

DETERMINING CONTOURS OF SECTION 28 OF THE PREVENTION OF CRUELTY TO ANIMALS ACT, 1960

*Udit Raj Sharma**

*Shreshth Srivastava***

ABSTRACT

Amidst the voluminous quantum of crimes committed, environmental crimes (especially the crimes against animals) have received less attention from lawmakers and law enforcers. Reviewing social and legal measures towards curbing crimes against animals is a demanding area of legal research. One such research dimension is in India's old legislation to prevent animal cruelty, titled 'Prevention of Cruelty to Animals Act, 1960' (hereinafter referred to as the 'Act of 1960'). The legislation was enacted 'to prevent the infliction of unnecessary pain or suffering on animals', and it made punishable several acts amounting to 'treating animals cruelly'. The legislation, among other things, also provides an exception under section 28, which exempts '*killing any animal in a manner required by the religion of any community*' from the ambit of an offence under the Act. The recent developments flowing through the judicial pronouncements (for instance, concerning the *Gadhi Mai Festival* in Nepal) and legislative interventions appear to have influenced the ambit of the provision above of the Act. With the Hon'ble Supreme Court and the High Court's developing animal protection jurisprudence on the one hand and the wide-open gate of the exception provided under section 28 on the other, the scope of the provision has become challenging to determine. The research explores the contemporary ambit of section 28 of the *Act of 1960*. It also attempts to explore how far the recent judicial pronouncements, which have given impetus to the animal rights jurisprudence in the country, impacted the scope of the provision above.

Keywords: Gadhimai, cruelty, prevention, section 28 and religion

- I. Introduction**
- II. Cruelty Towards Animals Act, 1960- Background and overview**
- III. Section 28 of the PCA: A need to revisit**
- IV. Animal Sacrifice: Against the Constitutional Morality**
- V. Gadhimai, the Indian Supreme Court and implications**
- VI. Conclusions and Suggestions**

* Assistant Professor (Senior Scale), School of Law, University of Petroleum & Energy Studies, Dehradun.

** Student, B.A. LL.B., University of Petroleum and Energy Studies, Dehradun.

I. Introduction

ANIMAL LAW and jurisprudence are gradually finding a place in mainstream law concerns. Discussions over recognising animals as legal persons entitled to hold rights, making stricter laws to prevent animals from cruelty and violence, imposing liability on caretakers for lack of care towards animals, recognising victimhood of animals for crimes against them, etc., are ongoing among several jurisdictions worldwide. Humans and animals share a close relationship of being dependent on each other across the globe. Among those relations, religion is one such aspect where humans use animals, sometimes to worship and sometimes to kill them, as sacrificial offerings to the divine. The research work attempts to critically understand the scope of the legitimacy of animal sacrifice in India. It focuses on section 28 of the Prevention of Cruelty to Animals Act 1960, which allows for sacrificing animals for religious purposes and keeps it outside the scope of cruelty to animals. In light of the recent jurisprudential developments, which are eco-centric and animal-sensitive, it is exciting to mark how much the extent of section 28 has narrowed down. However, no change has been brought to it literally by the Parliament.

The first part of the research discusses the overview of the central legislation for preventing animal cruelty in India, the PCA 1960.¹ It also provides for recent interpretations given to the operative provisions of the PCA² by the Apex Court of India in its recent landmark pronouncement. The second part focuses specifically on section 28 of the PCA. It attempts to analyse its legitimacy in light of the eco-centric approach of law and recent developments in the judicial and legislative domain towards amending/abrogating the provision. The third part of the research analyses the practice of animal sacrifice and questions its legitimacy at the altar of constitutional morality and jurisprudential developments in the contemporary world. The fourth part of the research discusses a festival named Gadhaimai celebrated in Nepal, wherein animal sacrifice is practised at a humongous rate, and how the intervention of the Supreme Court of India contributed positively towards shaping the legal approach against animal sacrifice. The fifth and last part of the research offers concluding remarks of the paper. It proposes an effective and expeditious revisit of Section 28 in light of what has been argued and observed in the research.

¹ The Prevention of Cruelty to Animals Act, 1960 (Act 59 of 1960).

² *Ibid.*

II. Cruelty Towards Animals Act, 1960- Background and overview

The Act of 1960 replaced the then prevalent legislation Prevention of Cruelty to Animals Act 1890 (now referred to as the Act of 1890) by removing the deficiency in the Act of 1890 and making the law more comprehensive. The Act of 1960 declared certain types of cruelty to animals as offences, provided necessary penalties for such violations, and established an ‘Animal Welfare Board’ to promote animal welfare measures.³ The Act of 1960 also offered provisions concerning licensing and regulating the training and performance of the animals for any entertainment to which the public is admitted through the sale of tickets. The Preamble of the Act of 1960 provides that: “An Act to prevent the infliction of unnecessary pain or suffering on animals and for that purpose to amend the law relating to prevention of cruelty to animals”.

The Apex Court of India, in the celebrated case of *Animal Welfare Board of India v. A. Nagaraja*⁴, mentioned the following describing the Act of 1960:

PCA Act is a welfare legislation which has to be construed bearing in mind the purpose and object of the Act and the Directive Principles of State Policy. It is trite law that, in the matters of welfare legislation, the provisions of law should be liberally construed in favour of the weak and infirm. Court also should be vigilant to see that subtle devices do not defeat benefits conferred by such remedial and welfare legislation.

In the above case⁵, the apex court, when made to decide over a tussle between the tradition of bull taming (Jallikattu) and the concern of law for cruelty to animals, observed the following:⁶

PCA Act, welfare legislation, in our view, over-shadows or overrides the so-called tradition and culture. Jallikattu and Bullock cart races, how they are conducted, do not support Tamil tradition or culture. Assuming it has been in vogue for quite some time, in our view, the same should give way to welfare legislation, like the PCA Act,⁷ which has been enacted to prevent the infliction of unnecessary pain or suffering on animals and confer duties and obligations on persons in charge of animals. Of late, there are attempts at

³ *Ibid.*

⁴ (2014) 7 SCC 547.

