CHANAKYA LAW REVIEW

Refereed Journal

AN INTERNATIONAL JOURNAL ON
MULTIDISCIPLINARY FUNDAMENTAL RESEARCH

VOLUME IV **ISSUE II** **JULY-DEC**

[2023]

DISCLAIMER

The July-Dec 2023 issue of "The Chanakya Law Review" is an International Multi- disciplinary Journal of academic research having scholarly articles contributed by the authors listed in the contents. The views expressed in the Articles and all other contributions to "The Chanakya Law Review" belong to the individual authors/co-authors. The views expressed in the articles do not belong to the Editorial Board or the Centre for Innovation, Research and Facilitation in Intellectual Property for Humanity and Development (CIRF in IPHD) of Chanakya National Law University, Patna. No part of this publication may be reproduced or transmitted in any form by any means or stored in any system of any nature without prior permission of the publisher. The publisher and the Chief Editor of the journal has taken every care to avoid errors or omissions and similarities/plagiarism, which has been checked through Turnitin software. All the articles have been peer-reviewed by the experts and modified as per the suggestions made. This Journal is open access to world-wide without making any conversion addition or deletion etc.

Publisher: Registrar CNLU Patna

ISSN No. XXXX X0XXX (To be obtained)

ACKNOWLEDGMENT

I express my deep gratitude to Hon'ble Vice Chancellor Prof. (Dr.) Faizan Mustafa, Hon'ble Registrar Prof. (Dr.) S.P. Singh, for their free hand generous support in bringing this journal release. I also express my profound sense of gratitude to all the contributors of research papers, peer reviewers, all the Hon'ble members of the Editorial Board, my colleagues at CNLU. I acknowledge the sincere efforts of composition Team Mr. Vishal Anand (Research Scholar), Ms. Smriti (Research Scholar), Adil Ameen (B.A. – LL.B. 3rd Year), Md. Arman B.A. – LL.B. 3rd Year) and Mr. Amit Kumar (IT) for giving this journal a proper shape, publication, and release.

CHANAKYA NATIONAL LAW UNIVERSITY

PATNA

VOL. IV ISSUE II JULY-DEC, 2023

CENTRE FOR INNOVATION RESEARCH AND FACILITATION IN INTELLECTUAL PROPERTY FOR HUMANITY AND DEVELOPMENT (CIRF in IPHD)

CHANAKYA LAW REVIEW

(An International Journal of Fundamental Research in Juridical Sciences)

(CLR)

(ISSN No. …… To be obtained after release)

BOARD OF EDITORS

ADVISORY BOARD

EXECUTIVE EDITORS

ASSOCIATE EDITORS

Dr. Shivani Mohan **Assistant Professor, CNLU** **Email: shivanimohan@cnlu.ac.in**	**Dr. Anil Kr. Srivastava** **Prof. & Head, Dept. of Biotechnology, Govt. V. Y. T. PG Autonomous College, Durg, Chhattisgarh** **Email: anilkumardurg1996@gmail.com**	**Dr. Sanjeev Kumar Sinha** **Principal, TNB Law College, TMBU, BHAGALPUR.**
Dr. Amritha **Assistant Professor,** **Kathmandu SOL Nepal** **Email: amy.shenoy@gmail.com**	**Mr. Pawan Kumar** **Assistant Professor of Law, School of Law, Bennett University, Greater NOIDA Delhi** **Email: pawa.cnlu@gmail.com**	**Mr. Kumar Gaurav** **Assistant professor,** **CNLU Patna.** **Email: kumargaurav@cnlu.ac.in**

EDITORIAL

The **CHANAKYA LAW REVIEW (CLR)** is a half yearly International Journal of multidisciplinary – Fundamental Research in Law, Social Sciences, Sciences and Humanities interface with Law, to be SCOPUS index database. The legal education is the backbone and driving force towards social justice. In fact, it's a social justice education. The study of law encompasses all the aspects of society. It is a study of society which needs to be regulated by social norms and statutory laws.

The social behaviour depends upon the behaviour of the people living in the society. Since human needs are varied, so the inter relations with various disciplines. It has impact on the administration of Justice System and governance. To explore the significance of interdisciplinary study, 'The Chanakya Law Review (CLR)' is being launched by CIRF in IPHD of CNLU. This Journal will provide a platform to the academicians all over the world on the inter-disciplinary, cross-disciplinary, and multi-disciplinary issues in Sciences, social sciences and humanities interface with laws. Keeping in view the needs and nature of the journal, the editorial board has been constituted. I express my gratitude to all esteemed members on the editorial board. It is an online journal for open access to all. The ISSN no. shall be obtained as per rule.

Prof. (Dr.) Subhash C. Roy

EDITOR-IN-CHIEF

THE CHANAKYA LAW REVIEW (CLR)

CNLU, PATNA

CHANAKYA LAW REVIEW (CLR)

Vol. IV Issue II, July-Dec, 2023

CHANAKYA LAW REVIEW (CLR)

VOL. IV (ISSUE II), JULY-DEC, 2023, pp. 1-12

ENSURING THE GIFT OF LIFE: 'NON-NEAR RELATIVES' AS ORGAN DONORS UNDER TRANSPLANTATION OF HUMAN ORGANS & TISSUES ACT

Anandita Anand[1]

Abstract

With the advancement in the field of medical science came the boon of organ transplantation, ensuring that several lives could be saved. However, this scientific breakthrough brings with it the possibility of gross exploitation of economically backward classes through organ trade. In India, to regulate the transplantation of organs while maintaining a balance between saving lives and ensuring organ trafficking is not taking place, the issue was addressed in the Transplantation of Human Organs and Tissues Act (THOTA). This article explores the complicated web of moral, medical, and legal issues surrounding organ donation. The study starts out by explaining THOTA and its legislative goals. The regulations relating to non-near relative donations are then carefully examined, taking into account the advantages, precautions, and difficulties of establishing the veracity of the donor-recipient relationship. The article also investigates the implications of THOTA on the right to life and looks at various legal viewpoints on the subject. Comparison has been made with Iranian law, which allows living, unrelated kidney donors in exchange for remuneration. The article's analysis of various legal interpretations, which serves as its conclusion, sheds insight on the delicate balance between medical progress and ethical considerations in the field of organ transplantation.

Introduction

In the realm of medical advancements and compassionate acts of humanity, the field of organ transplantation stands as a testament to both science and altruism. Organ transplantation has the power to bestow the gift of life upon those grappling with life-threatening conditions, offering a glimmer of hope and the promise of a healthier future.[2] However, within the noble

[1] Student of BA-LL.B. (Hons.), National Law University, Jodhpur.

[2] Transplantation of Human Organs and Tissues Act (THOTA), National Organ Transplant Program (NOTP) including NOTTO/ROTTOs/SOTTOs (July, 16. 2020). https://dghs.gov.in/WriteReadData/userfiles/file/RTI/THOA_NOTP_NOTTO_ROTTO_SOTTO_16-7-2020.pdf.

act of organ donation exists a complex interplay of ethical considerations, medical limitations, and legal regulations.

Suppose, a 59-year-old individual battling a dire medical predicament, demands an urgent kidney transplant for his survival. Unfortunately, none of his immediate family members possess the requisite medical fitness to serve as organ donors. However, on the horizon lies a potential solution: a distant, financially disadvantaged cousin who is medically fit to donate a kidney. While this prospect could be seen as a source of hope and relief, it also raises concerns about the potential for exploitation in the organ transplantation process.

In this submission, the authors have discussed the enactment of the beneficial legislation known as the Transplantation of Human Organs and Tissues Act (THOTA) and the legislative intent behind it. The authors have then analysed the provision related to the donation of organs by non-near relatives, exploring its benefits, the safeguards in place to prevent misuse, and the challenges associated with ascertaining the bond of affection between the donor and recipient. Next, the authors have scrutinized the scope of THOTA in relation to the right to life and examined the judicial stance on this matter. Additionally, the authors have provided insights into Iranian law governing living unrelated renal donation, which permits organ donation in lieu of compensation. Finally, the authors have concluded the article with remarks concerning the interpretation of the law in light of all the points presented.

The 'Beneficial Intent' Behind the Enactment

Organ transplantation is a selfless act motivated by the desire to save lives, but it also has a dual nature. On the one hand, it highlights our capacity for *altruistic* deeds and symbolises the highest level of human compassion. However, it can also provide a favourable environment for *exploitation*, particularly when weaker groups of society are placed in a desperate situation and have little ability to defend their own interests.

In recognition of this intricate balance between compassion and exploitation, THOTA came into being in 1994. This legislation was conceived with a dual purpose: *first*, to regulate the process of organ and tissue transplants, and *second*, to combat the burgeoning commercialization of organ trade.[3] It aimed to strike a compromise between the need to save lives by using the existing technology to transplant organs and making sure that the poor were not taken advantage of by the rich in this procedure, as was primarily feared at the time.

[3] Statement of Objects and Reasons, The Transplantation of Human Organs and Tissues Act, 1994.

Subsequently, THOTA underwent amendments in 2011, with the latest set of rules dating back to 2014, seeking to enhance its efficacy and relevance.

The Provision for "Non-Near Relatives" under THOTA

With a primary focus on *near relatives* as potential donors for people in need, THOTA presents a methodical approach to organ and tissue donation. In the 1994 version of the law, *near relatives* had a fairly narrow definition. Notably, in 2014, the term of *near relatives* was broadened to include grandparents and grandchildren, increasing the pool of potential family donors.[4]

However, because THOTA is a welfare-oriented legislation, it cannot overlook the situation of patients whose close relatives are unable to give organs due to physical or mental ailments. As a result, Section 9(3) of THOTA permits *non-near relatives* to volunteer as organ donors on the condition that their motivation is founded in true *love and affection* for the sick patient.

The THOTA's inclusion of *non-near relatives* as potential organ donors can greatly increase the pool of organ donors, solving the urgent problem of organ scarcity. This growth is extremely important because it corrects the ongoing organ transplant supply-demand imbalance.

First, allowing *non-near relatives* to step in as donors when close relatives are unable to do so for medical reasons creates additional opportunities for organ donation. This increases the likelihood of discovering suitable matches for patients on transplant waiting lists in addition to expanding the pool of potential donors.

Second, a variety of donor sources, such as distant relatives, can help shorten the waiting periods for patients in need of life-saving transplants. By expanding the donor pool, we can potentially save more lives and alleviate the suffering of those waiting for organs.

Therefore, a provision has been created in the Act to include non-relatives as well as relatives within the scope of donors, furthering the objective of ensuring human *welfare* and *lifesaving*. However, this calls for crystal-clear legislative rules to strike a balance between the rights of sick people in need of organ donation and those of the economically vulnerable group vulnerable to exploitation.

Prevention of the Misuse of "Non-Near Relatives"

[4] Transplantation of Human Organs (Amendment) Act, 2011 (16 of 2011).

To address the concern of 'blatant exploitation of poor by the rich' as expressed in number of parliamentary debates was also sought to be prevented by THOTA. The provision related to 'Authorisation Committees' was added in the Act. Several procedural requirements were laid down to ensure that transplantation by *non near relatives* under the act happen only when they are in furtherance of the beneficial object of the act and not for commercial exploitation.

A critical role is played by the *Authorization Committee* in ensuring that no commercial transactions taint the altruistic act of organ donation. The Committee undertakes a comprehensive assessment, considering the nature of the relationship between the donor and recipient, scrutinizing the reasons behind the donation, and diligently examining various factors. This process includes the examination of documentary evidence, review of old photographs, verification of the absence of intermediaries, assessment of the donor's financial status, confirmation of the absence of drug addiction, and interviews with adult family members to ascertain the authenticity and awareness of the decision.

Moreover, Section 13B of THOTA bestows upon the Authorization Committee powers akin to those of a civil court, enabling it to issue summons, request crucial documents, and even issue search warrants. These powers empower the Committee to conduct a meticulous and thorough evaluation, ensuring the authenticity and legitimacy of the organ donation.

As the Authorization Committee grapples with the responsibility of making decisions that can irrevocably shape the future of a recipient, it operates within the ambit of three fundamental principles.[5] *First*, it must conduct a thorough investigation while upholding the principles of natural justice. *Second*, it is tasked with the application of critical judgment to the case at hand, considering the unique circumstances. *Last*, should the Committee decide to reject an application, it is obligated to provide a comprehensive and well-documented rationale for its decision.[6]

In this endeavour, THOTA aligns itself with the principles enshrined in the case of *Bandhua Mukti Morcha v. Union of India*, where the court emphasized the state's obligation to safeguard the fundamental rights of vulnerable sections of society and prevent their exploitation, particularly when exacerbated by societal factors.[7]

[5] Vandana Dixit v. Visitor, Sanjay Gandhi Post-Graduate Institute of Medical Sciences 2010 SCC OnLine All 2660 ¶27.
[6] *Id.*
[7] Bandhua Mukti Morcha v. Union of India (1984) 3 SCC 161.

Ascertaining the Bond of 'Affection' between the Donor and the Recipient

Establishing an affectionate and attached relationship between the parties is necessary for a non-relative to be eligible to donate organs. A provision like this prevents commercial exploitation from appearing as a donation. However, the Authorisation Committee while determining if a bond of love and affection exists between the donor and recipient has to take a variety of circumstances into account and this can often act as an ordeal.

In the matter of *Parveen Begum v. Appellate Authority*, the petitioner/recipient was advised that the only viable choice for saving her life was to have a kidney transplant. The donor, though not coming under the category of *near relatives*, had a mother-daughter relationship with the recipient and took care of her in her tough times. But, on making an application before the Authorization Committee, it was rejected after conducting a below-par and haphazard inquiry on the following grounds[8]:

First, there is no convincing evidence linking the donor with the receiver; *second*, the husband and close family members are unwilling to donate; and *third*, there is income disparity between the two parties.

The Act and the Rules do not seek to prohibit, but to only regulate the transplant of organs and tissues from cadavers and living human beings. What is prohibited is the commercial transaction in the giving and taking of organs and tissues. However, donations offered out of love and affection - even amongst those who are not near relatives, is permitted. The aforesaid scheme under the Act recognizes two of the greatest human virtues of love and sacrifice, and also the fact that such intense love and affection need not necessarily be felt only for one's own blood or spouse, but could also extend to those not so closely related, or for those not related at all.[9]

Since, the Authorization Committee has only focused on the reasons why the recipient's close relatives have refused to give their organs in order to preserve the recipient's life and has not even posed a single inquiry addressing the financial relationship between the beneficiary and the donor. The transplant cannot be delayed just because there may be a financial connection without any supporting evidence. People who are either distantly related or unrelated in any

[8] Parveen Begum v. Appellate Authority, 2012 SCC OnLine Del 2839. ¶8
[9] *Id.*

way frequently become closer friends because of their shared interests or through a strange twist of fate than even their own parents, siblings, or children.[10]

In the Manoranjan Rout v. State of Orissa case, we come across a compelling situation where the petitioner, a physician with renal failure, was in need of an urgent kidney transplant due to a life-threatening predicament. The only real chance for saving his life, according to the Hospital medical staff, was a kidney transplant.[11]

The petitioner actively looked for a suitable kidney donor within his extended family because his wife and other family members' blood types did not match. Ultimately, petitioner No. 2, who is the son of petitioner No. 1's father's sister, consented to donate a kidney, creating a matching donor-recipient pair. However, the Authorization Committee declined to consider their request.

In light of petitioner No. 1's declining health, the petitioner claimed that the Committee had improperly considered their application. As a result, they petitioned the court for intervention under Article 226 of the Indian Constitution. The court acknowledged that in situations where donors and recipients are familiar to one another through shared family ties and visits, approvals should be given on the basis of pure love, affection, and humanitarian considerations.

This case highlights the necessity for sensitive and adaptable policies regarding organ transplantation. It reaffirms the notion that non-near relatives should not be denied the opportunity to donate organs when there is a demonstrable tie of love and care, especially in cases where life is at risk, like the one petitioner No. 1 encountered. Such situations necessitate a nuanced appreciation of the human element of organ donation, which goes beyond rigid notions of familial ties in order to save lives.

In the case of *Balbir Singh v Authorization Committee*, we are presented with a scenario in which the petitioner, Balbir Singh, had a condition, called cirrhosis of the liver caused by hepatitis C, that required immediate liver transplantation. Baljit Singh, his brother, offered himself as a willing donor to help save his brother's life. The HLA Typing Test first failed to prove a close connection between the petitioner and the donor, which raised questions about the donor's eligibility under the laws in effect.[12]

[10] *Id.* ¶68.
[11] Manoranjan Rout v. state of Orissa ¶2.
[12] Balbir Singh v Authorization Committee ¶ 3.

It is crucial to note that this instance highlights the necessity of reconsidering the rigid criteria of a *near relative* in organ transplant cases, especially when the recipient's life is hanging by a thread. The court acknowledged that, in contrast to kidney transplants, where tissue matching is crucial, liver transplants primarily depend on variables such matching the size and condition of the organ and blood group compatibility. These medical factors, which are independent of any particular definition of a *near relative*, are crucial to the transplant's success.[13]

The court noted that the requirement that the donor be a *near relative* in this case lacked any medical or scientific foundation due to the petitioner's deteriorating health and the urgent need for a liver transplant. This example demonstrates how current laws should change to reflect the practicalities of organ donation in medicine, emphasising that non-relatives shouldn't be prevented from giving organs when their compatibility is confirmed by medical evaluations such size and blood group matching. In the end, saving lives should take precedence over rigid conceptions of family bonds.

In the matter of *Huma Qamar and Anr. v. Authorization Committee*, the petitioners made a strong argument on their behalf. Petitioner No. 1 had End Stage Renal Disease (ESRD), and as a result of renal failure, she was totally reliant on dialysis twice a week.[14] Petitioner No. 2, who had known Petitioner No. 1 for more than ten years and shared a bond similar to that of siblings, voluntarily offered to donate her kidney in this dire medical situation out of love and devotion.

Medical experts confirmed this connection, attesting to the voluntariness of petitioner no. 2's choice and the absence of outside influences. Despite this, the Authorization Committee, in its decision, rejected the organ transplantation application on grounds that long association and love and affection could not be established, citing differences in community, age, and economic status between the donor and recipient.[15]

The petitioners correctly contended that the rejection was not warranted because there was no proof that any money was exchanged, threats were made, or coercion was used to make the judgement. The true respect and devotion that had grown over the years between petitioners No. 1 and 2 was judged to be irrelevant to the Committee's focus on the disparity in communities and ages.[16]

---

[13] *Id.* ¶ 5.
[14] Smt. Huma Qamar and Anr. V Authorization Committee ¶6
[15] *Id.* ¶12
[16] *Id.* ¶32

This case highlights the importance of considering ties based on love and affection, even those that are not strictly defined by traditional familial or social bounds, when determining a donor's appropriateness. When a person's life is in danger, the priority should be saving lives through organ donation, taking into account the sincere feelings and connections that exist between potential donors and receivers.

In the case of *Arup Kumar Das v. State of Orissa*, the petitioner, a 28-year-old attorney with kidney failure, was urged to get a kidney transplant by medical professionals.[17] However, the Authorization Committee turned down the petitioner's request, citing a number of factors, such as the donor and recipient's alleged lack of emotional attachment, their brief acquaintanceship of only two years, and inadequate HLA matching.

The court acknowledged that the THOTA had been in place for more than 16 years but pointed out that the goals of the Act were not being sufficiently met.

To address this matter, the court issued orders stressing that the lack of HLA compatibility should not be the only factor used to reject approval for kidney transplantation in situations involving a single unrelated donor and recipient combination. Due to the urgency and seriousness of the petitioner's medical situation, the court's ruling aimed to encourage equitable access to organ transplantation.

The Authorization Committee's quasi-judicial role was also emphasised by the court, underscoring the significance of adhering to natural justice principles when conducting business. In order to make sure that consent for transplantation is granted voluntarily and not as a result of undue influence or coercion, it was emphasised the importance of carefully inspecting donors and recipients during investigations.[18]

In order to uphold the principles of justice and compassion in the context of organ transplantation, it is crucial to strike a balance between regulatory measures and ensuring that people who are in urgent need of organ transplants are not unduly constrained by onerous requirements.

There is little doubt that the Authorization Committee has a quasi-judicial role and, as such, is required to follow processes that are reasonable and consistent with natural justice principles.[19] It is possible to identify any signs of suspect circumstances during the inquiry procedure as the

[17] Arup Kumar Das v State of Orissa ¶2
[18] *Id* ¶15.
[19] *Id* ¶11.

donor and recipient are examined by the Authorization Committee. The Authorization Committee will examine the donor and recipient during the inquiry process in order to look for any signs of suspicious circumstances. It is only reasonable to claim that the authorization cannot be considered to have been given voluntarily unless all such doubtful circumstances are effectively addressed and eliminated. Authorization shouldn't be granted merely because of the donor's love or devotion to the recipient, or for any other unusual circumstances; rather, it should be the outcome of a fair and complete evaluation.[20]

Interpretation of THOTA in light of the 'Right to Life'

As said by HH Pope Francis and WHO Director-General, Dr Tedros Adhanom Ghebreyesus, "Healthcare is a right, not a privilege. It is the duty of governments to ensure its provision to all citizens".[21] A man cannot be compelled to limit his life to simply his animalistic perceptions and pleasures in a well-functioning society. Man is able to create societies that are conducive to growth and intellectual enjoyment. The latter pleasure can only be fostered in an environment where he is able to freely devote himself to his mind rather than worrying about the limitations that impede his growth.

Any civilised society's guarantee of the right to life includes the rights to housing, food, water, a clean environment, education, and medical treatment. Any civilised culture is aware of these fundamental human rights.[22] It is a settled position of law that the right to health comes under the right to life under Article 21 and thus, the government is under a constitutional obligation to provide the patient with medical facilities.[23]

In the case of *S Samson v Authorization Committee*[24], the recipient underwent regular dialysis because of chronic renal failure. As the recipient's family members were either physically unsuitable or legally too young to donate a kidney, he approached the donor, a non-relative. The application was turned down by the Authorization Committee because the recipient had only known the donor for two years and there was a chance that money would be exchanged to make the transplant possible. By using its writ jurisdiction, the court issued the writ of certiorari, overturning the Committee's decision. It further ruled that the Committee must

[20] *Id.*
[21] World Health Organisation, 'HH Pope Francis and WHO Director-General: Health is a right and not a privilege', News release (Oct. 23, 2018) https://www.who.int/news/item/23-10-2018-hh-pope-francis-and-who-director-general-health-is-a-right-and-not-a-privilege.
[22] Chameli Singh v. State of U.P., (1996) 2 SCC 549.
[23] State of Punjab v. Mohinder Singh Chawla, (1997) 2 SCC 83.
[24] S. Samson v. Authorization Committee for Implementation of Human Organ Transplantation, 2008 SCC OnLine Mad 317.

conduct the investigation with the goal of saving a life, therefore the inquiry must be fair and expeditious.[25]

In another case of *Vandana Dixit v. Visitor, Sanjay Gandhi Post-Graduate Institute of Medical Sciences,* the recipient had experienced renal failure, and she was becoming worse every day. Despite their willingness, none of the recipient's close relatives could donate an organ due to medical restrictions. Because of his deep love for the receiver, the donor, a non-near relative, voluntarily volunteered his kidney for donation. Despite the Authorization Committee allowing the transplant to go-ahead, the concerned hospitals were impeding it, endangering the patient's right to life. The court agreed with the petitioners' arguments, stating that "right to life includes protection of health and health care" and that since the hospital is not only engaging in commercial activity or business for the purpose of making enormous profits but also in social service and is required to provide right, effective, and prompt medical treatment and health care like any other Government Hospital, it cannot be construed as violating the letter and spirit of Article 21 of the Constitution.[26] Furthermore, delaying such care might occasionally prove fatal for the ill person, who has a right to enjoy a longer, more comfortable life. No human organ transplant can be rejected for grounds not covered by the Act.[27]

In another case of *Vidya Ramesh Chand Shah vs. State of Gujarat*, the petitioner raises a fundamental concern regarding the Indian Constitution's Article 21's protection of the right to life in the context of rules governing organ transplantation. At the core of the issue are Section 9 and Rule 7 of the Transplantation Rules, which state that transplantation should not be allowed if the recipient is a foreign country and the donor is an Indian national unless they are close relatives.[28]

The petitioner claims that these regulations violate Articles 14 and 21's fundamental rights because they place unjustifiable limitations on the right to life and health by restricting access to organ transplants based on nationality and kinship.[29] The petitioner maintains that people with organ failure, such as kidney and liver disorders, legitimately have the right to request these life-saving transplant procedures without being constrained by these limitations.

[25] *Id.* ¶11
[26] Vandana Dixit v. Visitor, Sanjay Gandhi Post-Graduate Institute of Medical Sciences 2010 SCC OnLine All 2660.
[27] *Id.*
[28] The Transplantation of Human Organs and Tissues Rules, 2014
[29] Vidya Ramesh Chand Shah v. State Of Gujarat AIR 2009 Guj 7 ¶17

Specifically, the requirement for a domicile certificate to be registered as a recipient for cadaveric organ transplants in Gujarat was deemed illegal and unconstitutional by the court in its judgement.[30] The petitioner and others will now be able to get organ transplants without being subject to this restriction thanks to this ruling, which upholds their fundamental right to life and healthcare.[31] The necessity of safeguarding the right to life in the context of organ transplantation laws and providing fair access to life-saving treatments is highlighted by this case.

These three cases highlight that the primary objective of THOTA is to facilitate and enhance the transplantation process, rather than creating unnecessary hurdles, with the ultimate goal of saving lives. The courts have time and again correctly interpreted THOTA and invoked it to support the transplantation process and enable life-saving interventions. These cases could exemplify how the act's provisions were utilized to overcome obstacles or challenges and ensure that the recipient receives timely and appropriate treatment.

Iranian Law on Kidney Transplantation

Many countries have strictly prohibited the donation of organs by people who are not genetically related to the recipient. This approach mainly shows the intent of the counties to curb the menace of organ trafficking and commercial exploitation of the poor.

However, some countries like Iran have formally adopted laws to allow for donation or organs by non-related parties even for consideration. While this may seem to be ethically in conflict with the altruistic objectives of laws regulating transplantation of organs, their reasoning for having such provisions in place is sound.

The Iranian law on living unrelated renal donation has safeguards in place to ensure that there is no coercion on the donor to donate organs. Some scholars are of the opinion that disallowing organ donation in lieu of payment on the ground that it is unethical is a form of state paternalism.[32]

As long as steps are taken to ensure that there is no coercion on donors to donate their organs, they should not be deprived of choosing this option to not only improve their economic situation but also save lives.

[30] *Id* ¶45
[31] *Id* ¶46
[32] Friedman EA, Friedman AL. 'Payment for donor kidneys: pros and cons.' Kidney Int 2006; 69: 960–962.

And contrary to the common belief that exploitation is bound to happen when organ transplantation is allowed in exchange for monetary consideration,[33] studies conducted in Iran have shown that the disparity in the socio-economic status of the donors and the recipient is not that high. The recipients don't always have a clear superiority over the average donor as is feared by ethicists.

Conclusion

Permitting non-near relatives to donate organs with authorization from the committee enhances the overall organ procurement ecosystem, offering hope to patients who might otherwise face prolonged waits or even adverse health outcomes.

In this evolving landscape of organ transplantation, the law must adapt to accommodate the motivations behind these selfless acts. It is a testament to the resilience of the human spirit and the deep-seated compassion that transcends the boundaries of self-interest. As we move forward, striking a balance between regulation and encouragement of altruistic donations remains paramount, ensuring that the gift of life continues to thrive, unfettered by exploitation, and guided by the principles of compassion and humanity.

Although safeguards are necessary to ensure that exploitation of the poor does not take place, transplantation of organs cannot be prohibited. Further, countries like Iran give us a perspective that an alternative to the traditional ethical understanding of the issue of transplantation of organs is possible. The same may even proof to be in the best interest of both doner as well as recipient.

[33] *See generally,* Zargooshi J. Iranian Kidney Donors: Motivations And Relations With Recipients. J Urol 2001; 165: 386–392.

CHANAKYA LAW REVIEW (CLR)

VOL. IV (ISSUE II), JULY-DEC, 2023, pp. 13-27

HOLY COW, CONSTITUTION AND CONTROVERSY: ASSESSING ANTI-COW SLAUGHTER LAWS FROM A CONSTITUTIONAL PERSPECTIVE

Shreya[34] *& Abhishek*[35]

Abstract

The issue of the slaughter of holy cows has always been a volatile issue since the time of independence. Even after the insertion of Article 48A in the Indian Constitution, which advocates for cow protection, the nation continues to grapple with frequent agitations and alarming incidents of Cow vigilantism. These beef ban legislations interfere with the rights of beef traders and individual's choice of food. Furthermore, the draconian provisions of these laws postulate disproportionate punishments in case of breach and procedural injustice in terms of invoking these laws even on mere suspicion which is an insult to constitutional ideals. Enactment of these laws leads to the very imposition of Hindu beliefs over non-Hindus. The conflicting state laws on cow slaughter, in furtherance of Article 48A, lack uniformity, adding complexity to the issue. Through this paper, we explore the nuances of the cow slaughter issue in India, examining its legal, and constitutional aspects. This paper delves into ascertaining the constitutionality of these beef ban laws, as the author attempts to examine it on three fronts- firstly, from the perspective of Indian secularism, which is different from the Western model, secondly, assessing the laws on the anvil of the fundamental rights under Part III of Constitution and thirdly, the proportionality test propounded in the Puttaswamy case. The paper navigates through the sea of opinions and perspectives, shedding light on the potential paths forward in a country that values its secular fabric while respecting individual rights and diversity.

Keywords: Cow Slaughter, Constitution, Secularism, Article 48A, Fundamental Rights

[34] Student of BA-LL.B. (Hons.), National University of Study and Research in Law, Ranchi.
[35] Student at National University of Study and Research in Law, Ranchi.

