; malaria vaccination and treatment; mustard gas; sulfanilamide and other drugs; bone, muscle and nerve regeneration and bone transplantation; ingesting sea water; epidemic jaundice, typhus, yellow fever, smallpox, paratyphoid A and B, cholera, and diphtheria vaccines; various sterilization methods; selected poisons; and bomb materials. A large collection of Jewish skeletons was also maintained and studied for evidence to support the doctrine of Nazi eugenics. General Taylor, who was brought to trial was reported to have described these crimes as "the logical and inevitable outcome of the prostitution of German medicine under the Nazis... All of the physicians violated "the Hippocratic commandments which they had

The Tuskegee experiments in which Black men were denied treatment for their syphilis, and the case of institutionalized children at Willowbrook who were intentionally infected with hepatitis and studied to determine the effects of a vaccine. Recent examples, such as the death of an eighteen-year-old in a gene therapy trial and the death of a nine-month-old given an experimental drug for reflux, serve as sobering reminders that using humans as research subjects continues to pose significant risks⁹.

Doctor as collaborators with police in criminal investigations

It is commonplace knowledge that tools of investigation adopted by the police for crime detection involve physical and mental torture. Securing vital leads to missing links in its process make way for active collaboration of the police with medical personnel for administration of certain types of drugs to induce the suspect to give information by questioning in a hypnotic state. The resort to medical professionals for their opinions is invariably made while the cause and the time of death are issues in a criminal trial for 'homicide' and 'murder'¹⁰ or in cases of injuries voluntarily caused on another with criminal intention. Extra Judicial confession and the maintenance of medical records afford vital evidence in criminal cases, where doctors are invited to tender testimony on facts to which they are privies. All these duties have important bearing on human rights issues. Indian Medical Council (Professional Conduct, and Ethics) Regulations with regard to professional conduct, etiquette and ethics, notified in 2002 sets out, inter alia, that the physician shall not aid or abet torture nor shall he be a party to either infliction of mental or physical trauma or concealment of torture inflicted by some other person or agency in clear violation of human rights.

Narco-analysis, brain mapping, lie detectors – tools for torture?

In respect of sensitive criminal cases where the investigating agency is not able to make headway, it resorts to the practice of subjecting the principal suspects to certain medical tests

solemnly sworn to uphold and abide by, including the fundamental principle never to do harm- *primum non nocere*." See *The Nazi Doctors and the Nuremberg Code*, (George J. Annas & Michael A. Grodin eds., 1992).

⁹ Jennifer Rosato on *The Ethics of Clinical Trials: A Child's View*, 28, *J.L. Med. & Ethics*, 262

¹⁰ The Indian Penal Code makes a technical distinction between murder and homicide not amounting to murder. See sections 299 and 300 of the Code.

such as narco analysis¹¹ and brain- mapping¹² with the help of doctors as a part of investigation strategy to pick up vital leads from the statements made in a drug induced state made by suspects and witnesses. The objections to this have been on the basis that it subjects the individual to testimonial compulsion and hence constitutionally impermissible¹³. Courts in India¹⁴, not surprisingly, lean in favour of investigating agencies and hold that while the statements made by persons in a state of stupor or the data collected by brain mapping could not be admissible, facts discovered through such statements that may help the State machinery follow the criminal trail and ultimately unravel mystery cannot be objectionable. Courts' willingness to surrender to the medical process as a scientific tool that is practiced in various countries is