⁵ *Ibid.*

⁶ *Supra* note 6, para 43.

⁷ *Supra* note 1.

certain quarters to reap maximum gains, and human beings are exploiting the animals by using coercive methods and inflicting unnecessary pain for pleasure, amusement and enjoyment. We have a history of doing away with such evil practices in society, assuming that such practices are supported by culture and tradition, as attempted in the TNRJ Act. According to Professor Salmond, custom embodies those principles that have commended themselves to the national conscience as the principles of justice and public utility.

The Act of 1960 also established the Animal Welfare Board of India⁸. Chapter III of the Act of 1960 is the most operative since it provides for what amounts to treating animals with cruelty⁹ and the necessary sanctions. The Act also makes provisions regarding experimentation on animals¹⁰ and performing animals¹¹. However, the main focal point of the paper is section 28, which provides for savings with respect manner of killing prescribed by religions.

III. Section 28 of the PCA: A need to revisit

“The humble sage, by true knowledge, sees with equal vision a learned and gentle brahmana, a cow, an elephant, a dog and a dog-eater.”

Bhagavat Geeta¹²

This part of the research explores the study's focal point, i.e., section 28 of the PCA, 1960¹³ and issues and challenges the provision. An attempt is to understand the rationale behind section 28, its scope in light of the contemporary legal developments and an analysis of its standing in the statute in the letter and form it exists today. The research underlines two questions: whether the ‘essential religious test’ the yardstick for a religious practice to be protected under section 28, or are there other determinative criteria? The other is that even if an ‘essential religious test’ is the criteria, is it a fair determination criterion in light of the contemporary developments in animal jurisprudence in India?

⁸ *Supra* note 1, s.4.

⁹ *Ibid*, s.11.

¹⁰ *Supra* note 1, Chapter IV.

¹¹ *Ibid*, Chapter V.

¹² The Holy Bhagavad Gita, “Chapter 5: Karma-Yoga-Action in Krsna Consciousness”, available at: <https://asitis.com/5/18.html> (last visited on June 7, 2021).

¹³ *Supra* note 1.

Section 28 of the Act of 1960 states, “Nothing contained in this Act shall render it an offence to kill any animal in a manner required by the religion of any community.”¹⁴ If one analyses this provision, it can be very well seen that it fails to differentiate between “Religious Belief” and “Religious Sentiments”. The very objective of the Act is to “Prevent Cruelty to the animals”; however, this provision is somewhat contrary to the preamble of the act because allowing sacrifice in the name of the religion cannot be kept outside the scope of cruelty. However, loose terminology in the provisions may not help achieve the statute's objective and may defeat its purpose. An analogy may be drawn with foreign laws preventing cruelty to animals wherein the law fails to define “bonafide” scientific experiments over animals.¹⁵ Varn Chandola mentions that “such loose terminology allows for any school experiment on an animal, whether it be conducted in the elementary school or university, to be considered legal.”¹⁶ Section 28 suffers from a similar challenge.

Cruelty should not only be limited to sacrifice. Instead, it must be given the broadest interpretation, e.g. Supreme Court in *Animal Welfare Board of India v. A. Nagaraja*¹⁷ banned the practice of Jalli kattu certain bull-fighting practices. In its analysis, the Court attempted to bring animals under the protection of the rights discourse by stating that Article 21 of the Indian Constitution could be applied to animal life. The Court noted that the term 'life' must be interpreted broadly.¹⁸ As animals form a crucial part of human beings' environment, their rights must also be protected under Article 21.¹⁹ By saving non-human animal life through Article 21,²⁰ the Supreme Court has defied earlier notions of who the possessors of this right are²¹ beyond the concept of possessors of ownership; the more significant question revolves around the effectiveness of a rights-based approach towards animal protection.

¹⁴ *Supra* note 1.

¹⁵ Thomas E. Baker, “Constitutional Theory in a Nutshell”, 13 *William. & Mary Bill of Rights Journal* 57 (2005).

¹⁶ *Ibid* at 10.

¹⁷ *Supra* note 6.

¹⁸ Anita Dichter, “Legal Definitions of Cruelty and Animals Rights”, 7 *Boston college environmental law affairs* 147 (1979).

¹⁹ The Constitution of India.

²⁰ *Ibid*.

²¹ *Supra* note 20.

Balancing of animal's rights vis a vis essential practice of Religion

To understand the animal rights approach, it is initially essential to understand what the term “rights” means. As a starting point, rights may be defined, from a simple and general moral perspective, as valid claims that specific treatment is owed or due to oneself or another.²² However, to be more precise with the research undertaken, the authors will focus on John Rawls's contractual theory, another theory to understand the concept of rights.²³ Rawls revives the social contract theory in describing the legitimacy of political authority.²⁴ Rawls's approach is based on two assumptions:

- (1) There exists an “original position” before the creation of society and;²⁵
- (2) Humans are rational creatures capable of demonstrating reciprocity in considering another's interest.²⁶

However, if one examines the second assumption, then there arises a problem in balancing animal rights²⁷ because there is no reciprocity by humans in considering the interest of animals, which has been explained in length by the authors later in the paper.

The most commonly accepted theory arguing for animal rights is based on the idea that all things capable of having interests are also capable of possessing rights. The following syllogism may describe the application of interest theory to animal rights:

- (1) All and only beings with interest can have rights.
- (2) Animals can have interest.
- (3) Therefore, animals can have rights.²⁸

Tom Regan, credited with being the founder of the animal rights view, argues that nonhuman animals with characteristics such as perception, memory, the ability to feel pain and suffering, psychological identity, and the ability to act on beliefs and desires have inherent value.²⁹ All

²² Tom Regan, *The case for animal rights* 327 (University of California Press, California, 11th edn., 1983).