Introduction

"Secular State does not mean that we shall not take into consideration the religious sentiments of the people. All that a secular State means is that this Parliament shall not be competent to impose any particular religion upon the rest of the people. That is the only limitation that the Constitution recognizes."[36]

– Dr BR Ambedkar

In 2023, the Supreme Court in *Mathala Chandrapati Rao v. UOI*[37] heard an appeal against the National Green Tribunal's (NGT) decision, a plea that had sought a unique and specific direction - the prohibition of cow slaughter. Exercising judicial restraint, the court observed that it cannot compel the legislature to enact a specific law, even within the purview of its writ jurisdiction. Since time immemorial, the contentious question of cow slaughter has been an ever-present thorn, pricking at the nation's conscience. Several times the central government has already expressed its intention to push for a beef ban nationwide, fulfilling its poll promise.[38] Many states have already taken steps in enacting anti-cow slaughter laws due to which over 99% of Indians are currently living under cow protection laws, some of which are more than 50 years old.[39]

As a democratic nation, India upholds the principles of secularism, right to livelihood and right to life. This brings into focus the constitutional dilemma - on one hand, the protection of cows is considered to be an essential sign of being a Hindu, while on the other hand, citizens have the right to practice their occupation, choose their dietary preferences and practice their faith freely. Critics argue that cow slaughter laws when motivated solely by religious sentiments, may undermine the secular fabric of the nation. They contend that such laws may favour one religious community over others, potentially leading to discrimination and infringing upon the rights of those who do not share the same beliefs.

The concept of secularism is multifaceted in India. The Indian model of secularism is different from that of the Western model in the sense that religious and secular life are so intricately entangled with each other that one cannot clearly differentiate the two. The Indian version of

[36] Arun Kumar Singh, "Myth and Reality of Secularism in India: An Analysis" Vol. XIX The NEHU Journal (2021).
[37] *Mathala Chandrapati Rao* v. *UOI*, (2023) Civil Appeal Nos. 5826-5827/2019 (Unreported).
[38] Krishna N. Das, "Modi govt says to push for cow slaughter ban in India"*, Reuters*, Mar. 30, 2015.
[39] Alison Saldanha, "More than 99% Indians now live in areas under cow protection laws, Gujarat has strictest rules"*, Hindustan Times,* Apr. 29, 2017.

secularism basically means having respect for all religions. Thus, the word 'Secular' should not be seen as antithetical to the word 'religious.' Cow protection laws primarily stem from the reverence given to cows in Hinduism, Jainism, and other religious traditions, making them a matter of deep-seated faith and cultural significance. These laws tend to paint the picture that the majoritarian views and beliefs of Hindus are being forced upon other communities.

From the ancient Vedic scriptures to modern-day legislation, the debate echoes through the ages, resounding in every nook and cranny of the country. It's a conversation that refuses to be silenced, persistently demanding attention and resolution. Chapter II of this paper specifically delves into the Constituent Assembly debates on the contentious issue of the holy cow and the ban on its slaughter in order to ascertain the legitimacy of the present beef ban laws. Chapter III of the paper digs deeper into the draconian provisions of anti-cow slaughter laws enacted by different states. Chapter V of the paper attempts to test the constitutionality of anti-cow slaughter laws, legal challenges have emerged, questioning whether these laws rupture the secular fabric of the country and infringe upon individual rights and freedoms. Lastly, chapter VI concludes by providing effective solutions to the constitutional dilemmas.

Historical Background

The Constituent Assembly was established in 1946 to frame a new Constitution for a free India. Cow slaughter as a subject was even sensitive when the Constitution was being framed. The Constituent Assembly has debated the issue of cow slaughter and was very close to placing it in Part III of the Constitution. However, the same was not done for two reasons. *Firstly*, it is because the State must remain neutral[40] in religious matters and placing the issue of cow slaughter under the Fundamental Rights would give the picture as if the State is siding with the Hindu majority population. *Secondly*, Part III dealt with Fundamental Rights dealing with human rights and a ban on cow slaughter was a matter concerning animals.[41]

Dr Rajendra Prasad has expressed his desire for a general ban on cow slaughter.[42] Thakurdas proposed the amendment for the prohibition on cow slaughter in the draft constitution stressing the 'economic value' of the cow rather than just religious sentiments involved.[43] Seth Govind Das, a member of the Constituent Assembly, argued that cow is not only a matter of religion

[40] Koma Deol, "Cow Protection was a sensitive subject in India even when the Constitution was being framed", *Scroll*, July 07, 2021.
[41] Tarun Kavuri, "The Constitutional Scheme of Animal Rights in India", *Animal Legal & Historical Center* (2020).
[42] Lovish Garg, "Examining the Constituent Assembly Debates on Cow Protection", *The Wire* Oct. 15, 2016.
[43] Ibid.

but also carries cultural and economic questions. It could be seen that Thakurdas and Seth Govind Das, both made a point on the 'usefulness' and economic importance of cows.

In India, there were two influential Muslim leaders, Zahir-ul-Hasan Lari and Syed Muhammad Saadulla. Z.H. Lari in the Constituent Assembly voiced for a ban on cow slaughter. They were of the view that the Assembly must not incorporate the cow slaughter prohibition clause in the Directive Principles of State Policy and make it vague and ambiguous.[44] As there has been violence in the name of cow slaughter on the occasion of Bakrid, the State must make its intention clear and make it a fundamental right instead of leaving the matter in the hands of the Provincial Government it would come out making its own laws, thus leading to conflict and differences.[45]

The long debate on the issue culminated with the insertion of Article 48[46] in the Directive Principles of State Policy-

"That the State shall endeavour to organise agriculture and animal husbandry on modern scientific and shall, in particular, take steps for preserving and improving the breeds, and prohibiting the slaughter, of cows and calves and other milch and draught cattle."

This insertion of the clause as one of the directive principles is thought to be the reflection of the religious preferences of the majority community. The provision clearly speaks of taking steps to prohibit the slaughter of cattle and makes no mention of consumption transportation or possession. Kancha Ilaiah, a Dalit scholar and activist remarked this was 'cow nationalism' of the Brahmins and the insertion of the clause as a forceful imposition of the Hindutva forces.[47] While this matter was being debated in the Constituent Assembly, Frank Anthony referred to this issue as 'an entrenchment on the domain of private life and private liberty.' He further contended that the fact the ban on slaughter has been inserted as a provision under Directive Principles of State Policy shows that the legislature has adopted an indirect way to give preference to Hindu sentiments.

The year 1966 saw a massive agitation on anti-cow slaughter which eventually turned violent depicting the sensitive and emotive value of this issue.[48] A group of Hindu protestors known

[44] Dilip Mandal, "From Constituent Assembly to Azam Khan, Indian Muslims have supported cow slaughter ban", *The Print*, Oct. 16, 2019.
[45] Ibid.
[46] Article 48A, The Constitution of India, 1950.
[47] K Ilaiah, "Cow and culture", *The Hindu,* Oct. 25, 2002.
[48] "Fact Check: 1966 incident of police firing on sadhus goes viral with exaggerated claims", *India Today,* Dec. 06, 2021.

as Sarvadaliya Goraksha Maha-Abhiyan Samiti backed by Rashtriya Swayamsevak Sangh and Bhartiya Janata Party protested to criminalize cow slaughter.[49] The movement showed a huge number of participation of people from various strata of life including many religious acharya and common people who went on to march outside the parliament peacefully. When their demands were unmet, the group of protesters tried to storm the parliament. However, they were countered by the Delhi Police who sprayed bullets and tear gas at them with many losing their lives.

Then Prime Minister Indira Gandhi sacked her Home Minister Gulzarilal Nanda as he was seen having a sympathetic attitude towards the protesters. As the February 1967 elections were approaching, PM Indira Gandhi formed a high-level committee under the chairmanship of A.K Sarkar, retired Chief Justice of India to assess the viability of the cow slaughter ban law.[50] The committee was supposed to submit its report by the end of six months, however, it never happened. Eventually, it was after 12 years in 1979 when Morarji Desai became the Prime Minister that this committee was finally wound up.[51]

Cow Protection Laws In India: Some Eyes Water; Some Mouth Water

On July 28, 2023, the Supreme Court in *National Federation of Indian Women v. Union of India & Ors*.[52] issued a notice seeking a response from the Union Home Ministry and police chiefs of several states over the alarming rising incidents of mob lynching cases by cow vigilantes. Lynching is an assault on basic human rights and the Rule of law, and the Supreme Court had previously issued guidelines on the prevention of mob violence in 2018.[53] There exists a positive correlation between the adoption of cow protection laws and a surge in violence with states having stricter cow protection regimes accounting for almost 54% of the total reported mob lynching cases.[54]

Agriculture[55] as a subject which includes animal husbandry has been dealt with under the State List. In furtherance of Article 48A enshrined under the Directive Principle of State Policy, around 20 States have enacted laws prohibiting cow slaughter. While section 48A clearly

[49] Shoaib Daniyal, "Looking back: The first Parliament attack took place in 1955- and was carried out by rakshaks*", Scroll*, Aug. 28, 2016.
[50] Nalin Mehta, "Indira Gandhi put RSS's Guru Golwalkar on cow slaughter committee … wound up after 12 years without a report"*, Times of India,* June 15, 2017.
[51] "The very first attack on Parliament"*, The Hindu*, Nov. 09, 2016.
[52] *National Federation of Indian Women v. Union of India & Ors.*, Writ Petition (Civil) No. 719 of 2023.
[53] Apoorva Mandhani, "Lynching: Parliament may create A Special Law", *Live Law*, July 17, 2018.
[54] *Cow Slaughter Prevention Laws in India*, CJP, July 02, 2018.
[55] The Constitution of India.

prohibits cow slaughter, it doesn't mention placing a ban on their transportation or possession. These laws regulating cow slaughter enacted by several states lack uniformity. The States can be divided into three broad categories based on the kind of law that they adopted[56]- *first,* States like Kerala, West Bengal, Goa and Northeastern which includes Arunachal Pradesh, Mizoram, and Manipur have no restriction on cow slaughter, the *second* category includes Several states have imposed blanket ban on slaughter of all kind of cattle and *third* category includes States which have the mechanism of obtaining slaughter permission for aged cattle that are certified as "fit for slaughter".

In 2017, the Central government made an attempt to bring some consistency in laws by introducing the Prevention of Cruelty to Animals Rules 2017. The rules primarily dealt with preventing the mistreatment of cattle during transportation or slaughter, controlling smuggling and regulating animal markets. This came about after the direction was given by the Supreme Court in the case of *Gauri Maulekhi v Union of India*[57] where the issue of cattle smuggling across borders was highlighted. The rules were withdrawn by the Government and a draft was notified titled "Prevention of Cruelty to Animals in Animal Markets Rules 2018". [58]

The blanket ban or partial ban imposed by the states is nothing but legislative overreach as the states has their own interpretation of the term 'cattle' widening the scope and in addition to slaughter, other activities like transportation, sale, and possession have been criminalized and are dealt with disproportionate punishments. The Maharashtra Animals Preservation Act, 1976 stipulates that cow slaughter is totally banned in the state but the slaughter of bulls, buffaloes and bullocks is permitted on producing a 'fit-for slaughter' certificate. This decision was welcomed by the Muslim Chamber of Commerce and Industry which further appealed to the Prime Minister to impose a nationwide ban on cow slaughter.[59]

States like Jharkhand, Rajasthan, UP, Uttarakhand, Gujarat, Haryana and Goa have even criminalised the transportation of cattle despite the fact that Article 48A is not concerned about transportation and only slaughter. The laws in these states have criminalised transportation, sale of beef or even the possession of it, this would mean the consumers of beef would be cast as criminals. This section of society would mostly include Muslims and the Dalit population.

[56] "The states where cow slaughter is legal in India", *The Indian Express*, Oct. 08, 2015.
[57] *Gauri Maulekhi* v. *Union of India,* Org 486 of 2016.
[58] *All India Jamiatul Quresh Action Committee* v. *Union of India*, W.P. (Civil) No. 422 of 2017 (Unreproted).
[59] "Muslim chamber welcomes cow slaughter ban", *Zee News*, Mar. 04, 2015.

States like Delhi, Punjab and Maharashtra had placed the burden of proof upon the accused to prove their innocence divulging from the principle of "innocent until proven guilty".[60]

In Uttar Pradesh, Chief Minister Yogi Adityanath had even directed the police officers to take strict action against cow slaughter or cow smuggling under National Security Act even on mere suspicion.[61] In Sikkim, cow slaughter has been made a non-bailable offence. The data reveals that 76 out of 139 people were booked on cow slaughter charges under the NSA Act.[62] This clearly shows the intention of such enactments is corrupt and aimed at mostly targeting people of a certain group.

The Gujarat Prevention of Anti-Social Activities Act stipulates preventive detention of one year for a list of offences, one of which is cow slaughter. The Gujarat Animal Preservation Act, 1954 is one of the strictest laws in place prohibiting cow slaughter as it bans selling, keeping, storing, transporting, offering, or even buying beef or beef products and makes the offence non-bailable. [63] In 2017, an amendment was brought in which elevated the punishment for the offence to a minimum of 10 years and a maximum sentence for life imprisonment coupled with an increase in a fine ranging from Rs. 1 lakh – Rs. 5 lakhs.[64] These regulations blatantly contravene the Supreme Court's verdict in *Dulla and Ors v. the State*[65] which states that no sentence should be excessive to the extent that it undermines the object and erode respect for the law.

Balancing Culture, Religion And Constitutional Freedoms: A Tale Of Constitutional Dilemmas

These laws have been challenged in various instances, but the Apex court of the country has upheld the validity of these laws. The Supreme Court was confronted with the question of whether cow slaughter ban laws interfere with the religious freedoms under Article 25[66] of the Muslim community during the festival of Bakrid in the case of *Hanif Qureshi v State of Bihar*.[67] The court opined that the holy scriptures provide for the sacrifice of any person or camel or

[60] The Constitution of India.
[61] Rajesh Kumar Singh, "Cattle smuggling, slaughter in UP now punishable under National Security Act", *Hindustan Times*, June 11, 2017.
[62] Jitendra Gupta, "Of 139 Booked Under NSA in UP this Year, 76 Accused of Cow Slaughter"*, Outlook*.
[63] Alison Saldanha, Supra note 4.
[64] Bharath Kanchaela, "A review of the 'Prevention of Cow Slaughter' laws across the country", *Factly*, Jan. 01, 2021.
[65] *Dulla and Ors* v. *The State*, AIR 1958 All 198.
[66] The Constitution of India.
[67] *Hanif Qureshi* v. *State of Bihar,* 1958 AIR 731.

cow and hence, it was not obligatory for a Muslim to sacrifice only cows. The court simply mentioned that such a ban wasn't a prohibition but a "restriction" without going any other on this distinction.

The cow slaughter ban laws imposed by the State were held to be constitutional in a slew of judicial cases like the *State of West Bengal v. Ashutosh Lahiri*[68]. The court has distinguished between "useful cattle" and "unproductive cattle" where the slaughter of the latter has been permitted[69], however, this was later overturned by the Supreme Court in *State of Gujarat v. Mirzapur Moti Kureshi Kassab Jamat & Ors*[70]. The Mirzapur case[71] upheld the validity of these laws on the ground that it falls under reasonable restriction under Article 19 and is in the interest of the public. The court failed to consider the long-term impacts of these laws on the personal liberty of an individual.

A. Anti-Cow Slaughter Laws Vis-À-Vis Indian Secularism

Secularism has become a part of the basic structure of our constitution which cannot be altered by any constitutional amendment.[72] Article 26[73] confers the right of every religion to manage its religious affairs. The Indian model of secularism has three essential inseparable elements to it: freedom of religion, equality, and non-discrimination. Secularism demarcates a line of separation between state and religion.[74] The "equal respect for all religion*"* allows the court to intervene in religious matters as well unlike the Western model which adopts the path of non-intervention. However, this interventionist and reformist role of courts has further created a lot of problems for the judiciary in tackling questions based on religion.

The concept of 'essential practices' adopted by the courts has solved the problem to a considerable extent. When the state passes any law on a ban on cow slaughter under Article 48A, it doesn't adopt a reformist approach but upholds the purported principles of the majority religion. To assess the validity of such laws in the context of Indian secularism, a two-pronged test is essential- *firstly,* it must be ascertained whether the cow slaughter ban falls under the 'essential practice' of the Hindu religion and *secondly,* if such a ban is permitted within the

[68] *State of West Bengal* v. *Ashutosh Lahiri*, 1995 AIR 464.
[69] *Hasmatullah* v. *State of Madhya Pradesh*, AIR 1996 SC 2076.
[70] *State of Gujarat* v. *Mirzapur Moti Kureshi Jamat*, AIR 1998 Guj 220.
[71] Ibid.
[72] *S.R Bommai* v. *UOI*, (1994) AIR 1918.
[73] The Constitution of India.
[74] V Vijaya Kumar, "Constitution and Secularism - A Rejoinder" 6 *National Law School of India Review* (1994).

Hindu religion, then placing a blanket ban which would impact other communities is permissible or not.

The Supreme Court's observation in *Commissioner v. Lakshmindra Swamiar*[75] emphasizes that the determination of the essential elements of a religion should primarily be based on the doctrines and principles within that religion. In the case of *Manohar Joshi*,[76] the court interpreted the term Hindutva as a 'way of life.' Similarly, in the case of *Sastri Yagnapurushadji v. Muldas Brudardas Vaishya,*[77] the court observed that the Hindu religion doesn't worship any single god or follow a certain definite set of religious rites or subscribe to any one dogma or concept and thus, doesn't fulfil the features of a creed or religion. Therefore, the court was of the view that Hinduism is a way of life.

In *Sridharan's case*, the Supreme Court mentioned that the word Hindu embraces within itself many diverse beliefs, faiths, practices and worship. Hinduism is characterized by tolerance and unlimited freedom of private worship with a stringent social code but exhibiting a wide diversity of practices. [78] Hindus have such diverse practices that it is impossible to bring out an exact definition of Hinduism and described Hinduism as "*encyclopaedic in* character" and "*commonwealth of all faiths*". [79]

There are two things that can be derived from the aforementioned judgements- *firstly*, Hinduism as a religion does not circumscribe to any single or rigid concept and is more of a 'way of life,' and *secondly*, tolerance, inclusivity and flexibility are the hallmarks of this religion. The term "Way of life" is too broad and can accommodate anything to everything ranging from language, customs, food habits and cultural aspects of life. Using the meat of the cow is considered to be a horrifying trait of Hindu society. However, it is a farfetched idea to declare that beef eating is completely prohibited in the Hindu religion as there is no conclusive evidence for the same.

In *State of Gujarat v. Mirzapur Moti Kureshi Jamat*,[80] the Supreme Court focused on the nature of the Indian State justifying the insertion of Article 48A and thus held that the provision is in line with the ideals of secularism. Given the fact that a wide Hindu population considers beef eating as a sin, it is unreasonable to put a complete ban on cow slaughter which will affect other

[75] *Commissioner* v. *Lakshmindra Swamiar*, AIR 1952 Mad 613.
[76] *Manohar Joshi* v. *Nitin Bhaurao Patil & Anr*, 1996 AIR 796.
[77] *Sastri Yagnapurushadji* v. *Muldas Brudardas Vaishya*, 1966 AIR 1119.
[78] *Bhagwan Koer* v. *J.C Bose*, (1903) 31 Cal 11.
[79] *Ashima* v. *Narendra*, AIR 6 Cal W N. 1016.
[80] *State of Gujarat* v. *Mirzapur Moti Kureshi Jamat*, AIR 1998 Guj 220.

communities and interfere with their lifestyle. As reasoned in the *Ram Janmbhoomi*[81] case the court was seen quoting Vedas to justify the concept of secularism: 'Sarwa Dharma Sambhava' i.e., tolerance for all religions.

The concept of 'secularism' can be best understood by the Ramaswamy views in *Sri Adi Visheshwara of Kashi Vishwanath Temple v. State of UP*[82] where he mentions that Hindus are the majority and are further divided into various castes and sub-sects. The only way unity is possible is by suppressing violence and encouraging tolerance. At one point in time, Dalits' entry into the temple premises was considered sinful and this was the belief or 'way of life' among the Hindus. However, the court took a stand in the matter by combining the 'way of life' of Hindus with that of the democratic way of life. Similarly, in the present scenario, imposing a blanket ban on cow slaughter would be a coercive measure.

B. Constitutionality Of Beef Ban On The Anvil Of Articles 14, 19 And 21

The primary question is the special status given to the cows. Upon analysing the court's reasoning, they have cited its importance in the Hindu religion and mentioned the 'usefulness' of cows as they yield milk. However, in disguise of cows 'usefulness,' the court has been consistently inclined towards Hindu sentiments. The report of the National Dairy Development Board mentioned that India produces 176 million tons of milk in total. Out of this, 100 million tons is buffalo milk as against 76 million tons provided by cows.[83] One could clearly infer that buffalo milk contains twice the fat of cow milk and can be considered more valuable than the cow. This would not justify the special status accorded to cows and therefore, the decision to ban cow slaughter on grounds of its 'usefulness' is arbitrary.

A law stands invalid if it fails to satisfy the rest of reasonableness and non-arbitrariness. Invoking the National Security Act to arrest the individuals accused of cow slaughter at the whims UP Government is clearly arbitrary. Furthermore, cow slaughter laws are irregular and inconsistent in different states concerning the same issue. A person committing the same crime would be treated differently under different laws of respective states which blatantly violates Article 14.

[81] M Siddiq (D) Thr Lrs v. Mahant Suresh Das & Ors, CA 10866- 10867/2010.
[82] *Sri Adi Visheshwara of Kashi Vishwanath Temple* v. *State of UP*, (1997) 4 SCC 606, para 24.
[83] Aakar Patel, "The Dark Chronology of India's Cow-Slaughter Law"*, Article 14*, Dec. 30, 2020.

As per recent rulings in the case of *Ministry of Defence vs Babita Puniya,*[84] *Anuj Garg & Ors v. Hotel Association of India & Ors*[85] and *Nitisha vs Union of India*,[86] it was held that even if it appeared to be neutral, the law would not be impartial if it had a differential effect on one group. With regard to cow protection laws, the Dalit and Muslim populations face the brunt of these draconian laws due to their difference in dietary practices.

Article 19(1)(g) mentions the Right to Trade which is not absolute in nature. The judiciary has faced this tedious task of balancing the right to trade and cow slaughter ban laws. The court in the *Abhilash Textile*[87] and *Sushila Mill*[88] *case* observed that the individual cannot assert their right without carrying out their fundamental duty and such restriction on business, trade and occupation is constitutionally valid if it's on account of public interest.

The Karnataka Prevention of Slaughter and Preservation of Cattle Act (2020) has expanded the definition of cattle which now includes *cow, the calf of a cow and bull, bullock and or she buffalo under the age of 13 years."* Similarly, the Maharashtra Animal Preservation Bill provides for a complete ban on cow, bull and bullock slaughter which was permitted earlier on obtaining a fir-for-slaughter certificate. India is home to many leather-producing industries and contributes 10% of the production of leather products. A blanket ban would hamper their business prospects and would have a detrimental impact on the livelihood of the people involved there. Also, the price of other meat products would rise in the market. In the case of *Olga Tel-lis v. Bombay Municipal Corporation*[89]*,* the Supreme Court opined that the prohibition of any activity essential for an individual to earn his livelihood would lead to the abrogation of his right to life under Article 21.

An important observation of the judgement of Justice M. Katju in *Hinsa Virodhak Sangh v. Mirzapur Moti Kuresh Jamat*[90] is that a person had his right to exercise his discretion in their dietary choices and it would form a part of their right to privacy and autonomy under Article 21. Therefore, the prolonged restriction would compel a person to change his dietary practices and would impinge on his fundamental Right.

---

[84] *Ministry of Defence* v. *Babita Puniya*, 2020 7SCC 469.
[85] *Anuj Garg & Ors* v. *Hotel Association of India & Ors*, AIR 2008 SC 663.
[86] *Nitisha* v. *Union of India*, W.P 1469 of 2020 (Unreported).
[87] *Abhilash Textile and Ors* v. *The Rajkot Municipal Corporation*, AIR 1988 Guj 57.
[88] *Sushila Saw Mill* v. *State of Orrisa & Ors*, 1995 AIR 2484.
[89] *Olga Tel-lis* v. *Bombay Municipal Corporation*, 1986 AIR 180.
[90] *Hinsa Virodhak Sangh* v. *Mirzapur Moti Kuresh Jamat*, (2008) 5 SCC 33.

"... a large number of people are non-vegetarian, and they cannot be compelled to become vegetarian for a long period. What one eats is one's personal affair and it is a part of his right to privacy which is included in Article 21 of our Constitution as held by several decisions of this Court."

Section 5-D of the Maharashtra Animal Preservation Act 1976 specifies that possession of beef is a criminal offence. The question was brought before the Bombay High Court whether such a provision is violative of Article 21 of the Constitution in the case of *Shaikh Zahid Mukhtar* v. *State of Maharashtra*[91]. The court struck down Article 5-D and observed that the right to eat the food of one's choice is a part of the right to privacy.

Moreover, the stringent and disproportionate provision for imprisonment in lieu of cow protection impinges on the personal liberty of an individual. As per the court ruling in the *State of Madras vs V.G Row*[92], to check whether the restriction imposed is reasonable or not, one must not only check the factors of such restrictions but also the manner in which that restriction is being imposed. The court in the *Hinsa Virodhak case* found the restriction to be just and reasonable and relied on *Om Prakash & Ors vs State of UP & Ors* [93] wherein the court has previously held that municipal bye-law prohibiting the sale of non-veg foods like meat, and fish and egg in Rishikesh was valid as most people who travel there for religious purpose and other population were vegetarian.

An important observation here is that the court took into consideration the nature of food intake while imposing such restriction. Now if we see States like Lakshadweep where around 96.5% population is Muslim[94], the new regulation of Lakshadweep Animal Preservation Regulation, 2021 was enacted which not only bans the slaughtering of cows but also buying, selling and transportation of them in any form. One of the reasons behind the 'Save Lakshadweep' protests was these laws. Regions like Lakshadweep are the places where despite the composition of the population ban was implemented.

C. Proportionality Test

The landmark judgement of *Puttaswamy* affirmed that privacy is an inseparable part of Article 21. The right to choose what to include in one's dietary habits is one such personal choice. No

[91] *Shaikh Zahid Mukhtar* v. *State of Maharashtra*, W.P 3395 of 2015.
[92] *State of Madras* v. *V.G Row*, 1952 AIR 196.
[93] *Om Prakash & Ors* v. *State of UP & Ors*, AIR 2004 SC 1896.
[94] Moushmi Das Gupta, "These are the 3 Lakshadweep draft laws that have triggered controversy", *The Print*, May 28, 2021.

one can dictate to any person to change their taste preference or dietary practices as it forms part of one's 'informational privacy'. As Justice Chandrachud expressed his view,

"*Privacy safeguards individual autonomy and recognises the ability of the individual to control vital aspects of his or her life. Personal choices governing a way of life are intrinsic to privacy."*[95]

The Proportionality Test laid down in *K.S Puttaswamy v. UOI* mentioned that a restriction on personal liberty must stand the test of threefold requirements of legality, legitimate State aim and proportionality. The legislative intent behind cow protection laws stems from the fact that the Cow has been considered holy by Hindus. The insertion of Article 48A was a backdoor legislation furthering majoritarian views. The objective of the law may appear reasonable on grounds of compassion towards living creatures, however, it tends to interfere with other Fundamental Rights. The rights of humans explicitly recognized under Articles 14, 19 & 21 will prevail over animal rights in case of conflict.

The reasonableness must be both: substantive and procedural. While determining the restriction placed, one must analyse the manner in which the restriction is being placed or the procedure that the statute specifies. Relying on *Anuradha Bhasin v Union of India*[96], the State must weigh down the implications of the restriction imposed and apply only those restriction that least interferes with the fundamental rights. The issue herein is that enforcing a beef ban does not withstand the powerful notion of an individual's right to enjoy their choice of food within the confines of their own home and their right to livelihood. The effect of law is for an indefinite period of time and placing the restriction on an individual's freedom indefinitely is clearly disproportionate.

Article 48A clearly mentions its objective to prevent the slaughter of cattle. However, the state legislation has gone on to criminalize the transportation and even the possession of beef. Haryana has passed a bill on cow slaughter ban laws which seek to impose from Rs 30,000 to Rs 1,00,000.[97] More than 50% of the arrest in Uttar Pradesh under the National Security Act is made on the pretext of cow slaughter. This means that individuals arrested under the NSA Act have been jailed without trial. It doesn't satisfy the requirement of nexus between object and

[95] *K.S. Puttaswamy* v. *UOI*, (2017) 10 SCC 1.
[96] *Anuradha Bhasin* v. *Union of India*, W.P 1164 of 2019.
[97] Vrinder Bhatia, "10-yr jail, 1 lakh fine: What Haryana's tough cow protection law says", *The Indian Express*, Oct. 19, 2020.

means adopted to achieve it. These draconian measures in no way pass the test of reasonability imbibed in Articles 14, 19 and 21.

In the *K.S Puttaswamy case*, the concurring opinion was given by Justice Kaul which mentions the term 'procedural guarantees.'[98] It is imperative for the State to introduce procedural safeguards which prevent the misuse of governmental interference. Upon analyzing the State laws, there is no judicial oversight to curb the arbitrary use of power under such laws. In fact, the burden of proof lies upon the accused in such matters. This is the deviation from the norm of 'innocent until proven guilty.' Thus, there is no procedural guarantee by the State laws and unfettered power lies in the hands of the State which can easily be misused. For example, in the Assam Cattle Preservation Bill 2021, there are no procedural safeguards in matters of seizure.[99] Such a seizure can be conducted if the officer believes that the offence is 'likely' to be committed. The Officers can easily give any vague reasons justifying their actions and get away with it.

The Conclusion

Reasonable accommodation spirit is expected out of people to keep up the spirit of diversity in this country. The very identity of India is its diverse nature whether in terms of culture, traditions, language or even food. To preserve this plurality among people, one is expected to be tolerant and 'reasonably accommodate' other people's choices. This has been very well-explained in the Supreme Court judgement on the Hijab case[100] where Justice Dhulia made a noteworthy observation on "Reasonable Accommodation" as a sign of mature society. He elaborated on the rich diversity of this country in terms of language, culture, religion, food and clothes and the need to imbibe and celebrate these differences in constitutional values of tolerance. It is only then that a person will learn to live and adjust to the difference slowly adapt itself to constitutional values of tolerance and realizing the strength of diversity.

