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## MESSAGE

Date: 06.11.2019

The research articles written by law students from all over India on the theme of 'Child and the Law' presented in this issue of KSLU Students Law Review shed critical light on various legal problems that haunt children. They are well-researched, brimming with original reflections and identifying the gaps in the law.

Children have potentialities of great development of their personality, surroundings and society. But they are vulnerable to various types of exploitations by the elders, be it in the form of child labour, sexual abuse or trafficking and so on. Parents, society and the State have responsibility of facilitating their education, and providing access to nutritional food, health, shelter and basic necessities of life. When they are in need of care and protection, legal system has to extend the same to them. When they are in conflict with law, fair and reasonable legal procedure befitting to their dignity should operate. Their safety, dignity and all round development are a matters of great social concern. The warmth of love and affection within the family is their moral entitlement. Family law has to respond to this imperative.

The discussions in the bunch of articles in this issue by young and brilliant minds have made positive contribution to the knowledge system on this vital area. I congratulate the prize winners and others whose articles have been included in this volume of KSLU Students Law Review.

**Prof.(Dr.) P. Ishwara Bhat**  
Hon'ble Vice Chancellor  
Karnataka State Law University  
Navanagar, Hubballi

## EDITOR'S NOTE

We are indeed delighted to publish this sixth volume of the Journal, 'Student Law Review'. Karnataka State Law University, right from its inception has nurtured the ideas of law students by providing platform to canvass their vibrant ideas and original thoughts on various aspects of *corpus juris*. Under the astute guidance of our Vice Chancellor, Prof. (Dr.) P. Ishwara Bhat, we present to our readers, this volume to ignite new legal dimensions in the think tank. This volume is contributed to the most lucrative subject of law i.e., 'Child and the Law', which is not receiving the attention it deserves.

The children of this country for a long period of time have been denied of basic rights for the meaningful life. Further the child rights movement in India was given impetus by the series of judicial verdicts, realizing the importance of the role of children in nation building and future of the nation. Then various national policies were materialized with some landmark laws. Despite all such efforts, yet the small voices suffer in silences for various socio-economic and cultural factors. Having regard to the massive deprivation of child rights and alarming incidents the theme was aptly chosen to encourage young minds to write on the legal discourse surrounding the theme.

The scholarship on child rights has been enriched by the valued contribution of different sections of legal fraternity. Perhaps this journal provides an opportunity for the students to manifest the erudite ideas. This volume of Student Law Review, endured to encourage the students from different law schools to contribute for publication. This time the editorial board was happy to witness the overwhelming response from the student. We received around 57 manuscripts which included Articles, Case comments and Essays. The Editorial board on the scrutiny of all the manuscript under the proficient guidance of Parton, Advisory Board and Faculty In-charge the manuscripts were subjected to formal editing process. Thereafter, seventeen manuscripts were shortlisted for the assessment by the scholar for

awarding the incentives and also to decide the competency for the publication in the order of merit.

This volume conglomerates numerous articles by student authors on diverse themes like: child custody issues, child sexual abuse, child and the criminal law and also constitutional aspects. We congratulate all writers and express our sincere gratitude for their contributions and look forward for this kind of continued response from the student writers and this unique journal becomes a value addition in the annals of Karnataka State Law University.

**-Editorial Board**

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## JUDICIAL PATTERNS IN THE ENFORCEMENT OF FOREIGN JUDGMENTS: INTERNATIONAL CHILD CUSTODY ISSUES

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-Ms. Lakshana Radhakrishna\*

### Abstract

*The cases concerning parental child abduction often raise questions of comity of courts principle since they are generally cross-jurisdictional. The comity of courts principle requires that courts effectuate judgments of foreign courts as a matter of justice, equity and good conscience. Indian courts have displayed significant inconsistency in enforcing foreign court orders in child custody matters. The reason behind this is that India lacks a legislation to regulate parental child removal. The Government sought to fill this legal vacuum in vain by introducing the Protection of Children (Inter-country Removal and Retention) Bill, 2016 that has lapsed. The researcher identifies patterns in the inconsistent judicial orders pronounced by Indian courts in child custody matters and analyses the same in three phases. The first phase relates to the period when the Indian judiciary placed paramount importance on child welfare in deciding custody cases and ignored other factors. The second phase saw the Indian judiciary abiding by the comity of courts principle and passing mirror orders to enforce foreign judgments. The final phase is the ongoing attempt at reconciling international comity principle with child welfare. The Supreme Court has chosen the via media in several recent cases by following the approach of first strike principle, intimate jurisdiction or visitation rights. The researcher concludes by highlighting the need for a new legislation.*

**Keywords:** Child Custody, Code of Civil Procedure 1908; Intimate Jurisdiction; Visitation and First Strike Principal.

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\* 5<sup>th</sup> Year Student, B.A.LL.B.(Hons.), NALSAR University of Law, Hyderabad.

## Introduction

The Indian legal system is notorious for criminalisation of certain actions as much as it is for the legalisation of certain others. One such curious case is that of inter-parental child removal. Presently, India does not recognise parental child removal as an offence. Cases concerning parental child abduction raise questions of comity of courts principle since they are generally cross-jurisdictional. The comity of courts principle requires that Courts effectuate judgments of foreign courts as a matter of justice, equity and good conscience.<sup>1</sup> Indian courts have displayed significant inconsistency in enforcing foreign court orders and the jurisprudence is particularly incongruous in child custody matters. Orders given by foreign courts have often been ignored by Indian courts as they seek to act in what they see as the 'best interests' of the child. This problem persists despite the clear language of Sections 13 and 14 of the *Code of Civil Procedure, 1908* which give effect to the comity of courts principle.

Child custody disputes often spill across borders since people are increasingly moving to different countries for education and employment related opportunities.<sup>2</sup> Cross-border inter-parental child abduction has become a common occurrence as the migrant and immigrant populations increase manifold. Cross-border inter-parental child removal refers to a situation where a child is wrongfully removed or retained by a parent across frontiers. As a matter of international law, child removal connotes the violation of certain parental rights that exist by virtue of law, agreement, court order or other privileges.<sup>3</sup>

India does not recognise child removal as an offence and there is no clarity on the enforcement of foreign court orders in this regard. Hence, the Indian courts have produced varied judgments and they have taken diverse positions on the issues involved. Interesting patterns can be observed in the judicial orders pronounced by Indian courts in child custody matters. The researcher attempted

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<sup>1</sup> *Satya v. Teja Singh*, AIR 1975 SC 105.

<sup>2</sup> A. R. Lakshmanan, "International Child Abduction - Parental Removal", 48 *Ind.J.Int'l L.* (2008) p. 427.

<sup>3</sup> Jambholkar, "India and the 1980 Hague Convention on Civil Aspects of International Child Abduction", 51 *Ind. J. Int'l L.* (Jan- Feb, 2011) pp. 85-96.

to briefly analyse the same after discussing *the Hague Convention* and the 2016 and 2007 Bills.

### ***The Hague Convention***

Article 3 of *the Hague Convention* provides that child removal or retention in breach of parental custodial rights under the laws of the place of habitual residence of the child constitutes an internationally wrongful act.<sup>4</sup> The person who has custodial rights as per the applicable family laws determines habitual residence of the child.<sup>5</sup> The Convention seeks to ensure the return of the child to the place of habitual residence, in furtherance of the belief that the same would be in the best interests of the child.<sup>6</sup> It provides for the designation of Central Authorities in each State party to discharge the duties envisioned in the Convention.<sup>7</sup> The Convention also covers rights of access under domestic laws<sup>8</sup> and seeks to protect the same and other rights until the child reaches sixteen years of age.<sup>9</sup> Secretariat of the Hague Conferences has published in three parts, guides to good practice, namely central authority practice, implementing measures and preventing measures which seek to aid the contracting States in fulfilling the aims of the Convention.

A major drawback of the *Hague Convention* is that it doesn't include any penal provisions and it only provides a framework within which countries can collaborate with each other to secure the return of abducted children. What the 1980 Convention fails to take into account is that such collaboration is an ideal goal in a world with diverse legal systems that have their own problems and unique ways of functioning.

India has not signed the said Convention and it is consequently not bound by the obligations envisaged under it. Several scholars have criticised India for failing to sign the International instrument despite having a huge migrant population

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<sup>4</sup> Article 3, *Hague Convention*.

<sup>5</sup> Article 5 (a), *Hague Convention*.

<sup>6</sup> Ishaque and Mustafa, "The Best Interests of the Child: A Prevailing Consideration within Islamic Principles and a Governing Principle in Child Custody Cases in Pakistan", 29 *Int'l J. L. Pol'y & Family* (2015) pp. 78-96

<sup>7</sup> Chapter II, *Hague Convention*.

<sup>8</sup> Article 1, *Hague Convention*.

<sup>9</sup> Article 4, *Hague Convention*.

around the world.<sup>10</sup> Legal disputes involving international parental child removal have become common place and the Indian judiciary is often made a helpless onlooker as children are claimed, removed and accessed like properties.

India claims that it has not signed the Hague Convention in the interests of the Indian women living abroad.<sup>11</sup> These women escape to India with their children in cases of domestic violence or abusive marriages. If India signs the Convention, such women could be made liable for civil offence under the strict laws of foreign countries. For instance, in the United Kingdom, *the Child Abduction Act, 1984* has very stringent provisions making such wrongful removal and retention, an offence. However, it is important to balance the interests of Indian women living abroad with the interests of their wards before taking a final decision. The current position of the Indian Government has its own disadvantages.

Firstly, the *Hague Convention* helps to delineate the jurisdiction in cases of cross-border inter-parental child removal and it provides a mechanism for settling disputes. The Indian courts are over burdened and rather inefficient when it comes to speedy delivery of justice. India is worsening the situation by failing to sign on to a specialised mechanism that would streamline the legal landscape in this regard with that of the major developing countries where a large Non-resident Indian (NRI) population resides.

Secondly, an indirect disadvantage faced by India on account of failing to sign the 1980 Convention plays out when a foreign judge hears a petition for allowing a child to spend a vacation in India with a divorced parent. Since there is no guarantee of swift return of the child to the country of origin, the foreign judge will show greater reluctance in allowing such petitions.

### **Indian Legal Regime**

As mentioned earlier, India does not recognise child removal as an offence and it has recently made known that, it has no intention of doing so in the near future.<sup>12</sup> *The Protection of Children (Inter-country Removal and Retention)*

<sup>10</sup> Duncan, "The Work of the Hague Conference in the Field of the International Protection of Children and its Relevance to India", 2 *Int'l Law Issues & Challenges* (2009) pp.149-68

<sup>11</sup> J. Venkatesan, "India Not to Sign Pact on Inter-Country Child Abduction" *Deccan Chronicle*, Feb 12, 2017.

<sup>12</sup> Press Trust of India, "Govt Likely to Junk Inter-Parental Child Abduction Bill" *Indian Express*, Nov. 6<sup>th</sup>, 2016.

*Bill*, which was introduced in 2016 as a precursor to adopting *the Hague Convention* has been allowed to lapse. The major reason cited by the Indian Government for not joining *the Hague Convention* is that Indian women living abroad will be disadvantaged since they might end up facing charges if they leave their abusive husbands and return to their country of origin with their children. Further, the Indian Government has pointed out that the instances of a parent leaving India with the child and escaping to a foreign country have been negligible. The Indian Government has taken the position that creating an offence of child removal would do more harm than good and there is no real need for it in the Indian legal context.

The Indian Government's position is misconceived since, the lack of recognition of child removal as an offence and the inconsistency displayed by the Indian courts in enforcing foreign custody orders has created several problems.<sup>13</sup> There is a need for clarity in the Indian position on the subject as voiced out in the 18<sup>th</sup> and the 20<sup>th</sup> Law Commission reports. The 2016 Bill sought to bring in much needed clarity and conformity to internationally recognised standards but it has met the sad fate of its 2007 predecessor, which lapsed before it could be tabled in Parliament.<sup>14</sup>

The 2007 Bill proposed the creation of a central authority that would decide on returning children illegally removed by parents from other countries. It was meant to give effect to *the Hague Convention* once India joins it. Unfortunately, the Bill was never debated in Parliament and the issue was side-lined as a low-priority subject despite the glaring number of NRI marriages and cross-border child abductions that were coming to light.<sup>15</sup>

A refurbished version of the 2007 Bill was tabled in Parliament in 2016.<sup>16</sup> The 2016 Bill borrows the definition of 'child removal' from *the Hague Convention*

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<sup>13</sup> Anil Malhotra and Ranjit Malhotra, "Child Abduction Law in the Indian Jurisdiction", *Int'l Fam. L.* 195 (November, 2003).

<sup>14</sup> V. Kumara Swamy, "Betwixt and Between" *Telegraph India*, April 7<sup>th</sup>, 2007.

<sup>15</sup> Mohammed Iqbal, "Legal Experts Seek Uniformity of Laws Governing Children" *The Hindu*, Oct 19<sup>th</sup>, 2014.