²³ Contractarianism, Stanford Encyclopedia of philosophy, available at: <https://plato.stanford.edu/entries/contractarianism/> (last visited on July 6, 2022).

²⁴ *Ibid.*

²⁵ *Ibid.*

²⁶ *Ibid.*

²⁷ Wesley W. Hofeld, Walter Wheeler Cook, et. al., *Fundamental Legal Conceptions as applied in Judicial reasoning and other legal essays* 35-64 (Lawbook Exchange, New Jersey, 1st edn., 1983).

²⁸ Izhak Englard, “Human Dignity: From Antiquity to Modern Israel’s Constitutional Framework”, 21 *Cardozo law review* 1903 (2000).

²⁹ Christopher L. Eck & Robert E. Bovett, “Oregon Dog Control Laws and Due Process: A Case Study”, 4 *Animal Law Review* 95 (1998).

beings possessing intrinsic value who share interest based on a relevant similarity must have such interest treated equally.³⁰

David Favre, a well-known animal rights scholar, also discusses how the interests of animals must be balanced alongside those of humans and how human interests can sometimes take precedence over animal interests in being free of torture and suffering. Another well-known scholar, Cass Sunstein, believes that animals should not be subjected to more pain than necessary.³¹ And how human interests can sometimes take precedence over animal interests in being free of torture and suffering. Another well-known scholar, Cass Sunstein, believes that animals should not be subjected to more pain than necessary.³² However, it should be prohibited if an activity calls for unacceptably high levels of suffering.

In cases where religious norms appear to conflict with the overarching constitutional structure, Indian courts have chosen to avoid the Gordian knot. Instead of engaging in the politically risky exercise of balancing religious norms against constitutional/state norms, they have developed a threshold criterion to determine which religious models merit protection in the first place.³³ This has been dubbed the Essential Religious Practices doctrine, whereby legal protection is conferred on matters deemed 'essential' to a religion. Applying this threshold criterion has the unstated benefit of dismissing certain beliefs or practises as superfluous, making a balancing exercise unnecessary.³⁴

The question now arises here is whether sacrifice constitutes an essential practice of religion. If one looks back in history, the practice of Ashvamedha was considered a pious practice to analyse the powers of the mantras. However, this custom of sacrificing the animals doesn't hold well in modern times. Sunstein contends that most animals bred and used for food fall outside the scope of anti-cruelty legislation, rendering most modern farming techniques unregulated.³⁵ Thus, Sunstein advocates for stricter regulation in areas where anti-cruelty legislation has allowed for broad exceptions and exemptions, such as scientific experiments,

³⁰ Charled E. Friend, "Animal Cruelty Laws: The Case for Reform", 8 *University of Richmond Law Review* 201 (1973).

³¹ Cass R. Sunstein, "The Rights of Animals", 70 *University of Chicago Law Review* 387 (2003).

³² *Ibid.*

³³ Mary Kavita Dominic, "Essential Religious Practices' Doctrine as a Cautionary Tale: Adopting Efficient Modalities of Socio-Cultural Fact-Finding", 16 *Socio-Legal Review* 46 (2020).

³⁴ *Ibid.*

³⁵ *Ibid.*

entertainment, and farming. As a result, any suffering must be convincingly justified to avoid irreparable harm to animal interests. In the context of animal welfare, what constitutes necessary or unnecessary suffering? Sunstein sums it up nicely: "If we focus on suffering, as I believe we should, it is not necessarily impermissible to kill animals and use them for food, but it is completely impermissible to be indifferent to their interests while they are alive."³⁶

This drives home the idea that since animals have been of immense importance to humans for food, agriculture, etc., since the dawn of time, it is impossible to abstain from using them to fulfil specific human needs. In simpler terms, a custom which sacrifices a functional living being cannot be called a valid custom because such custom is solely for human pleasure. In *N.R. Nair v. Union of India*³⁷, the Supreme Court opined that those legal rights must be granted to animals and should not be restricted to humans alone.

Following that, the courts reiterated that animals must be protected because they have intrinsic value. On this basis, the Supreme Court granted animals certain rights in *Nagaraja*, including the right to live with dignity, freedom from hunger, thirst, and malnutrition, freedom from fear and distress, freedom from physical and thermal discomfort, freedom from pain, injury, and disease, and freedom to express standard patterns of behaviour. The Court recognised these rights as the five internationally recognised animal rights referred to in the Universal Declaration of Animal Welfare.

Similarly, based on the premise that animals have intrinsic worth and the right to live with dignity, it was held in *Animals and Birds Charitable Trust v. Municipal Corpn. of Greater Mumbai* that the use of horse-driven carriages for joyrides was solely for human pleasure and was an avoidable human activity. Such non-essential, avoidable human activities, thus, violate the fundamental rights granted to animals under the Constitution and the concerned statutes.³⁸

Section 28 and eco-centric principles

According to the eco-centric ethic, all animals have intrinsic value in and of themselves; that is, they have moral worth and interests that must be protected, which implies that specific

³⁶ *Ibid*, at 395.

³⁷ (2001) 6 SCC 84.

³⁸ *Ibid*, para 40.

ethical considerations should guide humans' treatment of animals.³⁹ This ideological approach adopted by Indian courts shows a rejection of the anthropocentric school.⁴⁰ Anthropocentrism holds that humans are morally superior and that their interests take precedence over those of non-humans. Anthropocentrism has been used to justify animal welfare causes by arguing that protecting the interests of nature is also in the interests of the human race.⁴¹ While some courts have made an exception by allowing certain activities that use animals for human benefit, such as using animals for food, the Indian judiciary has primarily rejected this ideological position in favour of the eco-centric philosophy when deciding animal welfare cases.⁴² This means that even when using animals for necessary purposes, we must be mindful of their moral and intrinsic value and primary interests. So why is this honest and intrinsic value not present in Section 28 of the Act? It is difficult to admit that Section 28⁴³ has been drafted keeping in mind religious practice because animal sacrifice cannot be said to be an essential practice of religion. As the *parens patriae*, what role do they play in protecting the animals?