The issue of cow slaughter has been there since the time of Independence. The issue was vigorously debated then in the Constituent Assembly and after all these years it is still being debated nationwide. Even after the insertion of Article 48A, issues keep cropping up and the laws related to slaughter are still called into question. However, a balanced approach can be

[98] Supra note 75.
[99] *The Assam Cattle Preservation Bill, 2021,* PRS Legislative Research.
[100] *Fathima Bushra* v. *State of Karnataka*, WP(c) 95/2022.

adopted giving due regard to Hindu sentiments along with fundamental rights of other communities.

Firstly, the intent behind Article 48A is being misunderstood by many as people perceive it as the imposition of Hindu beliefs upon them. However, the usefulness and the need for cattle cannot be ignored in today's time. Laws placing bans on useful cattle must be continued as it is for the betterment of the agriculture industry. However, a blanket ban on the slaughter of all kinds of cattle is uncalled for as it will unnecessarily burden farmers and caretakers financially to maintain the cattle that are no longer useful to them.

Secondly, the States must make sure that they have a common definition of cattle, cow, bull etc as the same leads to a lot of confusion among the people. The punishment stipulated must be proportional to the crime committed and must not be arbitrary. Also, the burden of proof which is upon the accused right now must be reversed and restored back to "innocent until proven guilty." The State must refrain from giving any unnecessary religious colour to the provision as it would lead to polarization among the people.

Lastly, the Centre and State must collaborate and work out common guidelines to regulate the livestock market. It must adopt a regulatory approach and refrain from being too restrictive on grounds of religious sentiments getting hurt. Beef is cheaper than most non-vegetarian food items like chicken and fish and forms the dietary habits of a major chunk of the population. It is an industry upon which the livelihood of a lot of people depends especially in the rural economy where people's source of income depends on agricultural and livestock-related work. Hence, the legislature must avoid interfering with basic rights as it would disrupt the daily life of people.

CHANAKYA LAW REVIEW (CLR)

VOL. IV (ISSUE II), JULY-DEC, 2023, pp. 28-37

INTERNALIZATION OF INTERNATIONAL AGREEMENTS IN INDIA: A STUDY WITH SPECIAL REFERENCE TO THE ROLE OF THE EXECUTIVES

Kirti Rashmi[101]

Abstract

Internalization of international agreements holds in its ambit, an embargo of things, among which, the prominent one is who should be the proper authority for the incorporation of such agreements and what should be the procedure to fuse them into the domestic legal system. Addressing such questions depends upon the legal framework and the policy decision of each nation and so, there are deviating responses for the same. In India, the Constitution itself imbibes in its provisions, the duty of the State to honor international law. However, in want of explicit provision covering all nuances of such admittance, the appropriate authority and procedure for the assimilation of international agreements in India is still a conundrum. The other reason can be appended to the inconsistent judicial decisions that fall short of providing a precise guideline regarding the assimilation of international law in India. The article thus aims to focus on the enigma attached to the topic and stresses the possible legal recourse for the same.

Keywords: International Law, International Instruments, Treaty, Binding nature of Treaty, Treaty Internalization.

Introduction

A. Overview of Treaty and other International Instruments

In a world where different nation-states resort to their separate norms, there is a need for a guiding framework that suits all. The reasons for resorting to such universal principles are to define and manage the relationship among the States, manage the global economy, and sort global issues in front of them. These guidelines take the shape of international agreements, which can be written or unwritten, the written form is generally a treaty, and the latter one does

[101] Research Scholar, School of legal Studies, Cochin University of Science & Technology, Kerala.

not enjoy the status of a treaty. However, at times, some oral international agreements also have the effect of a treaty if the participating parties intend so or if the negotiation reflects so. The agreements other than treaties, which are verbal or may be written at times, are other international instruments that are not defined specifically but are usually informal and non-binding agreements such as declarations of intent, unilateral commitments, MOUs, open joint statements by venturing States, and others. Even though these instruments do not create legal obligations, they stand as valid instruments[102] and the States still enter into such arrangements to meet their certain needs, arrive at some mutual understanding, and adhere to moral or standard practice. So, non-adherence to such instruments may have no legal remedies unless manifested as binding but have certainly political repercussions. However, at times, they may have indirect legal effects, for instance, a Memorandum of Understanding (MOU) between States that is signed before any treaty as a precondition, might be used for legal interpretation to understand the intent of the parties. Helsinki Accord is such an international instrument, which is not a treaty, but nearly all European states U.K., and Canada signed for human rights protections after World War II.

On the other hand, treaty is a formal agreement among States and in some cases, between other international actors such as international organizations, that establishes rights and obligations and carries a binding effect among the venturing parties. It, however, does not create any obligation for any third party, without its consent[103]. According to the 1969 Vienna Convention,

"treaty means an international agreement concluded between the States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation[104]*"* (emphasis added)

So, following the definition stated above, all treaties qualify as international agreements and not otherwise, however, the 1969 Vienna Convention mandates a treaty to be in writing in order to bring such treaty under its ambit, but at the same time, the Convention does not negate the legal validity or application of unwritten agreements[105]. Treaties outline the negotiations of the parties, reflect the outcome of their complex interaction, and emancipate the rights and liabilities of the signatory parties. A treaty is designated with different names such as a convention, charter, protocol, covenant, or declaration. The labeling of various names for

[102] The 1969 Vienna Convention on Law of Treaties, art. 4.
[103] The 1969 Vienna Convention on Law of Treaties, art. 34.
[104] The 1969 Vienna Convention on Law of Treaties, art. 2(1)(a).
[105] See n.1. VCLT, art. 4.

treaties reflects the character of the particular instrument or habitual usage by the nation-states, but the same 1969 Vienna Convention, applies to them. Though India had not signed the said Convention, however it follows and ought to follow its provisions as a practice, in treaty-making and implementation. The 1969 Vienna Convention covers several other aspects of the treaty such as the creation, termination, validity, invalidity, or suspension of treaties, irrespective of the nomenclature it holds.

B. Binding Nature of a Treaty

A treaty is accorded legally binding status only when it creates such obligations. To understand if it is manifested to have a binding character, a treaty is interpreted according to its ordinary meaning with reference to its objective and purpose, unless special meaning to its terms has been accorded by the parties[106] or the terms of such agreements are ambiguous or absurd[107]. In the latter situation, *travaux preparatoires i.e.,* the preliminary drafts corresponding to such treaty, are referred to denote if the treaty creates such obligations or not.

The authority asserting the binding nature of the treaty is *pacta sunt servanda*[108]*,* enshrined in the 1969 Vienna Convention which stresses that every treaty in force is binding upon the parties consenting to it and must be performed by them in good faith[109]. The States are not expected to vitiate their consent to treaty entered unless such consent leads to a violation of its internal law of fundamental importance[110]. There are certain exceptions to this rule as well, clearly stated in the said Convention, for instance, the State may invoke an error in the treaty as a ground for non-adherence when such an error relates to a fact or situation that was an essential basis for consent and was assumed by the State to exist at the time when the treaty was concluded, or when the State was fraudulently induced by the other party to enter into such agreement, or when the consent taken was through corruption or coercion[111]. A treaty is also considered invalid if it conflicts with *jus cogens*[112]. In summary, it can be said that treaties are binding as they represent a formal and voluntary agreement between States or international organizations as the case may be, to be bound by their mandates. The treaties, understood as

[106] The 1969 Vienna Convention on Law of Treaties, art. 31.
[107] The 1969 Vienna Convention on Law of Treaties, art. 32.
[108] See I.I. Lukashuk, "The Principle Pacta Sunt Servanda and the Nature of Obligation Under International Law", 83 *ASIL* 513 (1989).
[109] The 1969 Vienna Convention on Law of Treaties, art. 11, 18, 26.
[110] The 1969 Vienna Convention on Law of Treaties, art. 46.
[111] The 1969 Vienna Convention on Law of Treaties, art. 48-52.
[112] The 1969 Vienna Convention on Law of Treaties, art. 53, 71.

the foundation of the international legal regime, are thus obligatory and can attract legal and diplomatic consequences when violated.

The Need for Entering into a Treaty

In a world where no nation-state is self-sufficient to meet all of its needs or resolve all of its crises and concern areas, it becomes necessary to seek help from the other States. In such a situation, the States enter into a treaty to bring into being rules and norms that regulate their interplay and maintain relations between them. According to the Charter of the United Nations[113], every treaty or international agreement entered by the member States of the United Nations shall be registered with the Secretariat and then it should also be published.[114] The multilateral treaty which is sponsored by any U.N. organ covering the interests of nearly all nation-states is deposited with the Security General (a.k.a. Open Multilateral treaty) and others not deposited with the same are managed by the various nation-states among themselves (such as Bilateral or Closed Multilateral treaties)[115].

Entering into any treaty serves many other purposes as well such as fulfilling common interests, maintaining cooperation and coordination to fathom out global concerns such as promoting peace, security, human rights, environment, and trade; assisting in technological and economic growth; extending helping and providing amenities to each other in situations of war, rebellion, or any aggression. The treaties thus affect international relations by promoting common interests and resolving disputes between them. India, therefore, by the reason of the aforesaid ascendence of entering into a treaty, has entered into many treaties.

Nevertheless, the benefits of treaty-making are enormous, States are, however, not obligated to sign and ratify each treaty, they participate in. The reasons appended for the same differ from the nation's preferences, political ideologies, legal framework, national policies, foreign relations with other states, approaches for resolving international problems, and the need for creating foreign institutions. The commitment to a treaty also depends upon the economic interests of the States and the extent of cooperation that any State is willing to gain or provide in the world community[116]. This reiterates the sovereignty of the States in deciding whether or not to enter or ratify any treaty. India, by virtue of the same reason, has not ratified many treaties

[113] United Nations, *available at: https://www.un.org/en/about-us/un-charter* (Visited on October 15, 2023).
[114] United Nations Charter, 1945, Chapter XVI, art. 102.
[115] Thomas J. Miles & Eric A Posner, "Which States Enter into Treaties, and Why" (John M. Olin Program in Law and Economics Working Paper No. 420, 2008).
[116] Yonatan Lupu, "Why Do States Join Some International Treaties but Not Others? An Analysis of Treaty Commitment Preferences" 60 *TJCR* 1221.

that have been ratified by the other States, for instance, many torture-related treaties[117], refugee treaties[118], and other United Nations pacts[119].

Once the State has entered into any treaty, as in India, it has to be honored by their legal regime. As already mentioned, this is attributed to the principle of *pacta sunt servanda*[120], and in the Indian case, both this principle and the constitutional provisions as discussed in the forthcoming segment, are the reasons for honoring such treaties.

The Authority and the Procedure to Internalize Treaty in India

A. The Authority to enter into a Treaty

It is pertinent to note that the authority and procedure to enter into any treaty depends upon the internal laws of a nation. The U.S. Constitution states that a treaty is enforceable once it is ratified, and the ratification can be done by the Executives upon the pre-approval by two-thirds of the Senate present and concurring on the same[121]. The agreements not requiring such approval requisites are called Executive Agreements in the U.S. The Indian legal regime, however, differs from such differentiation, and all instruments are covered under the brackets of international agreements.

In India, the Constitution drives the State, to foster respect for international law and treaty obligations[122], however, the authority to internalize a treaty is understood by a combined reading of a few of its provisions. Article 246(1)[123] of the Constitution empowers the Parliament to make laws for the matters enumerated in List I[124]. The matters related to international arenas are covered under entries 10 to 21 of the said schedule, namely, Foreign affairs, all matters which bring the Union into relation with any foreign country; Diplomatic, consular, and trade representation; United Nations Organization; Participation in international conferences, associations, and other bodies and implementing of treaties, agreements and conventions with foreign countries; War and peace; Foreign jurisdiction; Citizenship,

[117] Outlook, *available at:* https://www.outlookindia.com/website/story/india-among-9-nations-that-havent-ratified-un-convention-against-torture/298749 (Last Modified 04 May, 2017).
[118] UNHCR Global Appeal 2011 Update, *available at:* https://www.unhcr.org/sites/default/files/legacy-pdf/4cd96e919.pdf (Visited on October 15, 2023).
[119] The Economic Times, *available at:* 'https://economictimes.indiatimes.com/news/politics-and-nation/india-has-not-signed-or-ratified-over-200-un-pacts-government/articleshow/58149826.cms?from=mdr (Last Modified 12 April, 2017).
[120] See n. 7. The Principle Pacta Sunt Servanda and the Nature of Obligation Under International Law.
[121] The Constitution of the United States 1789, art. II (2).
[122] The Constitution of India 1950, art. 51(c).
[123] The Constitution of India 1950, art. 246(1).
[124] The Constitution of India 1950, VII schedule, List I.

naturalization and aliens; Extradition, Admission into, and emigration and expulsion from, India, passports and visas; Pilgrimages to places outside India; and Piracies and crimes committed on the high seas or in the air, offenses against the law of nations committed on land or the high seas or in the air[125]. As mentioned, the items stated above are related to international relations and are the part of Union List, therefore, the Union Legislature is the competent authority to make laws on the said areas and such laws are applicable throughout India. Again the Indian Constitution suggests that for implementing any treaty, agreement, or convention, Parliament can make law for the whole nation [126]. Further, the Parliament can also legislate on the matters in the state list[127] to make a law for implementing a treaty[128]. Now reading of these provisions all together, it can be shown that the Parliament can make law on matters pertaining to international agreements application on the whole nation. Now reading these articles as a corollary with Article 73(1)(a)[129], it can be derived that the Executive's power extends to the matters over which the Parliament is empowered, which means that the Executive also has the power and authority of treaty-making and implementation, and as laws made by the Legislature is a binding obligation, such treaty made by the Executives have a force of law as well.

As a result of this, the President, under whom the Executive power of the Union resides[130], can sign and ratify the treaty with the international actors. Implementation of such a treaty may affect domestic legislation, however, the President can make adaptations and modifications to such law, which shall not be questioned in any court of law[131]. The reason for barring inquiry by the court is that making any law is the legislative domain of the Parliament, and the President being the head of the Parliament, can also legislate. The other reason is that, by virtue of the Separation of Power doctrine[132], the other organs of the State can't intervene in their exclusive domain. Certain other treaties and international agreements are also barred from interference by the courts subject to discussion on the question of law or fact[133]. It implies thus, that the

[125] *Ibid*.
[126] The Constitution of India 1950, art. 253.
[127] The Constitution of India 1950, art. 246(3).
[128] See observation of Justice Shah in *Maganbhai Ishwarbhai Patel v. Union of India* (2002) 3 SCC- "the effect of Article 253 is that if a treaty, agreement or convention with a foreign State deal with a subject within the competence of the State Legislature, the Parliament alone has, notwithstanding Article 246(3), the power to make laws to implement the treaty, agreement or convention or any decision made at any international conference, association or other body. In terms, the Article deals with legislative power: thereby power is conferred upon the parliament which it may not otherwise possess"
[129] The Constitution of India 1950, art. 73(1)(a) 'Subject to the provisions of this Constitution, the executive power of the Union shall extend to the matters with respect to which Parliament has the power to make laws'.
[130] The Constitution of India 1950, art. 53(1).
[131] The Constitution of India 1950, art. 372(2).
[132] See The Constitution of India 1950, art. 50.
[133] The Constitution of India 1950, art. 363(1).

President can enter and ratify treaties for the State, which is applicable throughout the country and it can also repeal and make necessary amendments in laws to make such treaties applicable in India. It can be, therefore, said that the authority to internalize treaties and international agreements lies with both the Executives and Legislature as incarnated in the Constitutional provisions.

B. The Procedure of Treaty Making and Internalization

Now, the procedure to implement any treaty varies according to the practice of each State. The parties to any treaty can decide if it can be made applicable just after signing or if it has to pass through the pre/post ratification process by the legislative agency to have a binding effect. In want of explicit provision in the Constitution, the procedure for entering into and internalizing any treaty in India can be explained through the Standard Operating Procedures (SOP) with respect to MOUs/Agreements, issued and updated by the Ministry of External Affairs released in the year 2018[134]. According to the SOP, it is the Legal and Treaties (L & T) division of the Ministry of External Affairs (MEA) that assists in delegations and negotiations for entering into treaties, and then it is approved by the Union Cabinet. It is pertinent to note that only in exceptional situations, for instance, any cultural treaty not hampering the nation's security or any commercial agreement that is already approved by the concerned ministry, such approval is not needed. After it is approved, the President or the person authorized by him executes the treaty, and the treaty is implemented. Such implementation can also be done without framing new legislation or without making any amendments to the prevailing legislation to incorporate the provisions of the treaty[135]. However, if required, a legislative action i.e., legal amendments or new legislation can be done, after signing the treaty but before ratification[136]. In such a scenario, the L& T division again lends a hand to the Parliament in drafting legislation or making amendments. After the L&T division is done with its work, it is sent to the Cabinet for approval, and then ratification takes place while submitting it to the repository of the treaty and the treaty concludes[137].

Thus, the provisions reflecting the procedure to internalize international law are kept with the Executives in line with the Legislature as Parliamentary intervention is required at times for

[134] Ministry of External Affairs, Revision of Standard Operating Procedures (SOPs) with respect to MoUs/Agreement with foreign countries, 312/AS(MD)/17, (04 April, 2018).
[135] *Pratap Singh v. State of Jharkhand* (2005) 3 SCC.
[136] See n. 44. 81st Report of Parliament, 5.
[137] See n. 33. Revision of Standard Operating Procedures (SOPs) with respect to MoUs/Agreement with foreign countries.

passing or amending laws for including these treaty provisions in the domestic law domain. These processes reflect that again, there is the involvement of both the Executives and the Legislature in the treaty-making process.

Legislative Oversight: An Issue in Internalizing Treaty in India

A. Legal Issues in Treaty Internalization

Treaty internalization in India attracts several intricacies. As stated earlier, since the Constitution mandates both the Legislature and the Executive's participation in treaty-making and its internalization, the contention involved herein is, over-emphasizing the Executive's power and sidelining the Legislature in such process.

The reason is, that the Executives can also by virtue of the Constitution, exercise the powers similar to the Parliament in treaty-making, but that doesn't imply that they solely have this power. The Executives do not enjoy such power in isolation, as the Parliament in the first place is empowered by the Constitution to exercise such right, a part of which is shared with the Executives. However, ignoring the Parliament is depicted while venturing into treaty-making when such a treaty is signed without Parliamentary discussion or pre/post-approval.

Again, the SOP mentioned above, also reflects that treaty-making is mainly the domain of the Ministers as the Ministry of External Affairs is the nodal agency for treaty-making and there is a comparatively minor role of the Parliament in treaty-making and implementation.

Further, as per the schedule of The Government of India (Allocation of Business) Rules[138], pertaining to the distribution of subjects among the departments, the MEA has the authority to negotiate political treaties with foreign countries.

Furthermore, corollary from the same can be attributed to the fact that since the President acts on the aid and advice of the Council of Ministers[139], with the Prime Minister as the head, effectively it is the ministers who decide if the State should enter into any such agreement or not. Acquiring the fact that the ministers originate from the Parliament and sit in the Parliament, it can be lucidly stated that there is no specific deliberation in the Parliament before signing any treaty. The ministers being people's representatives sometimes fail to understand the public

[138] The Government of India (Allocation of Business Rules) 1961, rule 3, Sch. II.
[139] The Constitution of India 1950, art. 74.

opinion in want of proper discussion on the same and ultimately rights of citizens are affected when such a treaty is signed.

Treaty making thus, has been understood as more of a political act than a collective act of Legislature and Executives[140].

B. Bills Corroborating Such Issues

These issues are reflected by many Parliamentarians in their respective bills. A bill moved by M.P. Veerendrakumar suggested for insertion of a proviso to Article 253 requiring a prior approval of the Parliament before entering into any treaty, agreement, or convention[141]. The bill warranted the knowledge and confidence of the Parliament before accepting any obligation under any agreement.

Another bill introduced in the Lok Sabha by M.P. Chandrappan also advocated amending and improvising Article 253, by stating that the government while entering into any treaty or agreement with a foreign country, commits itself and the people of India to many obligations, such exercise, however, is done without the connivance of the Parliament, which is not a healthy practice[142].

Again, the Lok Sabha bill initiated by M.P. Prabodh Panda in the year 2009 stated that before treaty implementation, it should be ratified by the Parliament[143].

In addition, the Lok Sabha Bill of 2017 moved by M.P. Adv. Joice George also endorsed ratification before implementation[144].

Further, the report of the National Commission to Review the Working of the Constitution (NCRWC) set up by the Ministry of Law & Justice in February 2000[145], also suggested that the Parliament must make a law to regulate the treaty-making power.

Furthermore, the Second Commission on Centre-State Relations headed by former Chief Justice of India, M.M. Punchhi also recommended in his report in March 2010 that the Parliament should enact a law to streamline the procedures involved in treaty-making[146].

---

[140] See n. 27. *Maganbhai Ishwarbhai* case.
[141] The Constitution (Amendment) Bill (2005) (Bill No. 79).
[142] The Constitution (Amendment) Bill (2006) (Bill No. 12).
[143] The Constitution (Amendment) Bill (2009) (Bill No. 115).
[144] The Constitution (Amendment) Bill (2017) (Bill no. 9).
[145] The Parliament of India, 81st Report on Role of Ministry of Law and Justice in Framing/Approving the Provisions of International Covenants/Multilateral/bilateral Treaties or Agreements (15th March 2016).
[146] *Ibid*.

In a nutshell, all these bills and reports reflected the absence of consultation with the Parliament before entering into any treaty. They also cogitated that there is very little room for Parliamentary scrutiny as even without a legislative backup for the same, the treaties once entered can be applied in the domestic legal regime[147].

Thus, the will of the people, which could have been reflected by the Members of Parliament is also neglected, as a discussion on the same is jumped over, and the people are left clueless, oblivious, and unaware if their rights have been marginalized when any treaty is signed by India. Such an act is thus reflective of the executive overreach over the powers of the Legislature.

The Remedial Measures

As discussed, treaty-making plays a pivotal role in shaping international relations that affect the country as a whole. Therefore, it should be attended to mindfully with utmost caution as there is a possibility that some provisions might impede the rights and interests of its people and hamper the country's growth as well. This can be mitigated if there is proper deliberation on the same before agreeing to any such convention, agreement, covenants, and treaties. The State should thus, transpire into practice, the involvement of Parliament while entering into any treaty. The Executive powers of treaty-making should be, therefore, exercised in consonance with the Parliament. The author further opines that in line with the suggestions of the bills, the Parliament should first, incorporate in the Constitution, explicit provisions to internalize treaties and agreements in India, to remove such ambiguities of authorities and procedures. Also, as suggested by the 81st Report of the Parliament, treaty negotiations and drafting should be supported by legal experts, particularly international law and politics[148]. Lastly, in a parliamentary democratic country like India, the power of the Parliament should not be undermined.

[147] *Gramophone Company of India Ltd. v. Birendra Bahadur Pandey & Ors.* (1984) SCR (2) 664.
[148] *Ibid*.

CHANAKYA LAW REVIEW (CLR)

VOL. IV (ISSUE II), JULY-DEC, 2023, pp. 38-48

CRIMINAL LAW VIS-À-VIS CRIME AGAINST CHILDREN IN INDIA: AN ANALYSIS

Neha Raj[149]

Abstract

There is no strict definition of a law that covers all its ambit. A law is a collection of acts, rules, regulations, legislation, codes, and other documents that aim to achieve justice, order, peace, and morality in a society. The criminal law in India is governed by the Indian Penal Code (IPC) of 1860 and the Criminal Procedure Code (CRPC) of 1974. IPC is a substantive law, i.e., "a law that governs the original rights and obligations of individuals." CRPC was passed by the British parliament in 1861 in the wake of the 1857 mutiny and had amendments in 1882 and 1898. There were 1,28,531 crimes recorded against children in India last year. Madhya Pradesh, Uttar Pradesh, West Bengal, and Bihar account for more than half of all crimes against children committed in India. This paper will be analysing three criminal offences, i.e., child sexual abuse, child marriage, and child labour. "Madhya Pradesh", "Uttar Pradesh", "Maharashtra", "West Bengal", and "Bihar" account for more than half of all crimes against children committed in India. India has more than 450 million children, and nearly 40% are susceptible to all sorts of abuse. Last year, nearly 43000 CSA cases were registered under POCSO. An 88% increase in child marriages in August 2020, when India was in complete lockdown, was reported in comparison to the previous year. In India, there are nearly 10 million child labourers, with industries like brick kilns, garment making, carpet weaving, food eateries, mining, etc., employing a major chunk of them.

Introduction

The terms "law" or "laws" are used in a variety of contexts, like when science students talk about gravitational laws, motion laws, mechanics laws, and so on. But what concerns this paper is the definition of law in the legal sense, so taking that in mind, a law is a collection of acts, rules, regulations, legislation, codes, and other documents that aim to achieve justice, order,

[149] 4th Year Student at Amity Law School, Amity University Chhattisgarh.

peace, and morality in a society. Various legal philosophers have also defined the law. “Salmond” says that "the law may be defined as the body of principles recognised and applied by the state in the administration of justice." Austin says, "law is an aggregate of rules set by men politically superior or sovereign to men as politically subject, and it is a command which obliges a person or persons to a course of conduct." Like mentioned earlier, these definitions are also not inclusive and have been subjected to various criticisms. Unlike law, justice can't be codified. It is a universal value that encompasses the ideas of righteousness, fairness, and morality. Serving justice is the topmost goal of any legal system, and the law is a tool for doing so.

Issues Raised

Overview of Criminal Law in India: Provides an overview of the criminal justice system in India, with a focus on the Indian Penal Code (IPC) of 1860 and the Criminal Procedure Code (CRPC) of 1974. Discusses the historical background and pillars of the criminal justice system.

Child Sexual Abuse (CSA): Explores the definition and impact of child sexual abuse, citing statistics and referring to the Protection of Children from Sexual Offences (POCSO) Act. Raises concerns about the poor implementation of the act and suggests measures for improvement.

Child Marriage: Addresses the high prevalence of child marriages in India, discusses the legal provisions under the Prohibition of Child Marriage Act (PCMA) of 2006, and identifies challenges, including the recent surge during the COVID-19 lockdown.

Child Labour: Explores the issue of child labor, defining it and citing the Child Labour (Prohibition and Regulation) Act of 1986. Discusses the reasons behind child labor, the impact of the COVID-19 pandemic, and measures to combat the practice.

Review Of Literature

The research paper explores the multifaceted realm of criminal law in India, emphasizing its diverse components, including acts, rules, regulations, legislation, and codes. The introduction provides a comprehensive definition of law, highlighting its role in establishing justice, order, peace, and morality in society. The criminal law in India is dissected, focusing on the Indian Penal Code (IPC) of 1860 and the Criminal Procedure Code (CRPC) of 1974, tracing their historical origins and amendments.

A stark reality is presented with the alarming statistics of crimes against children in India, particularly in states like Madhya Pradesh, Uttar Pradesh, West Bengal, and Bihar. The paper delves into three specific criminal offenses against children: child sexual abuse, child marriage, and child labor. Child sexual abuse is scrutinized with a focus on the Protection of Children from Sexual Offences (POCSO) Act of 2012. Despite the Act's comprehensiveness, issues of poor implementation, lack of awareness, and delayed justice are underscored. Child marriage, a pervasive issue in India, is examined through the lens of the Prohibition of Child Marriage Act (PCMA) of 2006, with a critical analysis of its flaws and the challenges posed by the societal norms and economic factors.

The scourge of child labor is explored, emphasizing its detrimental impact on children's physical and mental development. The Child Labour (Prohibition and Regulation) Act of 1986 is discussed in detail, along with the complexities surrounding poverty, familial pressure, and child trafficking contributing to the persistence of this issue.

The conclusion highlights the need for a more unified and streamlined legal framework, emphasizing the necessity of eradicating nebulous provisions and implementing comprehensive police reforms. The role of the judiciary and its existing challenges are acknowledged, advocating for swift resolutions to ensure an effective justice system. The paper concludes with a call for ongoing amendments and adaptations in the justice system to counter evolving criminal tactics.

Criminal Law In India

"The criminal justice system" in India follows an "Adversarial system" in which "the prosecution and defence compete against each other, and the judge serves as a referee to ensure fairness to the accused and that the legal rules of criminal procedure are followed. The adversarial system assumes that the best way to get to the truth of a matter is through a competitive process to determine the facts and application of the law accurately"[150]. The criminal law in India is governed by the "Indian Penal Code" (IPC) of 1860 and the "Criminal Procedure Code" (CRPC) of 1974. IPC is a substantive law, i.e., "a law that governs the original rights and obligations of individuals." On the other hand, CRPC is a procedural law, i.e., "a law that establishes the rules of the court and the methods used to ensure the rights of

[150] United Nations Office on Drugs and Crime, 'Adversarial versus Inquisitorial Legal Systems' <https://www.unodc.org/e4j/en/organized-crime/module-9/key-issues/adversarial-vs-inquisitorial-legal-systems.html> accessed 9 December 2021

individuals in the court system." The CRPC and IPC are both British-era statues, though the reasons behind their genesis are different. Before the Britishers arrived in India, Muslim law used to govern criminal law in India for both Hindus and Muslims, and even after the advent of the Britishers, for a couple of decades, the criminal jurisprudence was a heterogenous mixture of Muslim and British laws. The first Indian Law Commission was appointed under Section 53 of the Charter of 1833 when the conflict between existing British and local laws started hampering the judicial process. The commission consisted of T. B. Macaulay, J. M. Macleod, G. W. Anderson, and F. Millett as its members, and they presented the first draft of the Penal Code in 1837[151]. After various law commission reports, debates, and commentaries, the Indian Penal Code was finally passed in 1860. The code of criminal procedure, on the other hand, was passed by the British parliament in 1861 in the wake of the 1857[152] mutiny and had amendments in 1882 and 1898. The version of CRPC that is in existence today is the result of a major amendment in 1973 that was brought in after the suggestions of the 41st Law Commission report[153].

There are four main pillars of the criminal justice system in India, i.e., Police, Court, Prison and Legal Aid.