¹¹ The Narco Analysis Test is conducted by administering 3 gms of Sodium Pentathol or Sodium Amytal dissolved in 3000 ml of distilled water depending upon the person's sex, age, health and physical condition and this mixture is administered intravenously along with 10% of dextrose over a period of 3 hours with the help of an anaesthetist. The rate of administration is controlled to drive the accused slowly into a hypnotic trance. The effect of the bio-molecules on the bio-activity of an individual is evident as the drug depresses the central nervous system, lowers blood pressure and slows the heart rate, putting the subject into a hypnotic trance resulting in a lack of inhibition. The subject is then interrogated by the Investigating Agency in the presence of the doctors. The revelations made during this stage are recorded both in video cassettes. The report prepared by the experts is what is used in the process of collecting evidence. Under the influence of the drug the subject talks freely and is purportedly deprived of his self-control and will power to manipulate his answers. The underlying theory is that a person is able to lie by using his imagination. In the Narco Analysis Test, the subject's imagination is neutralized and reasoning faculty affected by making him semi-conscious. The subject is not in a position to speak up on his own but can answer specific and simple questions. In this state it becomes difficult for him to lie and his answers would be restricted to facts he is already aware of. His answers are spontaneous as a semi-conscious person is unable to manipulate his answer. Injected in continuous small dosages it has a hypnotizing effect on a person when responds loquaciously when questioned. The ECG and blood pressure are monitored continuously throughout the testing procedure. The entire conduct of the procedure is video graphed. The questions are designed carefully and are repeated persistently in order to reduce the ambiguities during drug interrogation. After the Narco examination is over the suspect is made to relax for 2 - 3 hours.

¹² The Brain Mapping Test is also known as P-300 test. In this test of Brain Mapping the suspect is first interviewed and interrogated to find out whether he is concealing any information. The activation of brain for the associated memory is carried out by presenting list of words to the subjects. There are three types of words in the list used for Brain Mapping test, Part-I consisted of neutral words, which have no direct relationship with the case. Part-II consists of probe words directly related to the case and suspects to elicit concealed information, which all suspects have had opportunity to come to know during the course of events related to the case. Part-III consists of target, which are not part of the first two parts. The words in this part are based on confidential findings which suspect does not know. The recording of this test is done by acquiring the response through 32 channel EEG-ERP Neuro Scanning system. It is carried out by asking the suspect to sit down and close his eyes. The 32 channel electrodes are placed over the scalp directly. While conducting this test twice by presenting each word in three parts randomly. The suspect is instructed to relax and listen to the words presented in the auditory mode. This test does not expect any oral response from the witness. The conclusion drawn by the experts after the conduct of the test to indicate the possession of the knowledge about the relevant subject which is helpful in the investigation and collection of evidence. After the administration of the test, what comes out is that, the person undergoing the test has the knowledge of the crime about which he was questioned (brain mapping). In the said test there is no way to find out what the lie is or what is the information stored in the brain of the person concerned. It can be called the information received or taken out from the witness.

¹³ Article 20(3) of the Indian Constitution reads that 'no person accused of any offence shall be compelled to be a witness against himself'.

considered by human rights activists as too naïve and that it makes light a serious invasion into the privacy of the individual. In dispelling arguments against torture, courts have adopted yet again, what may be perceived as an objectionable reasoning of torture as not being involved in the practice of injecting Pentothal or sticking discrete electrodes placed over the scalp of the suspect to gather data. There is an objectionable assumption that there could be no torture except when it is physical.

National Human Rights Commission's guidelines on Lie Detector Test

The National Human Rights Commission on 12 November 1999 adopted a set of guidelines relating to administration of the Polygraph Test or the Lie Detector Test. The test is conducted after a certain drug is administered to the accused. As the existing police practice in invoking Lie Detector Test is not regulated by any 'Law' or subjected to any guidelines, the Commission felt that it could tend to become an instrument to compel the accused to be a witness against himself, violating the constitutional immunity from testimonial compulsion. The Commission observed that, in India, as regards such tests, we must proceed on the assumption of constitutional invasiveness (seen as a facet of Article 21) and evidentiary impermissiveness (guaranteed under Article 20(3)) the right to reject it is a prerogative of the individual not an empowerment of the police. In as much as this invasive test is not authorised by law, it must perforce be regarded as illegal and unconstitutional unless it is voluntarily undertaken under non-coercive circumstances. If the police action of conducting a Lie Detector Test is not authorised by law and impermissible, the only basis on which it could be justified is, if it is volunteered