<sup>16</sup> Moushumi Das Gupta, "Inter-Parental Child Abduction may soon become an Offence in India" *Hindustan Times*, July 29<sup>th</sup>, 2016.

and it seeks to create a suitable domestic atmosphere for return of abducted children.<sup>17</sup>

The central concept in child custody laws is that of 'habitual' or 'ordinary' residence of the child. The 2016 Bill understands 'habitual residence' as follows:

*"The place where the child resided with both parents; or, if the parents are living separately and apart, with one parent under a separation agreement or with the implied consent of the other parent or under a court order; or with a person other than a parent on a permanent basis for a significant period of time, whichever last occurred."*<sup>18</sup>

This provision should be read with *the Guardians and Wards Act, 1890*, which also gives primacy to the place where the minor ordinarily resides. A guardian judge can interfere by entertaining a petition for custody, only if the child ordinarily resides in his jurisdiction.<sup>19</sup>

The *Hague Convention* adopts a similar stance by emphasising the 'habitual residence' of the child over other considerations like place of birth or nationality.<sup>20</sup> The landmark case on 'habitual residence' is *Cooper v. Casey*<sup>21</sup> where it was held that a child can have only one place of habitual residence which should be determined by focusing on the child's past experience and not on its or its parents' intentions. Therefore, the concept of habitual residence unsurprisingly forms the core of judicial decisions on the subject and it becomes a bone of contention as Indian courts grapple with foreign court orders.<sup>22</sup>

The following section provides an analysis of judicial trends in enforcement of child custody orders given by foreign courts.

<sup>17</sup> Anil Malhotra, "Rights for Abducted Children" *The Hindu*, September 5<sup>th</sup>, 2016, available at, [www.thehindu.com/opinion/columns/anil-malhotra-writes-on-rights-for-abducted-children/article9072611.ece](http://www.thehindu.com/opinion/columns/anil-malhotra-writes-on-rights-for-abducted-children/article9072611.ece) (last visited on October 12<sup>th</sup>, 2016).

<sup>18</sup> Section 2 (f), *The Protection of Children (Inter-country Removal and Retention) Bill 2016*.

<sup>19</sup> Section 9, *The Guardians and Wards Act, 1890*.

<sup>20</sup> Articles. 3, 4, 5, 13, 14, 15, 25, *Hague Convention*.

<sup>21</sup> [1995] 18 Fam LR 433.

<sup>22</sup> Anil Malhotra & Ranjit Malhotra, "Child Abduction Law in the Indian Jurisdiction", *Int'l Fam. L.* (Nov., 2005) p. 225.

### Patterns in the Enforcement of Foreign Custody Orders

Indian Courts determine the validity of foreign court decrees and orders keeping in view the provisions of Section 13 of *the Code of Civil Procedure 1908* as amended by the Amendment Acts of 1999 and 2002. Section 13 embodies the principle of *res judicata* and it provides substantive law and not a mere rule of procedure.<sup>23</sup> It provides for the enforcement of foreign court orders in India without adjudicating the dispute in Indian courts again.

A threefold pattern can be identified in the history of judicial decisions on the subject of child custody. The division is not clearly chronological. *Firstly*, certain court rulings chiefly focus on considerations of welfare of the infant to the exclusion of all other factors. *Secondly*, there are judicial decisions that blindly enforce foreign court orders *via* mirror orders, implicitly ignoring the factors that would weigh on child welfare. *Thirdly*, a number of court rulings, which are mostly recent have attempted a reconciliation of the seemingly conflicting concepts of international comity and well-being of the child.

#### Phase I: Paramountcy of Child Welfare

The starting point for the child welfare jurisprudence and criminalisation of child detention is often located in *Gohar Begam v. Suggi Alias Nazma Begam*<sup>24</sup> where the Supreme Court provided relief under Section 491 of *the Code of Criminal Procedure* (as it existed then) to allow the recovery of child custody. The court cited the welfare of the minor as the major consideration. The concept of child welfare was subsequently developed in a string of cases and it has been beautifully captured by the Supreme Court's observation in the recent case of *Sumedha Nagpal v. State of Delhi*<sup>25</sup> as under:

*"No decision by any court can restore the broken home or give a child the care and protection of both dutiful parents. But a decision there must be, and it cannot be one repugnant to normal concepts of family and marriage. During infancy and impressionable age, the care*

<sup>23</sup> *Mologi Nar Singh Rao Shitole v. Sankar Saran*, AIR 1962 SC 1737.

<sup>24</sup> AIR 1960 SC 93.

<sup>25</sup> JT 2000 (7) SC 450.

*and warmth of both the parents are required for the welfare of the child.”*<sup>26</sup>

The consideration of well-being of the infant stopped being the sole factor when India began applying the comity of courts principle in child custody cases. However, child welfare continues to remain a predominant principle and it outlasted the comity principle in a case that was decided as recently as in 2007 where, the High Court of Bombay at Goa declined to issue a writ of habeas corpus thereby refusing the custody of a girl child to her mother in Ireland.<sup>27</sup>

### **Phase II: Comity of Courts- An Era of Mirror Orders**

The principle of the comity of courts is essentially a principle of self-restraint, applicable when a foreign court is *in seisin* of the issue of the custody of a child prior to the domestic court. There may be a situation where the foreign court though seized of the issue does not pass any effective or substantial order or direction. In that event, if the domestic court were to pass an effective or substantial order or direction prior in point of time then the foreign court ought to exercise self-restraint and respect the direction or order of the domestic court by the issue of a mirror order, unless there are very good reasons not to do so.

Mirror order is an order made in one country, which reflects the original order made in another country. Mirror orders are often made in circumstances where contact arrangements have been agreed and the child will then be living in another country. It signifies that the courts of the country where the child will later be living are aware of the original arrangements and they give protection for the other parent in the country where the child is living.<sup>28</sup>

In England, a mirror order is required to enforce a foreign court ruling in family law division unless the State in question is a signatory to certain Conventions. Two principles form the basis of this legal position: it is undesirable for there to be conflicting orders in different jurisdictions;<sup>29</sup> courts must discourage parallel rival

<sup>26</sup> *Ibid.*, at 453.

<sup>27</sup> *Mandy Jane Collins v. James Michael Collins*, (2006) 2 HLR 446.

<sup>28</sup> Anil Malhotra, “International Parental Child Abduction Law in the Indian Jurisdiction: Case Law Analysis and Procedural Safeguards”, 2 *Int’l L. Issues & Challenges* (2009) pp. 168-86; see also *Re G (Contact)*, [2006] EWCA Civ 1507.

<sup>29</sup> *E v. E*, 2007 1 FLR 1977.

proceedings in another jurisdiction or reconsideration of the facts of a case that has already been adjudged by a proper forum.<sup>30</sup>

Mirror orders are unheard of in several countries. Some countries like Indonesia allow “friendly settlement” arrangements whereby the parties can agree to lodge a consent order in the foreign state, which will be enforceable. In Islamic countries, the enforcement of foreign court orders depends on whether the order is within the bounds of what is permissible under Sharia law.

The Indian judiciary followed the mirror order jurisprudence in a small number of cases. The Supreme Court in *Surinder Kaur v. Harbax Singh Sandhu*<sup>31</sup> and *Elizabeth Dinshaw v. Arvind Dinshaw*<sup>32</sup> exercised jurisdiction in returning the minor children to the country of their parent and automatically accepted the relevant foreign court orders by issuing mirror orders for execution. The mirror order regime was soon tempered by considerations of child welfare, as the Indian judiciary began to take a more mature approach.

### **Phase III: Reconciling Comity and Child Welfare**

Welfare of child and comity of courts are not contrasting principles and they can be reconciled. The attempt at reconciliation began with *Dhanwanti Joshi v. Madhav Unde*,<sup>33</sup> where the Supreme Court observed that the order of the foreign court would only be one of the facts, which must be taken into consideration while dealing with child custody matters. It was further opined that India being a country which is not a signatory to the Hague Convention, was not bound to execute foreign child custody orders. The comity principle was thus back grounded.

The reasoning in *Dhanwanti Joshi* was re-affirmed by the Supreme Court in the case of *Sarita Sharma v. Sushil Sharma*<sup>34</sup> where it was held that in view of the facts and circumstances of the case, the decree passed by the American Court though a relevant factor, cannot override the consideration of welfare of the minor children.

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<sup>30</sup> *In Re A*, 2007 1 FCR 391.

<sup>31</sup> 1984 SCR (3) 422.

<sup>32</sup> 1987 SCR (1) 175.

<sup>33</sup> (1998) 1 SCC 112.

<sup>34</sup> 2000 (3) SCC 14.

In the case of *Kumar V. Jahgirdar v. Chethana Ramatheertha*,<sup>35</sup> the conflicting considerations were balanced by concluding that a female child of growing age needs company more of her mother compared to the father regardless of foreign court custody orders.

Further, in a recent case of *Paul Mohinder Gahun v. State of NCT of Delhi*<sup>36</sup> the Delhi High Court refused to grant custody of the child to the father and observed that the question of conflict of laws and jurisdictions should take a back seat in preference to what lies in the interest of the minor.

While attempting to reconcile the comity principle with the best interests of the child, the Indian courts have broadly employed three methods- first strike principle, the concept of visitation rights and the principle of intimate jurisdiction.

#### **i. 'First Strike' principle**

The case of *Surya Vadanam v. State of Tamil Nadu*<sup>37</sup> is the watershed verdict on this subject. It was held that the Rule of comity of courts should not be jettisoned except for compelling special reasons to be recorded in writing. The Supreme Court discussed the first strike principle and held that whichever court in whichever jurisdiction is seized of the matter first, will have the prerogative to decide the case. Accordingly, the children were ordered to be returned to UK since the English court was first *in seisin* of the matter. The theory applies whenever the foreign court's jurisdiction is not in doubt. Madan Lokur J., further opined that interim orders of foreign courts of competent jurisdiction should be respected and that enquiry by domestic courts must be based on reasons when there is a pre-existing order of a foreign court.

#### **ii. Visitation Rights**

Visitation rights is the court ordered privilege conferred on a non-custodial parent or any other relative for spending time with a child who is living with another person, usually the custodial parent.<sup>38</sup> In a number of cases,<sup>39</sup> the Supreme Court

<sup>35</sup> 2004 (1) HLR 468.

<sup>36</sup> 2005 (1) HLR 428.

<sup>37</sup> AIR 2015 SC P.2243.

<sup>38</sup> 2015 8 SCC 318.

<sup>39</sup> *Prabhat Kumar v. Himalini Kashyap*, CM (M) 373/2009 & CM(M) 821/2009; *Sahiba Ali v. State of Maharashtra*, 2004 (1) HLR 212; *Aishley Kapoorcase*, Case No: CO/5143/2014; *Ms. Neeta Misra v. Philip David Dexter*, W.P. (Cr.) 1562/2012 & FAO 29/2013.

has employed visitation rights as a balancing mechanism to partly circumvent a clearly worded custody order issued by a foreign court. Visitation rights have been conferred upon the non-custodial parent, grandparents, adoptive parents, maternal uncles and aunts et al. The prime consideration for visitation rights is the welfare of the child and the proximity of the child to the relation concerned.

### **i. Intimate Jurisdiction**

In *Ravi Chandran v. Union of India*<sup>40</sup> it was held that the Court in the native country that has the closest concern and the most intimate contact with the issues arising in the case, would be in the best position to investigate the aspects relating to the welfare of the child. The concept of intimate jurisdiction was discussed as early as 1950 in England in the case of *Mark T. Mc. Kee v. Eyelyn McKee*.<sup>41</sup> It was found that it may be proper for a court in one jurisdiction to make an order directing that a child be returned to a foreign jurisdiction without investigating the merits of the dispute relating to the care of the child on the ground that such an order is in the best interest of the child. The concept was re-affirmed In *Re, L (minors)*<sup>42</sup> and approved by the Supreme Court in *Dhanwanti Joshi v. Madhav Unde*.<sup>43</sup>

In *Shilpa Agarwal v. Aviral Mittal*<sup>44</sup> the High Court ordered that the child be returned to the foreign country by invoking Section 6 of the *Hindu Minority and Guardianship Act, 1956*, whereunder the mother is entitled to retain custody of the minor child under the age of 5 years. The foreign court was also found to be more proximate to the child's place of habitual residence.

In *Ruchi Majoo v. Sanjeev Majoo*<sup>45</sup> the concept of intimate jurisdiction was applied and the Court in *Surinder Kaur*<sup>46</sup> has specifically approved the modern theory of Conflict of Laws, which prefers the jurisdiction of the State, which has the most intimate contact with the issues arising in the case. The Court also holds

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<sup>40</sup> 2010 (1) SCC 174.

<sup>41</sup> (1951) A.C. 352 : (1951) All ER 942.

<sup>42</sup> (1974) 1 All ER 913.

<sup>43</sup> *Supra* note 35,

<sup>44</sup> 2010 (1) SCC 591.

<sup>45</sup> (2011) 6 SCC 479.