Crimes Against Children

Nelson Mandela once said, "Children are our greatest treasure. They are our future. " And here we are with 1,28,531 crimes recorded against children in India last year. Children are vulnerable to various horrendous offences like rape, kidnapping for ransom, prostitution, trafficking, marriage, and pornography, to name a few. The number of cybercrimes against children also witnessed an unfortunate 400% boom in the year 2020. "Madhya Pradesh", "Uttar Pradesh", "Maharashtra", "West Bengal", and "Bihar" account for more than half of all crimes against children committed in India. This paper will be analysing three criminal offences, i.e., child sexual abuse, child marriage, and child labour, and will also be discussing the law against them, how they fall short in delivering proper justice, and measures to improve their efficiency.

Child Sexual Abuse

---

[151] Atul Chandra Patra, 'AN HISTORICAL INTRODUCTION TO THE INDIAN PENAL CODE' (1961) 3(3) JILI <https://www.jstor.org/stable/43949716"> accessed 6 December 2021

[152] The Times of India, 'CrPC was enacted after 1857 mutiny' <https://timesofindia.indiatimes.com/city/hyderabad/crpc-was-enacted-after-1857-mutiny/articleshow/3010641.cms> accessed 6 December 2021

[153] Tilak Marg, 'Code of Criminal Procedure, 1973 (CrPC)' <https://tilakmarg.com/acts/code-of-criminal-procedure-1973/> accessed 6 December 2021

The WHO has given the definition of CSA, or child sexual abuse, as "the involvement of a child in sexual activity that he or she does not fully comprehend, is unable to give informed consent to, or for which the child is not developmentally prepared and cannot give consent, or that violates the laws or social taboos of society.[154]" India has more than 450 million children, and nearly 40% are susceptible to all sorts of abuse[155]. Last year, nearly 43000 CSA cases were registered under POCSO,[156] and the most spine-chilling fact is that most of the offenders are family member, family friends or neighbours of the victim[157]. In this age of the digital world, when internet penetration in India is at an all-time high and will continue to increase, the menace of online CSA is also one of the major challenges that face the country today. Interpole mentioned in its report that India reported over 2.4 million online CSA cases between 2017 and 2020 and that the demand for CSAM (child sexual abuse material) is increasing constantly.[158] Sometimes children are not even aware that they are being exploited because of the techniques like "online grooming" in which the offender befriends the child online and gains his/her trust, then asks for obscene materials. This is evident from the data released by "The Internet Watch Foundation," according to which, there is an increase of 77% in child 'self-generated' sexual material in between 2019 to 2020[159].

The POCSO Act (2012) is the main legislation in India that deals with sexual crimes committed against children. The law is very comprehensive because it includes a wide array of acts that can be considered offences, like stalking, making a child expose themselves, etc. A child is any person who is below eighteen years of age. It also distinguishes various types of offences, which include aggravated sexual offences, aggravated penetrative sexual offences, and non-

---

[154] World Health Organization Regional Office for Africa, 'CHILD SEXUAL ABUSE: A SILENT HEALTH EMERGENCY' <https://apps.who.int/iris/bitstream/handle/10665/1878/AFR.RC54.15%20Rev.1.pdf?sequence=1%26isAllowed=y> accessed 9 December 2021

[155] Mannat Mohanjeet Singh, Shradha S. Parsekar and Sreekumaran N. Nair, 'An Epidemiological Overview of Child Sexual Abuse' (2014) 3(4) JFPMC <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4311357/> accessed 9 December 2021

[156] Hindustan Times, '43,000 offences under POCSO Act registered last year: AG KK Venugopal to SC' <https://www.hindustantimes.com/india-news/43000-offences-under-pocso-act-registered-last-year-ag-kk-venugopal-to-sc-101629800727264.html> accessed 9 December 2021

[157] The Logical Indian, '90% Of Abusers Are Known to Victim: How This NGO Is Prepping Families to Fight Child Sexual Abuse' <https://thelogicalindian.com/exclusive/lockdown-child-sexual-abuse-cases-20852> accessed 9 December 2021

[158] India Today, '24 lakh online child sexual abuse cases with 80% girls under 14 reported in India from 2017 to 2020' <https://www.indiatoday.in/india/story/24-lakh-online-child-sexual-abuse-cases-girls-under-14-india-2017-2020-1877928-2021-11-18> accessed 9 December 2021

[159] Internet Watch Foundation, 'Grave threat to children from predatory internet groomers as online child sexual abuse material soars to record levels' <https://www.iwf.org.uk/news-media/news/grave-threat-to-children-from-predatory-internet-groomers-as-online-child-sexual-abuse-material-soars-to-record-levels/> accessed 9 December.

penetrative sexual offences. The most significant quality of this act is that it is gender neutral, i.e., it recognises that offending boys sexually is a possibility too. Before POCSO came into existence, sections like "354 (assault or criminal force to woman with the intent to outrage her modesty), 375 (rape), and 509 (word, gesture, or act intended to insult the modesty of a woman) of the Indian Penal Code (1860)" were invoked to deal with CSA.

Despite having such an exhaustive act, the record of providing justice to the minor victims is still dismal because of the poor implementation of the act. POCSO wasn't even invoked in over 57% of the total number of child rape cases that were recorded in India in 2017[160]. This reflects poor knowledge of the act and its nuances among the police officers. According to a report released by the Kailash Satyarthi Children's Foundation, "every day, four child victims of sexual offences are denied justice due to the police closing their cases filed under the POCSO act due to insufficient evidence." The pending POCSO cases are also a huge impediment in the way of attaining justice. The act also maintains that "a case of child sexual abuse must be disposed of within one year from the date of the offence being reported."[161] This provision is in shambles, which is evident from the report of Praja Foundation, according to which of all the cases that were filed under POCSO in 2019, 99% of them were still pending in December 2020.

On paper, the POCSO Act appears to be ideal legislation for child sexual abuse. The act was recently amended in 2019 with some commendable new provisions like: a clear definition of child pornography, enhanced punishment, and recognising the administration of artificial hormones to children to attain early sexual maturity as a sexual offence. However, in order to truly implement it on the ground, the government must remove institutional bottlenecks such as a lack of specific fast-track courts, a lack of sensitization among police, and delays in filing FIR, and should also ensure increased compensation for the victim, care for the mental health of the child victim, and continuation of his/her education, as well as train police personnel in the competent handling of forensic samples.

Child Marriage

[160] News 18, '17,500 Children Were Raped in a Year. The Law to Ensure Justice for Them Wasn't Used in 10,000 Cases' <https://www.news18.com/news/india/pocso-was-not-invoked-in-57-cases-of-child-rape-in-2017-reveals-ncrb-data-2374457.html> accessed 9 December

[161] POCSO Act 2012, s 35(2).

India has the highest number of child brides in the world, with more than 1.5 million child marriages taking place each year in the country[162]. According to UNICEF, child marriage is defined as "any formal marriage or informal union between a child under the age of 18 and an adult or another child." Child marriage does injustice to the child on multiple levels; it just robs away their childhood. Though child marriage has a negative impact on both boys and girls, the girl child faces far more challenges, such as having her education hampered and becoming sexually active at an early age, which increases the chances of STDs. There are two major reasons behind such marriages: deep-rooted orthodoxical norms and poverty. A major chunk of the Indian population lives in rural India, with a lack of education and a sense of conformity to traditional tenets that are often skewed against girls. This gives rise to sexist ideas like "the main duty of a girl is to take care of her husband and children," "there is no need for education for girls because she might start questioning the authority of males in the house, etc." Early marriage is also viewed as a means of transferring responsibilities and saving money on their upbringing, especially in poor families.

The prohibition of child marriage act (PCMA), 2006, deals with child marriages in India. Before this, the child marriage prevention act (CMRA) of 1929, a.k.a. the Sharda act, was used to tackle this practice. The legal age of marriage in India is 18 years and 21 years for girls and boys, respectively. This act has provisions to punish the families of both the child and the groom if he is an adult, i.e., 18 years or older, and all those performing, participating, or abetting a child marriage[163]. “A woman cannot be imprisoned under this act, and offenders can be punished with up to two years of imprisonment and/or a fine of up to Rs 1 lakh for violations.” This law also has some serious flaws. Like under section 3 of the PCMA act, child marriage is not “void ab initio” but "voidable" at the option of the minor contracting party. The apex court also observed the same in court on its own motion (Lajja Devi) v. state (2012)[164]. However, it should be void ab initio because minors are frequently unaware of such provisions, and even if they are, they must wait until they reach majority to file a case for annulment of the marriage, and that too, within two years of attaining majority. And after all these impediments, if either of them decides to file a case, they will face tremendous familial pressure. This provision is quite problematic on many levels. For example, on one hand, the PCMA designates child

[162] UNICEF, ‘Ending child marriage and adolescent empowerment’ <https://www.unicef.org/india/what-we-do/end-child-marriage> accessed 9 December

[163] The Prohibition of Child Marriage Act 2006, ss 9-11.
[164] “Court on its Own Motion (Lajja Devi) v State” [2012] CriLJ 3458

marriage as a criminal offence, but on the other hand, it says that it is not void. Looking outside PCMA, section 375 of the IPC, the foremost legislation in the country against rape, also indirectly aided child marriage. According to Exception 2 of Section 375, "sexual intercourse by a man with his own wife, the wife not being under fifteen years of age, is not rape." That means sexual intercourse with a minor girl aged between 15 and 18 was allowed. But thanks to the supreme court, it struck down this provision of section 375 in "Independent Thought v. Union of India (2017)".[165]

The fight against child marriage was bearing fruit, with the proportion of girls married before the age of 18 falling from 47 percent to 27 percent in a decade[166], but the onset of COVID-19 may have derailed the strides that have been made over the decades. An 88% increase in child marriages in August 2020, when India was in complete lockdown, was reported in comparison to the previous year[167]. A recent report on the impact of COVID-19 on child marriage was released by UNICEF, according to which India is among the five countries that account for half of the child marriages in the world[168]. With all these considerations in mind, it seems impossible that SDG goal 5.3, which also talks about eradicating child marriage by 2030, would be achieved. Other than COVID, there are some supreme court judgements and state-specific marriage registration acts that function as roadblocks in the fight against this practice by creating confusion. Recently, "the Rajasthan assembly passed a bill amending the 2009 Act [Rajasthan Compulsory Registration of Marriages Act] that provides for the mandatory registration of marriages." But the shocking provision of the amendment was that it also allowed the registration of child marriages. The rationale given by the Rajasthan government was that the supreme court in Seema v Ashwini Kumar and ors (2006)[169] had held that the state should enact laws for the registration of all sorts of marriages, so child marriages should also be registered. The state government later called back the bill after public furore.

This abhorrent practice of child marriage cannot be curbed by legislation and penal provisions alone; it also needs the proper sensitization of the whole population through village outreach

[165] Independent v Union of Indian [2017] 10 SCC 800
[166] Global Citizen, 'Child Marriage Numbers Drop Sharply Around the World' <www.globalcitizen.org/en/content/child-marriage-decrease-unicef-report-india/> accessed 10 December 2021
[167] The Wire, 'Rise in Child Marriages in the Lockdown: How the Centre Ignored Data of Its Own Nodal Agency' <https://thewire.in/rights/rise-in-child-marriages-in-the-lockdown-how-the-centre-ignored-data-of-its-own-nodal-agency> accessed 10 December 2021
[168] The Hindu, '5 countries including India account for about half of total child brides in world: UNICEF' <https://www.thehindu.com/news/national/5-countries-including-india-account-for-about-half-of-total-child-brides-in-world-unicef/article34019696.ece> accessed 10 December 2021
[169] Seema v Ashwini Kumar [2006] 2 SCC 578

programmes, workshops, radio and television. The central government also runs a number of schemes in order to incentivize the education of girls, like "beti bachao beti padhao," and "sukanya samriddhi yojana." There are various state-run schemes also, like "Kanyashree Prakalpa" in West Bengal and "Bhagyashree Scheme" in Karnataka. NGOs have a much more important role in tackling such social evils because they work on the ground level and are aware of the prevailing conditions. As a result, the government should actively fund such NGOs; it is not only the government's fight, but also the fight of society as a whole; with the help of civil societies and active citizens, we can defeat such social evils more quickly.

Child Labour

A famous adage goes like this: "Childhood is the most beautiful of all life's seasons." Indeed, it is, but not for all. Millions of children in India and the world over haven't experienced such a beautiful phase of life. It has been stripped from them mercilessly by depriving them of education and the right to good health and by illegally ladening them with hazardous and dangerous work by mostly informal industries to save money. The international labour organisation (ILO) defines child labour as "work that deprives children of their childhood, their potential, and their dignity, and that is harmful to physical and mental development." There are more than 160 million child labourers globally, which means 1 in every 10 children on this planet is a child labourer[170]. The census 2001 office of India defined child labour as "the participation of a child less than 17 years of age in any economically productive activity with or without compensation, wages, or profit. Such participation could be physical, mental, or both." Article 24 of the Indian Constitution prohibits the employment of a child in hazardous work. In India, there are nearly 10 million child laborers[171], with industries like brick kilns, garment making, carpet weaving, food eateries, mining, etc., employing a major chunk of them. Economic deprivation is the major reason behind child labour. When the main breadwinner of the family fails to earn the amount that is required for their basic sustenance, children are often forced to work either with their parents or in the industries. This reason was also asserted by the Gopalswamy committee, which was constituted in 1979 to examine the situation of child labour in the country, by mentioning that "as long as poverty continued, it would be difficult to totally eliminate child labour and hence, any attempt to abolish it through legal recourse would not be a practical proposition." Child trafficking is also a major reason behind child labour,

[170] UNICEF, 'child labour' < www.unicef.org/protection/child-labour> accessed 10 December 2021
[171] The Wire, 'On Child Labour Day, It's Clearer than Ever that Lockdown, Weakened Labour Laws Spell Doom' <thewire.in/rights/lockdown-child-labour-day> accessed 10 December 2021

which is tangible from a report by the ILO, which mentions that in 2005, nearly 980,000 to 1,225,000 children were in forced labour situations as a result of trafficking[172].

In India, the Child Labour (Prohibition and Regulation) Act, 1986 is the main legislation against this practice. Under this act, children are classified into two groups: first, children who are under 14 years of age and those between 15 and 18, i.e., the adolescents. Children under 14 are not allowed to work in any form, with some exceptions like helping family, in a family enterprise, or as child artists after school hours or during vacations. But adolescents can be employed, though only in non-hazardous industries. Violators are liable for imprisonment ranging from 6 months to 2 years, or a fine of 20,000–50,000 or both. There are also a few provisions that directly or indirectly aid the fight against child labour, like, "The Factories Act of 1948, The Mines Act of 1952, The Juvenile Justice (Care and Protection) of Children Act of 2000 and The Right of Children to Free and Compulsory Education Act of 2009."

The fight against child labour has been consistent, with the number of children at work falling from 1.26 crore in 2001 to 43.53 lakh in 2011, according to the 2011 census[173]. But here too, the pandemic has derailed the efforts. A sudden rise in child employment has been reported among impoverished families facing acute financial issues due to lockdown. "According to a study conducted by the West Bengal Right to Education Forum (RTE Forum) and the Campaign against Child Labour (CACL)", the state has witnessed a sudden rise in child labour among school-going children during the COVID-induced lockdown[174]. This trend is not limited to India alone but is being witnessed all over the world.

Conclusion

The criminal law in India is a concoction of new and old legislation. Most of the time, they complement each other and cover the lacunae of the preceding one, but sometimes they also create confusion and unintentionally hamper the effort to provide speedy justice. The government needs to eradicate such nebulous provisions and try to unify all the legislation dealing with a particular crime instead of having multiple acts. But only acts and codes cannot come to the rescue when the institutions whose job it is to implement and interpret them are

[172] International Labour Organization, 'Trafficking in children' < https://www.ilo.org/ipec/areas/Traffickingofchildren/lang--en/index.htm> accessed 10 December 2021

[173] Ministry of Labour and Employment, 'About Child Labour' <https://labour.gov.in/childlabour/about-child-labour> accessed 10 December 2021

[174] Hindustan Times, 'Child labour among school going children increased in lockdown period in West Bengal' <https://www.hindustantimes.com/education/child-labour-among-school-going-children-increased-in-lockdown-period-in-west-bengal/story-c6KxomHlk3FOOba1Ehf0yH.html> accessed 10 December2021.

marred by inefficiency and unprofessionalism, i.e., the police and the judiciary. It is high time now to implement the long-impending police reforms. The judiciary also has many vacancies and suffers from acute infrastructural problems. These shortcomings should be resolved quickly. One should keep in mind that no criminal law in any country can be perfect. Criminals will always try to devise new techniques to evade the justice system. So, our justice system should also go through the required amendments and changes from time to time to match them so that whenever and wherever a criminal, thinks about committing a crime, the thought of being behind bars should cross his/her mind a number of times.

CHANAKYA LAW REVIEW (CLR)

VOL. IV (ISSUE II), JULY-DEC, 2023, pp. 49-57

THE IMPACT OF ARTIFICIAL INTELLIGENCE ON THE INSURANCE INDUSTRY AND RELATED LEGAL ISSUES

Pawan. SS[175] *& Madhumita L*[176]

Abstract

The Insurance sector is one of the growing fields where AI was used in insurance in 1980 when the underwriting process was first machine learning where skimming the value information from the person who is filling proposal form. AI in Insurance is a revolutionising business that boosts customer satisfaction in a speedy manner to clear the claim, and detection of any kind of illegal activities carried out by agent is avoided compared to human error and risk management is lesser as it provides quality information, in upcoming years the physical robots will replace manual work done by humans, and the open source data will be clubbed with cyber security mechanism another is advanced to cognitive technologies transforming into active insurance, the exponential growth of data from connected devices, which are expected to number one trillion by 2025. Carriers will be able to better understand customers to this data influx, which will lead to more individualised pricing and real-time service delivery. The other phase is Article 21 of India's constitution, which affects individuals' personal liberty and privacy of individuals. Still, the software technologies are installed which doesn't collect sensitive content and involve ethical risk. Importantly, it faces intellectual property infringement, which leads to the blurring of essentials of patentability regarding ownership, trade secrets and confidentiality due to the increasing growth of technologies and algorithms; an improved version to curb this lacuna is blockchain technology provides secure transactions, and there are many developed countries like the US, the UK and China where according to reports the global artificial intelligence (AI) in the insurance market size was estimated at USD 4.59 billion in 2022 and it is expected to be worth around USD 79.86 billion by 2032, growing at a CAGR of 33.06% from 2023 to 2032. The IRDAI's goal of "Insurance for All" by 2047 will soon come to pass! We must all take up the baton and start igniting conversations about

[175] Student of 4th year BA-LL.B., Christ [Deemed to be University], Bengaluru.
[176] Student of 4th year BA-LL.B., Christ [Deemed to be University], Bengaluru.

insurance to begin raising awareness. The Insurance sector is transforming from insurance fraud - claims patterns, customer interaction and behaviour. This paper tries to analyse how AI mechanisms can be put forth in the insurance sector, where introducing the AI Act ("AIA") to govern AI has significant implications and challenges for the insurance sector. This writing presents how AI is used for risk assessment in the insurance industry[177]

Keywords - Artificial Intelligence, Challenges, Privacy, Technology, Underwriting,

Introduction

The insurance company's role in adopting AI Technology has played an essential part in efficiency and personalisation across the critical domain of Artificial Intelligence. AI can play a significant role in helping to analyse the applicant data, identify the risk, and determine the essential and appropriate premiums for underwriting[178]. In recent years, AI-based chatbots have played a role in automating parts of the customer acquisition process for claims processing. Artificial Intelligence can play a critical role in expediting decisions by significantly analysing the elements of data claims, Documents and images to help detect fraud and assess the damages. The computer version techniques can help in terms of vehicle damage from photos. The role of virtual assistants significantly highlights the standard Customer services to improve the responses over time. Artificial Intelligence has also played an essential role in the large volume of data to detect fraudulent claims through pattern recognition. It is also better to produce risk factors like natural disasters, which can help in guiding business decisions as the insurance industry is playing a leverage role of AI capabilities in terms of lowering the cost with the help of data analysis, improving the accuracy and providing a more effective and efficient form of the customised services. It is also crucial to analyse the importance of humans to oversight over the essentials to ensure ethics and fairness. The role of artificial Intelligence in the Insurance sector, from customer acquisition to claims processing and fraud detection, has evolved and played a crucial and dormant role. In the concepts of underwriting, the predictive analysis techniques are used in terms of better access to the risk factors for applicants based on large data sets; the artificial Intelligence can identify correlations in the data in terms of the likelihood of accidents in claims, which also played an essential role for enabling insurance to price policies appropriately based on analysing the risk profile. The chat box has

[177] Robotics and ALlaw society

[178] "United States : Eversheds Sutherland Attorneys Publish Updated Insurance Regulation Answer Book with Practising Law Institute." 2021. MENA Report, October.

played a necessary element in Natural Language Processing, which can assess the customers through the crucial component of the application process by answering the questions and recommending a suitable policy option.[179]

Regarding analysing and settling the claims, the computer algorithm, linked to Artificial Intelligence, can explore the photos of the damaged vehicles or the property to estimate the repair costs. Such artificial intelligence damage assessment tools can help automate the procedure of the clams to produce and reduce the manual workload. In addition to this essential element, the machine learning algorithms can detect fraudulent claims by recognising the behaviour pattern. The AI power chat box is vital to customer claim assistance and status updates in customer services. The virtual agents are now available 24/7 to handle customer enquiries. It could be through chat or voice interfaces that can improve customer satisfaction. Additionally, artificial intelligence analytics can help in terms of customer data, helping the internet to understand the Purchase pattern better and personalise the offerings to the customer. Along with that, the recommendations system can also suggest the insurance product ad to the customers. On the other operational side, the insurance is applying AI predictive modelling for cash potential significant claims, which are also considered to be like major events like natural Disasters.[180] This also provides for better and more effective planning and mitigation strategies. Artificial Intelligence can also help insurance in terms of streamlining compliance with the regulation through the element of document analysis, but how was this overall intelligent automation enabling cost reductions while also being creating a significant amount of customer satisfaction experience and how the human over side is essentially required to ensure that there is fairness and transparent in the element and power of artificial intelligence application in the industrial domain of insurance.

Benefits and Applications of AI in the Insurance Industry

Artificial Intelligence has transformed the Insurance sector by driving the most incredible wheel of efficiency, improving accuracy, and enhancing customer services. The significant gain of the artificial intelligence system is mainly about introducing the chat box, which can automate routine customer interactions and efficient handling of the claims processing as well

[179] O'Brien, S. (2021, July 08). How artificial intelligence is changing the insurance industry. Business News Daily. Retrieved October 14, 2023, from https://www.businessnewsdaily.com/10203-artificial-intelligence-insurance-industry.html

[180] Indatalabs. (2022, March 29). How AI is transforming the insurance industry. Indatalabs. Retrieved October 14, 2023, from https://indatalabs.com/blog/ai-in-insurance

as saving the valuable time and resources of the insurers.[181] With the advanced pattern and this analytical recognition capability, artificial intelligence algorithms can dramatically improve the accuracy of risk assessment underwriting decisions and claims processing. This can lead to the more precise pricing of premiums and the settlement of the claims and costs. Additionally, artificial Intelligence through virtual assessments and the engineers of recommendation can allow the insurance to provide 24/7 support and personalised and suggest tailored products to meet the customer's efficient and successful needs. Artificial Intelligence can also basically compact the element of fraud by detecting the anomaly in claims activity early. However, through the overall understanding, artificial Intelligence has the capability and capacity to scale its AI solutions to unlock substantial cost Savings and productivity games for insurance while also strengthening the power element of customer satisfaction through faster services and individually customised offerings. With the progression happening in the domain of Artificial Intelligence and its benefits rising in the insurance industry, an essential element of transparency and fairness needs to be examined. Artificial Intelligence is reshaping the competitive landscape of the powerful insurance component by enabling precession efficiency and customer-centric business capabilities, contributing significantly to the insurance domain.

Limitations of Adopting AI in the Insurance Industry

Artificial intelligence innovation holds spectacular promises. Insurance seeking to implement these advanced Technologies can face many hurdles and struggles ranging from data bias to regulatory compliances. Artificial intelligence systems rely on large data sets, leading to the risk of bias and eroding fairness. The complex algorithm, such as Black Box, also lacks transparency, impacting the wheel of trust and adherence to street regulations around risk models and consumer privacy. The customers can also help a fantastic impersonal boss for a customer service star, and on the work side, artificial Intelligence can lead to a significant amount of challenges in eliminating jobs, and it requires the retraining of the existing employees.[182] The Other critical element concerns humans in insurance decisions even as algorithms become more capable. The final major challenge is that accumulating the Humungousaur amount of customer data can lead to cyber-attacks and data security. While

[181] IBM. (2022, March 1). The risks and limitations of AI in insurance. IBM THINK Blog. Retrieved October 14, 2023, from https://www.ibm.com/blog/the-risks-and-limitations-of-ai-in-insurance/

[182] Finance Magnates. (2022, August 11). The Ethics of AI in Insurance: Balancing Efficiency and Fairness. Finance Magnates Financial and Business News. Retrieved October 14, 2023, from https://www.financemagnates.com/fintech/education-centre/the-ethics-of-ai-in-insurance-balancing-efficiency-and-fairness/

artificial Intelligence can enable in terms of transmitting gain in the element of efficiency and personalisation, the responsibility and implementation can lead towards the critical challenges of priority demanding careful ethical questions.

Legal and Ethical Risks of AI in Insurance

Adopting the artificial intelligence system across the insurance domain, like underwriting customer services and claims processing, can lead to substantial legal and ethical questions that the companies must consider carefully. The insurance company can be liable for any erroneous or harmful artificial intelligence decision that can deny the coverage, which can also lead to enabling discrimination, breaching the policyholder's rights, and providing flawed recommendations.[183] Constant testing, auditing and human overside artificial Intelligence are crucial and Critical to limit the legal liability as an autonomous system becomes more complex. The Biased or incomplete training data and the unintended coding insurance the smart contracts could make the insurance flawed or sanctioned if their artificial intelligence system produces disconnected or improper outcomes. The companies must implement AI transparency and ensure the algorithm decisions are explained adequately to affected individuals. While artificial Intelligence enables insurance efficiency, insurance must weigh the benefits and harmful effects. Extensive risk assessment auditing and human-machine collaboration are critical for developing responsible artificial intelligent systems that can limit the potential cost liabilities, which need to be considered more dynamically and significantly.

Safeguarding Privacy and Ethics in AI-Driven Insurance

The practical usage of customer data to power the artificial intelligence algorithms and predictive models across the Insurance sector domain can create a significant element of challenge over the privacy and ethical risks that companies must be responsible for. The insurance must minimise Opaque data accumulation and communicate the AI data practices to uphold transparency or risk losing public trust. Additionally, the buyer's training can lead to

[183] Lior, J. (2022). Insuring AI: How Existing Risk Allocation Frameworks Can Inform AI Regulation. Harvard Journal of Law & Technology, 35(2), 369-394. Retrieved from https://jolt.law.harvard.edu/assets/articlePDFs/v35/2.-Lior-Insuring-AI.pdf

algorithms to make discrimination decisions, which can be unethical.[184] The companies must also have a mirror obligation to prevent AI outcomes over data and privacy breaches, even if the discrimination is unintentional. The Other significant challenges of a cyber security vulnerability are created by the agreement with data volume for Artificial Intelligence and potential privacy through improper surveillance if consent is not obtained. While AI data practices may improve efficiency, they also lead to the rise of ethical risks surrounding job automation and reaching the customer's privacy, which cannot be ignored.[185] The insurance can promote ethical questions, which can be overcome by the government policies, Audit and security safeguards and explaining the AI systems adequately to all the stakeholders. India's Data Protection Law, the Personal Data Protection Act, emphasises the importance of data privacy. This law plays a vital role in protecting individuals' privacy, as established by the Indian Supreme Court in its 2017 landmark decision recognising privacy as a fundamental right. The Supreme Court noted that India has a comprehensive framework governing data privacy, with regulations and limits on how personal data can be used. Two major cases emphasised data protection law in India. In *Puttaswamy vs Union of India*[186], the Supreme Court held that privacy is part of the fundamental rights under the Indian constitution. The Court recognised that privacy is essential for individual autonomy and dignity, which are necessary for a democratic society. Overall, India's data protection laws and court decisions establish strong safeguards for data privacy as a fundamental right. In the 2018 Aadhar card case, The Honorable Supreme Court held that the government cannot make Aadhar mandatory for availing services. The court recognises that collecting biometric data for Aadhar races concerns privacy and data protection and that individuals have the right to control their personal information. In such landmark cases, the question arose in the element of privacy. Suppose Artificial Intelligence will play a crucial role in the Insurance sector. In that case, the question of privacy needs to be very scrutinised, whereas if there is any breach of confidentiality, the courts can take strict actions against those individuals. IRDAI (Protection of Policyholders' Interests) Regulations, 2017 Has also made mandatory that insurance companies maintain the total confidentially of the policyholder information unless it is legally necessary to disclose the

[184] FTICONSULTING. (2021, September 21). Ethical use of AI in insurance modeling and decision-making. FTI Consulting. Retrieved October 14, 2023, from https://www.fticonsulting.com/insights/articles/ethical-use-ai-insurance-modeling-decision-making

[185] European Parliamentary Research Service. (2020). The ethics of artificial intelligence: Issues and initiatives. Retrieved from https://www.europarl.europa.eu/RegData/etudes/STUD/2020/634452/EPRS_STU(2020)634452_EN.pdf

[186] Justice K.S. Puttaswamy (Retd.) v. Union of India, (2018) 1 SCC 809 (India).

same to the strategy authorities if the artificial Intelligence is going to play a vital role in the Insurance sector. The AI should play a crucial role in protecting the essential element of data protection privacy.