The Commission also noted: "there is distinction between 'volunteering' and 'being asked to volunteer.' This distinction is (of) some significance in the light of statutory and constitutional protections available to any person. There is a vast difference between a person saying, 'I wish to take a Lie Detector Test because I clear my name'; and the person told by the police, "If you want to clear your name, take a Lie Detector Test". A still worse situation would be by the police say "Take a Lie Detector Test, and we will let you go". In the first situation the person voluntarily wants to take the test. It will still have to be examined whether such volunteering was under coercive circumstances or not. In the second and third situations the police implicitly/explicitly link up the taking of the test to allowing the accused to go free.

The extent and nature of 'self-incrimination' is wide enough to cover the kinds of statements that were sought to be induced. The test retains the requirement of personal volition and states that

¹⁴ Gujarat High court in *Santokben Sharmabhai Jadeja v State of Gujarat* 2008 CrLJ 68, (2008) 1 GLR 497; Gujarat High Court in Special Criminal Application No.1200 of 2003 dated 16.12.2007 in *Malav A. Bhatt v. State of Gujarat*; Bombay High Court in *Ramchandra Reddy v. State of Maharashtra* 2004 ALL MR (Cri) 1704; *Arun Gulab Gavali v. State of Maharashtra* 2006 Cr.L.J. 2615; The Karnataka High Court in *Smt. Selvi and Ors. v. State* in CrI Pet No 1964 of 2004; the Madras High Court in *Dinesh Dalmia v. State* 2006 Cr.L.J. 2401; the Andhra Pradesh High Court in *K. Venkateshwara Rao, S/o K. Vijaya Simha, Hyderabad v. State of A.P.* Decided on 30th August, 2007 in Criminal Revision Application No. 1402 of 2006; as well as the judgment of the Supreme Court in *Jitubhai Babubhai Patal v. State of Gujarat* in 2005 (10) SCC 545.

self-incrimination must mean conveying information based upon the personal knowledge of the person giving information. The information, sought to be elicited in a Lie Detector Test, is always information in the personal knowledge of the accused.”

The Commission, after bestowing its careful consideration of this matter of great importance laid down, the following guidelines relating to the administration of Lie Detector Test:

- No Lie Detector Test should be administered without the consent of the accused. Option should be given to the accused as to whether he wishes to avail the test.
- If the accused volunteers for the tests, he should be given access to a lawyer. The police and the lawyer should explain the physical, emotional and legal implication of such a test to him.
- The consent should be recorded before a Judicial Magistrate.
- During the hearing before the Magistrate, the accused should be duly represented by a lawyer.
At the hearing, the person should also be told in clear terms that the statement that is made shall not be a 'confessional' statement to the Magistrate but will have the status of a statement made to the police.
- The Magistrate shall consider all factors relating to the detention including the length of detention and the nature of interrogation.
- The actual recording of the Lie Detector Test shall be done in an independent agency (such as a hospital) and conducted in the presence of a lawyer.
- A full medical and factual narration of the manner of information received must be taken on record.

These guidelines of the Commission were circulated to the Chief Secretaries and DGPs of States as well as Administrators and IGP's of UTs by a letter dated 11 January 2000.

Testimonial compulsions - Compulsory blood/ DNA test for determining the commission of offence, paternity, etc

A whole range of actions of medical professionals that impinge on patient's/suspected criminal's consent before investigation could be begun, have immediate relevance to human rights issues. Even apart from criminal cases, issues of paternity in matrimonial jurisdictions involve the active assistance of medical professionals. Compulsory blood/ DNA testing through doctors are resorted, at the instance of a party with the aid of the court order, to carry out the investigation. Taking of a genetic sample without consent was viewed by the Supreme Court held in *Sharda v Dharmpal*¹⁵ as undesirable. In *Goutam Kundu v. State of West Bengal and Anr*¹⁶, the Supreme

¹⁵ *Sharda v Dharmpal* (2003) 4 SCC 493.