<sup>46</sup> 1984 SCR (3) 422.

that Jurisdiction is not attracted by the operation or creation of fortuitous circumstances. The 'most intimate contact' doctrine and the 'closest concern' doctrine of *Surinder Kaur* cannot be ignored only because their application might be uncomfortable in certain situations. It is not appropriate that a domestic court having much less intimate contact with a child and having much less close concern with a child and his or her parents (as against a foreign court in a given case) should take upon itself the onerous task of determining the best interests and welfare of the child. A foreign court having the most intimate contact and the closest concern with the child would be better equipped and perhaps best suited to appreciate the social and cultural milieu in which the child has been brought up rather than a domestic court. The Court adds a caution that to allow the assumption of jurisdiction by another State in such circumstances will only result in encouraging forum shopping.

### Conclusion

The judicial practice can be thus classified on the basis of the relative importance given to the comity of courts principle and the consideration of the welfare of the child. But these heads are not comprehensive. They merely seek to provide a framework to appreciate the rich jurisprudence of the Indian courts in child custody and removal matters, especially, when there is a lack of legislative clarity.<sup>47</sup>

The Indian Government took a step in the right direction by preparing *the Protection of Children (Inter-country Removal and Retention) Bill, 2016*. The Bill would have brought in much needed legal clarity if India had also subsequently signed and ratified *the Hague Convention* to ease the process of inter-country child returning. This would have made it easier to monitor child removal or wrongful retention. Being part of a private international law regime might have helped reach finality on the interpretive application of Section 13 of *the Code of Civil Procedure 1908*. Apart from also being in consonance with the 18<sup>th</sup> Law Commission's

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<sup>47</sup> These issues have been dealt with in the report of the 20<sup>th</sup> Law Commission of India. See Ajit Prakash Shah, "Reforms in Guardianship and Custody Laws in India", Report No. 257.

Recommendations,<sup>48</sup> such an act of ratification would have, most importantly, truly ratified India's commitment towards the welfare of children.

However, the Indian Government has allowed the 2016 Bill to lapse and it is claiming that recognition of child removal as an offence would disadvantage Indian women living abroad. It is a legitimate consideration that Indian women might face an unfair disadvantage but it cannot be the sole factor for consideration. The Indian Government ought to balance it with the welfare of Indian and foreign children who are or have been victims of parental abduction. But it has failed to do so. One can only hope that the Indian Government would soon evolve an alternative mechanism to solve the problem of child removal and clarify the legal position.

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<sup>48</sup> A.R. Lakshmanan, "Need to accede to the Hague Convention on the Civil Aspects of International Child Abduction 1980", Report No. 218 (March, 2009).

## **NORMATIVIZING CONSTITUTIONALIZATION OF CHILDREN'S RIGHTS: AN ANALYTICAL EXEGESIS**

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-Ms. Aratrika Choudhari\*

### **Abstract**

*A Constitution forms the sacrosanct crucible in which the eudemonic aspirations of a polity are distilled and ensconced for posterity. With a growing awareness of the transformative potential of constitutions to ameliorate socio-political, cultural and economic subjugation of children, there is urgent need for recognizing and enabling children's constitutional agency and participation for their fullest rights-realization. This paper therefore critically examines the normative and jurisprudential debates surrounding the constitutionalization of children's rights, and seeks to afford a holistic typology of approaches for synergizing national constitutional frameworks with progressive rights-articulations. It analyzes the comparative constitutional experience of polities such as India, the U.S.A. and South Africa in birthing, framing and implementing such constitutional norms. Such critical analysis helps in evolving the most optimal holistic coalescence of constitutional approaches towards children's rights, so that they may be normatively institutionalized into the constitutional ethos and praxis of a polity.*

**Keywords:** Children's Rights, Constitutionalization, Participation Rights, Normativization

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\* 5<sup>th</sup> Year, B.A., LL. B.(Hons.), National University for Juridical Sciences, Kolkatta.

## Introduction

The discourse surrounding constitutionalization<sup>1</sup> of child rights is often stymied by a conceptual challenge to the very notion of children as agents capable of being vested with and exercising rights.<sup>2</sup> Parallels can be drawn with the struggles of feminist constitutionalism to catalyze normative and institutional configurations, juridical structures and serious academic deliberations to recognize and respect women as rights-bearing citizens who are endowed with the potential to exercise, assert and defend these rights to redress systemic inequities they encounter.<sup>3</sup> Historical experience demonstrates that such theoretical and dialectical aversion to rights-entrenchment leads to very real consequences of excluding and further marginalizing these vulnerable constituencies, an issue further compounded in the case of children, who are typically politically disenfranchised from seeking such entitlements in primarily adult-dominated polities.<sup>4</sup> The project of promulgating and inscribing children's entitlements in a modern democracy's *grundnorm*, the *Constitution of India*, which necessitates solid footing and deeper agency than statutory rights, to engender a culture of pervasive respect and enforcement, thus clearly entails complex challenges and polemical negotiation processes.<sup>5</sup>

This paper seeks to first critically examine the normative, theoretical, epistemological and jurisprudential debates surrounding such discourses of constitutionalization of children's rights. This helps develop a typology of constitutional approaches, the features of which can be identified in various modern constitutions through the lens of comparative constitutional exegeses. Such critical analysis helps in evolving the most optimal holistic coalescence of constitutional approaches towards children's rights, so that they may be normatively institutionalized into the constitutional ethos and praxis of a polity.

<sup>1</sup> This paper interprets "constitutionalization" to mean not only the formal processes of incorporating a generation of rights into the formal constitutional text, but also their accommodation and interweaving with the very experiential fabric, constitutional litigation and jurisprudential ethos of the polity as emanating from its Constitution.

<sup>2</sup> Barbara Woodhouse, *The Constitutionalization of Children's Rights: Incorporating Emerging Human Rights Into Constitutional Doctrine*, 2(1) *J. of Consti.L.* (1999) pp. 1-2.

<sup>3</sup> Beverley Baines and Ruth Rubio-Marin, "Toward a Feminist Constitutional Agenda" in *The Gender Of Constitutional Jurisprudence* (2005) pp. 4-20.

<sup>4</sup> *Ibid.*

<sup>5</sup> *Ibid.*

## Constitutionalization of Children's Rights: Normative, Theoretical and Epistemological Frameworks

### Contextual Background

From an ontological standpoint, the “*age-istadulthood*” fallacy *i.e.*, the proclivity to analyze and frame the world within the parameters of understanding of adults, without refusing to acknowledge alternative constitutive framings has predominantly pervaded conceptualizations of childhood in public, academic, scientific, pedagogic, constitutional and other varied discourses.<sup>6</sup> Early socialization theorists ranging from Parsons to Davis propounded dyadic personae of children as either Apollonian guileless angelic figures, or imperfect, immature, untamed, budding Dionysian troublemakers. The formative character of childhood was viewed as a menace imperiling the perfect rationality and order prevailing in adult society.<sup>7</sup>

Socialization, therefore, was the reformative force that brought children into the folds of conformity, tradition and restrained conduct any notion of good governance, peace and stability of the polity could not be fulfilled without exertion of such adult discipline, power and control.<sup>8</sup> This necessitated the familial investment of educational, economic, social and political resources in the marshaling of children's development, and neatly harmonized such investment with State paternalism molding norms of appropriate behavior in public spaces such as schools and workplaces.<sup>9</sup> The invisibility of children in such a constitutional ethos led to scant interrogation of the adult-centric conditions inhibiting their amelioration, and their own capacity to undertake such emancipation.

Support for such normative conceptualization also emerged from the field of developmental psychology, as Piaget postulated a universalistic, unidirectional model of child development, with pre-defined milestones marking bio-cognitive maturation and socio-emotional transmutation of children into adults.<sup>10</sup> The wedding

<sup>6</sup> Jens Qvortrup, “Childhood as a Structural Form” in Qvortrup, *et al.* (Eds.) *The Palgrave Handbook of Childhood Studies* (2009) pp. 21-33.

<sup>7</sup> *Ibid.*

<sup>8</sup> Martin Woodhead, “Child Development and the Development of Childhood” in Qvortrup, *et al.* (Eds.) *The Palgrave Handbook of Childhood Studies* (2009) pp. 46-61.

<sup>9</sup> *Ibid.*

<sup>10</sup> *Ibid.*

of such medical lexicon with the political rhetoric perpetuated by the bureaucratic and academic cognoscenti, thus informed the paradigm of childhood that we find paralleled in the evolution of modern constitutional doctrine pertaining to children's rights.

Nonetheless, the embodiment of the trinity of Protection, Provision and Participation Rights ("3 P's") by the *United Nations Convention on the Rights of the Child, 1989* ("UNCRC") signified the onset of more child-centred perspectives in rights-discourses. New interpretive reproduction and inter-actionist theories by ethnographers such as Corsaro,<sup>11</sup> and forward-thinking models of child participation espoused by Hart and Lundy, sought to demonstrate that children were as much active agents in the constitution, reproduction and perpetuation of social norms, structures and institutions as adults.<sup>12</sup> The patterns of behaviour and modalities of creativity demonstrated by children in inculcating, imbibing, testing, rebelling against and conforming to socio-cultural dictates, led several scholars to revise their limited notions of childhood and its contribution to social evolution.<sup>13</sup> Narrow liberal notions of intellect and rationality began to expand to account for an "ethic of care" complementing an "ethic of justice", and children began to be recognized as legitimate actors who must necessarily be afforded the space, choice and voice to shape and influence the ethos and functioning of societies, polities and cultures.<sup>14</sup>

This paper seeks to examine how far this shift is mirrored in the constitutionalization discourse pertaining to child rights. The implementation of a constitutional approach towards children's rights would be incomplete without first evaluating the theoretical, normative and epistemological groundings of such an approach, and how this particularly enables/disables other discourses recognizing children's protectionist interests.

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<sup>11</sup> William Corsaro, "Interpretive Reproduction in Children's Play" 4(4) *American J. of Play* (2012) pp. 488-504.

<sup>12</sup> Roger Hart, *Children's Participation: From Tokenism to Citizenship*, (UNICEF, 1992); Laura Lundy, "Voice is Not Enough: Conceptualising Article 12 of the United Nations Convention on the Rights of the Child" 33(6) *Brit. Edu. Res. J.* (2007) pp. 927-42.

<sup>13</sup> Woodhead, *supra* note 8.

<sup>14</sup> *Ibid.*

### Normative and Jurisprudential Approaches towards Constitutionalization of Children's Rights: A Critical Study

Drawing from *O'Neill*, one school of thought advocates for constitutionalization of obligations towards children: ubiquitous responsibilities that inhere in all human beings towards children, as well as group-specific responsibilities owed by parents, teachers and social workers who interact and care for children.<sup>15</sup> It acknowledges the power of constitutionalization as rhetoric- in so far as the *Derridian* and *Foucauldian* examinations of the constituting power of language and discourse point to the powerful institutional, political and discursive advantages offered to oppressed groups by rights-articulations in the constitutional text, which forms a sacred crucible for distilling the core eudemonic aspirations of modern democratic polities.<sup>16</sup> While this school of thought accepts the indubitable benefits afforded by constitutionalization to remedying social insubordination faced by children, it is still normatively posited against a bold assertion of children as competent, self-governing agents.

*O'Neill's* interestingly states that the historical oppression perpetuated against other social groups such as slaves and women cannot be equated to that of children, for any age-discrimination is finite and children can escape such subjugation merely by "growing up".<sup>17</sup> Several un-interrogated "*age-ist*" assumptions thus underlie her advocacy for a more benevolent view of the paternalistic welfarist duty-based model that conceptualizes the inherent dependency and naiveté of children as inextricably necessitating care and paternalism by adults.<sup>18</sup> If such emphasis on adults' duties had been placed in *R (on the application of Williamson) v. Secretary of State for Education and Employment*,<sup>19</sup> it may have led to detrimental trade-offs between parents'/teachers' constitutional duties on one hand,

<sup>15</sup> Onora O'Neill, Children's Rights and Children's Lives, 98(3) *Ethics* (1988)pp. 445-463.

<sup>16</sup> See TorbjörnWandel, "The Power of Discourse: Michel Foucault and Critical Theory" 5(3) *Cultural Values* (2001) pp.368-382; Serge Margel, "Derrida and the Power of Words" 36(2) *Oxford Lit. Rev.* (2014) pp. 254-256.

<sup>17</sup> O'Neill, *supra* note15.

<sup>18</sup> *Ibid.*

<sup>19</sup> *R. (on the application of Williamson) v. Secretary of State for Education and Employment*, UKHL, 152 A.C. 246 (2005).

which may be interpreted as including the right to impart religious education to children that sanctions corporal punishment at school, and children's constitutional rights on the other, which includes their rights to bodily freedom, dignity and protection from abuse and maltreatment.<sup>20</sup>

Moreover, basing on *Freeman's* criticisms, it may be observed that theorists who oppose constitutionalization of children's rights, often do not engage with the normative dichotomy that the architecture of our legal systems, including criminal, civil and constitutional regimes, do impose substantial legal responsibilities and duties on children.<sup>21</sup> A faithful reading of the *Hohfeldian* canon of co-existence of duties and corresponding rights would suggest that if one visualises children as citizens who are not exempted from the performance of Fundamental Duties, as for instance ensconced in Article 51A of *the Indian Constitution*,<sup>22</sup> or from the enforcement of criminal sanctions and tortious liability; the political disenfranchisement and denial of constitutional rights to children cannot be jurisprudentially justified.<sup>23</sup>

Another set of scholars adopt an epistemological proclivity to interpret constitutions and constitutional rights from an adult-centered perspective, which is then extended to children by an act of State/judicial *parens patriae* munificence - rather than as a matter of an inalienable, immutable, intractable constitutional right stemming and inhering in children by virtue of their very existence and *current citizenship* of the polity.<sup>24</sup> This leads to dichotomous denial of children's personhood, participation and agency.