Comparative Analysis between China and the UK with Respect to AI in the Insurance Sector

Many Countries are building up the insurance sector in the form of Artificial intelligence In China and Japan were they have initiated with national AI porgrammes and strategies such as with its Dingsunbao smartphone app, Ant Financial claims to be using artificial intelligence to calculate the compensation to policyholders for vehicle damage which is one of the largest network with many Chinese insurance firms where the speedy recovery for the vehicle damage claim, the provision is made to uphold the image through various angles and dimension where the person affected can claim for auto insurance based on the how much is the damaged caused to the vehicle, the analysis on the deciding the premium is functioned by the software created and set up a policy and it is assisted by the human employee who comes with assessment report Offering Watson software for use in claims adjustment is IBM Watson this software was mainly introduced where the how much the policyholder should pay out is automatically shown to the insurance firms it is highly functioned in health insurance sector where the person medical reports with the history of the patient medical history and it is beneficial in nature as it would save time and cost if done manually by people, Still the final report is anlaysed by the human employees with the AI software report. Chinese insurance company Ping An asserts to have created numerous AI technologies for usage in the health, auto and financial insurance sectors, and they are one of the largest insurance companies. The business asserts to have created several AI use cases, including computer vision for processing vehicle insurance claims, predictive analytics for healthcare insurance, and facial recognition for financial services. They work on predicting infectious diseases in a specific territory and come up with the high-risk individuals who are affected. The images of the X-rays are sent to their AI software, which diagnoses within seconds, compared to a human who takes 30 minutes to examine the medical report[187]. In the UK, there is rapid growth of Artificial intelligence in insurance companies where the latest data in August 2023 shows that 63% are investing in AI and Machine learning in comparison with 50% in the US. The insurance companies in the UK are relying on the

[187]The Digital Insurer. (n.d.). The Digital Insurer. Retrieved October 14, 2023, from https://www.the-digital-insurer.com

pragmatic approach; the government's new advisory service will give insurtechs "more tailored support," During G7, the UK came up with the 'Hiroshima AI process', where the aim of the AI should be trustworthy, and fairness aspect was dealt. They are forming policies to protect against AI risks of hacking and Intellectual property infringement.[188]

Conclusion

Technological progression is increasing on a day-to-day basis. The growth of machine learning in the underwriting process started in the 1980s. In the latest case, *Isnar Aqua Farms vs United India Insurance Co. Ltd 2023,* decided by Apex court in division bench said that insurance companies must deal In a bona fide and in good faith and not care of making profits[189], so this can be exercised when AI software and machine learning is implemented effectively where the human employee role will be minimal so no scope of making profits by the insurance companies and comparatively disputes will be reduced. The AI is reshaping with a customer-centric future as it is time-consuming and cost-effective, with no problem with intermediaries, direct contact between the insurer and insured will take place, compared to the filling of the proposal form where the policyholder tends to put incorrect information, so with the help of the Artificial intelligence within it Internet of Things which has the potentiality of analysing accurate input filled or not. At the same phase, there are challenges which need to be looked at for privacy and ethical concerns, as it is personal data which is produced in filling up the proposal form; this may lead to hacking of the data and using it for any illegal purposes, another is limited ability to personalise customer experience. Many developed countries, such as the US, are significantly inculcating AI in their Insurance sector and are leading among the other countries. The companies that installed AI mechanisms are Lemonade, State Farm, and GEICO, and the UK, China, and Japan are bringing remarkable inputs & changes on this subject matter. India is already making significant changes by adopting an AI System to be operated in the insurance sector. Thus, the protection of the Insured is the primary goal, where there must be indemnified for loss in a fair and transparent manner. The usage of A.I. technology does raise specific questions, though—biased AI algorithms might produce discriminating laws or practises. Additionally, AI-powered chatbots could cost human customer support professionals their jobs. Insurers must ensure that their AI algorithms are open and

[188] Insurance Times. (n.d.). Insurance Times - The latest insurance news, analysis and opinion. Retrieved October 14, 2023, from https://www.insurancetimes.co.uk

[189]Isnar Aqua Farms v. United India Insurance Co. Ltd., (2023) SCC OnLine SC 945.

impartial to reduce these risks. Further, they must ensure that their AI-powered chatbots support rather than replace human customer service teams.

CHANAKYA LAW REVIEW (CLR)

VOL. IV (ISSUE II), JULY-DEC, 2023, pp. 58-64

RECONCILING HART'S POSITIVISM AND FINNIS'S NATURAL LAW THEORY

Keertana Venkatesh[190]

Abstract

Debates in jurisprudence have been consumed in exploring the dichotomy between positivism and natural law theory. Admittedly, positivists and natural law theorists diverge in their view of the connection between law and morality. Consequently, reconciling their analysis of the nature of law and legal theory is perceived as being impossible. As part of the positivist tradition, HLA Hart's work stresses that there is no necessary connection between law and morality. On the other hand, John Finnis, a natural law theorist, proposes that law and morality are inextricably linked with each other. Whilst Hart's jurisprudential project seeks to imagine a legal system as constituent of rules, Finnis's theory is focused on the principles that must guide legislators in framing laws. Evidently, the two projects operate in different planes while still seeking to address the key jurisprudential question of what is law or legal theory. This Note utilizes this very difference to harmonize the theories, by relying solely on the original texts of Hart and Finnis. By conceptualizing a reconciliation between the two theories, the Note explains that there is no fundamental conflict between the theories propounded by authors in these distinct schools of jurisprudence.

Keywords: HLA Hart, positivism, John Finnis, natural law theory, morality and law

Introduction

Natural law theorists and legal positivists have diverging views about the connection between law and morality. As part of the positivist tradition, HLA Hart's jurisprudential project seeks to advance a conception of the law that is descriptive and not morally evaluative.[191] Although he maintains that there is no necessary connection between law and morality, Hart acknowledges

[190] Assistant Lecturer, Jindal Global Law School.
[191] HLA Hart, *The Concept of Law* (Clarendon Press, 3rd edn., 2012).

that moral principles could be part of the law, [192] so long as they are rooted in social practice. John Finnis, on the other hand, posits the achievement of the common good of the political community as the objective of law that legislators must pursue.[193] Finnis's natural law theory envisages the necessary incorporation of moral precepts in positive law.

While Hart's jurisprudential project chiefly seeks to explicate the validity of laws in a legal system, Finnis's project is interested in the determination of the content of law and the basis of political obligation. In light of Hartian legal positivism and Finnis's natural law theory, this Note will illustrate that there is no fundamental incompatibility in respect of the analysis of the nature of law. *First*, despite the methodological differences in Hart's and Finnis's legal theories, their accounts of the nature of law can be reconciled. *Second*, insofar as the key aims of the jurisprudential projects of Hart and Finnis are concerned, both theories can accommodate the other. *Third*, Finnis's account of unjust laws frees his theory from the shackles of Aquinas's classical law tradition, allowing it to be read harmoniously with Hartian positivism.

The consequence of divergence in methodology to the nature of law

In respect of methodology, both Hart and Finnis discarded the Austinian definitional approach in *The Province of Jurisprudence Determined*,[194] embracing the central cases method. For Hart, the central case method is descriptive and explanatory, oriented towards theoretical-explanatory virtues, such as precision, clarity, consilience, and adequacy, rather than virtues of political morality.[195] On the other hand, for Finnis, the identification of the central case involved an understanding of the purpose of law,[196] which is the realisation of the common good, in his view. Consequently, his legal theory is inherently evaluative.

This divergence in methodologies adopted by Hart and Finnis undoubtedly have some consequences for the nature of law and obligation in their legal theories. Hart regarded his legal theory as an exercise in "descriptive sociology", emphasising that there is no necessary connection between law and morality.[197] To this end, Hart maintained that laws can achieve iniquitous ends, and remained agnostic about whether the social and legal obligation imposed by norms could be regarded as moral obligations. To the contrary, Finnis's evaluative model

[192] *Id.* Chap. IX.
[193] John Finnis, *Natural Law and Natural Rights* (Oxford University Press, 2 edn., 2011).
[194] John Austin, *The Province of Jurisprudence Determined* (John Murray, London, 1832).
[195] *Supra* note 1 at 16-17.
[196] *Supra* note 3 at 11.
[197] *Supra* note 1.

sought to understand both the law and legal systems as morally justified phenomena, where in respect of the law, there exists a moral obligation on part of citizens to obey it.[198]

Notably, Hart's methodology is not prescriptive in respect of the content of the laws of a legal system which conforms to the structure he envisages, comprising of primary and secondary rules. Moreover, Finnis's paradigmatic case can accommodate a legal system with the Hartian structure of rules. Therefore, despite the differences on the methodological level, Finnis's natural law theory and Hart's positivism, insofar as they describe the nature of law, can be reconciled.

Compatibility of jurisprudential projects

When Hart conceptualises law as a union of primary and secondary rules in *The Concept of Law*,[199] he hints at the main aim of his jurisprudential project, which is to explain what grounds the validity of law in legal systems. Accordingly, he describes primary rules that are largely duty-imposing, with the rule of recognition, the master secondary rule, providing for the validity of primary rules. A key claim Hart makes is that laws may be divorced from morality, which in the *Postscript to the Concept of Law* is modified to a soft positivist approach which recognises that some rules of recognition *may* be in conformity with moral principles.[200]

Finnis's jurisprudential project is different in many respects. At the outset, Finnis in *Natural Law and Natural Rights* is interested in the orientation of the individual lives of persons, which according to him, should be the pursuit of self-evident basic goods. Recognising that the achievement of basic goods often involves multiple persons and coordinated action, Finnis conceptualises the notion of the common good, which affords conditions suitable for such coordination.[201] In light of the complexities in society, he argues that a political community needs authority that enacts laws to achieve the common good.

Despite the differences in their approaches, both Hart and Finnis conceive that in all legal systems, there are human legislators who are responsible for enacting laws that impose obligations upon citizens. Hart argues that it is the practice of these human legislators or legal governmental officials through the adoption of critical reflective attitudes that forms the basis

[198] *Supra* note 3.
[199] *Supra* note 1 at 79-99.
[200] *Id.* at 250.
[201] *Supra* note 3 at 155.

of the formulation of the rule of recognition, and consequently the primary rules which impose duties upon citizens. In this respect, Hart's theory focuses on rules, and more specifically on the rules that determine other rules.[202] In his theory, however, Hart does not prescribe any specification of the nature of the content of the positive law that is validated by a rule of recognition.

Finnis's account of natural law quite evidently recognises the need for positive law in order to achieve the common good of the political community.[203] His account, therefore, is an explication of the content of positive law, which must be consistent with the moral standards as prescribed by the theory of basic goods. Laws that are not made in pursuance of the common good, in his view, amount to unjust laws. Since Hart's theory makes no claim in respect of the specific nature of the content of the law, it is perfectly possible to imagine a legal system where the primary rules seek "to favour and foster the common good" as Finnis's theory demands, and such rules are validated by an ultimate rule of recognition.

Moreover, Finnis's theory of the law indicates the existence of two types of positive laws that legislators would enact for the achievement of the common good that may be derived from natural law. Whilst some positive laws can be derived through logical deduction, some others would involve the determination of laws of nature. Admittedly, the former kind, which concretises principles of practical reasonableness, has a morally evaluative character. The latter type, however, is concerned with legislators arriving at the most reasonable solution to a problem. This includes, for example, the determination of the rules of the road[204] through positive law, which he regards as *determining* or *specifying* the law of nature. Finnis's account thus provides for what is *good* positive law, which may either incorporate moral principles or specify the form of rule to solve coordination problems.

Crucially, Hart is not oblivious to connections between positive law and moral principles. In his discussion about the *minimum content of natural law*,[205] Hart evidently recognises that his positivist conception can accommodate laws that incorporate moral principles. Certainly, Hart would contend that such incorporation is only a contingent and not a necessary matter, whilst Finnis would argue that the incorporation of moral principles of natural law, such as the prohibition of murder, is oriented towards the realisation of a basic good. However, there is no

[202] *Supra* note 1 at 100.
[203] *Supra* note 3 at 281.
[204] *Id.* at 285.
[205] *Supra* note 1 at 193.

reason to think that Hart would reject the normative demand that laws made by legislators ought to conform to sound principles of morality and offer reasonable solution to problem of policy.

Consequently, this is not a fundamental conflict in their theories. Since both types of laws identified by Finnis are perfectly compatible with Hart's theory insofar as they are regarded as valid by the rule of recognition, Hartian positivists would have no reason to deny that the content of law may be shaped in these respects. At the very least, positivists can interpret Finnis's theory as a guide to enacting good positive law which is based on principles of practical reason. Therefore, insofar as the theories of Hart and Finnis are construed as providing different specifications of the law, both theories are capable of accommodating the other's perspective without any inconsistency.

Finnis's account of unjust laws and consistency with Hartian Positivism

A key aim of Finnis's jurisprudential project is the explication of the notion of obligation, and specifically the contrast between moral and legal obligation.[206] Underlying Finnis's conception of obligation is the principle of fair play, which demands that each person who benefits from institutions in a society must also make contributions to that society. The crucial difference between moral and legal obligation, according to Finnis, lies in the indefeasible character of legal obligation which provides people with exclusionary reasons to act in conformity with the law.

This distinction between moral and legal obligation that Finnis draws is particularly relevant in his elucidation of the force of unjust laws. Finnis regards those laws made by legislators that do not pursue, or facilitate the achievement of, the common good as one form of unjust law. In such instances, there is a tension between moral and legal obligation, because Finnis argues that these unjust laws lack morally obligatory force since they do not facilitate the achievement of the common good.[207] However, the lack of moral bindingness does not entail the discharge of the legal obligation imposed upon citizens under such unjust laws.

In his attempt to recast the classical natural law theory found in Aquinas's work[208] to a more palatable modern version, Finnis makes this concession that unjust laws are legally binding upon citizens, even though they "fail to create any moral obligation whatsoever". But, since

[206] *Supra* note 3 at 297-350.
[207] *Id.* at 360.
[208] Thomas Aquinas, *Summa Theologica* (1911).

such laws are still binding on the members of the political community in the legal sense, it raises questions as to the source of such legal bindingness.

When Finnis divorces the idea of the pursuit of the common good and legal obligation, there seems to be a suggestion that the validity of law, insofar as it imposes legal obligation upon persons, is not dependent on its orientation towards the common good which endows it with moral character, but a form of procedural rule that has given power to the legislators to make laws. This bears resemblance to Hart's positivist conception and the conclusion in Hart's theory that unjust laws are binding so long as they are validated by the rule of recognition. The implications of the position that Finnis takes on unjust laws thus commits him to a theory that leans in the Hartian positivist direction.

Certainly, Finnis would not approve of a legal system where the legislators enact laws that are not in pursuance of the common good. However, in his account, this alone is not sufficient to dismiss the legally binding character of the laws and the authority of the legislators to enact such laws. If Finnis was forcefully insistent on the necessary and inseparable connection between law and morality, as incorporated in positive law through the appeal to the theory of basic goods, he would not conclude that the moral reasons to comply with unjust laws would be left to the conscience of individuals, but rather that there are no moral or legal reasons to comply with such laws.

Finnis's account of unjust laws seems to suggest that the emphasis on the necessary connection between law and morality is not as forceful in his theory in comparison to other classical law theorists like Aquinas. On the basis of this concession, Finnis's theory can be said to have strokes of inclusive positivist approaches. If Finnis's account of unjust law is read in this fashion, then his theory can be understood as an account of what makes good positive law, and not an account that is insistent on the incorporation of moral principles in every instance of positive law posited by legislators.

Conclusion

Admittedly, Finnis's natural law theory which regards ascertaining the nature of law and legal systems through a moral evaluative exercise and assumes the presumptive moral obligatory force of law in pursuance of the common good of a political community sets it apart from the positivist tradition. However, the key aspects of Hart's positivist account and Finnis's natural law theory are perfectly harmonious, with the former allowing for considerations of the common good to guide legislators and the latter recognising the need for positive law. The

reasons explained in this Note illustrate that there is no *fundamental* conflict between the natural law theory of Finnis and the legal positivist theory of Hart in respect of the nature of law.

CHANAKYA LAW REVIEW (CLR)

VOL. IV (ISSUE II), JULY-DEC, 2023, pp. 65-75

MARRIAGE EVOLUTION: TRADITION, CHALLENGES, AND SAME-SEX UNIONS IN INDIA

Anshika Kaushik[209]

Abstract

The debate around the validity of the same sex marriage has again arisen in the recent petitions before the Supreme Court even after various judgements decriminalising same sex relation however the current issue deals specifically with marriage title and the surrounding rights of the either party. The major part of the whole canvas prepared out of bunch of such petitions comes out to be beyond decriminalisation, the demand for marital status in the society and the rights it brings with itself. The proponents of the same sex marriage has their arguments majorly based on broad issues like fundamental rights, equality, non-discrimination etc. This paper seeks to first analyse the contentions of the proponents and then it further tries to understand and analyse the traditional notion of marriage and its public character. The paper also identifies certain issues like that of interpretation of statue along with the question of personal laws, problem of piecemeal approach related to the same sex marriages. In the end the author brings in the alternative of the civil union which has been gathering lot of traction particularly in west however the discussion is that whether such a concept will at all be conducive to a nation like India and suggest that thorough deliberation is required in this matter.

Keywords: Social exclusion, Fatherhood, Procreation, Public Union, Partnership, Civil Union.

Backdrop

Recently, petitions were submitted against the idea that same-sex couples should be granted marriage privileges and be allowed to be hitched. The group of petitioners raising a number of comparable problems were heard by the honourable Supreme Court. The Supreme Court

[209] Second Year Student of BA-LL.B. at National Law Institute University Bhopal.

developed a canvass covering wide range of issues, and the main arguments in favour of same-sex marriage are as follows two same-sex couples applied for legal recognition at the Supreme Court in November by filing a writ petition. Supriyo Chakraboty and Abhay Dang filed the petition, which is concerned with the Special Marriage Act's validity. A declaration of their rights was also requested, and the petitioner claimed that discriminatory provisions like Section 4(c) of the Special Marriage Act were to blame. Due to this, the issue of same-sex couples' legal ability to marry has come up once more. The topic of the argument is not new, since it has been discussed before in India and other nations. I shall make an effort to clearly state and evaluate the claims made by each side in this work.

Arguments of advocates of same sex marriage.

A. The question of fundamental rights, equality, non-discrimination etc.

First comes the question of fundamental right to marry of the same sex couples then the difficulty around rewriting laws and statutes. In fact it could be said that the arguments of the proponents of same sex marriage is based on broad issues like equality and rights , equal representation civility , right to self-determination etc. Now let us first discuss this whole canvas of this side. The petitioner's argument for the recognition of same-sex marriage is founded on several compelling reasons. First and foremost, even after the momentous decriminalization of Section 377, which marked a significant milestone for LGBTQ+ rights in India, same-sex couples still do not enjoy the same marital status and rights as their heterosexual counterparts. This inequality not only perpetuates discrimination but also violates the fundamental principles of equality and non-discrimination enshrined in the Indian Constitution. Secondly, the enduring social stigma attached to same-sex couples remains a significant concern. While legal reforms have begun to address this issue, societal attitudes often lag behind. Same-sex couples frequently encounter prejudice, discrimination, and social exclusion, which can have profound adverse effects on their mental and emotional well-being. Recognizing same-sex marriage would not only provide these couples with the legal protections they rightfully deserve but also contribute to reshaping societal perceptions and fostering greater acceptance and inclusivity.

B. Demand for the rights surrounding marital status

Some of the rights which the same sex couples has been deprived off as contended by them includes the issue of adoption of child by same sex couples, automatic right of maintenance, right to surrogacy also gift given by a spouse is devoid of income tax but same is not available

to them, medical insurance of the spouse, rental accommodation also cannot be availed by them further payment of gratuity act provide pension only to spouse if married as per conventional rule of marriage. Another contention which has been raised is the constitutional enforcement of the right to marry to substantiate this point the petitioners has delved into fundamental rights and various judicial pronouncements as follows. Delving into the issue as to which forum should take up the issue the petitioners have on and again contended that we have seen the cases such as Navtej and Puttuswamy that when an issues of societal importance arises so as to call for immediate deliberation the people need not to wait for the legislature to act moreover if the issue involves the question of fundamental right. The whole intent behind articles such as Article 32 and article 226 is that when the legal injury is of such intensity so as to affect one's own fundamental right one can directly approach the court under the above mentioned jurisdiction as not allowing the same will result in more harm and restriction of one's fundamental right also the breach of one's fundamental right itself allows for the provision to approach the court directly without waiting for the legislation. It is to be noted that these right are so fundamental in the sense that these are constitutionally protected and comes with immediate hearing in the court. Following this argument the petitioners have argued that their fundamental right to marry has been protected by articles 14, 19 and 21 and their fundamental right is no less than the rights of the same sex couples. Article 21 provides for personal liberty therefore there has to be no discrepancy regarding the same. The petitioners relied on the case of Vishakha v. State of Rajasthan wherein the courts took the cognizance of the matter and provided for the interim law till the time no legislation was there pertaining to the subject matter. However they say that the situation here is different, we have seen that there have been in past cases where things have been recognised but no affirmative action has been done and therefore we are still on arguing on this issue. Delving deeper into the issue the petitioners have argued that in Navtej also the question of equal rights between homosexual and heterosexual couple is not undertaken it simply decriminalises the sexual conduct between two same sex couples. Petitioners have contended that all the citizen of the country are having equal right as provided by the preamble of the Indian constitution and there is no dispute to the fact that preamble is part of Indian constitution[210] . Preamble calls India as a secular, republic and further provides that "to secure to all its citizens (i) JUSTICE, social, economic and political; (ii) LIBERTY of thought, expression this is to say that it recognises the diversity and pluralism in

[210] Kesavananda Bharati v. State of Kerala (1973) 4 SCC 225.

the country[211]. Also secularism was held as the basic structure of the Indian constitution[212]. Rights under article 21, 14 and 15 provides for the rights which constitutes the fundamentals of the constitution[213]. Another thing which has been raised by the petitioners that denying them the equal recognition of marriage is actually discriminating them on the basis of gender discrimination and sexual orientation. Court have deliberated on this in the case of Nalsa. Gender identity refers to each person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the[214] personal sense of the body, which may involve a freely chosen, modification of bodily appearance or functions by medical, surgical, or other means, and other expressions of gender, such as dress, speech, and mannerisms. Gender identity, then, refers to an individual's self-identification as a male, woman, transgender, or other defined category. Whereas sexual orientation is that you are physically or emotionally sexually attracted towards other person. This orientation can be between two people of same sexes like homosexuals or between two different sexes like the heterosexuals or there can be a case where the person is attracted to both the sexes which is called bisexual or no sex at all that is asexual .

C. Hinch of sexual autonomy and sexual orientation

Coming back to the issue the petitioners have argued that both these two things sexual orientation and gender identification forms the intrinsic part of one's personality and is important aspect of his dignity and freedom which is protected under Article 21.Another aspect which is covered under article 21is that of right to family which forms the basic unit of the society. Family does not only provide institutional support to an individual but also emotional and psychological support. Same sex couples also have got the equal right to get their basic unit recognised there is no doubt that the right to meaningful family life, which allows a person to live a fulfilling life and helps in retaining her/his physical, psychological and emotional integrity would find a place in the four corners of Article 21 of the Constitution of India[215]. Family relationships can take form of queer relationships also, these manifestations of love and of families may not be typical but they are as real as their traditional counterparts. Such atypical manifestations of the family unit are equally deserving not only of protection under law but

[211] T.M.A.Pai Foundation & Ors v. State of Karnataka & Ors (2002) 8 SCC 481.
[212] S.R. Bommai v. Union of India (1994) 2SCR 644.
[213] I.R. Coelho v. State of Tamil Nadu, AIR 2007 SC 861.
[214] Vishaka & Ors v. State of Rajasthan & Ors (1997) 6 SCC 241.
[215] Lakshmi Bhavya Tanneeru v. Union of India & Ors. (2014) 4 SCC 427.

also of the benefits available under social welfare legislation.[216] The petitioners have also highlighted the fact this right has also been recognised internationally like that in UDHR and European Union's charter on fundamental rights also the Yogyakarta principles which provides for various facets of human rights recognising the fact that everyone has the right to marry and have family irrespective of his or her sexual orientation and gender identity.

Coming to the question that since the issue relates to the personal laws and therefore state representation is required which can be only done when the issue is discussed in the parliament have been rebutted by claiming that the Hindu marriage act is a statutory law and is devoid of its personal character since earlier marriage laws in India was particularly based on Hindu sanskritik notions of marriage however after the codification various reformative provisions were added like that of provision for divorce , intercaste marriage ,adoption which was never there in traditional Hindu marriage laws.

D. Parliament or court what is the appropriate forum for addressing the issue.

Next coming to the question of whether Court will be the correct forum to hear the matter the petitioners have argued that since their fundamental right as construed by them under article 14, 15 and 21 [217]is violated this itself gives them the locus standi in the court . Even after cases like Nalsa and Navtej we see that the similar petitioners are time and again coming involving questions relating to the same sex marriage and related rights which is why we have come to court to get our this right recognised also when court recognises a right it has the same effect as that of the legislation as we have seen in Vishakha case wherein till the time there was no law relating to the issue the court came to fill this void it has been no answer to the constitutional court that one has to wait for the parliament to act also rightly under article 32 itself comes at aid of the one who are minorly represented there can't be any justification that since the same sex couples are in minority so let the situation be , they are also equal citizen of the country and have right to be represented now this representation can only come by way of declaration by the court which the petitioners have been asking for a constitutional declaration of marriage not just an amendment to the acts as the same will again arise questions as to the rights arises out marriage . Therefore recognition of this right has to be done through secular act of declaration where no question of personal laws are involved and which will give rise to the flow of equal rights for same sex marriage couples.

[216] Deepika v. Central Administrative Tribunal (2022) SCC OnLine SC 1088.
[217] The Constitution of India, arts. 14,15,21.

E. Is same sex marriage an urban elitist concept?

Answering the question of urban elitist concept the proponents have been saying that it is not at all related to being elite or urban the topic is such which is innate in one self and is not something which is influenced by the surrounding, there have been several if not many examples where poor and slums also feels the same however their voice is subdued. Such issue was never in debate like it is today since people have now become more aware and particular about their existence , the concept is urban in the sense that people are now actually manifesting the notions of gender identity and sexual orientation and want to get them and their rights recognised .Petitioners have also been arguing that since the government has defined valid marriage as a marriage between a man and a woman so by definition it is wrong and it serves to be a self-validating statement this is to say that the legislature's purpose can't itself be discriminatory [218].

Now since we have seen the contentions and its reasoning from the side of the petitioners we now have an overview of the whole canvas which revolve around the issue of same sex marriage. This will help us to deeply delve into the issue. One thing is clear that the petitioners are more concerned about the broader issue like that of equality and fundamental right, discrimination etc. This being acknowledged I now shall take you to the other side of the table particularly the importance of the traditional notion of marriage not as a direct response to the issue of same-sex marriage, but rather as a position rooted in longstanding cultural norms. At the same time, it's important to remain open to the idea that there are potential implications associated with granting legal recognition to same-sex marriages.

Why marriage is not just a discussion of constitutional debate and why traditional notion of marriage is to be seen as non-discriminatory?

I will adhere to my argument that the traditional notion of marriage is not discriminatory in itself as there do exist important differences as to the legitimate public and societal purpose between heterosexual and same sex marriage. It is not discrimination to treat different relationships differently.[219] The cynosure question which revolves around the debate is weather our traditional notion of marriage is discriminatory? If the debate is about extending legal and other benefits to the same sex couple then that is a different tangent all together the question

[218] Deepak Sibal & Ors v. Punjab University and Another, 1989 AIR 903.
[219] Cf. Erwin Chemerinsky,"In Defense of Equality: A Reply to Professor Westen", 81 *MICH. L. REV* 575, 577–85(1983).

we are concerned with is of moral and societal character. At the same time I would like to advance that marriage is not a relationship invented by the government, owing to it's strong origins in nature, marriage is first and foremost a social institution. Marriage must be supported by the law, culture, and society if it is to matter at all.[220] However its inherent character remains to be that of a social institution. The civil law cooperates in the task of creating a marriage culture which matters, but in fact, the legal institution of marriage is at this point relatively weak, as the increasing number of cohabiters demonstrates. [221]But even when the law was a stronger player, the most important thing about marriage was that it was—and still is—a social institution.[222] Marriage as a social institution regulates the sexual behaviour of the people also the main public good of marriage is to bring together mothers and fathers into stable unions, in which they raise their children together. The premise behind calling marriage as a social institution is the social norms and regulation which surrounds it and regulates the sexual behaviour of the people also another strong factor which is the default scenario for sexual encounters is the creation of own young ones . The constitutional debate which revolves around the topic misses on the fact that marriage is not a creation of law. This contrast emphasizes how the primary purpose of marriage is overlooked when the marriage discussion is framed largely as a constitutional debate. If marriage is how the law is constructed, changing the law will inevitably alter the construct. If you alter the corporate legislation, corporations will change as a result. But if the marriage legislation maintains enough distance from the social conception of marriage, the Law loses its effectiveness in important ways. This has repercussions for marriage as it already exists and for same sex marriage as its supporter's desire for society to comprehend it. Marriage also extends the social benefits to child born out of a union. We know there are substantial advantages to children who are born to and raised by their own married mothers and fathers.[223] We also know the majority of children conceived in marital unions will enjoy this great good.[224]It is also only this union which forms a line of connect between their

[220] MG Collins, "Reconstructing Murdock v Memephis" 98 *Va Law Rev* 11, 12(2012).
[221]Maggie Gallagher, "(How) Will Gay Marriage Weaken Marriage as a Social Institution: A Reply to Andrew Koppelman", 2 *U. ST. THOMAS L.J.,* 38(2004); INST. FOR AM. VALUES & INST. FOR MARRIAGE & PUB. POLICY, Marriage and the Law: A Statement of Principles 12–14), http://www.marriagedebate.com/pdf/imapp.mlawstmnt.pdf (Visited On September 16).
[222]Barbara E. Johnson, **"Contemporary Marriage: Comparative Perspectives on a Changing Institution" 66** ***Social Forces*** **432**(1985); George P. Murdock, *Social Structure* 83-260 (The Free Press New York 1edn 1965).
[223] Kristin Anderson Moore, *"*Marriage from a child's perspective: How does family structure affect children, and what can we do about it? , Child Trends, available at https://cms.childtrends.org/wp-content/uploads/2002/06/MarriageRB602.pdf .(Visited On September 20,2023).
[224] Elizabeth Terry-Humen*,* "Births Outside of Marriage: Perceptions vs. Reality"Child Trends, available at https://www.childtrends.org/publications/births-outside-of-marriage-perceptions-vs-reality (Visited on September 22,2023).

mother and father. Courts in various countries where this issue have been raised have outwardly declined to accept this kind of marriage[225], not to say that they did not pondered on the question of right and equality etc. but were actually considerate of the repercussions the society will have if homosexual marriages are allowed. Key legitimate public purposes clubbed in marriage of a heterosexual couple, an alternative term as used by professor Lynn Wardle is "responsible procreation"[226] . When New York high court was faced with the question of how marriage is perceived by the society and how society wants to see it the court opined that present generation should have a chance to decide the issue through its elected representatives[227]. For people who supports the idea of marriage as one based on romantic love between two individual it's pretty simple to say that if two people share romance and love then they should be allowed to marry and they also attach to the notion of rights. However the people who have a traditional notion of marriage focuses on the procreation and its societal implication. Treating same-sex unions as marriage greatly alters the institutional and public understanding of marriage. [228] This to say that if we allow same sex marriage it means marriage is about the sexual choice of the people then it totally disposes the historic concept of marriage which is responsible procreation. Marriage changes, adapts, and evolves[229] however the marriage remains to be intrinsic in the diversified society. One can't simply claim marriage as a personal right as it has got certain important public purpose as well , it is also a public union[230] this is where one has to distinguish between a spouse and a lover . Family marriage is a partnership in which the man and woman's rights and obligations toward one another and any offspring her body produces are fixed by public definition and endorsement. This implies that we do not rely on teenagers going through erotic, romantic, sexual, and psychological turmoil drama to choose for themselves what this vast area of human nature entails knowledge means. That is what institutions are for—they are substitutes for the process of requiring individuals, on their own, to figure out best practices without any aid from civilization.[231]

Fatherhood's Impact: A Crucial Consideration.

