



INTERNATIONAL LAW
JOURNAL

**WHITE BLACK
LEGAL LAW
JOURNAL**
**ISSN: 2581-
8503**

Peer - Reviewed & Refereed Journal

The Law Journal strives to provide a platform for discussion of International as well as National Developments in the Field of Law.

WWW.WHITEBLACKLEGAL.CO.IN

DISCLAIMER

No part of this publication may be reproduced or copied in any form by any means without prior written permission of Editor-in-chief of White Black Legal – The Law Journal. The Editorial Team of White Black Legal holds the copyright to all articles contributed to this publication. The views expressed in this publication are purely personal opinions of the authors and do not reflect the views of the Editorial Team of White Black Legal. Though all efforts are made to ensure the accuracy and correctness of the information published, White Black Legal shall not be responsible for any errors caused due to oversight or otherwise.

WHITE BLACK
LEGAL

EDITORIAL **TEAM**

Raju Narayana Swamy (IAS) Indian Administrative Service officer



Dr. Raju Narayana Swamy popularly known as Kerala's Anti Corruption Crusader is the All India Topper of the 1991 batch of the IAS and is currently posted as Principal Secretary to the Government of Kerala. He has earned many accolades as he hit against the political-bureaucrat corruption nexus in India. Dr Swamy holds a B.Tech in Computer Science and Engineering from the IIT Madras and a Ph. D. in Cyber Law from Gujarat National Law University . He also has an LLM (Pro) (with specialization in IPR) as well as three PG Diplomas from the National Law University, Delhi- one in Urban Environmental Management and Law, another in Environmental Law and Policy and a third one in Tourism and Environmental Law. He also holds a post-graduate diploma in IPR from the National Law School, Bengaluru and diploma in Public

a professional Procurement from the World Bank.

Dr. R. K. Upadhyay

Dr. R. K. Upadhyay is Registrar, University of Kota (Raj.), Dr Upadhyay obtained LLB, LLM degrees from Banaras Hindu University & Phd from university of Kota.He has succesfully completed UGC sponsored M.R.P for the work in the ares of the various prisoners reforms in the state of the Rajasthan.



Senior Editor

Dr. Neha Mishra



Dr. Neha Mishra is Associate Professor & Associate Dean (Scholarships) in Jindal Global Law School, OP Jindal Global University. She was awarded both her PhD degree and Associate Professor & Associate Dean M.A.; LL.B. (University of Delhi); LL.M.; Ph.D. (NLSIU, Bangalore) LLM from National Law School of India University, Bengaluru; she did her LL.B. from Faculty of Law, Delhi University as well as M.A. and B.A. from Hindu College and DCAC from DU respectively. Neha has been a Visiting Fellow, School of Social Work, Michigan State University, 2016 and invited speaker Panelist at Global Conference, Whitney R. Harris World Law Institute, Washington University in St.Louis, 2015.

Ms. Sumiti Ahuja

Ms. Sumiti Ahuja, Assistant Professor, Faculty of Law, University of Delhi, Ms. Sumiti Ahuja completed her LL.M. from the Indian Law Institute with specialization in Criminal Law and Corporate Law, and has over nine years of teaching experience. She has done her LL.B. from the Faculty of Law, University of Delhi. She is currently pursuing Ph.D. in the area of Forensics and Law. Prior to joining the teaching profession, she has worked as Research Assistant for projects funded by different agencies of Govt. of India. She has developed various audio-video teaching modules under UGC e-PG Pathshala programme in the area of Criminology, under the aegis of an MHRD Project. Her areas of interest are Criminal Law, Law of Evidence, Interpretation of Statutes, and Clinical Legal Education.



Dr. Navtika Singh Nautiyal

Dr. Navtika Singh Nautiyal presently working as an Assistant Professor in School of law, Forensic Justice and Policy studies at National Forensic Sciences University, Gandhinagar, Gujarat. She has 9 years of Teaching and Research Experience. She has completed her Philosophy of Doctorate in 'Intercountry adoption laws from Uttranchal University, Dehradun' and LLM from Indian Law Institute, New Delhi.