As observed in *Planned Parenthood of Central Missouri v. Danforth*,<sup>25</sup> mere temporal flux leading to the attainment of legal majority has not been envisaged to operate in a cabbalistic fashion so as to suddenly transmute hitherto rights-deprived children to mature rights-bearing adults. Constitutional rights clearly inhere

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<sup>20</sup> Michael Freeman, "The Human Rights of Children" 63(1) *Current Legal Problems* (2010) pp.1-44.

<sup>21</sup> *Ibid.*

<sup>22</sup> Which bears no textual/interpretive indication otherwise

<sup>23</sup> Freeman, *supra* note 20.

<sup>24</sup> Woodhouse, *supra* note, 2.

<sup>25</sup> *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 (1976).

in children as human beings and citizens of the polity.<sup>26</sup> The normative issue arises when their future citizenship is privileged over their present existence, leading to progressive diminution of the ambit and purview of their current constitutional rights.

Thus for instance, research shows that the constitutionally prescribed “reasonable restrictions” on several fundamental rights and freedoms of children, far outweigh those corresponding to adults.<sup>27</sup> Both adults and children may be constitutionally prohibited from exercising their freedom of speech and expression in making seditious statements, yet children may find themselves the subject of more insidious political censorship, given the familial mechanisms and pedagogic codes of conduct exerting significant institutional control and dominion over developing minds.<sup>28</sup> Such a reading brings forth two troubling trends: firstly, the normativization of children as “lesser” citizens than adults so as to justify accordance of more restricted constitutional rights, and secondly, the obviation of the prospect of placing children’s constitutional rights on the same pedestal as those of adults, let alone expanding these beyond corresponding adults’ constitutional rights.

*Houlgate* questions the wisdom of such an approach that carves out a classification between adults and children without offering any rational nexus for the same.<sup>29</sup> Newer paradigms of childhood studies demonstrate that evolving capacities of children to understand, negotiate and deconstruct the complexities of their surroundings are intrinsically intertwined with the degree of autonomy they are permitted to exercise whilst navigating enabling environments and resources.<sup>30</sup> As Article 12 of the UNCRC postulates, the “right to be heard” not only means listening to children’s opinions and views, but to afford them the space to set the terms of the agenda and to lead discussions on policies and norms that affect their lives.<sup>31</sup> It is only through such daily political praxis can they seek to embody the

<sup>26</sup> *Ibid.*

<sup>27</sup> Janette Habashi, *et al.*, “Constitutional Analysis: A Proclamation of Children’s Right to Protection, Provision, and Participation” 18 *Int’l. J. of Children’s Rights* (2010) pp. 267-290.

<sup>28</sup> *Ibid.*

<sup>29</sup> Laurence D. Houlgate, “Three Concepts of Children’s Constitutional Rights: Reflections on The Enjoyment Theory” 2 *U. Pa. J. Const. L.* (1999) p. 77.

<sup>30</sup> Anne Dailey, “Children’s Constitutional Rights” 95 *Minnesota L. Rev.* (2011) pp. 2098-2179.

<sup>31</sup> Aisling Parkes, *Children and International Human Rights Law* (2013) pp. 20-25.

constitutional ethos they are expected to uphold not only as adults of the future, but as children of the present generation.<sup>32</sup>

Yet, *Houlgate* does not pursue this progressive embodiment to its fullest promise in his “Enjoyment Theory of Children’s Constitutional Rights”.<sup>33</sup> This theorization encapsulates children as prospective polity-constituents, who may be presently endowed with constitutional rights akin to adults, yet would hold them in trust such that their exercise and enjoyment may be deferred if there exists any potential that a current actualization of such constitutional “rights-in-trust” may lead to inhibition of future exercises of these rights attained upon entering legal adulthood.<sup>34</sup> The presuppositions that the State must intervene to curtail such enjoyment that is weighed and assessed yet again by adults; that the child is inherently lacking in the capacity to engage in such rational decisions of exercising constitutional rights akin to adults, necessitating such intervention; and that the child lacks the autonomy to choose the ambit of such rights in practice, which are theoretically imbued with the scope and demarcations similar to adults’ constitutional rights - all reek of the same “age-ist” bias identified in the foregoing discussion.<sup>35</sup>

The crux of traditional theories of children’s rights’ constitutionalization, was a narrow overemphasis on depicting the immaturity, dependency and lack of self-governance of children as precursors to lack of competence to exercise a plethora of their constitutional rights to vote, speak and express freely, to marry, procreate, refuse or consent to medical treatment *etc.*<sup>36</sup> Such *a priori* prejudice against children’s autonomous constitutional praxis stems from a deployment of medico-legal “evidence” pointing to children’s inherent limited bio-cognitive-social capabilities to reason, judge and make sound choices, thus failing to measure up to the adult-defined “reasonable man” standard that forms a cornerstone of modern jurisprudence.<sup>37</sup> Thus, whilst the verdict in *Gillick v. West Norfolk and Wisbech Area Health Authority*<sup>38</sup> acknowledged children’s competence in consenting to

<sup>32</sup> *Ibid.*

<sup>33</sup> *Houlgate*, *supra* note 29.

<sup>34</sup> *Ibid.*

<sup>35</sup> *Ibid.*

<sup>36</sup> Dailey, *supra* note 30.

<sup>37</sup> *Ibid.*

<sup>38</sup> *Gillick v. West Norfolk and Wisbech Area Health Authority*, [1986] AC 112.

medical treatment such as contraception, without parental permission, should they possess requisite intellect and comprehension of the matter at hand, the decisions in *In Re, R(A Minor)*<sup>39</sup> and *In Re, W (A Minor)*<sup>40</sup> refused to recognize such competence of children to refuse medical treatment for psychiatric and eating disorders respectively. At work there is the aforementioned discriminatory rhetoric that only selectively permits children to decide upon their own well-being, life and dignity, inhibiting its fullest constitutional expression under the guise of paternalistic bio-ethical narratives of parental duties to engage in responsible child-rearing practices.<sup>41</sup>

New theories on constitutionalization of children's rights seek to overcome the limitations of traditional paradigms.<sup>42</sup> What theorists such as *O'Neill* and *Houlgate* ignore, whilst focusing on constitutionalizing parental duties/children's protection "interests" rather than children's rights is the discursive, ethical, moral, jurisprudential and symbolic power afforded by the constitutionalization paradigm to empowering children as enlightened subjects and actors of a polity. Through the unfettered bestowal of constitutional rights unto the next generation, the institutionalization of intergenerational legacies of socialization, politics and ethos becomes feasible. The values of inclusiveness, diversity, tolerance and pluralism that form the bedrock of contemporary democratic constitutions therefore necessitate dismantling of antiquated notions of individualist, detached, ostensibly dispassionate and "rational" constitutional citizenship.<sup>43</sup> The social, cognitive, biological and cultural values animating children's decisions must thus be duly accepted, with concomitant accordance of legitimacy and validity of alternative forms of evolving capacities, identity-configuration, communitarian expression and emotional articulation, for it is only then that the ideals of constitutional pluralistic democracies can be enriched and realized.<sup>44</sup>

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<sup>39</sup> *In re.R(A Minor)*, [1991] 4 All ER 177 CA.

<sup>40</sup> *In re.W (A Minor)*, [1992] 4 All ER 627.

<sup>41</sup> Dailey, *supra* note 30.

<sup>42</sup> *Ibid.*

<sup>43</sup> *Ibid.*

<sup>44</sup> *Ibid.*

### Fructifying and Actualizing Children's Rights: A Comparative Constitutional Exegesis

In consonance with the normative study undertaken herein, and the entrenchment of the aforementioned 3 P's of rights under the UNCRC, it is possible to develop a typology of constitutional approaches towards children's rights.<sup>45</sup> The *first* approach completely invisibilizes children from the activation and operation of the constitutional ethos: in such a polity, they cannot claim the space or assert discursive power to invoke any right, be it owing to the lack of explicit embodiment in the constitutional text or due to their exclusion from access to adult-centered adjudicatory architecture.<sup>46</sup> The *second* approach premises itself on the paternalistic protection of children as dependent, impuissant, passive recipients of the care, discipline and control exerted by the State, family and other patriarchal institutions. Here, constitutionalization of children's Protection rights is observed to some extent, thus carving them out as constitutional subjects, if not constitutional citizens and polity-constituents.<sup>47</sup> The *third* and final approach synergizes the recognition of autonomous decision-making skills and constitutional competence of children with their development, agency, participation and emancipation. Thus, here all 3 P's of children's rights, viz., Protection, Participation and Provision (i.e. survival and development rights), are constitutionally inscribed, and fructified for the consummation of the highest constitutional eudemonic goals of the polity.<sup>48</sup>

In modern pluralistic democracies, it can be observed that, there is a slow but gradual evolution of constitutional experience from the first approach to various permutations of the second and third approaches.<sup>49</sup> A predominance of the second *i.e.* the protectionist approach is usually observed in post-colonial subaltern polities, although vestiges remain even in so-called mature constitutional polities such as the U.S.A.<sup>50</sup> *The Constitution of the Republic of South Africa, 1996* is especially

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<sup>45</sup> See John Tobin, "Increasingly Seen and Heard: The Constitutional Recognition of Children's Rights" 21(1) *South African J. on Human Rights* (2005)pp 86-126.

<sup>46</sup> *Ibid.*

<sup>47</sup> *Ibid.*

<sup>48</sup> *Ibid.*

<sup>49</sup> *Ibid.*

<sup>50</sup> *Ibid.*

interesting insofar as it aims to espouse the third approach in a vastly unique milieu redolent of communitarian living and intergenerational coexistence.<sup>51</sup> The *Indian Constitution* is comparable in its lofty aspirations of democratic multicultural pluralism, although dominant national discourses still oscillate between the second and third approaches.<sup>52</sup> These three polities with rich legacies of constitutionalism are especially useful for comparing the lived experiences of the various constitutional approaches towards children's rights, as identified in the aforementioned typology.

### **Birth of Children's Constitutional Rights in the USA., India and South Africa: A Comparative Overview**

The process of formal constitutional rights-articulation and their precise textual embodiment oft-reflect the polity's attitudes towards the constituency under question. In India, for instance, the vibrant, illuminating Constituent Assembly Debates evince that our constitution-makers were alive to the spectrum of grave issues facing the fledgling nation's children: from labour, health to education.<sup>53</sup> Article 15(3) embodies the explicit constitutional recognition of children as a vulnerable constituency requiring State intervention for overcoming social subordination. In fact, the Constituent Assembly Debates demonstrate that there was little dispute regarding the textual incorporation of children's constitutional rights as concomitant with other vulnerable populaces in the polity: rather, it may be argued that actualizing these rights to empower children as independent agents, distinct from adults, and capable of asserting and exercising their rights as bulwarks against State interference and parental abuse, was perhaps still not so radically envisaged.<sup>54</sup> Thus, the robust deliberations between Dr. B.R. Ambedkar and members of the Constituent Assembly such as Mr. H.V. Kamath, Sir Alladi Krishnaswamy Iyer and Prof. Shibban Lal Saxena shed light on the ready acceptance of the little-debated constitutional criminalization of child trafficking (Article 23), untouchability (Article 17) *etc.*; yet amendments seeking to raise the

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<sup>51</sup> *Ibid.*

<sup>52</sup> *Ibid.*

<sup>53</sup> Vineeth Krishna, "Child Labour, Criminalization and the Indian Constituent Assembly", available at, <https://clpr.org.in/blog/child-labour-criminalization-and-the-indian-constituent-assembly/> last visited on 13th June, 2016.

<sup>54</sup> *Ibid.*

age from fourteen to sixteen years in the context of abolition of child labor (Article 24) were rejected.<sup>55</sup>

This evinces that the primary lens adopted historically embodies a largely adult-oriented, top-down, protectionist approach to securing such rights, *i.e.* the second approach of the aforementioned typology: children's participation rights and autonomy in asserting their political constituency and representation in the constitutional text is not envisioned. Even if creative and imaginative lexical interpretations were deployed, the question remains if the intent of the constitution-makers could be refashioned and stretched to such an extent, and whether it would hold water under the scrutiny of judicial review.