[225]Hernandez v. Robles 855 N.E.2d 1 (N.Y. 2006); Andersen v. King County, 138 P.3d 963 (Wash. 2006); Conaway v. Deane, 932 A.2d 571 (Md. 2007).
[226] Lynn D. Wardle, "Multiply and Replenish: Considering Same-Sex Marriage in Light of State Interests in Marital Procreation*"* 24 *HARV. J.L. & PUB. POL'Y* 771, 781–84(2001).
[227] Hernandez v. Robles 855 N.E.2d, 12(2006).
[228] Transcript of Closing Argument, supra note 18, at 3045
[229] David Blankenhorn, *The Future of Marriage* 91 (Encounter Books, New York 1st edn, 2009).
[230] Katherine K. Young & Paul Nathanson (eds.), *Divorcing Marriage: Unveiling the Danger in Canada's New Social Experiment* 45 (McGill-Queen's University Press., 2004).
[231] ibid at 97–99.

Another question which the same sex marriage poses is the question of fatherhood. For a child both mother and father is necessary, it is fatherhood that is conceptually most at stake in the marriage debate.[232] Just for the sake of discussing this further let us for a while keep the debate of gender difference aside. Only having a biological connect between the fathers mothers and children will not suffice a strong mechanism such that of cultural ties is needed so as to regulate the sexual and erotic behaviour of the individual. This all is dependent on the fact as to how important is for us that a child is raised by both a mother and father. Marriage should be reconnected to a greater purpose rather than being severed from love or romance. By doing this, the intention is to turn romance into a positive force for the children it produces. All of this poses a serious question as to why again and again different societies come with the same cardinal notion of marriage. Answer to this question is rudimentary to the human existence, society needs babies. Today reproduction has become optional even in heterosexual marriage however it is an established fact that only societies that have persisted are those that have managed to address the procreative consequences of male and female desire.

Cracking the code: Unravelling the complexities behind inclusive statutory interpretation.

It can also be seen that the supporters of the same sex marriage are wanting a change in interpretation of various statutes so as to be inclusive of the homosexual couples. However this will involve a lot of difficulty, ambiguity and serious questions like that of personal laws. Let me explain this in detail. Special marriage act defines the concept of half-blood and full blood. Two person are related to each other by full blood if they are descended from a common ancestor (that is male) by the same wife and Half-blood if descended by common ancestors but by different wives. Now we can't really reconcile this section because it states that a woman was biologically created by one man, also a child between lesbians won't be full blood even if it was created through artificial insemination. This makes many other provisions impossible to reconcile not just this it will unavoidably have an effect on succession. Now let's take section 3(g) of the Hindu marriage act [233] which talks about restricted relationships now this whole section is based one's lineage also the section uses the words the intention of the section comes out to be referring to the biologically male husband and biologically female wife. Coming to

[232] Jason S. Carroll & David C. Dollahite, "Who's My Daddy?" How the Legalization of Same-Sex Partnerships Would Further the Rise of Ambiguous Fatherhood in America, in WHAT'S THE HARM? DOES LEGALIZING SAME-SEX MARRIAGE REALLY HARM INDIVIDUALS, FAMILIES OR SOCIETY? 47, 59–64 (Lynn D. Wardle ed., 2008).
[233] The Hindu Marriage Act, 1955 (Act 25 of 1995), s. 3 (g).

section 3 (f) [234]we see the concepts of sapinda and sagotra all these concepts are taken from the traditional Hindu law and therefore it can't be said that the Hindu marriage act is a secular law which again brings us to the issue of state representation . Further if we see section 4 (c) of the special marriage[235] act we see that words like male and female is used , now even if we replace this with person still it will not make the section logically coherent to include whole of the LGBTQ community . Also section 11 deals with declaration by parties and witness and it requires a statutory forms to be filled under the third schedule of the act which has got the words like bride and groom also the form in the second schedule uses the word "widower" and "divorcee" the whole point here is if we try to change the interpretation of this section so as to be inclusive of the homosexual couple there will arise a need to change these statutory forms as well which will further affect other legal rights and obligation arising out the marriage.

Now a greater difficulty arises when one sees section 19 of the special marriage [236]act. Section 19 provides that persons of Hindu , Bhudhist and Sikh if wants to get their marriage solemnised under the act then they have to severe from their religion however this is not applicable to Muslim , Parsi and Christian their personal laws will continue to exist except for related to succession which is dealt by section 21. Under section 21 succession law [237]is applicable across the religion but no other personal law of Parsi and Christian. Now here even for the Hindus the personal laws which were taken under section 19 [238]comes to play again under section 21 [239]since it lifts the disability which was created by section 19 this means that when a marriage is solemnised by any member of the undivided family under the act of any of the stipulated four religion then that person severs only from the family status in the sense that one will only loose the coparcenary rights however in respect of all the other aspects one will still be governed by one's personal laws. Therefore it may not be a choice to touch upon the personal laws as the same is interwoven.

These are some of the issues which revolve around the issue of same sex marriage to say the least. All these problems require though deliberation before anything is decided on the matter. Looking at the issue only from one perspective mainly as an issue of rights and recognition will be dealing with the issue in piecemeal.

---

[234] The Hindu Marriage Act, 1955(Act 25 of 1995), s. 3 (f).
[235] The Special Marriage Act, 1954(Act 43 of 1954), s. 4 (c).
[236] The Special Marriage Act, 1954(Act 43 of 1954), s. 19.
[237] The Hindu Succession Act, 1956 (Act 30 of 1956), s. 21.
[238] Ibid 30.
[239] Ibid 31

Civil union- Will India Embrace a New Relationship Paradigm?

One of the suggestion which is gathering a lot of force is that of the civil union or civil partnership however the question which requires a thorough deliberation is that whether the concept of such a union will be conducive to India. Since India is diverse and culturally rich nation also it has got complex web of state and federal laws. All these may pose serious repercussions which needs to be well thought.

Civil union is a legal status which provides status parallel to marriage and confers the rights and duties similar to that of marriage however is not at par with the status of marriage. The first distinction which arises is that civil union is a purely legal status whereas marriage holds a socio-legal status. Marriage is self-recognised within the society. Beginning with the premise that entirely denying same-sex couple's relationship rights breaches the principle of equal protection, the skirmishes between advocates for civil unions and those for full marriage recognition arises.

It is a point of thought that if the demand of the same sex couples is just to acquire equal rights as that of the married couples which is purely legal in its sense then it can be said that the concept such as this will turn to be useful. This conforms to the view that marriage devoid of its legal ramifications is merely a name, and that denying someone that name without denying them any quantifiable advantages is not necessarily a serious constitutional issue. However if the demand is to get equal status as that of marriage as a matter of equality and rights then this concept is itself discriminatory as what it brings with itself is the status which is secondary to that of marriage owing to the requirement of social recognition, it is uncontested that social recognition holds much more power than that of its legal counterpart. This is evident from that the fact that institution of marriage first evolved as a social institution.

In conclusion, exploring alternatives to same-sex marriage, such as civil unions, is a complex and nuanced endeavour, especially in a diverse society like India. It is imperative that we approach this issue with utmost care and consideration for the values, traditions, and social dynamics that define our culture. Before embracing any alternative, we must engage in thoughtful discussions and consultations with all stakeholders, including the LGBTQ+ community, legal experts, religious leaders, and policymakers. Only through such a comprehensive and inclusive approach can we determine whether these alternatives will be relevant and meaningful within the Indian context, and whether they will contribute to a society that respects the dignity and rights of all its citizens, regardless of their sexual orientation.

CHANAKYA LAW REVIEW (CLR)

VOL. IV (ISSUE II), JULY-DEC, 2023, pp. 76-88

BREAKING THE CYCLE: CORRECTION AND REHABILITATION IN THE FIGHT AGAINST RECIDIVISM

Sourabh Jha[240] *& Shivani Kataria*[241]

ABSTRACT

Justice is not revenge. It cannot be repressive as it is for both the victim and the accused. We don't say justice is done unless and until, the matter of rights involved in the question of law, have been adjudicated properly. No one is born criminal; it is the circumstances around the criminal under which a person commits some offense. It has been seen that many offenders in the prisons of our country are those who have mistakenly committed some crime or had no knowledge for the nature of their act at the time of committing the crime. We are humans and we are bound to make mistakes. Now, some mistakes can be forgotten and forgiven but some mistakes are such that they just can't be ignored. The criminal justice system in India although speaks for "Bail is rule, jail is exception" but we don't see its implementation in the way as it was supposed to be. Accused are given detention, even when their trial is undergoing no matter how serious the offense is. Imagine serving a month in a prison cell even when your case is yet to be decided upon and you are already serving the jail time as under trial prisoner. This leads to the number of problems and lacunas that are present in our system which will be discussed later in this paper. This paper focuses on the problems that are persisting in the Indian Criminal Justice System while deliberately emphasizing on the topic of rehabilitation of prisoners, conceptual framework of rehabilitation, rehabilitative measures, and various strategies for combating the recidivism amongst the prisoners. In this paper, the author has utilized the notable publications, reports, and recommendations of various governments, organizations, and authors. The methodology employed in the research is based on non-empirical evidence.

Keywords: Criminal Justice Administration, Rehabilitation, Open Prison, Pre-Sentence hearing, Human Rights, Victim Impact Statement.

[240] 5th Year student of BBA-LL.B., The NorthCap University, Gurugram.
[241] 5th Year student of BBA-LL.B., The NorthCap University, Gurugram.

Introduction

In India, the criminal justice system aims to combine punishment with rehabilitation. In Indian Constitution, individuals have the right to a just trial and are presumed innocent until proven guilty. Punishment in India is primarily in the form of imprisonment, fines, or both.[242] The severity of a crime committed is used to determine the length of the sentence. The Indian Penal Code (IPC) and the Code of Criminal Procedure (CrPC) are the primary legal frameworks used to regulate criminal offenses and their corresponding penalties. However, the Indian criminal justice system also recognizes the importance of rehabilitation in reducing recidivism and promoting social reintegration. Counselling, education and vocational training are the common rehabilitation programs that are provided to the offenders after they are being released from the prison in order to help them reintegrate in the society and to in leading a good productive life.[243]

Parole and Furlough are some of the statutory remedies that provides the prisoners a chance to get released from the prison early and reintegrate back in the society. For a prisoner to get release on parole in India, it is mandatory for prisoner to complete at least one-third of the prison time and that too while showing a good behaviour. Overall, while punishment remains an important aspect of the Indian criminal justice system, there is a growing recognition of the need for rehabilitation and reintegration of offenders into society.

The purpose of correctional law is to bring about social change, and a well-organized criminal justice system is essential for a functioning democracy.[244] It is the responsibility of the criminal justice system to effectively rehabilitate offenders. The goal of this study is to examine the role of rehabilitation strategies in the context of India for restoring the criminal justice system and reintegrating offenders, and to promote international best practices in the correctional system.

Objective Of The Study

Each offender has the capability to reform himself. The only limitation to that note is that if the system allows the person to do so. The prison system in India needs some serious overlooking

[242] Shyam Prakash Pandey, Kinds of Punishment under Indian Penal Code:A Critical Evaluation and Need for Reform, ISSN 2581-5369: Volume 4 Issue 1 : International Journal of Law Management & Humanities. 1699, 1703-1709 (2021).
[243] Vidit, Correctional & Rehabilitative techniques of Punishment: A Need for legislative reform in India, ISSN:2348-8212:Volume 4 Issue 1 : International Journal of Law and Legal Jurisprudence Studies. 114, 116-117(2014).
[244] Ankita, Critical Evaluation of the Imprisonment and Recidivism, ISSN 2581-5369, Vol. 4 Iss 5: International Journal of Law and Legal Jurisprudence Studies. 261, 268-270(2021).

and major reforms. We can't think of rehabilitating or correcting an offender of law if we don't have a proper prison system and administration in our country.

Our prison system in India was heavily influenced by the Britishers since and before the time of independence. Still, to this day, the prisons are considered as a house of captives where the prisoners must go through rigorous treatment as a result of the wrong committed by them rejecting all the basic human needs and reforms to them. This interpretation of prison is not just an imagination, in fact this is probably the closest to what every person thinks when it comes to prison. This stigmatised thinking needs to be stopped and measures and ways of rehabilitation of a prisoner must be created once again so that the criminal inside the mind of a criminal can be eliminated and a chance to start a new and better life must be given to such prisoners.

The present study would focus upon the Problems in the Indian prison system, meaning of rehabilitation of prisoners, strategies on promoting the victim-centeredness in the criminal justice system. The paper also substantiates upon How the implementation of Open prisons, victim-centric approaches including pre-sentence hearings and Victim Impact Statements impact the rehabilitation and punishment policy, and the potential benefits and drawbacks of these measures in terms of reducing recidivism rates and addressing the needs of victims.

Research Methodology

To evaluate the effectiveness of rehabilitation programs on offenders, the research utilizes both a doctrinal and exploratory approach. The researcher gathered information from various secondary sources such as books, theses, research papers, online articles, and journals to conduct the study. The objective of selecting this subject was to comprehend the psychology behind why individuals commit crimes and whether punishment is the only solution. Appropriate punishment or assistance should be given according to the seriousness of the offense. In order to prevent future crimes, it is essential to understand the underlying reasons behind the occurrence of the crime, as the purpose of punishment is to serve as a deterrent. The research paper aims to identify the internal and external factors that contribute to an offender's decision to commit a crime and to investigate whether rehabilitation is a viable option.

Review Of Literature

- Ms. Shalini Gupta's Paper titled "Correctional and Rehabilitative Techniques of Punishment: A need for Legislative reform in India" in which the author examines the

role of Criminal Justice system in the prisoner rehabilitation process. In the paper, the author gives insights about the problems existing in the system of rehabilitation and also suggest ways of overcoming it. The paper also mentions various alternatives to the imprisonment and how using these alternatives instead of detention will not only help maintain but also restore the rule of law in prisons where corrupt practices and violations of human rights are rampant.

- National Crime Records Bureau's Report which gives the statistics of the prisons in India. The report provides the information regarding the recidivism rates, inmates occupancy in the prisons and shows a clear picture of overcrowding in the Indian prisons.
- Paul Cassell's paper titled "In Defense of Victim Impact Statements". The paper thoroughly defends the use of victim impact statements during criminal sentencing by highlighting their significance to the victims of crime. Additionally, the paper argues that opponents of these statements do not adequately address the importance of these statements to those who have suffered harm.
- Suryansh Tiwari's paper titled "Concept of Open Prison System as a Correctional System" in which the paper aims to examine the origin of open prisons, analyze their effectiveness as a form of correctional facility, particularly in India's present circumstances, and offer suggestions for enhancement.
- Meagan Denny's paper titled "Norway's Prison System: Investigating Recidivism and Reintegration" in which the author talks about the higher recidivism rates in Western countries. The paper examines the unique qualities of Norway's prison system and investigates the reasons behind its notably low rates of repeat offenders, emphasizing the system's emphasis on reintegrating prisoners back into society through educational programs and normalization techniques, particularly in Norway's open prisons. This approach to incarceration is centered on rehabilitation, which is widely accepted by the majority of the Norwegian populace.
- National Institute of Mental Health & Neuro Sciences, Bengaluru-560029 handbook on "Dealing with Mental Health Issues in Prisoners during COVID-19". The handbook discusses the urgent requirement for the readiness, promotion of health measures, and handling of mental health concerns of both prisoners and prison personnel.
- Kaustubh Rote's research paper titled "Prison Reform and Social Change in India" in which the author argues that the current prison system in India needs to be reformed.

The paper highlights the issue of overcrowding in prisons due to an increase in the number of pre-trial prisoners who are detained in worse conditions than convicted prisoners despite being innocent until proven guilty. The lack of separation between different types of offenders in overcrowded prisons can lead to negative influences on other prisoners, which can be harmful to society.

Conceptual Framework Of Rehabilitation

The concept of rehabilitation is justified by the idea that individuals commit crimes due to negative societal conditions. As a result, it is both a societal responsibility to intervene and assist the offender, as well as the offender's right to seek help from society.

Bentham's utilitarianism philosophy focuses on actions that aim for greater happiness for all the people. Also, the theory of rehabilitation advocates the practice of restorative justice.

A wide range of punishments does not mean that the criminal justice system of the country are rigid and inhumane. The astute of those who are in power reflects upon the diversity and the range of punishments. It has become important to deploy various methods of preventing the crime as the society gains more knowledge on the nature of crime, intention behind them and circumstances surrounding the crimes. Therefore, having diversity in the types of punishments available is a strength of a penal code.[245]

The conceptual framework of rehabilitation for prisoners is a multifaceted approach that aims to address the unique needs and challenges faced by incarcerated individuals in order to help them successfully reintegrate into society.[246] This framework is grounded in the belief that rehabilitation should be a central goal of the criminal justice system, as it can reduce recidivism and improve public safety.

The key components are as follows:

1. Treatment plan based on individual assessment: The needs of each of the prisoners are identified through an extensive assessment. Some prisoners require vocational trainings, some requires program on substance use and mental health. The extensive assessment helps in formulating a treatment plan for such prisoners.

[245] Jeremy Bentham, Bentham on Utilitarianism, Journal of Liberal History. (Feb 23, 2023, 3:47 PM)
[246] Suryansh Tiwari, Concept of Open Prison System as a Correctional System: A Study in Light of Present Context, [ISSN 2581-9453] Vol. 3 Issue 4; International Journal of Legal Science and Innovation. 1025(2021).

2. Holistic Approach: A holistic approach is taken to address the physical, emotional, and social needs of prisoners. This may include access to healthcare services, mental health services, and educational and vocational training.
3. Re-entry Planning: Rehabilitation efforts begin as soon as possible and continue throughout the period of incarceration. A key component is reentry planning, which involves preparing prisoners for a successful return to their communities. This includes providing access to community-based resources and services, such as housing and employment assistance.

Rehabilitative Measures For Prisoners

No society is crime-free. Crime will take place no matter, how adverse a country's law gets. We cannot just get rid of the criminals; it is their criminal mind that needs to be eliminated. For that purpose, the reformative measures are required to eliminate the criminality within a criminal so that the individual gets a chance to live a normal live again. It is observed that the process of rehabilitation is not a single one and it doesn't stop at one point. It starts when the prisoner enter the prison and continues even after the prisoner is released.

In India, the most common form of punishment is the imprisonment out of all the other 5 kinds of punishment that are described in Section 53 of the Indian Penal Code, 1860.[247] Prisons have long been viewed as a powerful means of achieving the goals of punishment, but it appears that simply incarcerating individuals is not meeting these objectives in the desired manner. In order to achieve these objectives, prisons must serve to inspire and equip offenders for a life that follows the law and is financially independent after their release.

The main areas where prisons fall short in achieving these goals are in education and employment opportunities. The criminal justice system must prioritize the aspect of rehabilitation. Those who hold a reformative perspective believe that punishment is only reasonable if it looks forward, rather than backward. They maintain that punishment should not be viewed as settling a previous score, but instead as an opportunity to start anew. The Supreme Court has also provided certain directives concerning the well-being and improvement of prisoners.[248] Some of those recommendations are:-

[247] Indian Pen. Code, 1860, § 53
[248] PRISON REFORMS. Ministry of Home Affairs. https://www.mha.gov.in/Division_of_MHA/Women_Safety_Division/prison-reforms

1. New inmates should be allowed to call their family members once a day for a few weeks upon arrival in order to help them adjust to prison life quickly.
2. It is necessary to provide modern cooking facilities and a canteen to the prisoners, as the current conditions are inadequate.
3. Video conferencing could be used for trials to take place remotely.
4. Due to overcrowding in prisons, more staff should be hired to better manage the situation.
5. Greater priority should be placed on providing speedy trials and establishing fast-track courts.

Challenges Confronting The Existing System Of Prison Rehabilitation

It is important to discuss the problems with our prison systems before talking about the reformative measure for the prisoners. If we take a deeper look at our Indian criminal justice system, we can find thousands of lacunae in it. The increase in the prison population has led to overcrowding in prisons, which in turn has led to a rise in the cost of maintaining prisoners. Unfortunately, the budgetary allocation for prison administration has been consistently neglected, which has resulted in a significant decline in the quality of life for prisoners. In the post-independence era, the Indian government attempted to introduce significant reforms in prison administration. However, despite these efforts, there remain key areas where prisons are failing to adequately address the needs of prisoners, particularly in the areas of education and employment. Some of the problems with our prison system are: -

1. Overcrowding in prisons is the major problem in our country. The idle capacity of any prison to hold prisoners is being over utilized and more prisoners are kept in a single prison. The report of National Crime Records Bureau for the year 2021 showed that out of the 425609 available capacities of prisons, the inmate population of prisoners in the Indian prisons stood at 554034 taking the occupancy rate beyond normal at 130.2%.[249]
2. Another major problem in our prison system is that the prisoners are not distinguished from each other. The first lacuna in this is that the under-trial convicts are being locked up second lacunae is that these under trial prisoners are being kept with the convicted prisoners who are already serving their sentence. In fact, it is shocking to note that 77%

[249] National Crime Records Bureau, Prison Statistics India Tables – 2021, Table-1.2 Capacity, Inmate Population and Occupancy Rate of Jails.
https://ncrb.gov.in/sites/default/files/PSI-2021/TABLE%201.2%20-%202021.pdf

of inmates in the prisons of our country are under trial prisoners.[250] This factor plays a major role in the rehabilitation and correction of the prisoners in our country.

3. The existing rehabilitation system faces a significant challenge due to the absence of consistency in the sentencing policy across India. Judges in India have discretion in awarding sentences within the prescribed range of punishments for a particular offense. This discretion is exercised after taking into account various factors such as the nature and severity of the offense, the circumstances surrounding the commission of the offense, the age, gender, offender's social and economic status, and the impact of the offense on the victim. This discretion exercised by judges faces a lot of criticism. Judges have been accused that they either show leniency or become too harsh while prescribing the sentencing time in some particular cases. The sentencing process has also become a point of concern because of the political and external factors. In "Bachan Singh v. Union of India"[251], the Supreme Court held an important ruling. The matter was related to the lawfulness of capital punishment in India, with a particular focus on whether it conflicted with the constitutional guarantee of the right to life. The Supreme Court concluded that although the death penalty was consistent with the constitution, it could only be applied in extremely rare circumstances where the punishment of life imprisonment would not suffice.
4. The National Crime Records Bureau's report on the reoffending rates of individuals arrested for all crimes under the Indian Penal Code during 2015[252] stood at 8.1% as compared to 7.8% for the year 2014[253]. The past trends also portray a similar picture of increase in the number of recidivists which is a major concern as it prima facie showcases that the punishment policy in India has failed to achieve its objective of reducing the recidivism among offenders.

---

[250] 77% prisoners in India are under trials: NCRB. Money control. https://www.moneycontrol.com/news/india/77-percent-of-indias-prisoners-are-undertrials-ncrb-9142041.html

[251] Bachan Singh v. Union of India (1980) 2 SCC 684.

[252] National Crime Records Bureau, Prison Statistics India Tables – 2015, Table-11.1 Recidivism Amongst Persons Arrested under Total IPC Crimes During 2015. https://ncrb.gov.in/sites/default/files/crime_in_india_table_additional_table_chapter_reports/Table%2011.1_2015.pdf

[253] National Crime Records Bureau, Prison Statistics India Tables – 2014, Table-11.1 Recidivism Amongst Persons Arrested under Total IPC Crimes During 2014. https://ncrb.gov.in/sites/default/files/crime_in_india_table_additional_table_chapter_reports/Table%2011.1_2014.pdf

Strategies For Combating Recidivism And Promoting Rehabilitation

There has been a growing emphasis on victim-centric approaches to criminal justice, which prioritize the needs and concerns of victims of crime. The current scenario of the prison systems in India seems to put less emphasis on the rehabilitation of prisoners and the various problems stigmatizing the Indian prison system makes it an unattainable goal. The purpose of rehabilitation is to provide offenders with the skills and tools they need to lead productive and law-abiding lives after release. There are many strategies for promoting the idea of rehabilitation which, if followed correctly is believed to yield a better result. The use of open prisons, pre-sentence hearings, and victim impact statements forms the part of a broader strategy to promote rehabilitation and victim-centeredness in criminal justice policy.

A. Concept Of Open Prison System

As the name suggests, the concept of open prison means prisons without bars and limitations. Apart from being less expensive, open prisons allow the government to make better use of the inmates' abilities. The financial returns are positive, and once operational, the open jails achieve financial self-sufficiency. Open prisons are also beneficial in reducing prison overcrowding, which is desperately needed in Indian prisons.

Certain prisoners require special handling to facilitate their reintegration into society, particularly those who are first-time offenders or who express a desire to reform. Open prisons serve as a means of addressing their needs and providing them with an opportunity to reintegrate into mainstream society. Open prisons have existed in some form or another in India for a long time. Around the 1960s, the first open prison was established in India, and presently there are 63 such facilities. These prisons do not have walls or stringent restrictions, but the prisoners are still penalized and encouraged to repent for their offenses, and the experience of freedom serves as the most effective means of rehabilitation.[254]

Only prisoners who have been sentenced to life imprisonment and demonstrate positive conduct, progress, and willingness to reform and rehabilitate are selected and transferred to these prisons. Various actions for open prisons have been carried out in some Indian states. The primary objective of these open prisons is to create an environment that is akin to a jail but not entirely confining. Although the prisoner remains in custody, their mind and body are afforded

[254] Suryansh Tiwari, Concept of Open Prison System as a Correctional System: A Study in Light of Present Context, [ISSN 2581-9453] Vol. 3 Iss 4; INTERNATIONAL JOURNAL OF LEGAL SCIENCE AND INNOVATION. 1025(2021).

a degree of freedom. This approach aims to promote self-esteem, self-reliance, a sense of responsibility, and instil confidence in the individual, thereby reducing the likelihood of reoffending. Multiple Indian states have open prisons in operation. The benefits of open prisons are as follows:

1. It mitigates the adverse effects of criminal behaviour on both the offender and the community.
2. It addresses prison overcrowding concerns while also promoting humane living conditions.
3. Operational costs are lower because there is less of a need for security and guards because they are in open prisons.
4. Self-development and socialisation are encouraged so that they can maintain their place in society and avoid turning into sociopaths. They are also permitted to interact with others and communicate with their family.
5. Allowing inmates in open jail settings to find employment both inside and outside the prison gives them a confidence boost and allows them to earn money.

Research done by the Norwegian Correctional Service showed that the recidivism rates were quite lower in criminals in open prisons whereas it was high in the cases of traditional prison. Prisoners in open prisons were equipped with sufficient knowledge so as to allow them to secure employment and maintain a livelihood after they get released from the prisons.[255]

B. Pre-Sentence Hearings

The purpose of pre-sentence hearing is to give the convicted offender the chance to discuss with the sentencing judge any elements of their past or character that might affect the type of sentence that will be given. However, there is evidence that judges are treating this provision indifferently or perfunctorily because they are unable to understand its intended purpose. The pre-sentence hearing is frequently scheduled by judges on the same day as the conviction, which leaves little time for the defendant's defence team to prepare a proper sentencing case.

Additionally, given that many sentencing decisions are made almost immediately after the hearing, there are signs that judges do not give themselves enough time to consider all the sentencing-related factors after the hearing. Mandatory sentences create another obstacle to

[255] Meagan Denny, Norway's Prison System: Inv s Prison System: Investigating Recidivism and estigating Recidivism and Reintegration, Bridges: A Journal of Student Research(2016). https://digitalcommons.coastal.edu/cgi/viewcontent.cgi?article=1032&context=bridges

following the presentence hearing's goals. While presentence hearings are intended to consider factors that affect sentencing, mandatory sentences do not take any sentencing mitigation into account. Thus, mandatory sentencing often works against the presentence hearing's goals. Each judge must make every effort to enter the presentence hearing with an open mind and the intention to consider all the material and arguments given there before deciding on the appropriate punishment.

This is an advantageous approach for both victims and offenders. A research by the Australian Institute of Criminology showed that the satisfaction level in the victims was high who attended the pre sentence hearings from those victims who did not. The recidivism rate in the offenders attending the pre sentence hearing also reduced significantly.[256]

C. Victim Impact Statements

Victim impact statements (VIS) are written or oral statements given by crime victims, or their families or friends, about the impact of the crime on their lives. These statements are typically given during the sentencing phase of a criminal trial, and are intended to inform the court about the harm caused by the defendant's actions.