Dr. Rinu Saraswat



Associate Professor at School of Law, Apex University, Jaipur,
M.A, LL.M, Ph.D,

Dr. Rinu have 5 yrs of teaching experience in renowned institutions like Jagannath University and Apex University. Participated in more than 20 national and international seminars and conferences and 5 workshops and training programmes.

Dr. Nitesh Saraswat

E.MBA, LL.M, Ph.D, PGDSAPM

Currently working as Assistant Professor at Law Centre II, Faculty of Law, University of Delhi. Dr. Nitesh have 14 years of Teaching, Administrative and research experience in Renowned Institutions like Amity University, Tata Institute of Social Sciences, Jai Narain Vyas University Jodhpur, Jagannath University and Nirma University.

More than 25 Publications in renowned National and International Journals and has authored a Text book on Cr.P.C and Juvenile Delinquency law.



Subhrajit Chanda



BBA. LL.B. (Hons.) (Amity University, Rajasthan); LL. M. (UPES, Dehradun) (Nottingham Trent University, UK); Ph.D. Candidate (G.D. Goenka University)

Subhrajit did his LL.M. in Sports Law, from Nottingham Trent University of United Kingdoms, with international scholarship provided by university; he has also completed another LL.M. in Energy Law from University of Petroleum and Energy Studies, India. He did his B.B.A.LL.B. (Hons.) focussing on International Trade Law.

ABOUT US

WHITE BLACK LEGAL is an open access, peer-reviewed and refereed journal providededicated to express views on topical legal issues, thereby generating a cross current of ideas on emerging matters. This platform shall also ignite the initiative and desire of young law students to contribute in the field of law. The erudite response of legal luminaries shall be solicited to enable readers to explore challenges that lie before law makers, lawyers and the society at large, in the event of the ever changing social, economic and technological scenario.

With this thought, we hereby present to you

"SURGICAL CASTRATION AS PUNISHMENT: EVALUATING ITS CONFORMITY THROUGH HUMAN RIGHTS LENSE"

**AUTHORED BY – RISHABH,
KM. SRISHTI BHARDWAJ & DEVIKA SINGH**

Abstract:

The recent enactment of law in Louisiana, state in Deep south- and south-central regions of the United States allowed surgical castration as punishment for minor child rapists has sparked debates within the international legal community. Scholars argue that such measures serve as deterrents against future crimes, aligning with utilitarian principles. However, human rights groups have voiced concerns regarding the ethical implications and potential violations of Human rights.

This article delves into the multifaceted issues surrounding surgical castration from both legal and ethical standpoints. It traces the historical origins of castration practices and examines the contemporary context of its application as a punitive measure. Through analysis of international human rights instruments such as the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the article highlights the tension between punishment and the protection of individual rights.

Central to the discussion is the ethical dilemma surrounding the consent of offenders to undergo surgical castration. While proponents argue that such consent is voluntary, closer scrutiny reveals the coercive nature of the circumstances, as offenders may perceive castration as a means to avoid lifelong imprisonment. Drawing upon legal precedents and ethical principles, the article questions the justifiability of allowing individuals to consent to self-mutilation as an alternative of imprisonment.

Moreover, the article critically assesses the efficacy of surgical castration as a deterrent and its ability to address the underlying causes of sexual offenses. By examining case studies and expert opinions, it underscores the complexity of sexual behaviour and the limitations of castration as a solution.

In conclusion, the article presents a nuanced exploration of the legal and ethical dimensions of surgical castration, emphasizing the need for a holistic approach to addressing sexual offenses that prioritizes rehabilitation and respect for human dignity.