In light of this, it is pertinent to note that the Himachal Pradesh High Court, in *Ramesh Sharma v. State of H.P.*,⁴⁴ applied the doctrine of *parens patriae* and declared a ban on sacrificing animals and birds in temples.⁴⁵ The Supreme Court also recently invoked the doctrine of *parens patriae* to ban the event of Jallikattu.⁴⁶ This is relevant because the doctrine of *parens patriae* provides that the State has the duty and authority to protect those legally unable to act independently, and animals belong to this category.⁴⁷

However, it is sad to see that Section 28⁴⁸ tends to deviate from the eco-centric ethic. In the landmark judgment of *Nagaraja*,⁴⁹ the court vividly explained the ambit of protection of animals under Article 21.⁵⁰

³⁹ Sue Donaldson, *Zoopolis: A Political Theory of Animal Rights* (OUP Oxford, Oxford, 1st edn., 2013).

⁴⁰ *Ibid.*

⁴¹ *Supra* note 25.

⁴² *T.N. Godavarman Thirumulpad v. Union of India* (2012) 3 SCC 227; *Centre for Environmental Law, World Wide Fund-India v. Union of India* (2013) 8 SCC 234; *Animal Welfare Board of India v. A. Nagaraja* (2014) 7 SCC 547.

⁴³ *Supra* note 1.

⁴⁴ 2014 SCC Online H.P. 4679

⁴⁵ *Ibid.*

⁴⁶ *Supra* note 36.

⁴⁷ George B. Curtis, "The Checkered Career of *Patens Patriae*: The State as Parent or Tyrant?" 25 *DePaul Law Review* 895, 895-87.

⁴⁸ *Supra* note 1.

⁴⁹ *Supra* note 2.

⁵⁰ *Supra* note 21.

PCA is Not a true law

In India, the authors don't consider the Prevention of Cruelty to Animals Act as a true law because the act's objective, i.e., 'animal welfare', seems to be negated. In Western Culture, a diverse array of groups generally agrees with the concept of animal welfare, which basically states that animal cruelty should be minimised to the extent of not inflicting unnecessary pain and suffering upon them.⁵¹ But where does this concept find its place in PCA?⁵² If one interprets Section 28 of the Act,⁵³ then only one inference can be drawn, i.e. the law does not recognise that animals have any intrinsic worth which warrants protection independent of how humans may feel about them.

In the case of *Grise v. State*,⁵⁴ the court held "that in construing the term "cruelty", it was necessary to consider whether the act committed upon the animal was "needless". If an act were committed without any useful motive, except for cruelty or pleasure of destruction, then the act would be considered needless." So, now the question arises here: "Does animal sacrifice serve any purpose?" It is very safe to assume that it does not serve any scientific, educational or medicinal purpose; the only goal it could help is the fulfilment of any "Superstition" which cannot be considered a "needful" act at any point. If law and society consider killing animals acceptable, then the question arises whether animals have any meaningful protection against cruelty under the law.⁵⁵ Similarly, the Missouri Statute⁵⁶ provides that hunting, trapping, fishing and using animals for scientific experiments are exempted from animal welfare.

In light of these exemptions, the Supreme Court of the United States, in the case of *Church of the Lukumi Babula Aye v. City of Hialeah*,⁵⁷ held that:⁵⁸

A city ordinance banning animal sacrifice, which directly affected the religious performed by practitioners of the Santeria religion, could not be justified under the guise of animal welfare when activities such as hunting,

⁵¹ Gary L. Francione, *Rain Without Thunder: The Ideology of the animal rights movement* 14-15 (Temple University Press, United States, 1st edn., 1996).

⁵² *Supra* note 1.

⁵³ *Ibid.*

⁵⁴ 37 Ark. 436 (1881).

⁵⁵ *Supra* note 14.

⁵⁶ Schmahmann & Polacheck, "The case against animal rights", 22 *Boston college environmental law affairs* 762 (1995).

⁵⁷ 508 U.S. 520.

⁵⁸ *Ibid.*, at 535-537.

fishing, pest extermination, and other forms of slaughter were exempted from coverage.

However, the authors disagree with this particular ruling. The grounds apart from sacrifice are those with some reasonable nexus between the act and object that ought to be achieved, but what is the thing that ought to be completed in animal sacrifice? The court failed to recognise that the prohibition of animal sacrifice has solid secular grounds.

Recent Developments in India

Through the Prevention of Cruelty to Animals (Amendment) Bill 2011⁵⁹, section 28 was proposed to be omitted from the Act of 1960.⁶⁰ The rationale for proposing this omission was broadly that killing of living being for religious purposes is not only against the spirit of the Constitution and law but also against the tenets of any religion.

Through the Prevention of Cruelty to Animals (Amendment) Bill 2015⁶¹, section 28 was proposed to be substituted with a new provision⁶² wherein the Central Government was placed under an obligation that, in consultation with the state governments, it would notify the religious occasions on which it is customary to sacrifice animals. Further, the provisions provided that for such circumstances notified by the Central Government, the sacrifice be carried out in isolation where it is not within the view of other sacrificial animals and also that

⁵⁹ Bill No. 67 of 2011, As introduced in Lok Sabha

⁶⁰ Omission of section 28.— Section 28 of the Prevention of Cruelty to Animals Act, 1960 (59 of 1960) shall be omitted.

