

LEGAL ISSUES INVOLVED IN CHILDREN PARTICIPATION IN
CLINICAL TRIALS: A STUDY

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Clinical Trials are the essential step towards the manufacturing of new drugs or advancement in the drugs. Participation of children in the clinical trial cannot be avoided in this process. New Drugs and Clinical Trials, 2019 attempts to promote clinical trial as well as protect the rights of the research participant. Ethics Committee is the responsible body to take care of its daily affairs of clinical trial. But, in the entire procedure, certain major issues such as constitution of ethics committee, informed consent and functions of ethics committee are prevailing which are required to be addressed immediately. Author has made an attempt to analyze these issues and provided solutions to resolve these issues.

INTRODUCTION

Human beings are endowed with the reason naturally. This quality of human being developed with humanity, with certain basic, fundamental and inalienable rights. The historic development of the concept of human rights is often associated with the evolution of Western Philosophical and political principles and even in some of the religious texts. Recognition of the need to protect human freedom and human dignity is alluded to in some of the earliest codes, from Hammurabi's Code in ancient Babylon (around 1780 BCE), right through to the natural law traditions of the

West, which built on the Greek Stoics and the Roman law notions of just gentium (law for all peoples). Common to each of these codes is the recognition of certain universally valid principles and standards of behaviors. These behavioral standards arguably inspire human rights thinking and may be seen as precursors to, or different expressions of, the idea of human rights.¹

Early legal developments in the area of human rights are said to have emerged from the Magna Carta of 1215, a contract between the English King John and the Barons who were dissatisfied with the taxes being levied by the monarch.² At the same time, the work of a number of philosophers had a very concrete influence on the articulation of demands in the form of 'natural rights' or the 'rights of man.'³ The modern concept of human rights is thus traditionally easily traced to the ideas and texts adopted at the end of the 18th century. It is well known that the 1776 American Declaration of Independence, The French Declaration of the Rights of Man and of the citizen in 1789 summed up that 'Men are born and remain free and equal in rights and that the aim of every political association is the preservation of the natural and inalienable rights of man; these rights are liberty, property, security and resistance to oppressions. These revolutionary declarations represents attempts to enshrine human rights as guiding principles in the constitutions of new states or polities.'⁴

Human rights are rights we have simply because we exist as human beings - they are not granted by any state. These universal rights are inherent to us all, regardless of nationality, sex, national or ethnic origin, color, religion, language, or any other status.⁵ Human rights are standards that recognize and protect the dignity of all human beings. Human rights govern how individual human beings live in society and

with each other, as well as their relationship with the State and the obligations that the State have towards them.⁶ Human Rights are 'indivisible, interdependent and interrelated'.⁷

The same was reflected in the Universal Declaration of Human Rights, 1948. UDHR recognized as definitive and universal when they framed that crucial first modern statement of human rights.⁸ The Universal Declaration of Human Rights (UDHR), adopted by the UN General Assembly in 1948, was the first legal document to set out the fundamental human rights to be universally protected.⁹ Art. 1 declares that all human beings are born free and equal in dignity and rights.¹⁰ The UDHR, together with the 2 covenants - the International Covenant for Civil and Political Rights, and the International Covenant for Economic, Social and Cultural Rights - make up the International Bill of Rights.¹¹

In 1989, world leaders made a historic commitment to the world's children by adopting the United Nations Convention on the Rights of the Child – an international agreement on childhood. Among the core conventions, The Convention on the Rights of the Child is prominent one. The Convention is the most widely ratified human rights treaty in history. It has inspired governments to change laws and policies and make investments so that more children finally get the health care and nutrition they need to survive and develop, and there are stronger safeguards in place to protect children from violence and exploitation. It has also enabled more children to have their voices heard and participate in their societies.¹² Some of the important provisions relating to the rights of the children are as follows:

Best Interest of Child: Art. 3: 1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

Right to life: Article 6

1. States Parties recognize that every child has the inherent right to life.

Right to health: Every child has a right to health. Medical care, nutrition, protection from harmful habits (including drugs) and safe working environments are covered under the right to health. Art. 23¹³ and 24¹⁴ deals with right to health extensively under this convention. These provisions are related with the right to health which includes the children's participation in clinical trial.