Woodhouse faces a similar doctrinal dilemma while mapping the trajectory of constitutional adjudication pertaining to children's rights in the U.S.A., which is made even more pressing by the socio-temporal context of an exclusively wealthy, privileged class of white elite men negotiating constitutional semantics in the U.S.A. in the 1800s, as opposed to a relatively more pluralistic and representative group framing India's Constitution in the 1900s.<sup>56</sup> The insertion of the U.S. Bill of Rights had been a hard-won, deliberate move, and yet nowhere does the U.S. Constitution even today, after the litany of amendments, carry any explicit mention of children, let alone articulate their rights.<sup>57</sup> As Woodhouse argues, for U.S. constitutional adjudication therefore, it became absolutely indispensable to deconstruct the written covenants and unwritten constitutional silences/ambiguities pregnant with meaning, and consolidate such interpretations through adjudicative determination.<sup>58</sup> The insights imparted by critical legal realism and critical feminist, race theories, etc., led U.S. courts to explore more pragmatic, dynamic statutory and flexible constitutional interpretive canons than single-minded imagined fealty to a fast-antiquated generation's founding constitutional intent.<sup>59</sup> Thus, given the growing willingness of a jurisdiction such as the U.S.A. with limited/no express textual guarantees of children's constitutional rights, to respect and enforce such rights

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<sup>55</sup> Constituent Assembly Debates, Vol. VII, Book 2, (1999) pp. 814-815.

<sup>56</sup> Woodhouse, *supra* note 2.

<sup>57</sup> *Ibid.*

<sup>58</sup> *Ibid.*

<sup>59</sup> *Ibid.*

through forward-looking judge-made law and interpretation, it appears that while original intent of the Indian Constitution's framers may certainly be considered, it is only one amongst a multiplicity of factors that may enable Indian courts to determine the scope of children's rights ensconced at various places in the Constitution.

Furthermore, even though it may be argued that progressive notions of children's autonomy and participation rights percolated into academic and popular consciousness long after the promulgation of the Indian Constitution, the transformative character and organic growth of such a living constitutional text must be noted. Such a transformative constitutionalist ethos enables in channeling the constituent and constituting powers of "we the people" to read, interpret and extend constitutional canons for a pluralistic, inclusive polity.<sup>60</sup> It seeks to transcend a rigid "originalist" constitutional interpretative canon that unduly whittles down fundamental constitutional guarantees of equality, justice and liberty to only a limited class explicitly mentioned in the constitutional text.<sup>61</sup> Rather, it affords the minimal space for pragmatic, dynamic interpretation of the constitution's text, silences and ambiguities to redress socio-political-cultural-economic subjugation.<sup>62</sup>

This is precisely the ethos that informed the very inception of the South African Constitution, which had strong established legacies of the 1989 UNCRC and 1990 *African Charter on the Rights and Welfare of the Child* to draw from, for according due credence to the focal role played by South African children in articulating and fashioning the polity's uphill endeavor to secure sovereignty and freedom.<sup>63</sup> As linchpins of key constitutional moments leading to its eventual deliverance from colonial exploitation, the carving out of a lengthy separate Article 28 in *the Constitution* that is devoted solely to children, only celebrated and acknowledged their due stake and participation in deliberative political discourses.<sup>64</sup>

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<sup>60</sup> Upendra Baxi, "Preliminary notes on transformative constitutionalism" (Oscar Vilhena *et al.*, (Eds.) *Transformative constitutionalism: Comparing the apex courts of Brazil, India and South Africa* (2013) pp. 19-48.

<sup>61</sup> *Ibid.*

<sup>62</sup> *Ibid.*

<sup>63</sup> *Ibid.*

<sup>64</sup> *Ibid.*, Article 28.

The concern of the Constitution-framers in carefully calibrating a constitutional ethos that not only recognizes but also activates children's constitutional rights; thus fittingly exemplifying the third approach in the aforementioned typology is evident from the conscious lexical framing and elaborate enumeration of children's rights in both public and private spheres, including detailed safeguards concerning juvenile detention, espousal of autonomous access to justice in the event of rights-violations in both criminal and civil litigation, balancing the 'best interests' principle with participative yardsticks duly accounting for the child's views and opinions, *etc.*<sup>65</sup> Moreover, the South African Constitution textually entrenches far more unambiguous elucidations of proportionality, due process and interpretive canons that would guide courts whilst adjudging State interference with sacrosanct guarantees of children's constitutional rights.<sup>66</sup>

It is also important to note the distinctive communal, social and cultural contextual commonalities between the developing nations of India and South Africa characterizing their constitutional normativization of children's rights. Thus, parallels may be drawn between the strong traditions of filial obedience and piety, devotion to generational figures, cultural premium placed on duty and responsibility in internetworked relationships of caregiving and caretaking of children, *etc.* in both polities.<sup>67</sup> Such a balanced cultural relativist analysis demonstrates that the universalistic Western liberal paradigm of children's "rights" can be suitably expanded and reshaped in consonance with the normative study undertaken in Part 2 of this paper, without obviating the cultural, social and historical tapestry underpinning their constitutional ethos.

### **Constitutional Adjudication of Children's Rights in U.S.A., India and South Africa: A Comparative Overview**

Rather than reiterating descriptive chronological constitutional case-precedent analyses pertaining to child rights in these three polities, this Part seeks to analytically engage with certain key cases in these jurisdictions in order to determine how far they exemplify the polity's location in the aforementioned

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<sup>65</sup> *Ibid.*

<sup>66</sup> *Ibid.*

<sup>67</sup> Tobin, *supra* note 45. Although these may have vastly different socio-cultural manifestations.

typology. Such comparative critical examination helps in cogent discernment of the multitudinous normative frameworks underpinning child-rights constitutional adjudication, and in evolving sound constitutional strategies for litigating such rights in the future.

In the U.S.A. constitutional experience related to child-rights adjudication, the *locus classicus* decision in *Re, Gault*<sup>68</sup> ensconced expansionist constitutional readings to assert wider due process safeguards for juvenile delinquents, such as the right to receive due notice of the grounds for arrest, right against self-incrimination, right to cross-examination of witnesses, etc. Yet, constitutional adjudication was vexed by the curtailment of fullest expression of children's rights, by parental interests channelled through State mechanisms. Thus, once the constitutional right to privacy was established to include the right to abortion,<sup>69</sup> a whittling down of children's constitutional right to privacy by familial and parental concerns regarding such abortion, as was undertaken in *Planned Parenthood of Central Missouri v. Danforth*,<sup>70</sup> cannot be constitutionally or jurisprudentially justified. Such an approach not only sets the clock back to the invisibilization of children as can be seen in the first approach of the aforementioned typology, but also actively sanctions judicial interpretation to depredate the very meaning, nature and import of constitutional rights as overcoming lesser paternalistic interests and rights. A more dynamic interpretation in tune with the second and third approaches in the aforementioned typology can be found in *Schall v. Martin*,<sup>71</sup> where the court rightly framed the spirit and ethos of the U.S. Constitution as supporting a rehabilitative and reformatory system for redressing juvenile offenders. Similarly, in *Goss v. Lopez*<sup>72</sup> the U.S. Supreme court adopted a dynamic, progressive, spirited reading of children's constitutionally guaranteed right to education, such that suspension from school for long periods would necessitate due process safeguards beyond limited canons of natural justice.

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<sup>68</sup> *In Re, Gault*, 387 U.S. 1, 13 (1967).

<sup>69</sup> *Roe v. Wade*, 410 U.S. 113 (1973).

<sup>70</sup> *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 (1976).

<sup>71</sup> *Schall v. Martin*, 467 U.S. 253 (1984).

<sup>72</sup> *Goss v. Lopez*, 419 U.S. 565 (1975).

The child-rights constitutional adjudicatory trend in South Africa has been predominantly progressive. In *Christian Education South Africa v. Minister of Education*<sup>73</sup> the Constitutional Court of South Africa observed that the State machinery is constitutionally obligated to actively curtail acts of violence and exploitation that threaten children's Protection and Provision Rights. In *Republic of South Africa v. Grootboom*,<sup>74</sup> the Court interpreted the constitutionalization obligations under Articles 1 and 4 of the UNCRC as necessitating the establishment of governmental and institutional mechanisms fructifying such rights under the South African Constitution. Remarkably, in *Nicole Levenstein v. The Estate of the Late Sidney Lewis Frankel*<sup>75</sup> the Court remarked upon the participation rights of children of disempowered and marginalized communities in systems of State-sanctioned alternative care.

The Indian Supreme Court observed in *Bandhua Mukti Morcha v. Union of India*<sup>76</sup> and *M.C. Mehta v. Union of India*<sup>77</sup> that the scheme of educational rights envisaged under the Constitution would be fructified only when harmonized with proscriptions on child labour. Its emphasis on the UNCRC's embodiment of not only the first generation of civil-political rights, but also wider socio-political and human rights, flowed into its insistence on synergizing the directive principles of Article 45 with the fundamental right enshrined under Article 24.<sup>78</sup> The constitutional obligation to respect international law under Article 51 was deployed progressively in *Sheela Barse v. Secretary, Children Aid Society*<sup>79</sup> for indicting State machinery that had failed to institutionally redress children in need of care and protection. In *Brindavan Sharma v. State*<sup>80</sup> the Delhi High Court read the UNCRC's provision rights in light of the guarantees of life and liberty, dignity and socio-economic amelioration under Articles 21 and 39(e) of the Constitution, to

<sup>73</sup> *Christian Education South Africa v. Minister of Education*, CCT 4/00, ZACC 11 (2000).

<sup>74</sup> *Republic of South Africa v. Grootboom*, CCT11/00, ZACC 19 (2000)..

<sup>75</sup> *Nicole Levenstein v. The Estate of the Late Sidney Lewis Frankel*, CCT 170/17, Constitutional Court of South Africa (2017).

<sup>76</sup> *Bandhua Mukti Morcha v. Union Of India*, 1984 AIR SC 802.

<sup>77</sup> *M.C. Mehta v. Union of India*, (1996) 6 SCC 756.

<sup>78</sup> *Ibid.*

<sup>79</sup> *Sheela Barse v. Secretary, Children Aid Society*, 1987 SCR (1) 870.

<sup>80</sup> *Brindavan Sharma v. State*, 1987 SCR (1) 870.

tailor a holistic scheme for child victims left destitute after imprisonment of criminal offender parents. Similarly, in *Sakshi v. Union of India*<sup>81</sup> the Court dynamically interpreted the constitutional guarantees of Article 14 and 21 to proffer key guidelines governing trial of sexual abuse/rape cases, so as to account for more sensitive and accommodative adjudicatory cross-examination methods whilst dealing with such victims. Furthermore, whilst upholding the constitutionality of *the Juvenile Justice (Care and Protection of Children) Act, 2000* in *Salil Bali v. Union of India*<sup>82</sup> the supreme court adopted a judicious rapprochement of children's Provision and Protection rights with new empirical and scientific evidence adducing the intricacies of processes of maturity and evolving capacities of children, to hold that lowering the age of juvenility would not be constitutionally acceptable as panacea for the social malaise of crime and cannot be placed on a similar pedestal as retributive punishment meant for adult offenders. A similar encouraging instance of recognition of children's political participation and constitutional agency can be found in the Supreme Court's acceptance of a Special Leave Petition presented by the *Bal Mazdoor Sangh*, which cited the prohibition under Section 21 of *the Trade Union Act, 1925* on children under the age of 15 years from forming trade unions, as impermissibly impinging upon children's constitutional right to freedom of association under Article 19.<sup>83</sup> The recognition of the locus of a children's union to access State adjudicative machinery marks a foresighted attitude that would help create an enabling constitutional ethos for Indian children to recognize their 3 P's of rights in the future.<sup>84</sup>

## Conclusion

The constitutionalization of children's rights cannot be implemented without a sound normative grounding in a holistic rapprochement of children's Participation, Provision and Protection rights. Constitutional adjudication must abandon proclivities to resort to outdated "age-ist" bio-cognitive theories, and must espouse the growing body of reliable medico-legal evidence attesting to evolving capacities of children.

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<sup>81</sup> *Sakshi v. Union of India*, AIR 2004 SC 3566.

<sup>82</sup> *Salil Bali v. Union of India*, (2013) 7 SCC 705.

<sup>83</sup> Emma Williams, "Small Hands, Big Voices? Children's Participation in Policy Change in India" 36(1) IDS Bulletin (2005) pp. 82-90.

<sup>84</sup> *Ibid.*

The recognition of enabling and empowering potential of rights-rhetoric to normatively and pragmatically redress children's invisibilization and subjugation in law and society can be undertaken most powerfully through the constitutional ethos. As the comparative study of the constitutional experiences of India, the U.S.A. and South Africa demonstrate, it is only through such normativization of constitutionalization of children's rights can a polity hope to fructify its eudemonic aspirations.