¹⁶ AIR 1999 SC 2295

Court, while dealing with a question about the paternity of a child, took note of Section 112 of the Evidence Act and held that the conclusive presumption of paternity of child during the subsistence of marriage of man and wife arising under the provision could only be displaced by a strong preponderance of evidence and not by a mere balance of probabilities. It held: (1) that courts in India cannot order blood test as a matter of course; (2) wherever applications are made for such prayers in order to having roving inquiry, the prayer for blood test cannot be entertained; (3) There must be a strong prima facie case in that the husband must establish non-access in order to dispel the presumption arising under Section 112 of the Evidence Act; (4) The court must carefully examine as to what would be the consequence of ordering the blood test, whether it will have the effect of branding a child as a bastard and the mother as an unchaste woman; (5) No one could be compelled to give sample of blood for analysis". The truth of the matter is, by the time a subject-patient is brought before the doctor, a decision has already been taken by the court that investigation shall be done on the person and the doctor has not always the need to question whether consent was obtained from the person on whom the test is to be performed. The doctor becomes a passive collaborator for the invasion of privacy of the individual without his or her consent.

Compulsory vaccination policy

The health policies of government and sometimes the directives of International health organisations, like WHO, may dictate the adoption of vaccination against polio, small pox etc. The massive scale of operation may include administration of drugs at school, at Railway Stations and many other public places with a degree of persuasion that the recipient may not be able to repel. In some cases, the drug administration may not require that recipient of the drug any consent that may seem to violate the fundamental precept of autonomy. In the earliest case before the Supreme Court of USA in *Jacobson v Massachusetts*¹⁷, it was held that compulsory vaccination was "a proper exercise of the police power." Since the state's "police power" enables it to enact "health laws" reflecting dominant medical beliefs and those of the majority of society, the opinion of the minority should not subvert the opinion of the majority. The U.S. Supreme Court affirmed, explaining that they were "unwilling to hold it to be an element in the liberty secured by the Constitution ... that one person, or a minority of persons ... should have the power ... to dominate the majority when supported in their action by the authority of the State," or to "permit the interests of the many to be subordinated to the wishes or convenience of the few." Furthermore, the court asserted that "upon the principle of self-defense, of paramount necessity, a community has the right to protect itself against an epidemic of disease which threatens the safety of its members."

The current large scale immunization programmes against diseases like polio, small pox, measles, etc, or requirement of certain types of vaccination while securing visa for visiting foreign countries may involve no issue of consent of the individual at all. At the time of admission into schools one might encounter a mandate of a complete vaccine receipt as a condition for entry and continuation in the classroom. In 1944 the U.S. Supreme Court stressed

¹⁷ *Jacobson v. Massachusetts*, 197 U.S. 11 (1905).

"that the state has a wide range of power for limiting parental freedom and authority in things affecting the child's welfare; and ... this includes, to some extent, matters of conscience and religious conviction¹⁸." The court specifically mentioned vaccination as an area in which the government may override parental consent: "thus, [the parent] cannot claim freedom from compulsory vaccination for the child more than for himself on religious grounds. The right to practice religion freely does not include liberty to expose the community or the child to communicable disease or the latter to ill health or death."

Since *Jacobson v. Massachusetts*¹⁹ was decided by the U.S. Supreme Court in 1905, all challenges to state compulsory vaccination laws have failed, based on local governments' police power to protect the public health. Even religious exemptions hold little weight if the local department of health declares an emergency. Whereas only smallpox vaccine was available in 1905, children to-day are now recommended to receive one vaccine at birth, ten vaccines administered in multiple doses before their second birthday, four to six vaccines before entering kindergarten, and in some states, three to five vaccines before entering seventh grade or college. While undertaking large scale immunization programmes against polio, small-pox, measles, etc., there shall be information kiosks manned by medical personnel about the underlying risks, if any, in the administration of such vaccines or drugs. Counseling shall be offered to allay reasonable doubts about the safety of administration of drugs. In the absence of specific legislation about exemption justifications for vaccination policy, the minimum that is necessary is to tighten the regimen for better control over quality, proscription of administering of vaccine in the absence of doctors (as done now at railway stations, bus stands and many other public places by only paramedical persons), compulsory installation of information and counseling brochures for of such of those among the public who have doubts about the efficacy and risk factors relating to vaccinations.