Introduction

The republic government of Louisiana become the first state to implement surgical castration as the mode of punishment in certain sex crimes committed against minors. The law will go into effect on 01 August 2024. Along with Louisiana several other countries and states allow surgical castration as the mode of punishment like Czech Republic, Madagascar and state in Nigeria. The main target of the law is to punish the offenders guilty of aggravated sex crimes, including rape, incest or molestation committed against the children below the age of 13. The punishment will be awarded on the discretion of the Judge but at the same time, government advocated for the law by developing deterrence in the mind of potential offender by imposing such punishment.¹ As being advocated by the utilitarians and consequentialists, the deterrent theory of punishment focuses on creating deterrence in the mind of criminals (stop them from committing further crime) and in general public also.² The step by the government has been criticized by the various human rights group and put up several issues regarding the same. In this article the researcher tries to find out how human rights are affected by this move of the government, what are the types and consequences of castration, castration as an alternative of imprisonment, and finally the legal and ethical issues involved in the consent of offender.

¹ “Louisiana is now the first state to allow surgical castration for sex crimes against minors,” NPR, July 1, 2024, <https://www.npr.org/2024/07/01/nx-s1-5020686/louisiana-new-surgical-castration-law#:~:text=Louisiana%20is%20now%20the%20first%20state%20to%20allow,sex%20crimes%20against%20minors%20to%20undergo%20surgical%20castration>.

² Karim and E, “The Critical Evaluation of the Different Theories of Punishment” *Jahangirnagar Review* 471-489 (2020).

Chemical and surgical castration

The concept of the castration can be traced back to 4000 year ago from Egyptian mythology to 21st century in Madagascar.³ From time to time the purpose of castration has been varied as per the needs like the royal guards, choir singers etc. has undergone castration to increase their efficiency whereas in the present era it is proposed to be used as a method of punishment for the culprit of minor rapist.⁴ The word “castration” originated from the Latin word "castrare," which means "to cut off." Usually, this practice was performed before attaining puberty which led to underdevelopment of sex organ which prevent sexual desires and behaviour, castration can also be performed after attaining the puberty which leads in the same consequences.⁵ Castration is practiced in two ways i.e. chemical castration and surgical castration. Chemical castration is performed by using drugs which significantly lead to lowering the testosterone level, which prevents sexual desires,⁶ whereas the surgical castration performed by specialist by removal of genitalia (i.e. male sexual organ)⁷

Human Right perspective on surgical castration Punishment

Internationally there are various declaration, covenant, treaties etc. for the recognition and the protection of the human rights irrespective of their origin. Universal Declaration of Human Rights, spells out the basic rights that all human beings should avail. More explicitly, **Article 5** of UDHR states,

*“no one shall be subjected to torture or to cruel, inhumane or degrading treatment or punishment”*⁸

From the article above a debate arises regarding the validity of surgical castration with respect to human rights. Likewise, International covenant on civil and political rights secures to members of

³ Abraham Morgentaler and Han M Hanafy, “The Testis, Eunuchs, and Testosterone: A Historical Review Over the Ages and Around the World” 12 *Sexual Medicine Reviews* 199–209 (2023).

⁴ O’connor, L, Z. Werner, *et.al.*, “More than a Nick: Male Surgical Castration Throughout History” 21 *The Journal of Sexual Medicine* (2024).

⁵ Britannica, The Editors of Encyclopaedia. "castration". Encyclopedia Britannica, 18 Oct. 2023, available at: <https://www.britannica.com/topic/castration>. (last visited on 23 February 2024).

⁶ Hudi Winarso, Abraham Arwinta Sakti, *et.al.*, ““Chemical Castration in Perpetrators of Sexual Violence.”” 5 *Jurnal Indonesia Sosial Teknologi* (2024).

⁷ Jean D. Wilson, Claus Roehrborn, *et.al.*, “Long-Term Consequences of Castration in Men: Lessons from the Skoptzy and the Eunuchs of the Chinese and Ottoman Courts” 84 *The Journal of Clinical Endocrinology & Metabolism* 4324–4331 (1999).