⁶¹ Bill No. 298 of 2015, As introduced in Lok Sabha

⁶² “28. *Provisions as to sacrificial killing of animals during religious occasions.* —

(1) *The Central Government shall, in consultation with State Governments, within a period of one year from the coming into force of the Prevention of Cruelty to Animals (Amendment) Act, 2015, notify the religious occasions on which it is customary to sacrifice animals.*

(2) *Nothing contained in this Act shall render it an offence to kill any animal in a manner required by the religion of any community on any religious occasion notified under sub-section (1).*

(3) *During religious occasions notified under sub-section (1), every act of killing of an animal for sacrificial purposes under sub-section (2), shall be carried out in isolation where it is not within the view of other sacrificial animals.*

(4) *Every act of killing of an animal for sacrificial purposes during a religious occasion shall be carried out by trained persons and using such methods, as may be prescribed by the Central Government, to ensure minimum pain and trauma to the sacrificial animal.”*

such sacrifice be carried out by trained persons and using such methods which cause minimum pain and trauma to the animal sacrificed.

PETA, in a letter dated April 24, 2017,⁶³ to the Hon'ble Prime Minister of India, asked that animal-derived foods be eliminated from the menus of all government or government-sponsored meetings and functions, considering that meat production is one of the leading causes of climate change.

In a letter dated July 1, 2021, PETA, addressed to the Prime Minister of India, appealed to remove Section 28 of the Act of 1960, which allows for animal sacrifice in matters of religion. The letter was written before the festival of Eid-al-Adha since killing animals at a mass scale happens during this festival. PETA India also sent letters to the DGPs of various states and Union Territories asking them to take precautionary measures to stop illegal practices in transporting and killing animals before and during the festival of Eid-al-Adha.⁶⁴ In light of the recent developments, there is sufficient indication that section 28 needs to be revised in the manner it exists.

IV. Animal Sacrifice: Against the Constitutional Morality

“The greatness of a nation and its moral progress can be Judged by how its animals are treated.”⁶⁵

In our modern secular society, law is widely regarded as the primary tool of social control. As a result, an investigation into the relationship between law on the one hand and morals and religion on the other frequently begins with a broad question along the following general lines: What is the extent to which law may properly be used to enforce moral or religious obligations? This question raises another question of fundamental importance, which touches the very ambit of the right to life, i.e., whether sacrificing animals in the name of religion can even be considered an “*essential practice of a religion*”.⁶⁶

⁶³ PETA, “Letter addressed to the Prime Minister of India by People for The Ethical Treatment of Animals”, available at: <https://www.petaindia.com/wp-content/uploads/2017/04/PETAs-Letter-to-PM-Modi.pdf> (last visited on July 6, 2022).

⁶⁴ *Ibid.*

⁶⁵ *Supra* note 23.

⁶⁶ *Commissioner, Hindu Religious Endowments, Madras v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt*, AIR 1954 SC 282; *Ratilal Panachand Gandhi v. State of Bombay and others*, AIR 1954 SC 388

Meaning of Constitutional Morality

Constitutional morality refers to the respect, reverence, and internalisation of the “form” and the spirit of the Constitution⁶⁷. Constitutional morality is a term that is rarely used by academics or judges in India when deciding constitutional disputes.⁶⁸ The term “Constitutional morality” should be interpreted by the intent of the Constitution’s framers.⁶⁹ Dr. B.R. Ambedkar used it sparingly in the Constitutional Assembly debates. He used the term, borrowed from the Government of India Act of 1935, in his speech on the inclusion of administrative details in the Constitution:⁷⁰

The spread of Constitutional morality, not just among the majority of any community, but throughout the entire community, is an essential condition of a government that is both free and peaceful, because any powerful and obstinate minority can render the operation of a free institution impracticable without being strong enough to gain ascendancy for themselves.

According to Lodha and Bobde JJ. in the case of *Manoj Narula v. Union of India*:⁷¹

The principle of Constitutional morality means submitting to the norms of the Constitution and not acting in a way that would violate the Rule of Law or reflective of arbitrary action. It operates at the fulcrum and guides as a laser beam in a building. Traditions and conventions must develop to sustain the value of such morality.

The authors would like to emphasise the above-given definition because this definition establishes a nexus between morals and practice. The question the authors would like to raise is, “*Where do religious values or principles fit into animal sacrifice?*” India is a secular state; there is no state or preferred religion, and all religious groups enjoy the same constitutional protection without any favour or discrimination⁷².

⁶⁷ Latika Vashist, “Re-Thinking Criminalisable Harm in India: Constitutional Morality as a Restraint on Criminalisation”, 55 *Journal of Indian Law Institute* 71 (2013).

⁶⁸ Kritika Seth, “Constitutional Morality and Bar Dancers Judgment”, 24 *Public Law Review* 28 (2014).

⁶⁹ *Supra* note 11.

⁷⁰ S Pal, VI *India’s Constitution- Origin and Evolution* 255 (Lexis Nexis, India, 1st edn., 2005).

⁷¹ (2014) 9 SCC 1.

⁷² Dr. S Radhakrishnan, *Recovery of Faith* 127 (Orient Publications, India, 1st edn., 1984).

Morals and Religion

It is an essential characteristic of religion, i.e. it is evolutionary.⁷³ What earlier was considered to be right might not be considered correct in today's time, e.g. decriminalising homosexuality, abolishing Triple Talaq⁷⁴ and allowing the entry of women in the temple and this advancement of law is known as 'Constitutional morality' In simpler terms, it is the moral duty of law to protect what is right.