Sterilisation cases

When it is proposed to perform an operation of sterilisation on an adult woman unable to consent because of her mental incapacity, where the purpose of the operation is to avoid the risk of her becoming pregnant rather than the treatment of diseased organs, the fundamental and irreversible nature of the operation is such that as a matter of good practice it is highly desirable that such a declaration should be sought by those caring for the woman or intending to carry out the operation²⁰. The right to bodily inviolability and the right to procreate or, the right to choose whether to procreate or not is the fundamental premise on which the court will exercise its jurisdiction. The position in India is more apposite to what exists in Australia, which recognizes parental authority as sufficient to decide on sterilization of a person of unsound mind or a minor but would deem it desirable that sanction from court is also obtained²¹. In Canada,

¹⁸ *Prince v. Massachusetts*, 321 U.S. 158, 167 (1944).

¹⁹ 197 U.S. 11 (1905).

²⁰ *In re F. (Mental Patient: Sterilisation)*, [1990] 2 AC 1. See also see *Collins v Wilcock* [1984] 3 All ER 374 at 377-8 per Robert Goff LJ (as he then was); ; *Wilson v Pringle* [1987] QB 237; ; T v T [1988] 1 All ER 613.

²¹ *Re Marion* 14 Fam LR 427(Family Court of Australia)(1990)

following the decision of Supreme Court in *Re Eve*²², the law appears to be that the court should never authorise a non-therapeutic sterilisation of a mentally retarded person under its *parens patriae* jurisdiction. In cases where United States courts have authorised sterilisation, they have adopted 2 broad bases: one being the "best interests approach" and the other being the "substituted judgment" approach. Examining these concepts in an issue relating to medical termination of pregnancy in *Suchita Srivatsava v Chandigarh Administration*²³, the Supreme Court held that substituted judgment will not be warranted in a case of 'mild mental retardation', where even though the mental growth of a 19 year old woman was only akin to a 9 year old child, she was reported to be capable of rote-memorisation and imitation. Even the preliminary medical opinion indicated that she had learnt to perform basic bodily functions and was capable of simple communication. The 'Best interests test' requires the court to ascertain the course of action which would serve the best interests of the person is question. Costs of continuing pregnancy and special care and assistance shall not be relevant factors for denying the exercise of reproductive rights.

Doctor's role shall not rendered as a mere passive collaborator

The issue whether administration of drugs in narco-analysis, DNA/blood tests shall be undertaken merely on the order of courts without a further affirmation before the doctor that the person has consented for undergoing the procedure shall require serious consideration. This shall be so in all cases, except where substituted judgment is justified, on grounds of minority or mental illness or mental retardation and the court's intervention may be mandated. The norm shall be that there shall be no occasion for any doctor to be compelled to administer drugs on a person without assuring to himself that consent has been given. In matters of health policies of vaccination and sterilization, carrying out the required procedures shall be done only in the presence of doctors, where information and counseling shall be simultaneously available for addressing the genuine safety and justifying concerns of persons targeted for administration. Medical trials for all types of drugs against war criminals and prisoners shall be completely stopped and even consent could not be a justification. Consent shall be presumed to be vitiated for persons in detention. We have far too long trenched on the decision making abilities of the medical professionals and make them succumb to authority to carry out practices that are questionable. We owe to them to restore their right to dissent, empower them to elicit consent before invading on the bodies and privacies of persecuted, sick and the weak subjects.

²² (1986) 25 SCR 388;31 DLR 4d 1

²³ 2009(5) RAJ 306 (SC).