INDIAN CONSTITUTION

Indian Constitution is the supreme law of the land. Fundamental Rights are the basic human rights guaranteed under Indian Constitution. Art. 21 of the Indian Constitution deals with the right to life and personal liberty which includes right to health. Right to health is not included expressly in the Indian Constitution as a fundamental right. Judiciary in their several judgments expanded the interpretation of Art. 21 and covered right to life includes right to health as well. Part IV of the Constitution provides several provisions for the right to health such as Art. 38, 39E, 41, 42, 47 etc. Honorable Apex Court in the case of *Parmandand Katra v. Union of India* held that right to health and medical care is a fundamental right covered by Art. 21 since health is essential for making the life of workmen meaningful and

purposeful and compatible with personal dignity.¹⁵ Further, in case of *Consumer Education and Research Center v. Union of India*, Supreme Court held that right to health was an integral factor of a meaningful right to life.¹⁶ Afterwards, in the series of judgments Supreme Court has made it clear that right to life includes right to health of children as well.

CLINICAL TRIALS AND CHILDREN PARTICIPATION

A clinical trial is defined as 'any research study that prospectively assigns human participants or groups of humans to one or more health-related interventions to evaluate the effects on health outcomes.' Interventions include not only drugs but also cells and other biological products, surgical procedures, radiological procedures, devices, behavioral treatments, process-of-care changes, preventive care, etc.¹⁷ It simply means a systematic study of new drugs in human subjects to generate data for discovering or verifying the clinical, pharmacological (including the safety and efficacy of the new drug).¹⁸ Clinical trials are sets of tests in the medical research and drug development that generate safety and efficacy data (or more specifically, information about adverse drug reactions and adverse effects of other treatments) for health interventions (e.g., drugs, diagnostics, devices, therapy protocols).¹⁹

"clinical trial" in relation to a new drug or investigational new drug means any systematic study of such new drug or investigational new drug in human subjects to generate data for discovering or verifying its,-

- a) clinical or;
- b) pharmacological including pharmacodynamics, pharmacokinetics or;
- c) adverse effects,²⁰

LEGAL FRAMEWORK FOR CLINICAL TRIALS IN INDIA

For the regulation of clinical trials in India, The Drugs and Cosmetics Act, 1940 was enacted with an object to regulate the import, manufacture, distribution and sale of drugs and cosmetic.²¹

Section 18²² of the Drugs and Cosmetics Act, 1940 provides provision for the Prohibition of manufacture and sale of certain drugs and cosmetics. Without the license, no person shall be allowed to manufacture new drugs. To get the license for manufacturing of new drugs, clinical trial is necessary step.

NEW DRUGS AND COSMETICS RULES, 2019

Central Licensing Authority i.e. Drugs Controller is entrusted a duty to grant license to conduct clinical trial for the manufacturing clinical trial. As per rule 6 of the New Drugs and Clinical Trials Rules, 2019 constitution of Ethics Committee for clinical trial is compulsory. The constitution of Ethics Committee is laid down under rule 7 of the New Drugs and Clinical Trials, 2019. Registration of such Ethics Committee with Central Licensing Authority is essential. This Ethics Committee is bound to observe several functions mentioned under rule 11 of the New Drugs and Clinical Trials Rules, 2019. Ethics Committee is bound to perform functions such as to review and accord approval to clinical trial and to oversee the conduct of clinical trial to safeguard the rights, safety and wellbeing of trial subjects in accordance with these rules, to forward a report to the Central Licensing Authority and Comply the provisions mentioned in Chapter VI in case of any serious adverse event happens during the clinical trial. Also, at any stage of a clinical trial, that the trial likely to

compromise the right, safety or wellbeing of the trial subject, the Ethics Committee may order for discontinuation or suspension of the clinical trial and may inform to the institution or Central Licensing Authority.²³ Rule 20 of the New Drugs and Clinical Trials, 2019 provides that the work of every clinical trial site shall be overseen by an Ethics Committee for clinical trial registered under rule 8, before initiation and throughout the duration of the conduct of such trial.

Ethics Committee is bound to maintain the all records, registers and other documents relating to functioning and review of clinical trials.²⁴ Ethics Committee is under an obligation to maintain such records for a period of five years after completion of every clinical trial. First Schedule of the New Drugs and Clinical Trials Rules, 2019 covers general principles to be observed before and during clinical trial. To carry out studies on special populations, special rules are laid down in the Schedule I of the New Drugs and Clinical Trials Rules, 2019. Rules specified that before the introduction of new drugs for children, it should be tested on adult then after considering the effects, can be tested on children. To conduct such clinical trial, schedule 3 has specified detailed procedure and protocol. It is expected that for the conduction of clinical trial, the rules mentioned under the New Drugs and Clinical Trials Rule, 2019 would be observed. In this entire rules, certain issues are required to be discussed.