## **A RE-LOOK TO LAW RELATING TO CUSTODY OF CHILDREN**

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- Ms. Dikshana Subbaraj\*

### **Abstract**

*Children are considered as vulnerable group, being the most vulnerable group, they are given special protection under the Constitution. In spite of these safeguards children are victimised in various occasions. One such issue is the custody of children; there is no doubt, development of modern family law has regulated the system of family and the rights of individual but, still the issue relating to custody of children remains unaddressed. The word custody refers to guardianship which describes the legal and practical relationship between a parent or a guardian and the child under that person's care. This whole aspect of custody arises in case of divorce, annulment, separation, adoption and death of the parents. There exist different types of custody, the legal, physical, sole and joint custody. The judicial decisions relating to child custody differs from case to case, so as to protect the best interest of the child, as laid down under the United Nations Convention on the Rights of Child.*

*Thus the author in this paper attempts to analyse whether these judicial precedents safeguards the best interest of the child and how this principle of best interest is evolved by the Courts. Further in the light of globalisation we have issues relating to international child abduction and for which, Civil aspects of International Child Abduction was signed in 1980 at the Hague Conference, to which India has not signed yet. In this light the author attempts to analyse the principle of custody and the laws governing custody and the impact of signing the Convention. Therefore this paper will be dealing with the different notions and perceptions of the best interest of the child with the aim of suggesting recommendations to achieve the "paramount well-being of the child".*

**Key words:** Best Interest of Children, Custody and Child Abduction.

\* 2<sup>nd</sup> Year Student, B.B.A., LL.B. (Hons.), VIT School of Law, Chennai.

## Introduction

Children being the future of the nation, addressing their problems and issues are very important, for both the benefit and well-being of the child involved as well as for the progress of the society. As a developing country children are the pillar of development, hence, catering to their needs and wants is must. Though there are many issues relating to 'child', custody of a child is very important for proper upbringing of the child, and only if the child is living in a peaceful environment with all the positive vibrations required for both the physical and psychological development, the child will be able to excel in life. Therefore the very basic essential for the prosperity of the child is being under proper guardianship. The custody laws that govern the right, parent has over the child; how this right works in determining which parent or person has to get the custody of the child; and what are the parameters that are considered before giving custody<sup>1</sup> is a question unanswered. Whether the best interest of the child is of paramount importance and how this been determined and followed in reality has been discussed in this article.

## Purpose

The custody laws exist proving a legal structure for relationships between the children and the parents in case of divorce, separation<sup>2</sup> etc. Ideally the divorced parents must work for the amicable relationship between them, even after the commencement of the divorce or any form of separation because of the involvement of the child. In any familial dispute, particularly in case of divorce the children are the first and the last victims.<sup>3</sup> The Christian theology says, no divorce is permissible except for the case of adultery was prevailing, but as time passed and as the mentality of the people had different notions, now divorce and family issues keep coming up, but one fails to understand that the final victims are the children. The very existence of this custody laws, is to involve the children in marital and divorce

<sup>1</sup> Emily Doskow, Attorney, "Best Interest of the Child", <https://www.divorcenet.com/resources/divorce/divorce-and-children/the-best-interests-child-factors-a->, last cited on Feb 2, 2019.

<sup>2</sup> <https://www.divorcelaws.co.za/family-law-blog>.

<sup>3</sup> John Eekelaar, "The Interests of the Child and the Child's Wishes: The Role of Dynamic Self-Determinism" in P. Alston(Ed.) *The Best Interests of the Child: Reconciling Culture and Human Rights* (Clarendon Press, Oxford,1994) p.42.

disputes, at least while the court or anyone for that matter taking a decision must give paramount importance to a child and the laws have to help to define the family situation in terms of the best interest<sup>4</sup> of the child. However, that 'best interest' is also not been clearly defined with justifying general rules, though different cases are different with distinct facts but still with the view of regulating it for the welfare of the child, the laws exist.

These Child custody laws do not confine itself, it can be applied in issues relating to unmarried parents, i.e., claim for custody who are living together; at times grandparents dispute the competence of the child's parents,<sup>5</sup> where the same-sex couples with adopted children separate, *etc.* In some cases custody may also be granted to an individual or to the individuals not related. The word custody may on the outside look as tiny as a needle in a haystack, but it is important to understand that the needle can tear the entire haystack and destroy everything. Custody is one such issue<sup>6</sup> which requires much care and attention that has to be paid to its minute details and proper decisions need to be taken.

#### Issues Pertaining to Custody of a Child

Changing circumstances might demand for the change in the custody arrangements. The custody rules and regulations which were prevalent in the past is not been followed now, where in the previous years the father was unquestionably the guardian of the child, leaving no room for arguments and decision, the custody of the child was given to the father, but now, in the 21<sup>st</sup> century it is not so. After proper analysis and investigation, the child<sup>7</sup> is given to either of the parents who will be best satisfying to the needs and wants of the child for achieving both mental, psychological and physical stability. Though much efforts are being made by the

<sup>4</sup> P. Alston, "The Best Interests Principle: Towards a Reconciliation of Culture and Human Rights" in P. Alston(Ed.) *The Best Interests of the Child: Reconciling Culture and Human Rights* (Clarendon Press, Oxford,1994) p.1.

<sup>5</sup> R. Mnookin, "Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy", 39(3) *Law and Contemporary Problems* (1975) p. 226.

<sup>6</sup> S. Parker, "The Best Interests of the Child – Principles and Problems" in P. Alston (Ed.) *The Best Interests of the Child* (Clarendon Press, Oxford,1994) p. 27.

<sup>7</sup> The Establishment Clause and Religion in Child Custody Disputes: Factoring Religion into the Best Interests Equation", 82(7) *Michigan Law Review* (1984) p.1702.

law makers and the scholars to regulate the custody, keeping the best interest of the child as paramount importance, but still somewhere something fails, hence the objective being the 'best interest' and 'welfare of the child' is not been fairly addressed.<sup>8</sup>

Both the psychological and physical development is very essential for the progress of the child, therefore the standards being fixed for permitting custody of a child in case of divorce, judicial separation, annulment, or death of the parents must incorporate both in right proportions. Human beings generally are susceptible to change and the children are no exceptions. The child may be given in custody at a very early age of eight or nine, when the child has very little knowledge as to what the child really wants and to whom the child wants to go. Eventually, when the child becomes old, it will have different ideas and the best interest of the child also will definitely change.<sup>9</sup> In such circumstances, what if the child wants to live with another parent ? what solution would be given to the child ? In such cases the best interest of the child will get affected, which in turn affects the well-being and also, prosperity of the child. Issues like, when the custodial parent remarries and the new spouse being a step parent of the child may be abusive,<sup>10</sup> the child will not even know where to address these problems. Therefore, the law made for the well-being and welfare of the child becomes a threat and the child becomes the victim.

### Joint Custody

There are many types of custody like the joint custody, split custody, shared custody, sole custody *etc.*<sup>11</sup> The best interest of the child can be achieved, though not completely but at least to an extent in case of joint custody.

Some cases only a single parent will have custody whereas in some circumstances the joint custody will be awarded where both the parents have legal right<sup>12</sup> over the care and control of the children and must take shared decisions

<sup>8</sup> S. E. Mumford, "The Judicial Resolution of Disputes Involving Children and Religion", 47(1) *The International and Comparative Law Quarterly* (1998) p. 117.

<sup>9</sup> <https://www.psychologytoday.com/...is.../divorced-parents-kids-should-decide-where-...>

<sup>10</sup> <https://www.mentalhelp.net/...if-you-or-your-children-are-currently-experiencing-ab-...>

<sup>11</sup> <https://www.legalmatch.com/law-library/article/full-custody-vs-joint-custody.html>

<sup>12</sup> <https://www.boydlawsacramento.com/differences-custody-legal-guardianship/>

regarding the child, this will be a better option than single parent custody, where, in the joint custody both the parents are in contact with the child which will give the child a psychological balance, henceforth shared responsibility is a better option for achieving the best interest of the child, but joint custody requires a lot of co-operation from both the sides,<sup>13</sup> the very purpose of the parties applying for divorce is to be apart without having any contact with the other divorced partner, many of them will not be in support for this joint custody, unmindful of the welfare of the child,<sup>14</sup> at the time of custody each of the parties will have their own justification as to why they want the child and reasons as to why the child must not be given to the other party, but none of them are bothered about the child, though we say best interest of the child is the heart and soul for custody,<sup>15</sup> only with co-operation the real interest can be achieved. There prevails hesitancy on part of the court in making an order for joint custody due to the friction between the parents.

### **Sole Custody**

Talking about sole custody as in most of the cases the people want this sole custody, where it means the child lives permanently with that parent only. This does not mean the other parent has no rights to access; there will be rights like the visitation rights which will greatly affect the emotions of the child, though the child does not reveals it, the sole custody will affect the well-being of the child, is the reality.<sup>16</sup> In this case also, best interest is given more importance but the child can be easily manipulated with nice and sweet words. Therefore, there are many chances where the child is unaware of its wants and needs, and fascinated by the words, it would give consent to be with a single parent, but at last if the custodial parent fails to take care of the child in a proper manner, the child will be the victim. Hence the best interest of the child must be determined in such a manner, so as to reduce all these issues.<sup>17</sup> All these might look simple but the depth of it is very high which may even sometimes lead to the death of the innocent children.

<sup>13</sup> <https://www.theglobeandmail.com/life/relationships/joint-custody.../article570221/>

<sup>14</sup> <https://www.indiafilings.com/learn/custody-of-children-in-india/>

<sup>15</sup> <https://www.wealthysinglemommy.com/want-to-close-the-pay-gap-make-50-50-custo..>

<sup>16</sup> <https://www.omicsonline.org/open.../the-impact-of-parental-separation-and-divorce-o...>

<sup>17</sup> [www.ci.uct.ac.za/sites/default/files/image\\_tool/.../childrens\\_act/.../17-dp103-ch14.pdf](http://www.ci.uct.ac.za/sites/default/files/image_tool/.../childrens_act/.../17-dp103-ch14.pdf)

### **Laws Pertaining to Custody**

*The Guardians and Wards Act, 1890* being a uniform law, governs all the issues and regulations regarding the child custody irrespective of the religion the child and the parents belong to. However, India being a secular nation, which practices different religions like, Hinduism, Christianity, Islam and many more, each of them have a separate personal law set for the child custody, which determines the process through which parents can seek for the custody of the child. If there exist a uniform civil code it will be better, so that one can easily frame a general standard and say that these rules apply to all. Imposing of uniform civil code is important for all the issues pertaining to family law, but for custody where the children are being involved, it is very significant, so that at least the future generations will not be the victims.

The laws associated under Section 26 of *The Hindu Marriage Act, 1955* and Section 38 of the *Special Marriage Act, 1954* also deals with custody of the Hindu child. Under the Christian law Sections 41, 42 and 43<sup>18</sup> insist different rules of custody and under the Muslim law, only the mother holds the ultimate right to seek her child's custody under the Right to *Hizanat*, until she is not convicted of any misconduct. Therefore, as the saying goes, too many cooks spoil the broth; there exists much ambiguity which needs to be looked after.

### **Best Interest of the Child**

From the beginning best interest of the child was the epicentre in the discussion, what does the best interest mean? According to the UN Convention, best interests of the child means to evaluate and balance all the elements necessary to make a decision in a specific situation for a specific child, which particularly aims at well-being of the child, the child's view and aspirations, age of the child, social contact of the child with peers and adults, anything and everything is considered, but even still there exists problem with the custody standard. In the case of *Punnakattu Hidayathulla v. Cherussola Soudath*,<sup>19</sup> where the Kerala High Court gave importance to whether disturbing the custody will be of the best interest of the child was decided. In this case, the parents were divorced and the female child

<sup>18</sup> [www.legalservicesindia.com/law/article/938/15/Family-Laws-in-India](http://www.legalservicesindia.com/law/article/938/15/Family-Laws-in-India).

<sup>19</sup> [www.the-laws.com/Encyclopedia/Browse/Case?CaseId=119002749100](http://www.the-laws.com/Encyclopedia/Browse/Case?CaseId=119002749100).

was under the custody of the mother. Later, the father filed a petition as to give the custody to him on the ground of his better financial conditions and argued that, he can provide a better life for the child. But the court did not allow him to take the custody for two reasons; viz., i) disturbing the custody would affect the best interest of the child and ii) being a girl child, the mother has more right. Whether it affects or not cannot be determined unless proper test is conducted on the child and sometimes it might also fall within the best interest of the child. Further, being a girl child, the mother has more right is unfair, in such cases one can never see, if the best interest of the child is served, if the ultimate aim is to serve the best interest of the child. At the same time, as children are susceptible to change, disturbing the custody by just believing the words of the child also will not be a fair option.

*Nil Ratan Kundu v. Abhijit Kundu*<sup>20</sup> is another case, where the Supreme Court held that best interest does not mean, 'only monetary and physical benefit but also the ties of affection must be given importance. The parental contact is an important one and that should be factored into decision making about the best interests of the child'. Hence, various issues can be dealt under the purview of the best interest of the child and most of the decisions have been taken, based on the convincing argument of either of the lawyers. Nothing is wrong or right, when it comes to custody, as in most of the cases both parents genuinely want the custody of the children, that's the whole point the best interest principle was brought up, but due to some flaw and ambiguity the purpose is still not been effectively served.