Buddhism, Hinduism, and Jainism Concern for the welfare of other animals emerged as a system of thought in the Indus Valley Civilization as a religious belief that ancestors return in animal form. Thus, those animals must be treated as humans. Jainism and several other South-East Asian religions exemplify this.⁷⁵ The abandonment of animal sacrifice in Jainism, Hinduism, and Buddhism resulted in widespread vegetarianism and a strong dislike of unnecessary destruction of life.⁷⁶ Eastern religions emphasise two aspects of human-animal relationships: non-injury to living beings (ahimsa) and reincarnation (samsara) of all living beings. Ahimsa, or nonviolence or non-killing, is a doctrine derived from Hindu, Buddhist, and Jain beliefs. Ahimsa (Sanskrit) refers to all Jains and nearly all Buddhists being strict vegetarians.⁷⁷ The second concept allows people's souls to reincarnate as non-human animals and vice versa. These religions' adherents do not believe in a creator god. Killing any living being, according to Buddha, is a sin. If all of these religions consider animal slaughter to be a sin, why are humans committing it?

The answer to this question, which authors believe, is that in law, one of the sources of authority is its longevity, i.e. following a customary practice which is not backed by any logical reasoning, and this is the root problem of Law, which has been neatly put by Pound in the following often quoted statement: "Law must be stable, and yet it cannot stand still"⁷⁸ and this is where the authors submit that the section 28 of the PCA⁷⁹ needs to be revisited.

⁷³ *Supra* note 24.

⁷⁴ *Shayara bano v. UOI* (2017) 9 SCC 1.

⁷⁵ E. Szűcs et.al, "Animal Welfare in Different Human Cultures, Traditions and Religious Faith", *Asian-Australian Journal of Animal Sciences*, Nov. 25, 2012, available at: [https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4093044/#:~:text=Wade%2C%202004\).-Jainism%2C%20Hinduism%20and%20Buddhism,respect%20due%20to%20a%20human](https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4093044/#:~:text=Wade%2C%202004).-Jainism%2C%20Hinduism%20and%20Buddhism,respect%20due%20to%20a%20human) (last visited May 30, 2021).

⁷⁶ Joseph G. Sauder, "Enacting and Enforcing Felony animal Cruelty Laws to Prevent Violence Against Humans", 6 *Animal Law Review* 1, 16 (2000).

⁷⁷ *Supra* note 58.

⁷⁸ Roscoe Pound, *Interpretations of Legal History* 1 (Cambridge University Press, United States, 1st edn., 1923).

⁷⁹ *Supra* note 1.

The authors will now provide a detailed analysis of how section 28 of the PCA goes against the fundamental objective of Constitutional Morality. Section 28 of the Act⁸⁰ states that *no act shall be punishable if it is done in the form of sacrifice; such a definition does not align with the ratio of law decided by the Supreme Court in the case of M. Nagraj*⁸¹ wherein the apex court held that animals do have a “Right to Live” under article 21 of the Constitution. It is the moral duty of the State to protect this right. “Right to belief,” which is an essential part of Secularism, should not be equated with sacrifice because, according to the authors, killing someone who is the creation of God cannot be given the defence of “Religious belief,” and this brings us to practice of killing Goats in Eid-ul-zuha (Bakri Id).

The practice of sacrificing goats in Bakri Id somewhat goes against Constitutional Morality because such a method is against the Law of nature. John Locke, whose writing was to be so influential in the American colonies in the following century, said:⁸²

Thus the law of nature stands as an eternal rule to all men, legislators as well as others. The rules that they make for other men's actions must, as well as their own and other men's actions, be conformable to the law of nature-i.e., to the will of God, of which that is a declaration-and the fundamental law of nature being the preservation of humanity, no human sanction can be good or valid against it.

In the 18th century, Blackstone put it this way:⁸³

This natural law is, of course, superior in obligation to any other because it is co-eval with humanity and is dictated by God himself. It is binding over the entire globe, in all countries, and at all times: no human laws are valid if they contradict this; and those that are valid derive all their force and authority, mediately or directly, from this original.

Summarising these two above observations made by the two most learned Jurist of their time raise a question “Where is the will of God in these animal sacrifices”? The historic background of Bakri Id shows that Abraham had a dream that God had given him a command to sacrifice

⁸⁰ *Ibid.*

⁸¹ *Supra* note 6.

⁸² Locke, *The Second Treatise of Government* 77 (Hackett Publishing, United States, 5th edn., 1983).

⁸³ Blackstone, *III Commentaries on Laws of England* 41 (Oxford University Press, United States, 1st edn., 2016).

his son; the very next day, he took his son to the slaughterhouse, and when he was about to slit the throat of his son, God stopped him and told him that his objective his fulfilled and he replaced his son with a lamb.⁸⁴ Though this Quranic story may answer the question of God's will, it does not answer the question of the validity of goat sacrificing. If sacrificing a Goat in the name of God is an essential part of the religion, then offering a human in the word of God should not be considered a criminal offence, nor sacrificing a cow should be considered against the will of God.

Sacrificing an animal in the name of God is a guise in the form of "torture". The usage of words such as "torture," "torments," and "cruelly beats" are terms which apply to living rather than lifeless entities, which animals were described as by Rene Descartes.⁸⁵ Though the language employed in cruelty to statutes reveals that animals are perceived as sentient beings, the law has not always been prompt in recognising scientific facts or theories. While the idea of evolution revealed the close relationship between humans and sacrifice and animals, many legal systems are reluctant to adopt the opinion of those in the life sciences.⁸⁶ Therefore, the law in this area needs to be developed.

Judicial Intervention

The law does not recognise that animals have any intrinsic worth which warrants protection independent of how humans man feel about them.⁸⁷ The failure to identify any inherent value that animals may possess is demonstrated, either explicitly or implicitly, through case law, statutory law, and legal principles.

In 1896, the Supreme Court of Colorado stated, in *Waters v. People*, that cruelty to animals statutes *had a dual purpose of protecting animals and conserving human morals*.⁸⁸ In interpreting cruelty to animal statutes, the court stated that "their aim is not only to protect these animals but to conserve public morals, both of which are undoubtedly a proper subject of Legislation."⁸⁹ In interpreting cruelty to animal statutes, the court stated that "their aim is not

⁸⁴ FE Online, "Eid al-Adha 2021: Know the history, date, and significance of Bakrid", *Financial Express*, July 20, available at: <https://www.financialexpress.com/lifestyle/eid-al-adha-2021-know-the-history-date-and-significance-of-bakrid/2294328/> (last visited on July 6, 2022).