⁸ United Nations, Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217 (III) (Dec. 10, 1948).

human family “the inherent dignity, freedom, justice and peace in the world” more specifically **Article 7** of ICCPR states

*“No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.”*⁹

From the provision mentioned hereinbefore, it is clear that being a human, one has fundamental rights which can't be waived or overlooked in awarding punishment. Surgical castration overlooks the autonomy of an individual, as it impacts physically as well as psychologically which have lifelong effect on the individual leaving no option of reformation before the perpetrator. Though this practice deters the child sex offender and protect the society from such crimes, there has been cruel, inhumane and derogatory treatment of an individual.

Additionally, having regard to **Article 5** of UDHR and **Article 7** of ICCPR, “Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment” was adopted in, 1984¹⁰ and **Article 1** of convention states the definition of torture as-

“For the purpose of this Declaration, torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted by or at the instigation of a public official on a person for such purposes as obtaining from him or a third person information or confession, punishing him for an act he has committed or is suspected of having committed, or intimidating him or other persons. It does not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions to the extent consistent with the Standard Minimum Rules for the Treatment of Prisoners.” In addition to it, it also states “Torture constitutes an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment.” in furtherance **Article 2** of convention put an obligation on state to make legislation to eradicate torture also, **Article 3** specifically mentions that “*exceptional circumstances like such as a state of war or a threat of war, internal political instability or any other public emergency may not be invoked as a justification of torture or other cruel, inhuman or degrading treatment or punishment*”

surgical castration doesn't qualify to be as a mode of punishment as firstly, as it will constitute

⁹ United Nations Office of the High Commissioner for Human Rights, International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), U.N. Doc. A/6316 (Dec. 16, 1966).

¹⁰ United Nations Office of the High Commissioner for Human Rights, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, U.N. Doc. A/39/51 (June 26, 1987).

“Torture” against offender as per the definition mention above as, the punishment is awarded to *“punishing him for an act he has committed or is suspected of having committed”*. Even if the punishment is sanction by law, it cannot involve torture or cruel, inhumane, or degrading treatment or punishment. The declaration prohibits any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for various purposes, including obtaining information, punishing for an act committed or suspected, or intimidating or coercing individuals. Secondly, though there is a rise in sexual abuse cases, and to create deterrence in the mind of offender (as well as potential offenders), in shadow of these exceptional circumstances punishment of surgical castration is inflicted, but these doesn’t meet the standards laid under Article 3 of the declaration as public emergency cannot be the basis of justification for torture or other cruel, inhuman or degrading treatment or punishment.

Michelle Bachelet Jeria, former United Nations High Commissioner for Human Rights, clearly stated in her interview that, death penalty leads to violation of human rights likewise the punishment of surgical castration violates the international human rights laws and also considered this to be a draconian punishment and would further lead to violation of human rights further advised the states to adopt victim centric approach also, to train law enforcement and judicial officers.¹¹

Castration as an Alternative of Imprisonment

In the case of Jeffrey morse Judge made a statement that “the trading of body parts for a lesser sentence” would set a “dangerous Precedent”, Jeffrey morse confessed his guilt of sexual assault of a 9-year-old girl and involvement in similar offences months earlier. He undergone the surgical castration, on January 20, 1998 in order to get an alternative of incarceration but he was sentenced 26 years in prison by the judge.¹² The decision of the judge was ethically, morally and legally justified as, in what type of criminal justice system the offender has a right to choose his own punishment. Furthermore, in the case four expert witnesses stated that surgical castration will reduce the recidivism rate in Morse but the state witness stated that there is high probability of

¹¹ “Rape is wrong but death penalty, castration, not the answer: UN rights chief,” UN News, October 15, 2020.