### **Abduction**

Moving on to another major issue, 'the child abduction', when one considers this issue under the best interest of the child, it won't amount to abduction, as the best interest of the child being the paramount consideration. How can either of the parents bringing the child on whom the parent has entire right, amount to a criminal offence? Mere bringing of the child from one country to another, where the hometown of child is, cannot be called abduction. The Hague convention was created to bring back the abducted children. Such abduction may occur at the time when a parent removes the child from his or her country of habitual residence in

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<sup>20</sup> AIR 2009 SC (sup) 732.

violation of the other parent's custodial rights.<sup>21</sup> The sole purpose of abduction was to protect against illegal, irregular adoptions abroad. Though it is created for avoiding illegal moving of the people and the children, India has not signed this Convention. The reasons are very reasonable, if India joins the Convention in its current existing form, it would mandate to send back the women and their children, who have fortunately escaped from the bad marriages back to the same place, where their husband lives. Therefore welfare of the people being the ultimate aim of the country, every act done must ensure protection to its citizens, leaving the child with a cruel person will affect the best interest of the child which will eventually spoil the whole life of the innocent child. Hence, if India signs the Convention it will be forced to recognise the foreign judgements regardless of the justness of the decision on custody laws under the Indian law. The very usage of the word 'abduction' is very unfair; no parent can abduct her own child. Therefore, the provisions of the Hague Convention is controversial and if at all, India becomes signatory of the Convention in the future, the consultation paper submitted by the law commission on adopting a shared parentage system in India<sup>22</sup> needs to be considered before taking any initiatives.

### Conclusion

Unfortunately, children being the first and the last victims in case of custody disputes, they suffer from psychological and emotional damage. Though the child has the right to choose, which parent he/she wants to live with, this legal right of the child is not always for the well-being of the child. Therefore it is very important to bring changes in the existing method of determining the custody of child. Placing the responsibility on the child to make decision can also cause internal conflict and emotional disturbance and stress over the child, feeling of choosing one parent over the other may lead to emotional imbalance in the child. Hence, bringing joint custody and shared parental responsibility would be a better option. Also bringing restrictions for granting divorce would considerably reduce the custody issues. Therefore, to put it in a nutshell children being the great assets of the nation it is the duty of the nation to protect and nurture their growth so as to ensure their valuable membership in the society. ■ ■

<sup>21</sup> <https://www.hcch.net/en/instruments/conventions/full-text/?cid=24>.

<sup>22</sup> [www.lawcommission.nic.in/consultation%20Paper%20on%20Shared%20Parentage.pdf](http://www.lawcommission.nic.in/consultation%20Paper%20on%20Shared%20Parentage.pdf)

## **CHILD SOLDIERS: VICTIMS OR COMBATANTS**

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- Ms. Akshi Narula \*

### **Abstract**

*The practice of employing children in wars and armed conflict has been traced in world history and witnessed that many wars and armed conflicts by men for the power, children being vulnerable are natural victims of such greed. As they are, cheap form of labours for carrying out activities by the warring groups, during these outrageous activities children are often illegally abducted from their localities and trained thoroughly to be a soldier by inhuman treatment that is imposed on these young children during the course of training resulting in adverse effect to their health and use of children in the armed forces are cited in countries like Afghanistan, Myanmar, Somalia, South Sudan, Sudan, Syria and Yemen. The author attempts to analyse the principles of international humanitarian law that protects children from exploitation and cites the incidents from history to analyse the present situation regarding children and armed conflict.*

### **Introduction**

The vestiges of the practice of employing child soldiers can be traced to the year of 1996 when the Alliance of Democratic Forces for the Liberation of Congo, commonly known as, AFDL, employed child soldiers for the 1997 war in

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\* IV Year, B.Com.,LL.B., University of Petroleum and Energy Studies, Dehradun.

the Democratic Republic of Congo claiming that the Hutu Government was responsible for the 1994 genocide of Rwanda. The same is expressed to have created a precedent for other warring groups.<sup>1</sup> Some of these children enlisted themselves voluntarily and enjoyed a monthly pay of US \$100 or with the motivation of the duty to protect their communities.<sup>2</sup> However, others were illegally being abducted from playing areas, cities, schools, refugee camps and even their own homes to serve the military.<sup>3</sup> Thereafter they were trained thoroughly which included torture of all sorts, deprivation of food, sleep and healthcare, due to which hundreds of them died. Other 'soldiers' were pushed into the commission of murders and rapes of civilians, enemy soldiers or even family members.

According to the 2018 edition of the Annual Report<sup>4</sup> published by the United Nations (UN) on Children and Armed Conflict, seven countries were reported to have been indulged in the recruitment and use of children in the armed forces including Afghanistan, Myanmar, Somalia, South Sudan, Sudan, Syria and Yemen. Further, apart from the above, 56 other non-State armed groups appear which include the Mai-Mai in Democratic Republic of Congo, etc. Fourteen countries have been held as guilty of this offence including Afghanistan, Central African Republic, Colombia, Democratic Republic of Congo, Iraq, Mali, Myanmar, Nigeria, Philippines, Somalia, South Sudan, Sudan, Syria and Yemen.

According to the Report, the children might be raped and any of their attempts to escape were punished by commission of torture or pouring molten plastic onto the skin.<sup>5</sup> In a press briefing by Virginia Gamba, Special Representative of the Secretary-General for Children and Armed Conflict has mentioned that, there is increase in number of grave violations of children's rights up to 21,000

<sup>1</sup> Susanna Kim, "Child Soldiers in the Congo", 27 *Harvard International Review* (2006) pp.7-8

<sup>2</sup> *Ibid.*

<sup>3</sup> *Ibid.*

<sup>4</sup> U.N. Secretary-General, "Children and Armed Conflict", U.N. Doc. A/72/865-S/2018/465 (May 16, 2018).

<sup>5</sup> Virginia Gamba, U.N. envoy for children and armed conflict in a statement recorded by: Tom Miles, "Thousands of Child Soldiers Still Trapped After South Sudan War: U.N", available at, <https://www.reuters.com/article/us-southsudan-children/thousands-of-child-soldiers-still-trapped-after-south-sudan-war-u-n-idUSKCN1NB22F> last visited on 26.11. 2018.

emerging from recent crisis in Central African Republic, Myanmar, Syria, Yemen, South Sudan and Democratic Republic of the Congo were confirmed by the UN.<sup>6</sup>

Often called as a source of 'cheap labor', children are an easy addition to the membership of armed groups.<sup>7</sup> Children separated during war time willingly associate themselves with such military groups in the expectation of protection and to earn a means of living. Apart from the ones prepared, others are forced to join such groups by the armed groups themselves.

Recruiting children as soldiers during an armed conflict is one of the six grave violations against a child which has been recognized and condemned by the United Nations Security Council. The Security Council has declared protection of children from armed conflict as an important aspect of any comprehensive strategy towards resolving of conflict.<sup>8</sup> The other five of the six grave violations against children include killing and maiming, sexual violence, abduction and denial of humanitarian access of children and also include attacks against schools or hospitals.<sup>9</sup> These violations are the basis upon which the machinery of the UN to combat the same rests. The Security Council has resolved to counter such violations by measures like, Secretary General's global Annual Report on Children and Armed Conflict, Country specific Monitoring and Reporting Mechanisms establishment, formation of the Security Council Working Group on Children and Armed Conflict.

### **International Humanitarian Law on the Subject**

#### **1. 1949 Geneva Conventions**

The following Conventions are the constituents of the International Humanitarian Law and inscribe within itself the laws dealing with protection of

<sup>6</sup> Annual Report: Children Faced with Unspeakable Violence in Conflict as Number of Grave Violations Increased in 2017 June 27, 2018 *children and armed conflict*, Available at, <https://childrenandarmedconflict.un.org/children-faced-with-unspeakable-violence-in-conflict-as-number-of-grave-violations-increased-in-2017/> visited on 26.11.2018.

<sup>7</sup> Kristine Gronhaug, Flykninghjelpen, "The Number of Child Soldiers in the World is Increasing – Almost Half of Them are Girls", *Flykninghjelpen Norwegian Refugee Council*, available at, <https://www.nrc.no/short-hand/stories/child-soldiers/index.html>

<sup>8</sup> S.C. Res. 1261 (1999), 2068 (2012), etc. November 26.11. 2018.

<sup>9</sup> The Six Grave Violations, "Office of the Special Representative of the Secretary-General for Children and Armed Conflict", available at, <https://childrenandarmedconflict.un.org/six-grave-violations>, last visited on 26.11.2018.

children in hostile situations. These constitute international Conventions, including *the Geneva Conventions of 1949*, the Additional Protocols I and II of 1977 to the same, *the Convention on the Rights of the Child of 1989*, agreements which have been formed at local levels or national levels including the African Charter in *the Rights and Welfare of the Child of 1990*, and the *Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, 2000*.

Seventeen provisions of *the Geneva Conventions of 1949* deal with the protection of children. Broadly, the Conventions apply to conflicts of international nature except, Article 3 which also covers situations of non-international armed conflicts. The Conventions extend the application of the provision of protection entitled to non-participants to children laying down their arms. Further, it has been mentioned that such children may not be forced to take part in hostilities against their own country. Also, a country whose power changes or a power that takes possession of a country must address the educational needs of children of the occupied country's population. Apart from the protections discussed, *the Geneva Conventions* do not take into account the recruitment of children into armed forces. Children being special subjects of law under various jurisdictions have always enjoyed special legal protections keeping in consideration the presumption of their inability to maintain themselves. The aspect of children during an armed conflict has been covered by *the 1949 Geneva Conventions* and other international law instruments. The protections enjoyed by a child differ according to the concerned instruments.

## **2. Additional Protocols to the Geneva Conventions**

However, *the Additional Protocols to the Geneva Conventions of 1949* bring into picture the issue of participation of children under the age of 15 years in non-international armed conflicts. The rule hence prohibits the 'recruitment' into the armed forces. Such a prohibition absolutely prohibits all forms of direct and indirect participation of children is also present in the Additional Protocol II<sup>10</sup> which applies to a situation of civil war *i.e.*, conflicts between a Government and an organized armed group. Again, *the African Charter on the Rights and Welfare*

<sup>10</sup> Article 77 (2).

of the Child of 1990 which is applicable and open to members of the Organization of African Unity refers to 'direct' participation contrary to the Additional Protocol II which also includes 'indirect' participation.

### 3. Other Conventions

*The Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labor of 1999* prohibits child soldiering as well. Further *the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict of 2000* prohibits all forms of recruitment of children by armed group but allows such recruitment by the Governmental forces.

Further, *The Paris Principles of 2007* States "Any person below 18 years of age who is or who has been recruited or used by an armed force or armed group in any capacity, including but not limited to children, boys and girls, used as fighters, cooks, porters, messengers, spies or for sexual purposes. It does not only refer to a child who is taking or has taken a direct part in hostilities".<sup>11</sup>

### Conceptual Analysis of Child and Armed Conflict

#### a. Meaning of Child

Generally, a child in spite of being defined on the basis of his/her mental or physical development has always been categorized on the basis of his/her age. The age to qualify as a child might vary from country to country. The *travaux preparatoires* suggests that 'children' would have different meanings in different national and international laws.<sup>12</sup>

For the present article, *the 1949 Geneva Conventions* have attributed protection to the persons aged between 15 and 17 years of age in international armed conflicts. Further, *the Optional Protocol to the Convention on the Rights*

<sup>11</sup> Save the Children Alliance, "Children - Not Soldiers: Guidelines for Working with Child Soldiers and Children Associated with Fighting Force", December 2001, available at, [http://www.reliefweb.int/rw/lib.nsf/db/900sid/LGEL-5D8D6Q/\\$file/sc-children.pdf?openelement](http://www.reliefweb.int/rw/lib.nsf/db/900sid/LGEL-5D8D6Q/$file/sc-children.pdf?openelement) visited on 10.12. 2018.

<sup>12</sup> Knut Dormann, *Element of War Crimes under the Rome Statute of the International Criminal Court Sources and Commentary* (Cambridge: Cambridge University Press, 2003).

*of the Child on the Involvement of Children in Armed Conflict* prescribes 18 years as the minimum age of individuals to be eligible to be recruited in an 'armed conflict'. It is pertinent to note here that, *the Optional Protocol* has further prescribed the same age for non-state actors as well for being admitted. In order to avoid the ambiguity of considering different nations' standards for defining the term child in the Statute<sup>13</sup> has incorporated the term 'person' instead of 'child' stipulating the age with the same. The UN General Assembly further adopted a Protocol to *the Convention on the Rights of the Child* increasing the age to 18 years.

#### **b. Armed Conflict**

It was in the late 20<sup>th</sup> and 21<sup>st</sup> Centuries that the term 'war' was replaced by the word 'armed conflict'.<sup>14</sup> It is an accepted situation that, there is no universally accepted definition of the term. Attempts to define the term have been made by the Office for the Coordination of Humanitarian Affairs which defines it as "*A dispute involving the use of armed force between two or more parties. International humanitarian law distinguishes between international and non-international armed conflicts.*"<sup>15</sup> The International Committee of the Red Cross (ICRC) further differentiates between the two forms of conflict: "*International armed conflicts exist whenever there is resort to armed force between two or more States. Non-international armed conflicts are protracted armed confrontations occurring between Governmental armed forces and the forces of one or more armed groups, or between such groups arising on the territory of a State (party to the Geneva Conventions). The armed confrontation must reach a minimum level of intensity and the parties involved in the conflict must show a minimum organisation.*"<sup>16</sup>

<sup>13</sup> A/CONF.183/9 of (July 17, 1998).