- **Constitution of Ethics Committee and Protection of rights and well-being of children:**

Ethics Committee has been playing a very pivotal role in the clinical trial. The entire clinical trial is to be carried out under the observation of Ethics

Committee. The significant duty is imposed upon the Ethics Committee to take care of the rights, safety and wellbeing of the children in clinical trial and decide the essentiality of participation of children in clinical trial. The researcher and the team are responsible for protecting the dignity, rights, safety and well-being of the participants enrolled in the study.²⁵ Ethics Committee have a continuing responsibility to regularly monitor the approved research to ensure ethical compliance during the conduct of research. The Ethics Committee should be competent and independent in its functioning.²⁶ Independency and Competency are the basics of the rules. Notion of Independency covers two core ideas: authority and influence.²⁷ In this context, Independent Ethics Committee means with the exercise of powers and without any kind of influence directly or indirectly, committee performs obligations impartially.

In order to understand how the Ethics Committee carried out functions independently when the constitution of such committee is made by the Sponsor or Investigator or the applicant? This is rather a big question against the Constitution of Ethics Committee and functioning of committee independently. When such EC is formed by the sponsor or investigator or applicant, undue influence will be upon such committee. Acting without any kind of influence Moreover, EC is bound to take care of protection of rights and well being of research participant and communicate the report in any case serious adverse event occurs. Therefore, it would be absolutely imaginary situation that such Ethics Committee would act against the higher person or body by whom such committee is constituted.

• **Informed Consent and Child as a research participant:**

Autonomy, in the liberal tradition, is generally understood as self-determination: the freedom to pursue one's conception of the good life, just as long as it does not impinge upon another's identical freedom.²⁸ Concept of Autonomy is the basis for the individual's right to self-determination. Recognizing an individual right of autonomy makes self-creation possible.²⁹ Justice Cardozo said that 'Every human being of adult years and sound mind has a right to determine what shall be done with his own body.'³⁰

In all trials, a freely given, informed, written consent is required to be obtained from each study subject. The Investigator must provide information about the study verbally as well as using a patient information sheet, in a language that is nontechnical and understandable by the study subject.³¹ In case of children participation, subject's consent must be obtained in written format from the parent or legal guardian who assumes the fullest extent possible about the study in a language and terms that they are able to understand.³² Also, the same legal representative if unable to give understand then in the present of impartial witness, such consent can be obtained. Such children participant should be informed to the fullest extent possible regarding the study in a language and in terms to understand it. Audio-video recording of the informed consent process should be maintained by the investigator.³³

Informed Consent has five basic ingredients such as competency, understanding, information, voluntariness and disclosure of the information.³⁴ It is expected that all such five essential components are present in the entire process laid down in the New

Drugs and Clinical Trial Rules, 2019. But, unfortunately, the real concept of informed consent is not made it applicable to the New Drugs and Clinical Trials Rules, 2019 particularly in case of participation of children. Under the rules, legal guardian is empowered to give consent for children but there is no provision or authority to inspect whether such person presuming to be legal guardian is really legal guardian or not? Another unanswered question is whether such legal guardian is competent enough to take appropriate decision for participation in the clinical trial? Who is going to check the legal guardian's understanding of the details of clinical trial? Question can be raised here that who is going to verify that adequate and relevant information is provided to the legal guardian at the time of giving consent? Legal guardian is empowered to take appropriate decision on behalf of children regarding participation in clinical trial. The most significant question in this context is under what circumstances guardian has taken this decision? Rules are totally silent about it. Lack of mechanism to inspect entire informed consent procedure is the biggest flaw of the New Drugs and Clinical Trials Rules, 2019. Though Audio-Video Recording is compulsory but again who is going to verify the same whether informed consent is taken as a formality on documents or not? These issues clearly state that the concept of Informed Consent is not adopted in the entire procedure laid down under the New Drugs and Clinical Trials Rules, 2019. Therefore, the procedure laid down in Schedule 3 of the New Drugs and Clinical Trials Rules, 2019 is against vague and against the interest of the children.

CONCLUSION AND SUGGESTIONS

Participation of children in clinical trials is essential for the advancement of drugs. New Drugs and Clinical Trials Rules, 2019 provides the powers and procedure to conduct clinical trials wherein children are the participant. Ethics Committee constituted by the Sponsors or Investigators is under an obligation to provide safety, protect and respect the rights of the research participants including children research participant. Despite of this express obligation imposed upon Ethics Committee, the purpose of the Constitution of Ethics Committee cannot be achieved due to the issues exists in the system as discussed above. Hence, to resolve the above issues following suggestions are recommended:

To maintain the transparency, accountability as well as independency in the functioning of Ethics Committee, it is suggested that such Ethics Committee should be constituted by the Government. The government constituted Ethics Committee will be completely independent and without under the direct or indirect influence of Sponsors or Investigators. Accordingly, such Ethics Committee will function fearlessly and will give justice to their prime function i.e. to provide safety, protect and respect the rights of research participant.