¹² J. Michael Bailey and Aaron S. Greenberg, “Science and Ethics of Castration: Lessons From the Morse Case,” 92 Northwestern University Law Review 1225-1246 (1998).

occurrence similar sexual offences, also Michael Bailey¹³ and Aaron S. Greenberg¹⁴ stated that “we expect that there will be few failures but failures there will be”¹⁵, hence it means that surgical castration isn’t a reliable method to control the sexual appetite of the offender and there are chances of recurrence of the such offence. Sexual offences are not just limited to insertion of the sex organs they imply more than that, behavior of sexual offender results from the psychological component and hormonal influence though by castration hormonal influence can be controlled but the psychological component would be there to regulate the sexual appetite, which will lead to reversion of the sexual acts in the offender.

Steven Allen Butler,¹⁶ charged for assaulting 13-year-old girl, while he was on probation on an indecency conviction of a girl child. He demanded to undergo surgical castration rather than facing life imprisonment, initially Judge Michael McSpadden granted the permission, but Doctors and lawyers opposed the castration as “Not the answer” to the problem. Cassandra Thomas¹⁷, rightly said “It sounds good. It makes you feel good, but in the long haul it doesn’t deal in any way with the basic issues of sexual assault.” Surgical castration involves the removal of genitalia, but the offender is capable of having erection¹⁸, which means he is capable of performing sexual activities, also there are cases in which it has been seen that the offender didn’t use his sexual organ to assault the victim rather he used hands, fingers, other objects, etc. for gratifying his lust, sexual hormones are not the only factors which influence the sexual appetite in an offender there are psychological factors also. Jeffrey Morse and Steven Allen Butler¹⁹ case set the very foundation why surgical castration can’t be awarded as an alternative to imprisonment, as if the offender is imprisoned it guarantees they are unable to reoffend, ensuring complete reliability and they can be psychologically treated. The treatment of these offenders is the only cure to this problem rather than mutilating them.

¹³ Ph.D., Department of Psychology, Northwestern University

¹⁴ J.D., University of Chicago, Department of Psychology, Northwestern University

¹⁵ J. Michael Bailey and Aaron S. Greenberg, “Science and Ethics of Castration: Lessons from the Morse Case,” 92 Northwestern University Law Review 1225-1246 (1997-1998).

¹⁶ *BUTLER v. STATE. Court of Appeals of Texas, Houston (1st Dist.), No. 01-92-00822-CR, 1999*

¹⁷ President, National Coalition against sexual Assault.

¹⁸ Douglas J. Besharov and Andrew Vachhs, “Sex Offenders - Is Castration an Acceptable Punishment,” 78 ABA Journal 42-45 (1992)

¹⁹ *BUTLER v. STATE. Court of Appeals of Texas, Houston (1st Dist.), No. 01-92-00822-CR, 1999*

The “volunteered Coercion” objection to surgical castration

Advocates of castration often defend the practice by presenting several arguments, including the reduction of sexual drive, obtaining consent from the offender, and the belief that it will protect society by deterring future criminals. However, upon closer examination, the issue of obtaining consent from the offender raises significant concerns. Also, as rightly quoted by Michelle Bachelet Jeria, former United Nations High Commissioner for Human Rights that “evidence shows that the certainty of punishment, rather than its severity, deter crime”²⁰.

Firstly, the notion of consent in this context is inherently suspect. Offenders who choose to undergo surgical castration may not do so entirely voluntarily, but rather as a perceived alternative to facing lifelong imprisonment. Human nature dictates a strong inclination towards living within society rather than behind bars, leading offenders to consent to castration as a means to reintegrate into society. This decision is not entirely free from coercion, as the desire for freedom heavily influences the offender's choice.

Disagreeing with J. Michael Bailey & Aaron S. Greenberg's assertion that coerced actions can still be considered voluntary, it's crucial to recognize that the incentive of regaining freedom heavily coerces the offender's decision-making process. The desire to reunite with family and resume a semblance of normal life, coupled with the opportunity to potentially evade further incarceration, significantly skews the offender's perception of voluntary consent.