Studies indicate that victim impact statements can have a beneficial effect on both victims and the criminal justice system. For example, a study by the National Institute of Justice showed that, in the criminal justice process involving victim impact statement, the victims felt more validated and satisfied. Judges also get a good assistance from Victim impact statement as it helps them in better understanding the crime and making the decision accordingly.[257]

Victim Impact statements also have a deterrent effect on the offenders. It was found in a study that offenders actually showed repentance for their actions.[258] Offenders get to know about the damage they have inflicted upon the victim and also to be accountable for their actions. Victim impact statements are effective way of making the offenders accountable for their actions and helping victims heal.

D. Mental health of prisoners

[256] Edna Erez, Victim Impact Statements, AUSTRALIAN INSTITUTE OF CRIMINOLOGY. https://www.aic.gov.au/sites/default/files/2020-05/tandi033.pdf
[257] Victim Satisfaction With the Criminal Justice System, National Institute of Justice. (Jan 1, 2006). https://nij.ojp.gov/topics/articles/victim-satisfaction-criminal-justice-system.
[258] Paul Cassell, In Defense of Victim Impact Statements. (Vol 6:611 2009) OHIO STATE JOURNAL OF CRIMINAL LAW. 611, 616-619 (2009). https://www.researchgate.net/publication/228187798_In_Defense_of_Victim_Impact_Statements.

The mental health of prisoners refers to the psychological well-being of individuals who are incarcerated in correctional facilities. There is a well-established fact that inmates are more likely to suffer from mental health issues, including depression, anxiety, post-traumatic stress disorder, and substance use disorders, in comparison to the general public. This can be attributed to a range of factors, including exposure to violence, trauma, and isolation, as well as limited access to mental health care and support services. Mental health care facilities like counselling and medications of prisoners must be provided by the correctional facilities.

Some of the strategies promoting the mental health of prisoners include identification and treatment of mental health problems of prisoners and helping the prisoners gain skills that would come to their use after releasing from prison.[259]

E. Separate Prisons

The differentiation of the prisoners is quite important for criminal justice system. The differentiation must be based on the basis of criminal record, age of the offenders. One reason for this is that the influence of hardened criminals can negatively impact other prisoners, leading to potentially harmful outcomes for society. Furthermore, different types of offenders may require different approaches to rehabilitation. For instance, some may need to address behavioural issues, while others may require treatment for past traumas and emotional insecurities. Certain crimes may also require punitive measures rather than rehabilitative ones. Therefore, separating prisoners is important to ensure that each inmate receives the appropriate treatment and that the prison environment remains safe and conducive to rehabilitation.

F. Parole

Everyone should get a chance to correct their mistakes. The same is the thought while granting parole to the offenders who are serving their sentence in the prison. Parole is a significant part of the criminal justice system. it refers to the temporary or permanent release of a prisoner before the end of his/her sentence in view of good behaviour. Therefore, to put it simply, parole is the premature conditional temporary release of a prisoner on the condition that they abide by the conditions and observe certain restrictions in order to be granted the privilege of returning to the community and socialising with family and friends while considering correctional theory and preparing to resume their social lives. Simply deferring the execution of the sentence while maintaining its overall length. The paroled inmates risk being sent back to jail if they break the

[259] Hegde, P.R ,Dealing with Mental Health Issues in Prisoners during COVID-19: A Handbook. National Institute of Mental Health & Neuro Sciences, Bengaluru, India. (2021).

rules that govern their release. It helps in making the offenders deter from committing crimes by making them realise about the benefits of free living.

G. Probation

A court-ordered period of supervision known as Probation serves as an alternative to jail. Although some jurisdictions permit probation periods of up to five years, it usually lasts one to three years. According to state legislation, if someone is found guilty of a serious crime like drug trafficking or sexual assault, their probationary period may be prolonged or potentially last for the remainder of their lives. The goal of probation is to let offenders live in the community as long as they follow the rules the court sets forth. In recent years, punishment and retaliation have received more attention than recovery, but trust in care and healing has resurged as a result of signs that certain things are "working," a concentration on policymaking based on "evidence," and other factors. As the person who started the process at the beginning, the probation officer's role is crucial in this process of treating and rehabilitating offenders. If he performs his duties honestly and fairly, the system can be reinforced in order to reduce the number of offenders in the future.

Conclusion

The criminal justice system is a framework that regulates the operation of the courts, prisons, police, and other organisations that serve to provide victims with justice. Individuals are not born as criminals; it is always the circumstances surrounding an individual which makes him a criminal. These external factors can arise from different sources, including societal influences. Nonetheless, there have been developments in how the Indian Judicial System deals with crime by adopting a rehabilitative approach. This approach involves identifying the root cause of the offender's behaviour and addressing it to prevent the offender from repeating their criminal activities. Rather than solely punishing offenders, rehabilitation offers them an opportunity to reform and make amends for their actions. Special Courts, fast track courts may help in achieving this goal. Both the offender and society are to gain various benefits from the rehabilitative approach pointing out the need for reform in the current criminal justice system.

CHANAKYA LAW REVIEW (CLR)

VOL. IV (ISSUE II), JULY-DEC, 2023, pp. 89-105

ROLE OF ARTIFICIAL INTELLIGENCE IN DRUG DISCOVERY AND DRUG DEVELOPMENT

Dr. Sadaf Fahim[260]

Abstract

Given that AI can assist rational drug design, assist in decision making, determine the right therapy for a patient, including personalised medicines, and manage clinical data generated and use it for future drug development, AI can be expected to play a role in the development of pharmaceutical products from the bench to the bedside. Eularis' E-VAI platform is an analytical and decision-making AI platform that uses machine learning algorithms and an intuitive user interface to create analytical roadmaps based on competitors, key stakeholders, and current market share to predict key drivers in pharmaceutical sales, allowing marketing executives to better allocate resources. Gaining market share reversed economic outlook and allowed them to plan ahead of time where to invest. The huge chemical space, which contains about 1060 compounds, encourages the discovery of numerous medicinal molecules. The lack of advanced technology, on the other hand, hinders drug development, making it a time-consuming and costly endeavour that can be addressed by applying AI. AI can distinguish hit and lead compounds, allowing for faster validation of the therapeutic target and structure design optimization. The goal of drug development is to find a therapeutically beneficial chemical for curing and treating disease. Identification of candidates, synthesis, characterisation, validation, optimization, screening, and tests for therapeutic efficacy are all part of this process. Once a molecule has been proven to be useful in these studies, it will begin the drug development cess prior to clinical trials. To create a medicine that is safe, effective, and meets all regulatory standards, the new drug development process must go through numerous stages. One of the main points of our study is that the process is long, complicated, and costly enough that multiple biological targets must be explored for any new treatment that

[260] Teacher Associate at the Chanakya National Law University (Patna).

is eventually approved for clinical use, and new research techniques may be required to investigate each one. Pharmacological discovery is a multidimensional process that include identifying a drug molecule that is therapeutically useful in the treatment and management of a disease. Typically, researchers discover novel medications by developing new perspectives on a disease process that allow researchers to construct a medicine to counteract or stop the disease's symptoms. The identification of drug candidates, synthesis, characterisation, screening, and assays for therapeutic efficacy are all part of the drug development process. Following clinical trials, if a molecule achieves favourable results in these studies, it will begin the process of drug development. Due to hefty R&D and clinical trial costs, drug discovery and development is a costly process. A single new medicine molecule takes almost 12-15 years to develop from the moment it is discovered to the time it is accessible on the market for treating patients. Each effective medicine is expected to cost between $900 million and $2 billion in research and development.

Keywords: Target Identification, Lead Optimization, Artificial Intelligence, Machine Learning, In Silico, Image screening and Clinical Testing.

Introduction

The fourth industrial revolution's machine is thought to be artificial intelligence (AI). Every industry is expected to change because of AI. The time and money needed to maintain the drug development pipeline are the main difficulties in drug research and development. The development of an anticancer treatment is predicted to cost over 2.6 billion USD and take more than ten years. Most of the money spent on the 90% of candidate therapies that fail in the last stages of drug development, between phase 1 trials and regulatory approval, is the cause of these skyrocketing prices. The cornerstone for a time of quicker, less expensive, and more effective medication development is predicted to be AI. Recent developments in AI show the potential for quick, affordable drug discovery and development. The ability of a machine to carry out actions frequently associated with intelligent creatures is generally referred to as AI. Another term for AI that involves machines using data to reason for themselves is machine learning (ML). The primary distinction between ML and AI is that ML involves the direct application of combining and analysing large, diverse data sets. Experts concur that AI will revolutionise and modify how medications are discovered in the pharmaceutical sector. AI can improve a wide range of directly and indirectly linked aspects of drug discovery and development. These include, but are not limited to, the application of AI in biomarker and target

discovery, drug discovery, assay creation, and cancer categorization. To significantly speed up R&D drug discovery, AI generally seeks to automate and optimise slow processes. A number of biotech, software, and pharmaceutical firms are also working hard to incorporate AI into the research and development of new medicines. To improve the search for immuno-oncology medicines, Pfizer joined with IBM Watson Health, an AI platform, in 2016. To find treatments for metabolic diseases, Sanofi teamed up with Ex Scientia, a spin-off from Dundee University. Genentech was purchased by Roche for $46.8 billion in 2009, giving Roche's biotechnology sector, which does not integrate AI, a solid basis. Now, Genentech and the GNS Healthcare platform are working together to uncover and validate possible novel medication candidates using machine learning. The ability of AI to diagnose diabetic macular degeneration was recently demonstrated by Genentech. Even massive, established IT corporations are funding the development of pharmaceuticals. In the 13th Critical Assessment of Structure Prediction, Alphabet subsidiary DeepMind's AlphaFold AI technology, which used genomic data to predict protein 3D structures, outperformed over 90 other companies, including Novartis and Pfizer. DeepMind's achievement with AlphaFold serves as an example of how non-healthcare businesses may contribute to and enhance the pipeline for drug discovery and development. diabetes-related macular deterioration. These investments are creating a clear picture of the significant role AI will play in drug research and development in the future. In this overview, we begin by outlining the essential elements of traditional cancer drug discovery and their shortcomings. Fundamental AI ideas are then discussed, along with historical and contemporary developments in AI and drug discovery and development. The promise and difficulties of AI in oncology are introduced lastly.

What Is Artificial Intelligence: An Understanding

In order to understand the use of artificial intelligence in discovery and development of drug, we firstly need to have a basic understanding of artificial intelligence. An Artificial Intelligence (AI) is basically a wide range of branch of computer science whose main purpose is building of smart machines which are capable enough to perform those works which primarily requires human efforts.[261] An AI simply just simulates the human intelligence by the machines and these machines are programmed in a way to think like humans and react just like humans with their actions. The term may also be applied to any machine that exhibits traits associated with a

[261] Artificial Intelligence, Builtin, https://builtin.com/artificial-intelligence

human mind such as learning and problem-solving.[262] AI is a device that perceives its environment and takes such actions which maximises its chances of successfully achieving its goals. Artificial Intelligence is a field of computer science which emphasizes on the creation of machines that could work and act just like humans. It aims at achieving accuracy and efficiency in human decision-making by replicating human intelligence. It could be said that it is intelligence demonstrated by machine, in contrast to the natural intelligence displayed by humans and other animals. Artificial Intelligence could be classified into two different kinds, namely, *Analytical Artificial Intelligence* and *Human-Inspired Artificial Intelligence.*

The *Analytical AI* has characteristics which are similar to that of cognitive intelligence: This refers to the natural intelligence possessed by humans and animals involving the brain to perform an intelligent activity. Analytical AI generates such logical reasoning of the functioning of the world using past experiences based on which future decisions are taken. And on the other hand, *Human AI* comprises of those elements which consists of both cognitive capacities as well as emotional intelligence in addition to such other competences needed in decision-making and interactions with others.

Depending on the usage and purpose, AI could be categorized into two types i.e., *Weak AI* and *Strong AI.* Weak AI is a system which is designed and created for any task. This type of system is also known as narrow AI as its purpose and scope is limited and can perform only certain number of functions, whereas on the flip side a Strong AI is a system with human cognitive or logical capabilities due to which it can perform such functions without human dependency and intervention. This type of system is also known as artificial general intelligence and is much broader than narrow AI due to its widespread functions and abilities. A subset of artificial intelligence is machine learning, which refers to the concept that computer programs can automatically learn from and adapt to new data without being assisted by humans. Deep learning techniques enable this automatic learning through the absorption of huge amounts of unstructured data such as text, images, or video.[263]

A. AI and conflict of its identity

The scope of AI is very vast and huge, the systems present a range of different functions and uses which raises few ethical and moral questions. The system is not only as smart as the human

[262] Jake Frankenfield, *Artificial Intelligence (AI),* INVESTOPEDIA (Mar. 8, 2021), https://www.investopedia.com/terms/a/artificial-intelligence-ai.asp
[263] *Ibid. 2*

who programs it and it can perform only those functions as designed. Because the system is programmed by a human and it is he who decides what data must be used in its training, the potential for misuse and bias is very high and thus, needs to be monitored closely in order to prevent disruption of society. This leads to the much-debated question over the personhood status of AI in society.

Personality is a very wide-ranging process and is most of the time connected to individual autonomy, but as seen in many cases human beings are not exclusively granted the status of the personhood. Many of the non-human entities have been granted the status of personhood including corporations. In the Indian scenario, there are no specific laws that states AI systems as a person. The personhood argument of AI has always been a subject of debate and research, this idea can be analyzed by looking into the definitions provided by various jurists and ideas of intelligence. According to Salmond, a person is *"any being whom the law regards as capable of having rights and duties."* Any being that is so capable is a person, whether a human being or not, and no being that is not so capable is a person, even though he may be a man. That is, no being can have rights unless such a being is also capable of interests which may be affected by the acts of others. Similarly, no being is capable of processing duties unless such a being is capable of such acts by which the interests of others may be affected. So, people are substances of which rights and duties are attributed.

The definition of "persons" brings forth a lingering question, whether AI should be given the status of personhood? AI is a machine and an inanimate object which can perform various activities and is more similar to other machines like cars, choppers etc. than other biological beings as they unlike other social beings cannot perceive the world and lack of human intelligence, ethical intelligence and moral values which are some essential characteristics of human beings. Human emotions have been categorized as an evolutionary process related to the survival of species; they are reactions to external stimulus or an expression of the thought process. Emotional intelligence is a very important part of human intelligence; these can be interdependent. Human decision-making process is highly influenced by and dependent on the value systems imbibed in humans. The debate of whether machines need to have emotions or whether they could be intelligent without emotions is highlighted with the discussion on emotional intelligence in machines. The main concerns with AI systems are that they are not equipped with the aspect of ethical or moral values. It just focuses on the shallow reflection of only looking into reducing real world complexities.

The AI system lacks the ability to investigate the feelings and circumstances of the parties involved while taking a decision and it has been seen that all the knowledge that human decision-maker applies while arriving at conclusion, can in its entirety be captured and programmed while developing a knowledge-based expert system. The domain of emotional intelligence comprises of the aspects of self-awareness, that is the knowledge of one's own feelings and character and self-consciousness that is awareness of one's actions. These are very important aspects as with these the question on the efficiency of AI systems in this domain and the liability of the actions of AI systems arises. *Responsibility Objection*- this theory emphasizes on the fact that AI systems would inherently not be responsible while fulfilling its responsibilities and duties and thereby questions its capacity regarding the same. This theory also emphasizes on the liability of breach of trust. *Judgment Objection*- this theory focuses on the moral problems associated with AI and dilemma that arises when AI is to make decisions that are subjective in nature and related to morality.

B. The Indian Regulation of AI

The stance of India on AI can be considered to be in a primitive stage. It had been emphasized on to a great extent and there have been deliberations for devising a concrete national policy on AI. The major concern being analysis of the legal dilemmas which surround AI systems. One of the major concerns that arise with this idea is the absence of legal relationship between AI systems and humans. Recent policy documents and working drafts on Artificial Intelligence issued by the Niti Aayog (or the Planning Commission under the Government of India) recognize ethical and fundamental concerns with the implementation of AI and hint towards a self-regulatory approach towards the same in coming times. In this backdrop, it is important for Artificial Intelligence (AI) and Machine Learning (ML) developers and stakeholders to understand the importance of precise self-regulatory exercises required to avoid risking legal and regulatory red-flagging by government authorities in the coming future.[264] The trends in these policy documents suggest greater responsibility for developers of AI systems than just the broader known issues related to AI systems already recognized globally.

With the increasing use of AI to develop scalable business solutions companies around the world are also increasing their legal and regulatory risks. Authorities around the globe are now conscious of the issues of 'Explainability', 'Provability', 'Transparency', and 'Accountability'

[264] Tuhin Batra, *Self-Regulation in Artificial Intelligence: An Indian Perspective,* MONDAQ (Dec. 11, 2020), https://www.mondaq.com/india/privacy-protection/1015476/self-regulation-in-artificial-intelligence-an-indian-perspective

and 'Accessibility' associated with AI. With growing dependency upon technology and machine learning capabilities, the authorities are working extensively on preparing policy and legal frameworks for the regulation of AI. Policy Documentation states that existing laws are sufficient for tackling the challenges of AI that directly impact society. They are described in the documents as "System Considerations" and that the existing laws require sector-specific modifications and alignments. However, the policy documents identify a different category of challenges which indirectly impact the society such as loss in jobs, deep fakes, psychological profiling and malicious use. For challenges having indirect impact such as loss of jobs they suggest skilling, adapting legislations and regulations to harness new job opportunities. It is interesting to see that the recommendations on dealing with malicious use of AI for spreading hate or propaganda is to use the technology for proactive identification and flagging.

Policy documentation also identifies ethical challenges in AI based on their impact on the Indian society while recognizing the issues such as the 'Black Box Phenomenon', the issues of data collection without proper consent, the privacy of personal data, inherent selection bias, risk of profiling and discrimination, and non-transparent nature of certain AI solutions. They also recognize the reputational issues of public fear that companies are somehow harnessing huge consumer data and utilizing it inappropriately to gain consumer insight; and that the companies are developing large DATASETS and building unfair competitive advantage somehow.[265]

Drug discovery and drug development: How it's done?

Drug discovery is a process which aims at identifying a compound therapeutically useful in curing and treating disease. This process involves the identification of candidates, synthesis, characterization, validation, optimization, screening and assays for therapeutic efficacy. Once a compound has shown its significance in these investigations, it will initiate the process of drug development earlier to clinical trials. New drug development process must continue through several stages in order to make a medicine that is safe, effective, and has approved all regulatory requirements. One overall theme of our article is that the process is sufficiently long, complex, and expensive so that many biological targets must be considered for every new medicine ultimately approved for clinical use and new research tools may be needed to investigate each new target. From initial discovery to a marketable medicine is a long, challenging task. It takes about 12 - 15 years from discovery to the approved medicine and

[265] *Ibid.* 4

requires an investment of about US $1 billion. On an average, a million molecules screened but only a single is explored in late stage clinical trials and is finally made obtainable for patients. This article provides a brief outline of the processes of new drug discovery and development.[266]

Drug discovery is a multifaceted process, which involves identification of a drug chemical therapeutically useful in treating and management of a disease condition. Typically, researchers find out new drugs through new visions into a disease process that permit investigator to design a medicine to stopover or contrary the effects of the disease. The process of drug discovery includes the identification of drug candidates, synthesis, characterization, screening, and assays for therapeutic efficacy. When a molecule avails its satisfactory results in these investigations, it will commence the process of drug development subsequent to clinical trials. Drug discovery and development is an expensive process due to the high budgets of R&D and clinical trials. It takes almost 12-15 years to develop a single new drug molecule from the time it is discovered when it is available in market for treating patients. The average cost for research and development for each efficacious drug is likely to be $900 million to $2 billion. This figure includes the cost of the thousands of failures: For every 5,000-10,000 compounds that enter the investigation and development pipeline, ultimately only one attains approval. These statistics challenge imagination, but a brief understanding of the R&D process can explain why so many compounds don‘t make it and why it takes such a large, lengthy effort to get one medicine to patients. The Success requires immense resources the best scientific and logical minds, highly sophisticated laboratory and technology; and multifaceted project management. It also takes persistence and good fortune. Eventually, the process of drug discovery brings hope, faith and relief to billions of patients.[267] There are certain important stages which are important with respect to discovery and development of a drug. Those stages are as follows:

Target Identification:

The first step in the discovery of a drug is identification of the biological origin of a disease, and the potential targets for intervention. Target identification starts with isolating the function of a possible therapeutic target (gene/nucleic acid/protein) and its role in the disease. [6] Identification of the target is followed by characterization of the molecular mechanisms

[266] Deore, AB, Dhumane JR, Wagh HV, Sonawane RB, *The Stages of Drug Discovery and Development Process*, Asian Journal of Pharmaceutical Research and Development, 2019; 7(6):62-67

[267] Gashaw I, Ellinghaus P, Sommer A, Asadullah K., *What makes a good drug target Drug Discovery Today,* 2012; 17:S24-S30.

addressed by the target. An ideal target should be efficacious, safe, meet clinical and commercial requirements and be 'druggable'. The techniques used for target identification may be based on principles of molecular biology, biochemistry, genetics, biophysics, or other disciplines.

Target Validation:

Target validation is the process by which the expected molecular target – for example gene, protein or nucleic acid of a small molecule is certified. Target validation includes: determining the structure activity relationship (SAR) of analogy of the small molecule; generating a drug-resistant mutant of the presumed target; knockdown or over expression of the presumed target; and monitoring the known signalling systems downstream of the presumed target. Target validation is the process of demonstrating the functional role of the identified target in the disease phenotype. Whilst the validation of a drug's efficacy and toxicity in numerous disease-relevant cell models and animal models is extremely valuable the ultimate test is whether the drug works in a clinical setting.

Identification of Lead:

A chemical lead is defined as a synthetically stable, feasible, and drug like molecule active in primary and secondary assays with acceptable specificity, affinity and selectivity for the target receptor. This requires definition of the structure activity relationship as well as determination of synthetic feasibility and preliminary evidence of in vivo efficacy and target engagement. Characteristics of a chemical lead are:

- SAR defined
- Drug ability (preliminary toxicity, hERG)
- Synthetic feasibility
- Select mechanistic assays
- In vitro assessment of drug resistance and efflux potential
- Evidence of in vivo efficacy of chemical class
- Toxicity of chemical class known based on preliminary toxicity or in silico studies

Lead Optimization:

Lead optimization is the process by which a drug candidate is designed after an initial lead compound is identified. The process involves iterative series of synthesis and characterization of a potential drug to build up a representation of in what way chemical structure and activity

are related in terms of interactions with its targets and its metabolism. In initial drug discovery, the resulting leads from hit-to-lead high throughput screening tests undergo lead optimization, to identify promising compounds. Potential leads are evaluated for a range of properties, including selectivity and binding mechanisms during lead optimization, as the final step in early-stage drug discovery. The purpose of lead optimization is to maintain favourable properties in lead compounds, while improving on deficiencies in lead structure. In order to produce a pre-clinical drug candidate, the chemical structures of lead compounds (small molecules or biologics) need to be altered to improve target specificity and selectivity. Pharmacodynamics and pharmacokinetic parameters and toxicological properties are also evaluated. Labs must acquire data on the toxicity, efficacy, stability and bioavailability of leads, in order to accurately characterize the compound and establish the route of optimization. Researchers in drug discovery need rapid methods to narrow down the selection of drug candidates for this downstream selectivity profiling and further investigation. High throughput DMPK (drug metabolism and pharmacokinetics) screens have become an essential part of lead optimization, facilitating the understanding and prediction of in vivo pharmacokinetics using in vitro tests. In order to make new drugs with higher potency and safety profiles, chemical modifications to the structure of candidate drugs are made through optimization.

Product Characterization:

When any new drug molecule shows a promising therapeutic activity, then the molecule is characterized by its size, shape, strength, weakness, use, toxicity, and biological activity. Early stages of pharmacological studies are helpful to characterize the mechanism of action of the compound.[268]

Formulation and Development:

Pharmaceutical formulation is a stage of drug development during which the physicochemical properties of active pharmaceutical ingredients (APIs) are characterized to produce a bioavailable, stable and optimal dosage form for a specific administration route.

Pre-Clinical Testing:

Pre-clinical research in drug development process involves evaluation of drug ‘s safety and efficacy in animal species that conclude to prospective human outcome. The pre-clinical trials also have to acquire approval by corresponding regulatory authorities. The regulatory

[268] *Ibid.* 6

authorities must ensure that trials are conducted in safe and ethical way and would give approval for only those drugs which are confirmed to be safe and effective. ICH has established a basic guideline for technical necessities of acceptable preclinical drug development. The pre-clinical trials can be conducted in two ways: General pharmacology and Toxicology. Pharmacology deals with the pharmacokinetic and pharmacodynamics parameters of drug. It is essential to explore unwanted pharmacological effects in suitable animal models and monitoring them in toxicological studies. Pharmacokinetic studies are very important to make known the safety and efficacy parameters in terms of absorption, distribution, metabolism and excretion. Toxicological studies of the drug can be performed by invitro and in-vivo test which evaluate the toxicological effects of the drug. In-vitro studies can be performed to inspect the direct effects on cell proliferation and phenotype. In-vivo studies can be performed for qualitative and quantitative determination of toxicological effects. As many drugs are species specific, it is essential to select appropriate animal species for toxicity study. In-vivo studies to evaluate pharmacological and toxicological actions, including mode of action, are often used to support the basis of the proposed use of the product in clinical studies.

The Investigational New Drug Process (IND):

Drug developers must file an Investigational New Drug application to FDA before commencement clinical research. In the IND application, developers must include:

- Preclinical and toxicity study data
- Drug manufacturing information
- Clinical research protocols for studies to be conducted
- Previous clinical research data (if any)
- Information about the investigator/ developer

Clinical Research:

Clinical trials are conducted in people (volunteer) and intended to answer specific questions about the safety and efficacy of drugs, vaccines, other therapies, or new methods of using current treatments. Clinical trials follow a specific study protocol that is designed by the researcher or investigator or manufacturer. As the developers design the clinical study, they will consider what they want to complete for each of the different Clinical Research Phases and starts the Investigational New Drug Process (IND), a process they must go through before

clinical research begins. Before a clinical trial begins, researchers review prior information about the drug to develop research questions and objectives.

New Drug Application (NDA):

A New Drug Application (NDA) expresses the full story of a drug molecule. Its purpose is to verify that a drug is safe and effective for its proposed use in the people studied. A drug developer must include all about a drug starting from preclinical data to Phase 3 trials detain the NDA. Developers must include reports on all studies, data, and analysis. Beside with clinical trial outcomes, developers must include:

- Proposed labelling
- Safety updates
- Drug abuse information
- Patent information

Final Drug Approval (FDA):

Once FDA obtains a complete NDA then FDA team of review may require about 6 to 10 months to take a pronouncement on whether to approve the NDA. If Once FDA obtains a incomplete NDA then FDA team of review refuse the NDA. If FDA governs that a drug has been revealed to be safe and effective for its proposed use, it is then essential to work with the developer for upgrade prescribing information. This is denoted as *"labelling."* Labelling precisely defines the basis for approval and direction how to use the drug. Although, remaining issues required to be fixed before the drug to be approved for marketing. In other cases, FDA has need of additional studies. At this situation, the developer can choose whether to continue further develop mentor not. If a developer distresses with an FDA decision, there are tools for official appeal.

Application Of Artificial Intelligence In Drug Discovery And Drug Development

Involvement of AI in the development of a pharmaceutical product from the bench to the bedside can be imagined given that it can aid rational drug design; assist in decision making; determine the right therapy for a patient, including personalized medicines; and manage the clinical data generated and use it for future drug development. *E-VAI* is an analytical and decision-making AI platform developed by Eularis, which uses ML algorithms along with an easy-to-use user interface to create analytical roadmaps based on competitors, key stakeholders, and currently held market share to predict key drivers in sales of pharmaceuticals,

thus helping marketing executives to allocate resources for maximum market share gain, reversing poor sales and enabled them to anticipate where to make investments. The vast chemical space, comprising $>10^{60}$ molecules, fosters the development of a large number of drug molecules. However, the lack of advanced technologies limits the drug development process, making it a time-consuming and expensive task, which can be addressed by using AI.[269] AI can recognize hit and lead compounds, and provide a quicker validation of the drug target and optimization of the drug structure design.[270]

AI and the concerned challenges

Despite its advantages, AI faces some significant data challenges, such as the scale, growth, diversity, and uncertainty of the data. The data sets available for drug development in pharmaceutical companies can involve millions of compounds, and traditional ML tools might not be able to deal with these types of data. Quantitative structure-activity relationship (QSAR)-based computational model can quickly predict large numbers of compounds or simple physicochemical parameters, such as log P or log D. However, these models are some way from the predictions of complex biological properties, such as the efficacy and adverse effects of compounds. In addition, QSAR-based models also face problems such as small training sets, experimental data error in training sets, and lack of experimental validations. To overcome these challenges, recently developed AI approaches, such as DL and relevant modelling studies, can be implemented for safety and efficacy evaluations of drug molecules based on big data modelling and analysis. In 2012, Merck supported a QSAR ML challenge to observe the advantages of DL in the drug discovery process in the pharmaceutical industry. DL models showed significant productivity compared with traditional ML approaches for 15 absorption, distribution, metabolism, excretion, and toxicity (ADMET) data sets of drug candidates.[271] The virtual chemical space is enormous and suggests a geographical map of molecules by illustrating the distributions of molecules and their properties. The idea behind the illustration of chemical space is to collect positional information about molecules within the space to search for bioactive compounds and, thus, virtual screening (VS) helps to select appropriate molecules for further testing. Several chemical spaces are open access, including

[269] Vyas M., Artificial intelligence: the beginning of a new era in pharmacy profession. Asian J. Pharm. 2018; 12:72–76.
[270] Mak K.-K., Pichika M.R., Artificial intelligence in drug development: present status and future prospects, Drug Discovery Today, 2019;24:773–780.
[271] Debleena Paul, Gaurav Sanap, Snehal Shenoy, Dnyaneshwar Kalyane, Kiran Kalia and Rakesh K. Tekade, Artificial Intelligence in Drug Discovery and Development, NATIONAL LIBRARY OF MEDCINE (Jan. 26, 2021), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7577280/

PubChem, ChemBank, DrugBank, and ChemDB. Numerous *in silico* methods to virtual screen compounds from virtual chemical spaces along with structure and ligand-based approaches, provide a better profile analysis, faster elimination of nonlead compounds and selection of drug molecules, with reduced expenditure. Drug design algorithms, such as coulomb matrices and molecular fingerprint recognition, consider the physical, chemical, and toxicological profiles to select a lead compound.