⁸⁵ Roger W. Calvin, What rights for Animals? A Modest Proposal, 2 *Pace environmental Law Review* 245 (1985).

⁸⁶ M. Varn Chandola, "Dissecting Animal Protection law: Healing the wounds with animals rights and eastern enlightenment", 8 *Wisconsin Environmental Law Journal* 3 (2002).

⁸⁷ *Supra* note 57.

⁸⁸ 23 Colo. 33. 46 P. 112 (1896).

⁸⁹ *Ibid*.

only to protect these animals but to conserve public morals, both of which are undoubtedly proper subjects of legislation.⁹⁰ The inference that can be drawn from this case is that the animals' rights are independent of public morals. The terms like “public morals” are such terms which are difficult to construe in more straightforward terms. What is their intrinsic value?

In 1893, the Supreme Court of North Carolina held, in *State v. Porter*⁹¹, as follows:

Man's desire for amusement and sport is no justification for the infliction of suffering or death upon any creatures protected by the statute now under consideration. It was enacted to protect the public morals, which the commission of cruel and barbarous acts tends to corrupt.

One may, therefore, conclude that the protection of animals is an independent and sufficient reason to justify animal protection laws without considering the conservation of public morals. Since it is clear that the preservation of human values, rather than any consideration of the intrinsic value of animals, is the legally proper justification for cruelty to animals statutes, questions arise as to what constitutes cruelty and to what extent society will tolerate it. Technologically advanced Western nations still depend on animals for food, scientific experimentation, clothing, and entertainment. In third-world countries, humans rely on animals for labour and transportation. The law does not recognise these common uses of animals, which some consider the "institutional exploitation" of animals as cruelty.⁹²

V. Gadhimai, the Indian Supreme Court and implications

This part mentions an infamous tradition, ‘Gadhimai’, celebrated in Nepal, wherein animal sacrifice is made at a humongous level as an offering to the deity. Also, the intervention of the Hon’ble Supreme Court barred the transport of animals from India to be sacrificed in the festival above. The research also discusses its implications in developing jurisprudence for animal welfare in India.

⁹⁰ *Ibid.*

⁹¹ 112 N.C. 887, 889.16 S.E. 915, 916 (N.C. 1931).

⁹² G. Suader, “Enacting and Enforcing Felony animal Cruelty Laws to prevent violence against humans”, 6 *Animal Law Review* 1, 10-15 (2000).

The roots of this festival lay back some 256 years, when a person in prison dreamt of Gadhimai requesting him to construct a temple for her.⁹³ The next day, that person was released, and as per the direction, he built a temple. Still, the most amusing thing was that they made an animal sacrifice as an offering to Gadhimai. Since then, this festival has been celebrated every five years, where approximately 50,000 animals are sacrificed.⁹⁴ Considering this aspect from a religious point of view, the question which strikes the mind of the authors is, ‘Could the almighty ever ask for a sacrifice for his loved ones?’. However, knowing the intentions of the almighty may not be within the scope of this research.

The sacrifice of around 50,000 animals in a couple of days speaks about the gruesome torture animals are subjected to. Looking at this gruesome act, the Indian Supreme Court, on October 20, 2014, passed an interim order directing the Union of India to prohibit the illegal transport of animals across the border. Nearly seventy per cent (70%) of animals sacrificed in this festival are transported from India⁹⁵. N.G. Jayasimha, the managing director of Humane Society International/India, on this move of the Supreme Court emphatically stated that:⁹⁶

The Gadhimai Festival’s massacre of innocent animals is an unholy bloodbath that has no place whatsoever in religion. This mass slaughter of animals is not part of Hinduism and has been thoroughly and rightly rejected by the Hindu Council of Britain. The Supreme Court of India’s order offers a vital lifeline to the hundreds of thousands of animals being illegally taken across the border to be killed, and there is every chance that with this action, we can prevent the killing from going ahead this year. In a modern, civilised society, we cannot continue to sanction the death of animals in the name of religion.

Owing to this decision of the Supreme Court, the Gadhimai Temple Trust, on July 28, 2015, announced that all animal sacrifice should henceforth be banned at the Gadhimai festival. Even after this ban in 2019, this festival took place, and approximately 70,000 animals were

⁹³ Rastriya Samachar Samiti, “Supreme Court directs govt to ‘control’ Gadhimai Sacrifice”, *The Himalayan*, Aug 4, 2016, available at: <https://thehimalayantimes.com/nepal/supreme-court-order-gadhimai-festival-sacrifice> (last visited on July 6, 2022).

⁹⁴ Navamita Mukherjee, “Supreme Court of India Intervenes to Save Thousands of Animals from Nepal’s Brutal Gadhimai Festival Sacrifice”, *Humane Society International*, Oct. 20, 2014, available at: <https://www.hsi.org/news-media/india-supreme-court-gadhimai-ruling-102014/> (last visited on July 6, 2022).

⁹⁵ *Ibid.*

⁹⁶ *Ibid.*

sacrificed. The saddest part of this tragedy is that not even a single penal action was taken against these people. As reported in the New York Times, one of the individuals who participated in this festival stated: “It’s always fun to behead animals,” said Ram Aashish Das, who said he had slaughtered 30 buffalo this week. “If the tradition is so bad, why are so many people coming here?”⁹⁷

The order of the Hon’ble Supreme Court of India is a welcome decision-making positive contribution towards animal jurisprudence. Whenever animal welfare is pitted against economic interests, the law and courts may not be handcuffed and surrendered towards economic interests; instead, a rational, workable and sensitive approach may be preferred. A blind allegiance to economic interests may result in unfair treatment of animals. Interestingly, this approach of the Apex Court raises essential questions about the continuance and practice of any such practices within India. Has sacrificing animals in the name of religious practices/traditions completely abrogated in India? The prevalence of the ‘Bakra-Eid’ festival raises questions about the clarity of approach in this regard.