The case of Klaus Grabowski²¹ from Germany serves as a stark example. Despite a history of heinous crimes against children, Grabowski consented to surgical castration as an alternative to life imprisonment. His choice, driven by the allure of freedom, underscores the questionable nature of such consent.

Furthermore, from a legal standpoint, the concept of consent to surgical castration may not be

²⁰ “Rape is wrong but death penalty, castration, not the answer: UN rights chief,” UN News, October 15, 2020, <https://news.un.org/en/story/2020/10/1075452>.

²¹ Andrea Peirano, “The Murder of Anna Bachmeier,” *Odd Murders and Mysteries*, available at: <https://www.oddmurdersandmysteries.com/the-murder-of-anna-bachmeier/>. (last visited on 24 February 2024).

justifiable. India, in the case of *Gian Kaur v. Union of India*²², apex court asserted that the right to life does not include the right to die, emphasizing the sanctity of life as a divine concept. Viewing surgical castration through this lens reveals its inconsistency with the divine notion of life. Allowing individuals the option to mutilate themselves contradicts the sanctity of life and raises ethical concerns.

Moreover, surgical castration fails to address the root causes of sexual offenses. Research suggests that offenders are often driven by rage rather than solely by sexual appetite, as evidenced by the use of objects other than genitalia in committing assaults²³. Therefore, the effectiveness of castration in preventing future offenses remains uncertain.

Lastly, the question arises: if an offender, despite undergoing surgical castration, reoffends, should they still be held liable? This dilemma highlights the inadequacy of surgical castration as a foolproof method for controlling sexual impulses. Offenders may consent to castration under the belief that it will prevent further offenses, but the possibility of recurrence raises significant legal and ethical questions regarding their culpability.

In conclusion, the practice of obtaining consent for surgical castration raises complex ethical and legal issues. The perceived voluntariness of such consent is compromised by the coercive nature of the circumstances, while the ethical justifiability of allowing individuals to mutilate themselves contradicts fundamental principles of life and dignity. Moreover, the efficacy of castration in preventing future offenses remains uncertain, further complicating its ethical and legal implications.

Conclusion and Suggestions

The implementation of chemical and surgical castration as a means of punishment for sexual offenders in Madagascar has ignited a debate, particularly concerning its compatibility with human rights principles. While proponents argue for its potential deterrent effect and protection of society,

²² *Smt. Gian Kaur v. The State of Punjab*, 1996 SCC (2) 648.

²³ Douglas J. Besharov and Andrew Vachhs, "Sex Offenders - Is Castration an Acceptable Punishment," 78 ABA Journal 42-45 (1992).

opponents raise valid concerns regarding the infringement of fundamental human rights, the efficacy of castration as a deterrent, and the ethical implications of obtaining consent from offenders.

From a human rights perspective, surgical castration raises significant red flags, as it violates the principles outlined in international declarations and covenants, such as the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights. The infliction of severe physical and psychological suffering upon individuals, even in the context of punishment, contradicts the fundamental tenets of human dignity and the prohibition of torture or cruel, inhuman, or degrading treatment.

Moreover, the ethical and practical shortcomings of surgical castration as an alternative to imprisonment are evident. While it may reduce testosterone levels and potentially curb sexual impulses, it fails to address the underlying psychological and behavioural factors that contribute to sexual offenses. Additionally, the issue of obtaining genuine consent from offenders is fraught with coercion, as the prospect of freedom incentivizes individuals to agree to castration as a means of escaping prolonged incarceration.

Given these complexities, it is vital to reconsider the use of surgical castration as a punitive measure and explore alternative approaches to addressing sexual offenses against minors. Rather than resorting to drastic measures that risk violating human rights and may prove ineffective in preventing recidivism, efforts should be directed towards comprehensive rehabilitation programs, psychological interventions, and community support networks aimed at addressing the root causes of sexual violence and facilitating the reintegration of offenders into society.