To provide solution to the Participation of Children and Informed Consent Issues as discussed above, it is suggested that Ethics Committee which is constituted by the Government, should be shouldered express obligation to conduct entire procedure of the informed consent before this Ethics Committee. Power should be transferred with Ethics Committee to verify the real understanding of the legal guardian regarding informed consent process as well such committee should check the competency of

the legal guardian. Entire process to obtain informed consent should be conducted before the Ethics Committee. This committee should be responsible to observe the existence of informed consent in the entire process.

In brief, incorporation of these suggestions in the New Drugs and Clinical Trials Rules, 2019 will boost the powers of the Ethics Committee and rights of the children as research participants will be protected in real sense.

¹ ANDREW CLAPHAM, HUMAN RIGHTS: A VERY SHORT INTRODUCTION 1 (OXFORD UNIVERSITY PRESS 2007)

² *Id* at 21.

³ *Id*.

⁴ *Supra* note 1.

⁵ United Nations Human Rights, <https://www.ohchr.org/en/what-are-human-rights> (last visited Oct. 10, 2022)

⁶ UNICEF, <https://www.unicef.org/child-rights-convention/what-are-human-rights> (last visited Nov. 1, 2022)

⁷ DANIEL J. WHELAN, INDIVISIBLE HUMAN RIGHTS A HISTORY (1, 2010).

⁸ RITA JOSPEH, HUMAN RIGHTS AND THE UNBORN CHILD, (1,2009).

⁹ *Supra* note 5.

¹⁰ UDHR. art. 1.

¹¹ *Supra* note 5.

¹² UNICEF, <https://www.unicef.org/child-rights-convention#:~:text=In%201989%2C%20world%20leaders%20made,children's%20lives%20around%20the%20world> (last visited Nov. 2, 2022)

¹³ CONVENTION ON THE RIGHTS OF THE CHILD. art. 23.

¹⁴ CONVENTION ON THE RIGHTS OF THE CHILD. art. 24.

¹⁵ Parmandand Katra v. Union of India, AIR 1989 SC 2039

¹⁶ Consumer Education and Research Center v. Union of India, AIR 1995 DC 636

¹⁷ Clinical Trials, http://indialawjournal.com/volume2/issue_3/article_by_sreesudha.html (last visited Nov.5, 2022).

¹⁸ DR. NANDITA ADHIKARI, LAW AND MEDICINE, (1,2007).

¹⁹ Clinical Trial, http://en.wikipedia.org/wiki/Clinical_trial (last visited Nov. 15, 2022).

²⁰ New Drugs and Clinical Trials Rules, 2019, Rule 2(j)

²¹ The Object of the Drugs and Cosmetics Act, 1940, No. 23 Acts of Parliament, 1940 (India).

²² The Object of the Drugs and Cosmetics Act, 1940, S. 18, No. 23 Acts of Parliament, 1940 (India).

²³ The New Drugs and Clinical Trials, 2019, Rule 11.

²⁴ The New Drugs and Clinical Trials, 2019, Rule 13

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²⁵ Indian Council of Medical Research, ICMR Guidelines, https://main.icmr.nic.in/sites/default/files/guidelines/ICMR_Ethical_Guidelines_2017.pdf (last visited on Dec.17, 2022).

²⁶ Id.

²⁷ VOL. 50, NO. 2, HAFTEL, YORAM Z., AND ALEXANDER THOMPSON, THE INDEPENDENCE OF INTERNATIONAL ORGANIZATIONS: CONCEPT AND APPLICATIONS, T.J.C.R., 254, (2006).

²⁸ ARKING, K., AUTONOMY AND THE SUBJECTIVE CHARACTER OF EXPERIENCE, J.A.P., 17(1), (2000).

²⁹ Chester v. Afshar, (2002) EWCA Civ 724, (2003) QB 356.

³⁰ Scholendorff v. Society of New York Hospital, (1914) 211 NY 125.

³¹ The New Drugs and Clinical Trials Rules, 2019, Third Schedule.

³² The New Drugs and Clinical Trials Rules, 2019, Third Schedule

³³ The New Drugs and Clinical Trials Rules, 2019, Third Schedule

³⁴ TOM BEAUCHAMP AND JAMES CHILDRESS, PRINCIPLES OF BIOMEDICAL ETHICS, 7(2012).