Various parameters, such as predictive models, the similarity of molecules, the molecule generation process, and the application of *in silico* approaches can be used to predict the desired chemical structure of a compound. Pereira presented a new system, DeepVS, for the docking of 40 receptors and 2950 ligands, which showed exceptional performance when 95 000 decoys were tested against these receptors. Another approach applied a multi-objective automated replacement algorithm to optimize the potency profile of a cyclin-dependent kinase-2 inhibitor by assessing its shape similarity, biochemical activity, and physicochemical properties.

AstraZeneca and its first step in AI

AstraZeneca is one of the globally recognised pharmaceutical industry and it is well known for manufacturing medicines for the masses and they are highly involved in Research and Development of new drugs which could be beneficial for the masses. As they are heading to future, they have decided to make certain advancements in their modes of R&D as they are now starting to involve AI into these process. They are generating and have access to more data than ever before. In fact, more data has been created in the past two years than in the entire previous history of the human race. But the value of this data can only be realised if we are able to analyse, interpret and apply it. Right across our R&D, we are using AI to help us decipher this wealth of information with the aim of:

- Gaining a better understanding of the diseases we want to treat
- Identifying new targets for novel medicines
- Recruiting for and designing better clinical trials
- Driving personalised medicine strategies
- Speeding up the way we design, develop and make new drugs

The scientists at AstraZeneca are using AI to help redefine medical science in the quest for new and better ways to discover, test and accelerate the potential medicines of tomorrow. The following sections tell just some of the stories behind how data science and

AI are starting to make a difference to our R&D efforts. They are determined to advance our fundamental understanding of diseases such as cancer, respiratory disease and heart, kidney and metabolic diseases. Because by learning what causes or drives disease, we hope to find new ways to treat, prevent or even cure them.

Through data science and AI, we are uncovering new biological insights with the aim of increasing our R&D productivity. For example, we are using knowledge graphs – networks of contextualised scientific data facts such as genes, proteins, diseases and compounds, and the relationship between them – to give scientists new insights and help overcome cognitive bias. In 2021 we selected the first two AI-generated drug targets into our portfolio, from our collaboration with Benevolent AI in Chronic Kidney Disease and Idiopathic Pulmonary Fibrosis.

Data science and AI can also help us reveal the secrets of disease in our genes. Our Centre for Genomics Research is working to analyse up to two million genomes by 2026. Alongside the gene-editing power of CRISPR to delete every gene in the genome to ask what role those genes play in biology; AstraZeneca scientists are peering inside our genetic make-up to help us better understand disease.

But the huge scale of the genome means these experiments produce a colossal amount of data. Data science and AI are at work helping us analyse and interpret the data more quickly and accurately.

Diamond v. Chakrabarty[272]

Chakrabarty (Plaintiff) developed a new species of bacterium capable of metabolizing hydrocarbons in a manner unknown in naturally occurring organisms using recombinant DNA processes. The microorganisms exhibited great promise in the treatment of oil spills. Plaintiff applied for a patent, which was denied by the Patent Office (Defendant) on the basis that the microorganisms were products of nature and therefore patentable. The Board of Appeals affirmed. The Court of Customs and Patent Appeals reversed, and the United States Supreme Court granted review. The issue of the case was may a live, man-made microorganism be patented?

The apex court was of the opinion that yes, a live, man-made microorganism is a non-naturally occurring composition and therefore may be patented. Resolution of this issue is, regardless of

[272] 447 U.S. 303, 100 S. Ct. 2204 (1980)

its philosophical implications, strictly a matter of statutory construction. The relevant statute here, 35 U.S.C. 101, defines as patentable any new and useful manufacture or composition of matter, among other things. It is a basic rule of construction that words are given their natural, ordinary meanings. There can be little doubt that microorganisms produced by recombinant DNA technology may be said to be manufactured and to be compositions of matter. For purposes of patent law, the fact they are alive is not relevant. Although it is true that naturally-occurring products may not be patented, a genetically-engineered microorganism is not naturally occurring. While this Court recognizes that recombinant DNA technology is a controversial field, it is ill-equipped to balance the competing values and interests manifested therein; this is a task for Congress. Since the patent laws clearly include materials such as are at issue here within their scope, and no specific law exists to exclude it, the only appropriate holding is that recombinant DNA-produced microorganisms are patentable.

Conclusion

We all are very well-aware of the fact that in the pharmaceutical industry, most important phase is considered to be the drug discovery and drug development. This reason behind this being that the leading pharmaceutical business industry is very much dedicated in consistent research and development of new drugs so that it would help in treating the patients who are suffering with certain incurable diseases which do not have any medicine as of now. Development of a medicine takes a considerable period of time. It is not an expedite process which would take just 4-5 years, in order to come up with new medicines it involves a long period of time for R&D and after that the medicine are being tested on different levels and on different organisms so that the scientists could determine about the efficacy of the medicine and the toxicity of that particular medicine.

As the times have passed by and we are now heading to our future, this industry has also started to move ahead with time. There is a revolutionary advancement in the manufacturing industry taking place, and by manufacturing industry it would include each and every industry either it be automobiles, gadgets etc. Somewhere or the other we all have heard the term Artificial Intelligence, and this has started to make its way in pharmaceutical industry also. Certain leading pharmaceutical industries have started investing in AI which would be helpful for them in R&D of their medicines. Undoubtedly, if the AI is involved in the process of drug discovery and drug development, the process will save a lot of time and human labour and also they will help in providing a very precise way of R&D which at times human hands could also cannot

achieve. But, with every pros, there comes a con. Considering the situation in India, AI will take a lot of time to flourish in a proper way. Artificial Intelligence makes progress in three phases, each of these phases are named as;

- Artificial Narrow Intelligence (ANI)
- Artificial General Intelligence (AGI)
- Artificial Super Intelligence (ASI)

Taking into consideration the Indian scenario, we are only the very first phase i.e., Artificial Narrow Intelligence in which we are just able to get a taste of what actually is an AI, we are actually not using AI in a proper way. In this phase we are yet to determine the legality and personhood of the Artificial Intelligence. We still are not clear on this issue that what would happen if there is any fault on the part of the AI machines. Taking a drug from idea to the clinic is a long diverse process, costing over 2.6 billion dollars, and takes over a decade to develop a cancer therapeutic. This is primarily due to high numbers of candidate drugs failing at late drug development stages. Advancements in AI are continually displaying the possibility of rapid low-cost drug discovery and development. As we make our way through the 2020s, it is evident the drug discovery and development will be permanently shaped by AI. Therefore, AI can very well shape the future of pharmaceutical industry.

CHANAKYA LAW REVIEW (CLR)

VOL. IV (ISSUE II), JULY-DEC, 2023, pp.106-118

THE PROGRESSIVE MOVEMENT AND CHALLENGES IN IMPLEMENTATION OF RTE ACT, 2009

Hemlata Singh[273] *& Dr. Mithilesh Kumar Yadav*[274]

Abstract

Education plays an indispensable role in the growth of a country and its citizen. Education acts as medicine for social evils and prejudices which afflict the country. Primary education is the foundation on which the development of a country and every citizen as whole depend. To strength the roots of elementary education in India, on 4th Aug 2009, Indian government approved a landmark legislation in parliament, the right of children to get free and compulsory education (RTE)Act 2009[275] *which entered prevalence and communal from 1April 2010. This law guarantees the free and required education for all children of age group 6 to 14, irrespective of their sex, religion, caste-creed, and family income. According to section 12(1)(c) of RTE Act, all schools- aided, unaided, and private special schools are forced to ensure 25% of their total enrollment seats for economically weaker students (EWS) and disadvantage group (DG)*[276] *students with their fees on the government shoulders. After the enactment of Act, with increase in enrollment of such students in private schools, many serious challenges have been faced in implementation of the Act. This paper deals with an attempt to look at RTE act 2009, what are challenges in implementation of this act especially in private unaided school, to understand what is happening at the ground level and what can be done.*

Keywords: RTE Act 2009, Section 12(1)(c), Economically Weaker Students (EWS), DG

Introduction

[273] Research Scholar, IIMT University, Meerut
[274] Assistant Professor, IIMT University, Meerut.
[275] Right of children to free and compulsory education Act 2009 (New Delhi MHRD), 2009.
[276] Disadvantage group includes Scheduled Cast, Scheduled tribe, non-creamy OBC, transgender, Disable and HIV/AIDS victims.

Huge number of revolutions, struggles, and sacrifices results freedom of India, and then there was need of strong constitution. Under the guidance of Dr. B.R Ambedkar[277], father of Indian constitution, final draft of Indian constitution had been framed and came in to force from 26th jan1950. After independence the Indian government faced various challenges such as to improve infrastructure, to be economically strong and to enhance the standards of quality education. The economic growth and development of a country relies on the standards of the basic education system. The education system paves way for creating new culture and acts as trapper for culture of the nation. Education is a significant instrument for empowering an individual to stand on their own feet. A famous educationist John Dewey, one of the founding fathers of sociology Emile Durkheim and many social activists discern education provides a path for social transformation and disengagement of an individual and of a community.

During the struggle for freedom of India, Jyotiba Phule in the year 1882, put provisions in front of Sir William Hunter, head of Indian education commission and demanded that state should take responsibilities to deliver free and compulsory education for all children until the age of 12. Afterwards in, G. Krishna presented an individual bill in the Imperial legislative assembly in the year 1991, which also demanded, free and compulsory education. A welfare state, India has implemented several progressive executive orders, policy decision and legislation from time to time. Post-independence, in the article 45 of Constitution of India, the list of "**Directive principles of the state policy"**[278] which interpret that all children, the age of 0 to 14 have the right to free and compulsory education provided by the states, within 10years of inception of Indian constitution. However, the goal to achieve universal free and compulsory education was not attained by states even after five decades of independence.

Sarva Shiksha Abhiyan (SSA) program[279] has been launched by the Indian government to achieve the Millenium Development Goals (MDGs) as set by UN sponsored Millenium declaration. In the year 2002, 86th amendment, included in 3rd chapter of Indian constitution was adopted with uninsured cheers in parliament. A new Article 21-A was inserted which mandates the provision of free and obligatory education as fundamental right without exclusion of any child from ages 6-14. Subsequently, the President signed the bill on Aug 26, 2009

[277] Dr.B.R Ambedkar accepted the amendment proposal that was given by Mr.Maitra, suggesting the deletion of the words "every citizen is entitled to free primary education". After amendment every child shall be kept in an educational institution under training until the child of 14 years.
[278] Indian Constitution at Art 45.
[279] SSA-Sarva Shiksha Abhiyan launched in 2001-02 in partnership with local self-governments and state governments and is a comprehensive and integrated flagship programme to attain universal elementary education.

granting children the right to free and compulsory education. This Act came into existence from 1st April 2010 and India became one of the 135 nations that declared the right to education to be a fundamental human right. This Act is found as one of the most revolutionary legal techniques by which Indian government guarantees every youngster between the ages of six and fourteen entitled to get free public education.

According to RTE Act section 12(1)(c), all schools including private ones are required to set aside 25% of their registered seats for children belongs to economically underprivileged and disadvantaged groups between age 6 and 14 for endeavouring the equity and quality education[280]. The introduction of privatization and globalization policies played a crucial role in the development of various sectors in the world. The educational framework throughout the world has been changed with initiation of the policies of privatization and globalization. Even in India, the education system is found to be affected in several fields such as violation of RTE, enhancement in the cost of education, exclusion of children of marginal communities and disadvantaged groups, inequalities in education, the primary motive of private educational institutions is to made profit not to endeavour valuable education.

Most of data presented in this paper is taken from official website and government agencies. This article is divided in to three different segments; the first part discusses the historic development of Indian education system and the constitutional provisions providing free and compulsory education. The second part mainly focus on the key features of RTE Act 2009 and challenges in its implementation. The third part of the article suggest recommendations for better implementation of RTE Act 2009.

A Progressive Journey to RTE Act 2009:

In India, during the ancient and medieval periods, the concept of compulsory education to all was not prevalent and the government or king was not directly responsible for providing education. During these periods royal nobility supported educational institutions. Many social reformers and social activists thought to deliver the concept of education to all. Prior to independence, the parliament instructed the East India Company to assume responsibilities for Indian citizens education under the terms of 1813 Charter Act[281]. This was the first

[280] The respective state rules for understanding the income criterion for classifying economically weaker section and class of people who are classified under the disadvantaged category, under the RTE Act.
[281] This act directed the East India company to spend 1 lakh rupees on the education of Indian to encourage toward study of literature and science in India.

breakthrough related to right of education where it was stated the availability of public revenues for arrangement of education system.

In 1838, **William Adam** was appointed for enforcement of compulsory basic education and to report on suffrage education of the people of Bengal, Bihar, Orissa. Following the passage of England's compulsory education in 1870, a demand of enforcement of this Act was raised in all British colonies and in rest of India. The **first Hunter education commission** (1882) also known as Indian education commission led by William Hunter was given the task of analyzing the state of elementary education in British territory at this moment and making recommendations for how to make it better and more comprehensive. **Dadabhai Naoroji and Jyotiba Phule** demanded to make laws for primary education to be compulsory. In 1882, J. Phule cocked the theme of right to education, however this demand was strongly opposed by British Raj, Nawabs, Landowners and upper class. In 1884, the deputy education, **Shri Shastri Ji** also perceived the initiative of compulsory education. In 1891, a proposal similar to the demand of J. Phule proposed free and compulsory education for all, in the Imperial legislative assembly but the governing British and upper class rejected it once more. The positive impact of these demands come out when prince of Baroda **Sir Sahaji Rao Gaikwad** introduced the scheme for free and mandatory education program in his state in 1896. Later in 1906, primary education was made compulsory for boys of age between 6 to 12 years and for girls of age 6 to 10 years throughout the state. The Indian congress called for primary education to be free and required for both boys and girls during that same session all over the country. In 1911, **Gokhle** presented a private bill and demanded to make better laws for extension of basic education in India.

After the enforcement of Government of India Act in 1919, the responsibility to control the elementary education was given to the Indian ministers and more work has been done towards the path of compulsory education in the decade 1917-1927. When the congress came in political power in seven states in 1937, **Wardha scheme** of Ghandhi ji for basic education was an important step toward making basic education mandatory. The **Kher committee** in 1938 recommended the universalization of elementary education as Sergent plan (1944) recommended the provisions requiring all children aged 6 to14 to get free education. Kher committee suggestions served as foundation for article 45 of the Indian constitution's Directive Principles of state policy. Later Dr. B.R Ambedkar brought up the subject of fundamental right to education.

In 1966, **Kothari commission** recommended for neighborhood school and common school system for development of elementary education in India. NPE, 1968 also advised for compulsory basic education. The Indian government adopted the proposal on the national policy for children in 1974 to achieve outlined in the UN declaration on the rights of child. **The Acharya Ramamurti** committee (1990) officially first time recommended for including right to education as fundamental right. Ramamurti committee (1990), 73rd and 74th amendment Act (1992) and UN declaration on rights of the child (1992) recommended Gram Panchayat to take responsibility of compulsory primary education. In 1991, the privatization of education in India affected by implementation of privatization, liberalization, and globalization policies. The case of "**Mohini Jain vs state of Karnataka 1992, 3 SCC 666"**,[282] often known as the capitation fee case, marked the first instance in which the supreme court acknowledged the right to education as substantive right. According to the Supreme Court, a citizen's right to education is guaranteed by article 21 of the constitution and cannot be restricted by paying a higher capitation tax. The right to life is the foundation for the right to education, and one cannot assess someone's dignity in isolation from their right to education. In a different case, "**Unnikrishnan Vs. State of Andhra Pradesh (1993), 1 SCC 645"**,[283] the Supreme Court limited the scope of the basic right to education by declaring that it is only granted to children up to the age of 14. The implementation of secondary and higher education will be contingent upon the state's development and economic capacity limitation. There are several provisions in part IV, relating to the right to education which pellucidly speak of it.

- **Article 41** states that "the state shall make effective provisions for implementing and securing the rights to education, right to work and to public assistance in unemployment cases within limits of its economic capacity and development".
- **Article 45** state that within 10 years of the Indian constitution's adoption, the state shall work to offer early childcare as well as free and mandatory education for children ages six to fourteen.
- **Article 46** promotes the states to make the educational, economical and welfare policies for people of weaker sections particularly Scheduled Tribes (ST) and Scheduled Castes (SC) to shield them from exploitation and social injustice.

[282] Mohini Jain Vs. State of Karnataka AIR1992, 3 SCC 666 (India).
[283] J.P Unni Krishnan Vs. State of Andhra Pradesh (1993) 1 SCC 645 (India).

In the light of these three articles 41, 45 and 46, the parameter of right to education will have to be determine[284]. One of the signposts was the 86th constitutional amendment act2002 which added a new Article 21A to the document guaranteeing all children between the ages of 6 and 14 the basic right to free and compulsory education. The second drive was the emphasis on education of a 2% levy on all taxes in 2004 to raise more money for education. The ministry of education reported that in 2005, 57 years after gaining political independence, school enrolment had finally reached 100% for the first time. In 2005, the 93rd constitutional amendment act introduced Article 15(5) granting the state-the authority to make any special provision regarding the admission of citizen of scheduled cast and tribes to private unaided and aided educational institutions, or for the development of socially and educationally backward classes of people. The Supreme Court raised the issue and delivered the notices about the obligations to provide education for all children from aged 6 to 14, which faced by state and central government.

However, the central and state governments launched a number of policies and legislation to fulfil the provisions regarding the free and compulsory education. A crucial breakthrough came when the RTE Act 2009, which guaranteed children's access to free and compulsory education, was approved by the Indian parliament on August 4, 2009 and it became operative on April 1, 2010. This Act empowered to endeavor the free and obligatory education for every child of age group between 6 and 14. The important section 12 (1) (c) of RTE Act 2009 ensure to reserve the 25% of total enrolled seats for the children of disadvantage groups (DG) and economically weaker students (EWS) in the educational institutions including private unaided[285] and aided institutions.

Key Features of RTE Act 2009:

- Section 14 of RTE remarked that admission of any child cannot be denied in absence of his/her birth certificate or transfer certificate.
- The No Detention policy[286], established by section 16 of the RTE Act, prohibits any kid up to the eighth grade from being held in any class or expelled until they have completed

[284] Society for unaided private schools of Rajasthan v Union of India (2012) 6 SCC 1 (India) at 256 ('articles 41,45 and 46 of Part IV of the constitution cast the duty and constitutional obligations on the state under article 21-A')

[285] The school operated by an individual and does not receive any financial assistance from either government or the local authority.

[286] No-Detention policy, enshrined in RTE Act 2009 groundbreaking concept which prevents the detention or failure of students to class 8.

their elementary education. However, from the academic year 2018, MHRD has decided to remove the provision of No Detention Policy.

- Section 17 of the RTE prohibits any kind of emotional harassment or physical punishment.
- RTE also banned (i) the test or interview procedure for admission of children (ii) the private tuition by government teacher (iii) conducting the unrecognized school (iv) any type of donation or capitation fee[287].
- The most radical clause of RTE Act's section 12(1)(c) which ensure reservation of 25% seats of their class strength for the youngsters from socially, disadvantage groups and economically weaker section through random selection process in private aided and unaided school. No seat can be vacant in this quota. These children's fees will be reimbursed by the state, meaning that the state will support them at the average cost per student in government schools. This section also ensures that private schools must take liabilities to fulfill this important social goal.
- RTE focused on Pupil Teacher Ratio (PTR)[288]. It mandated that at primary level, teachers should be appointed for every thirty children (PTR should be 30:1) and for thirty-five children at upper primary level (PTR should be 35:1).
- It also lays down the norms and standards related with, building infrastructural facilities including safe drinking water, separate toilets for girls and boys, playground with boundary wall or fencing, school-working days, teacher working hours, existing curriculum, evaluation, inclusive aspects, school management committees (SMCs) and role of community.
- This act stipulated that neighborhood schools must be located within a radius of one kilometer for primary level pupils (class I through V) and three kilometers for upper primary level students (class VI through VIII).
- If a school fails to comply with the Act's standards and norms within three years, it will not be permitted to continue operating. It will be necessary for all unrecognized schools to apply for recognition. If the schools are still operating, they would have to pay a punishment of Rs 10,000 per day for failing to meet the norms and requirements.

[287] Capitation fee refers to transaction in which an organisation that provides educational services collect a fee higher than that approved by regulatory norms.
[288] (AISHE Survey) Pupil Teacher Ratio is average number of students per teacher at a specific level of education in given school-year.

- All teachers in schools must subscribe to the training norms and standards of minimum credentials required by an academic body within 5 years of passing the Act.
- This Act mandates the recruitment of huge no. of teachers (approx. 15 lacs more teachers) and made a provision of training for teachers as well as teacher educators. So that para teachers should be banned.
- It offers opportunities for curricular development that guarantee a child's holistic growth and liberate them from fear and anxiety by creating a welcoming learning atmosphere.
- Section 4 of the RTE Act states that older student or the children who dropouts the school, can accept a class that is age appropriate to manage the squandered years to enable them to be par with their peers by receiving special training.

Challenges in implementation of RTE:

- Finance is a vital challenge in the implementation of the RTE Act. Without sufficient fund, the basic necessary infrastructure facilities as laid down in the Act, such as access to drinking water, availability of playground, separate toilets for girls and boys, implementation of pupil-teacher ratio, and quality teacher training is not possible. States like Orissa and Bihar require financial assistance from the federal government. In the current scenario, it is going to extremely challenging to provide the basic infrastructure with growth in the quantity of educators and learners.
- Lack of education among the parents/guardians of children is a big issue in the implementation of RTE Act, because doing so makes it more difficult for the school management committee (SMCs) to be formed and oversee the school growth plans, teacher accountability and leaves the stakeholders unaware regarding the provisions of RTE act.
- Enforcement of 25% reservation of seats in private/public unaided schools for children of underprivileged group and disadvantage group is another big challenge. The state government will refund these students' tuition fees at the government rate. The amount that government reimburses for education, however, differs significantly from the cost of education for each child who will finish this piece of deficit. The provision under article 12(1)(c) leads other questions like what about fee charged by Elite schools other than tuition fee under different heads such as expenditure on uniforms, unnecessary textbooks, stationary, or in the name of annual day, sports day, picnic after admission

of 25% quota students? Can the poor students pay the huge amount under different heads other than the tuition fee? The more chances are that the parents feel scared to send their children to private schools. What about the poor students admitted in private school after 8th class because this facility has been provided for the children of age 6-14? What about the donation demanded by these schools.

- Lack of coordination among different ministries, child right commission, local bodies, and police regarding implementation of RTE is one of the vital hurdles. The implementing agency does not penalize properly. So, times hamper occurs in taking decision for implementation. If the authorities fail to provide the right to elementary education, there is no provision of specific penalty.
- Child labor is another big challenge as many children start laboring to manage food for their family and drop out the school without completing primary education.
- One major obstacle to the implementation of RTE is the general lack of knowledge among teachers and parents regarding its requirements particularly among parents who are members of the poor and economically weaker sections of society.
- Despite having a high pupil-teacher ratio in schools, the deployment of teachers on the places other than academic works such as in decennial census, involving in local, legislative elections and disaster relief is another big challenge.
- The fact that implication of "No Detention Policy" is good step to away the children from stress and anxiety but the education system should take the responsibility to prepare them to handle any kind of pressure, stress or anxiety and should provide path for successful life. Automatic passage of every student to next class can promote lethargy and deception towards their studies among the students and slackness among teachers. Thus, the children evaluation is another challenge in all round development as our education system is predominantly focused on scholastic aspects.
- For children aged 6 to 14 the Act offers free and required education, but what about youngsters aged 0 to 6 and 15 to 18? even so India has ratified the United Nation charter which stipulates that children between the age of 0 and 18 receive free and compulsory education.
- Many school administrations continue to persist in submitting the birth certificates, transfer certificates and other documents which violates RTE act, as though these documents are imperative for regime of schools. It results either in dropping out of school or leaving the parents to cope with the school system and a no. of procedures.

- Most private/public schools even some government schools have flouted the provisions by continuing to conduct test or interview procedure for admission of children and explode them in favor of giving priorities to meritorious students. These screening test procedures create discrimination, banishment and decline equal opportunities. So, there is need to conceive a transparent procedure for inclusion.
- Although mental harassment and corporal punishment to the students has been banned by RTE, there still complaints of physical punishment are registered by the parents/guardians which is the breach of provisions of RTE Act.
- The act prohibits private tuition by government teachers, but it is observed that tuition is very common, and a no. of students are taking tuition by their schoolteachers violating RTE. Such teachers do not give their hundred percent to students in classrooms.
- This act specifies that children should be admitted to class according to age to save wasted years but there is no special training or bridge course to train late admitted students to adjust the admitted class. To overcome this challenge there is need of extra efforts by teachers which is injustice with low salaried and overloaded teachers.
- One of the biggest obstacles to the RTE Act's implementation is the instructor's lack of training and proper knowledge of it. Our elementary education system already suffers from a shortage of qualified and trained teachers and huge no. of teachers are untrained. It is herculean task to get qualified and trained teacher within the period as stipulated by RTE norms. On demand of more teachers large no. of contractual teachers or para teachers have been appointed, but these teachers have diluted the teaching quality and identity of the teacher as professional. Without providing any details on how the RTE Act will be put into practice, most instructors said that it enhances their obligations.
- The RTE Act is for the youngster of aged 6 to 14 years studying in class I to VIII, there is no standard definition of teaching eligibility for the teachers for class I to VIII because the teachers trained for primary classes are only eligible to teach classes from 1st to 5th and teachers who are trained to teach secondary classes are eligible only for middle classes from V to VIII.
- The inclusion of minority schools in this bill conflict with article 30 of Indian constitution as it permits minorities to set up educational institution independently.

Recommendations to overcome the challenges in implementation of RTE:

After enactment of RTE Act, versatile challenges have been faced in context with its smooth implementation. The recommendations, need to be made to nullify the challenges in the implementation of this Act are as follows.

- The implementing agencies should take responsibility to conduct the awareness programs to educate the untrained teachers and the parents /guardians especially those of the target groups about the significant RTE Act provisions.
- There is a strong need to introduce special training and bridge courses for late admitted students to the class, according to their age, to enable them at par with their peers on learning scales.
- There should be provision under the RTE Act for children of the age 0-18 years to get free and compulsory education.
- To build a proper panel or coordination among the implementing agencies.
- To provide sufficient infrastructure facilities such as clean and separate toilets for girls, safe drinking water, more classrooms with proper safety, computers for students, sufficient furniture for students and teachers.
- To endeavor the textbooks in sufficient number in time.
- To manage the no. of sections of a class and the pupil-teacher ratio to the desired level of 30:1 at primary level and 35:1 at upper primary level, there should be recruitment of large no. of qualified and trained teachers.
- To remove the complaints of corporal punishment given to the students which is the breach of RTE.
- To guarantee a 25% seats reservation in private and public schools for pupils in the EWS and DG groups.
- To check the donation demanded by the school at time of admission.
- To employ well trained and qualified teachers and avoid deploying them at non-educational works.
- The assessment of schools should be on a quantitative and qualitative basis after regular and proper inspection by the concerned officer and check strictly the enforcement of provisions of RTE Act. There should be provision of punishment if RTE is violated.
- To minimize the no. of children who drop out the school whatever the reason may be and protect the child from laboring.
- Centralizing learning based on activity to adjourn the students in the schools and their potential can be channelized properly.

- To allocate sufficient funds for education to fulfill the indebtedness of panchayat (section 9 of RTE Act).
- To use teaching aids and appropriate methods of teaching to generate the interest of children in studying.
- RTE Act preview should include children with special needs (CWSN)[289].
- To ensure the role of local government in the development of schools.
- To provide the special training for teachers to prepare them potentially viable to teach the children as laid down under RTE and to develop professionally them to away from the act of tuition. The standards of the schools can be improved by providing good quality education.
- To check the corruption involved in implementation of policies regarding elementary education and to avoid nepotism in education sector.
- To check the absenteeism of teachers strictly and to focus on curriculum that should be vocational on the line of elementary education.
- To supply the professional needed to resolve issues with school development plans (SDPs) and school management committees (SMCs)[290].
- To check the extra burden on the shoulders of parents/guardians of children EWS and DG to pay in the name of unnecessary textbooks, picnics, and annual day in public/private aided or unaided schools.

Conclusion:

According to the study's findings, education is the single most powerful factor that can alter a person's or a nation's fate and is essential to a citizen's socioeconomic progress in any nation. In India pre-independence and post-independence, various provisions and policies have been launched to strength the roots of elementary education. The RTE act is an effective tool to guarantee every child, aged 6 to 14, the right to free and compulsory education, regardless of gender, caste, creed, or color. After the enactment of RTE Act2009, the enrollment of children in the schools has maximized, however there was need to provide good quality education by

[289] CWSN-children with special needs, which are young adolescents and determined to need exceptional care and necessities.
[290] The school management committee is responsible to construct or to form school development plans and members of committee have major responsibility to monitor the utilization of government grants and funds along with whole school environment.

smooth implementation. With the increase in enrollment of children, a lot of challenges have been faced in the RTE Act's implementation.

Teachers are frontline providers of education services and act as mentors who can give the right shape to children, however this study reveals that few no. of teachers and principals are aware of the RTE Act's provisions. RTE's primary goals are not being achieved. Teachers who are heavily involved in the RTE act's implementation are subject to explicit guidelines. This study focused on special training of teacher time to time, on providing the material required for teaching. In present study the infrastructure facility like clean classrooms, clean separate toilets for girls and safe drinking water, is pointed as major challenge. The RTE Act has been in effect for 14 years, but the primary schools still need to make progress towards providing all students with access to high quality education.

xxxxxxxxxxxxxxxxxx