VI. Conclusions and Suggestions

When Claude Levi Strauss observed,⁹⁸ “animals are good to think,” implying that they are food for symbolic ideas, he roused anthropologists to look at changed gatherings’ opinions on animals. These contemplating animals are shot through with inconsistencies, similar to our pondering their mistreatment. On the one hand, it is not shocking that people differ concerning whether specific demonstrations establish mercilessness. The most widely recognised clarification is that enduring subjectivity ensures a struggle over what it implies. Since animals can’t speak for themselves, people should figure out their inner states, making way for a surge of unique interpretations,⁹⁹ and section 28 of the PCA Act¹⁰⁰ is one such provision which requires others to speak for the animals.

⁹⁷ Bhadra Sharma, “Nepal’s Animal-Sacrifice Festival Slays On. But Activists Are Having an Effect”, *New York Times*, Dec 6, 2019, available at: <https://www.nytimes.com/2019/12/06/world/asia/nepal-animal-sacrifice-gadhimai.html> (last visited on July 6, 2022).

⁹⁸ Karen Bleitz, “Animal Tales”, British Library, Nov. 10, 2015, available at: <https://www.bl.uk/animal-tales/articles/thinking-with-animals> (last visited on July 6, 2022).

⁹⁹ Arnold Arlurke, *Just a Dog: Animal Cruelty, Self and Society* 29 (Temple university Press, United States, 1st edn. 2006).

¹⁰⁰ *Supra* note 1.

It's time that it focuses on animals and non-humans as the victims of crime and seeks protection for them both in letter and spirit.¹⁰¹ In the end, the often-sung anthem of the animal 'rights movement is a quote by Jeremy Bentham wherein he argues for the rights of non-human animals by emphatically stating, "*The question is not can they reason? Nor can they talk. But can they suffer?*"

Whether preventing animal cruelty constitutes a compelling state interest is not quickly answered.¹⁰² Because of the porous nature of existing state and federal statutes, it may be challenging to classify animal protection as a state interest at all and a compelling one.¹⁰³ Although companion animals have some legal protections, their interests are always subordinate to their legal owners. As a result, the animals' legal rights and ability to enforce those rights are limited. The situation for non-companion animals is even worse.

Some animals are better protected than others. As a result, even without a normative shift in society's view of animals, the state may have a compelling interest in protecting certain animals from certain types of mistreatment. Other animals subjected to human-caused harm do not elicit the same interest.¹⁰⁴ As a result, they are determining whether a compelling state interest would necessitate a fact-specific investigation focusing on existing laws, the animals involved, the level of public concern, and other competing societal priorities.

Animal Cruelty *vis-a-vis* State Interest

Whether banning animal sacrifice constitutes state interest is difficult to answer. Surprisingly, in the case of *Church of Lukumi Babalu Aye v. City of Hialeah*, the US Supreme Court declared the ordinance banning animal sacrifice as it violated the Constitution's First Amendment, i.e., the right to freedom of religion. However, the authors are of the firm viewpoint that the State, being the *parens patriae* is bound to protect the rights of the animals; in the case of *Shri Subhash Bhattacharjee v. State of Tripura*,¹⁰⁵ the question before the Court was whether animal sacrifice constitutes an essential practice of religion under Article 25 of the Indian Constitution.

¹⁰¹ *Ibid.*

¹⁰² David N. Cassuto, "*United States v. Stevens: Win, Loss, or Draw for animals*", 2 *Journal of Animal Ethics* 15 (2012).

¹⁰³ *Ibid.*

¹⁰⁴ *Supra* note 5 at 100.

¹⁰⁵ 2019 SCC OnLine Tri 441.

The court held that section 28 of the PCA¹⁰⁶ defenestrates the very objective of the Act. A method involving barbaric work can never be called an essential religious practice of the religion.

In the case of *Welfare Board of India v. A Nagaraja*^{the} apex court held that animal rights are covered under Article 21 of the Indian Constitution. However, the court also held that section 28 of the act is an exception to animal cruelty. The authors object to this conclusion drawn by the court because “Right to life” cannot be equated with “Religious sacrifice”. The Hon’ble Supreme Court, in the landmark judgement of *Charan Lal Sahu v. Union of India*,¹⁰⁷ held that:

The doctrine of *parens patriae* cannot be confined to only sovereign right of the state independent of and behind the title of the citizen. The concept of *parens patriae* can also be varied to enable the government to represent the victims effectively in the domestic forum if the situation so warrants. The jurisdiction of the State’s power cannot be circumscribed by the limitations of the traditional concept of *parens patriae* jurisprudentially; it could be well utilised to suit, alter, or adapt itself in the changed circumstances.

Animals form part of our ecosystem, and the state must protect our ecosystem. Slovenia, in 2012, amended its Animal Welfare Act¹⁰⁸ and banned all sorts of religious sacrifices. There is no doubt that State interest involves the protection of essential practice of religion, and around the globe, animal sacrifice has been recognised as a critical practice of religion. However, law “grows like grass” what once was held to be valid may now fail the test of time. In light of the research above, the paper argues for an effective and expeditious revisit (which includes curtailing its scope to a considerable extent or even its abrogation) of section 28.

¹⁰⁶ *Supra* note 1.

¹⁰⁷ (1990) 1 SCC 613.

¹⁰⁸ Global Animal Gal Association, *available at*: <https://www.globalanimallaw.org/database/national/slovenia/> (last visited on July 6, 2022).