<sup>14</sup> Children and Armed Conflict: "A guide to International Humanitarian and Human Rights Law", *International Bureau for Children's Rights* (2010).

<sup>15</sup> OCHA, *Glossary of Humanitarian Terms*, (New York, 2003), available at, <http://un-interpreters.org/glossaries/ocha%20glossary.pdf> last visited on 26.11.2018.

<sup>16</sup> ICRC, "How is the term armed conflict defined in International Humanitarian Law?" Geneva, 2008, available at, [http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/armed-conflict-article-170308/\\$file/Opinion-paper-armed-conflict.pdf](http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/armed-conflict-article-170308/$file/Opinion-paper-armed-conflict.pdf) last visited on 11.12. 2018.

The presence of an armed conflict is hence essential to know the application of the Conventions over the existing circumstances. The terminology used for defining different types of crimes of child soldiers vary from convention to convention leading to a different application in different situations of armed conflicts as has been discussed and will be discussed in detail further leading to divergent results of such applications.

Hence, except knowing that employing child soldiers is an international crime, regard must also be given to the limited and expanded scopes of application and the defences available in different set of circumstances.

#### **Recruitment of Children in Armed Conflict**

*The Rome Statute of the International Criminal Court*<sup>17</sup> defines “Conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities” as a war crime by virtue of Article 8. The extent and interpretation of the war crime (limiting the same to Rome Statute only) has been made as follows:

##### **i. Use v. Participate**

Article 8(2)(b)(xxvi) of the Statute constitutes of offences of ‘conscripting or enlisting children into the national armed forces’ and ‘using them’ to ‘participate’ actively in hostilities. Hence, it has been suggested by the Preparatory Committee preceding the Diplomatic Conference in Rome<sup>18</sup> that both the words of ‘using’ and ‘participate’ have been used to define this war crime with the intent of including both “direct participation in combat and also active participation in military activities linked to combat such as scouting, spying, sabotage and the use of children as decoys, couriers or at military checkpoints. The use of terms having broad connotations can hence fit within their meaning a range of incidental activities which might be a result or an accomplice of the major ‘war crimes’.

<sup>17</sup> A/CONF.183/9 (July 17, 1998).

<sup>18</sup> Report of the Preparatory Committee on the Establishment of an International Criminal Court A/CONF. 183/2/Add/ 1 (Apr 14, 1998).

## ii. Recruiting v. Conscripting or Enlisting

Another observation<sup>19</sup> is that while the Additional Protocol-I<sup>20</sup> contains the word 'recruiting', the Statute<sup>21</sup> uses the terms 'conscripting' or 'enlisting'. The wording is drawn from *the 1989 Convention on the Rights of the Child*.<sup>22</sup> However the Statute does not further define the meaning of the terms. Making a further reference to the Oxford English Dictionary, 'to recruit' means to "enlist new soldiers. It hence makes a reference to the requirement of army men in the army force. Further, 'to enlist' has been defined to mean addition on the list of military body. Furthermore, 'to conscript' has an element of compulsion or compelling the military service.

This replacement of words was done to suggest something more passive, as a means of putting the name of a person on a list.<sup>23</sup> It is hence clear that the intention of the law is to include within its purview to prohibit all forms of recruitment of children into such military forces by way of new addition to the army as a measure to fill the vacancies (short term or long term which might arise), to add to the list of military body or any other forms. It has been further reiterated by the ICRC Commentary,<sup>24</sup> that "the principle of non-recruitment also prohibits accepting voluntary enlistment."

## iii. Participate Actively in Hostilities

The provision under the Additional Protocol-I employs the words 'direct part in hostilities' contrary to the ICC Statute which uses the terms 'participate actively in hostilities'. It has been ruled by the International Criminal Tribunal of Rwanda in the case of *The Prosecutor v. Jean Paul Akayesu*<sup>25</sup> held that the term "direct part in hostilities" has been evolved from the phrase "active part in the

<sup>19</sup> *Supra* note 12.

<sup>20</sup> Article. 77(2)

<sup>21</sup> A/CONF.183/9 (July 17, 1998).

<sup>22</sup> GA Res. 44/25, Annex, Art. 38.

<sup>23</sup> Schabas, *An Introduction to the International Criminal Court*, (Cambridge: Cambridge University Press, 2011).

<sup>24</sup> S. Junod, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (ICRC, Martinus Nijhoff, Geneva, 1987).

<sup>25</sup> ICTR-96-4-T, para. 629.

hostilities” and further ruled that the phrases are so similar that they can be treated as ‘synonymous’.

### **Mental Element if Necessary**

The issue which surfaces here is that, whether the constitution of the offence includes the element of ‘*mens rea*’ for conviction of the offender. It is expected here that a person booked under the charge of conscripting children as soldiers would want to establish that such recruitment was not made under the ‘knowledge’ that the person so employed was a child i.e., was a person below the age of 18 years. He would try to establish that the child appeared to him to be of an age older to the prohibited age of 18 years.

The Rome Statute<sup>26</sup> states that a ‘mistake of fact’ shall be a ground for excluding criminal responsibility under the Statute only if the same leads to negation of the mental element required to be proven by the crime so stated. Hence, the defence is that that an offender who lacks knowledge of an essential fact does not possess the guilty mind necessary for conviction. Obviously, the Court will need to assess the credibility of such a defence pleaded in the light of circumstances so prevalent. War crimes jurisprudence has rather been welcoming the defence of mistake of fact since International Humanitarian Law is considered quite specialized and rather technical.<sup>27</sup>

The defence of ‘mistake of law’ was pleaded in the case of *Lubanga*<sup>28</sup> where he pleaded that since the Rome Statute was new neither had their country enacted such an offence of enlistment of child soldiers, the law was not “accessible” or “foreseeable”. The claim hence was based on the defence of ignorance of law. Further the Rome Statute<sup>29</sup> excludes invocation of the defence of mistake of law for doing away with criminal responsibility. However it provides for exceptions to the general rule stating that mistake of law can be a ground for excluding criminal responsibility if it negated the mental element present under Article 33. Article 33 permits this defence in existence of three conditions which include: (1) That the

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<sup>26</sup> Article 32.

<sup>27</sup> *Supra* note 23, p. 242.

<sup>28</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06.

<sup>29</sup> Article 32 (2).

accused must be under a legal obligation to obey orders; (2) He must be under the knowledge that the orders were lawful; and (3) That the order must not be manifestly unlawful.<sup>30</sup> Also, according to Paola Gaeta, 'orders to commit genocide or crimes against humanity are manifestly unlawful.'<sup>31</sup>

Hence, the defence cannot be applicable if the crime is against humanity or genocide even if the act was done under without the knowledge of the law. But if the offender commits the crimes excluding those against humanity or genocide, and he was under a legal obligation to obey orders followed by the belief that the orders were lawful, the defence would find its way of operation.

In the present case, 'child soldiers' as the name suggests, it is apparent that the soldiers would be enlisted for the commission of the crimes of genocide of would constitute the crimes against humanity again making the defence inapplicable in this particular case.

### **Land Mark Judgments Relating to Children in Armed Conflict**

#### **1. The case of *Thomas Lubanga Dyllo* (International Criminal Court)**

Some cases where the accused were declared as war criminals on the basis of employment of child soldiers includes the *Lubanga case*<sup>32</sup> where Thomas Lubanga Dyllo, the former President of the Union des Patriotes Congolais was sentenced to an imprisonment of 14 years in the year 2012. He was the first accused to appear before the Court charged for the crime of employing child soldiers. The evidence demonstrated that he was Commander-in-Chief of the army and along with co-perpetrators participated in the plan to build an army for maintaining military and political control over Ituri by recruitment of children under the age of 15 years to use them as child soldiers known as hostilities between September 1, 2003 and August 12, 2003.<sup>33</sup> He repeatedly enlisted children under fifteen years of age, who were brought to various training camps, by stating-

<sup>30</sup> Llandovery Castle Case (1923-4) 2 Ann. Dig. 436.

<sup>31</sup> Paola Gaeta, "The Defence of Superior Orders: The Statute of the International Criminal Court Versus Customary International Law", 10 *European Journal of International Law* (1999) p.172

<sup>32</sup> *The Prosecutor v. Thomas Lubanga Dyllo* ICC-01/04-01/06.

<sup>33</sup> *Ibid.*

*“Many of the children were abducted on the road. Abducted from schools. Abducted from their parents houses. In the presence of their families... The children were instructed to kill the enemies regardless of whether they were combatants or civilians. The commanders forced children, boys and girls, to fight at the frontlines. Forced by threats of execution. Many child soldiers were killed. Others were seriously wounded. The Prosecution will present to the Court details of the individual cases of six children who were victims of these crimes.”<sup>34</sup>*

## **2. The case of *Charles Taylor* (Special Court for Sierra Leone)**

Another case for the same crime as was stated under the Statute of Special Court for Sierra Leone parts of which have been adopted from the Rome Statute includes the *Charles Taylor case* under which Charles Taylor the former President of Liberia was sentenced to a term of 50 years by the Special Court for Sierra Leone. He was held guilty of 11 war crimes during the Sierra Leone civil war including war crimes, crimes against humanity and the violation of international humanitarian law of engaging child soldiers.<sup>35</sup>

In addition to the above cases, there are other several arrest warrants issued so far by the Court for non-international armed conflict including the civil war in Northern Uganda, Joseph Kony, Vincent Otti, Okot Odhiambo and others in the present case were charged with murder, intentionally directing an attack against a civilian population, cruel treatment of civilians, forced enlisting of children, etc.<sup>36</sup>

### **Child Soldiers: Victims or Combatant**

#### **a. Meaning of Child Soldiers**

International humanitarian law makes a clear distinction between civilians and combatants and also between lawful and unlawful combatants. Lawful combatants are the ones who are legally entitled to kill other combatants. Further, if lawful combatants are captured, they are entitled to protection as prisoners of

<sup>34</sup> Opening Remarks: Luis Moreno-Ocampo, *Fifth Session of the Assembly of States Parties*, Nov. 23, 2006.

<sup>35</sup> <https://www.opensocietyfoundations.org/briefing-papers/trial-charles-taylor-special-court-sierra-leone-appeal-judgment> visited on 3.12.2018.

<sup>36</sup> *Supra* note 23, p.145.

war and hence, they cannot be treated as criminals. On the other hand, if unlawful prisoners are captured, they enjoy none of the rights of prisoners of war.<sup>37</sup> It is also pertinent to mention here that, the International Humanitarian Law has emerged principles to prevent such children by: (1) ensuring that the captured children who are lawful combatants are conferred with the privileged status of Prisoner of War; and (2) it protects children from the severest punishments of the law for the children who are unlawful combatants.<sup>38</sup>

#### **b. Principles of Distinction and Proportionality**

The same can also be understood by reference to the two major principles of 'Distinction' and 'Proportionality' mentioned under *the Geneva Conventions* and their Additional Protocols which operate under the law of armed conflict and have attained the status of International Law. The conventions elaborate upon the situations falling under both Government and non-state armed conflicts. On the basis of the principle of 'Proportionality', they prohibit the disproportionate military attacks against civilian i.e., if a military attack results in civilian death or injury or damage to civilian objects in excess when compared to the concrete and direct "military advantage anticipated from the attack." On the other hand, according to the Principle of Distinction, parties to conflict distinguish between civilians and combatants at all times and the attack shall not be directed towards civilians. Hence, in application of this principle of Distinction, it becomes important to label this newly established category of child soldiers into one of the two.

Furthermore, the above categorizing would also answer the question of whether the child soldiers can be subjected to detention. Currently, the detention of children allegedly associated with armed groups is prohibited under both humanitarian and human rights law. It is hence a settled law that arrest, detention or imprisonment of a child shall follow the standards laid down under the national and international laws.

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<sup>37</sup> "Child Soldiers, International Humanitarian Law, and the Globalization of Childhood, *American Anthropologist*", 109, *In Focus: Children, Childhoods and Childhood Studies* (Jun., 2007) pp. 296-306

<sup>38</sup> *Ibid.*

*Arguendo*, categorizing child soldiers as 'combatants' would lead to a step towards allowing such employment that would be in contravention of the International Humanitarian Law and the human rights law.

**c. Child Associated with an Armed Force or Armed Group**

As is evident from the above discussion that a category from 'combatant' or 'civilian' has to be conferred upon child soldiers making the use of the term 'soldier' as non-existent. Another view exists that the term 'combatant' should not apply to children because of the unlawful association of children with the armed conflict. Child protection agencies have further used the term "Child Associated with an Armed Force or Armed Group" (CAAFG). The term emphasizes the need for emergence of inclusive programmes that provide support to all child soldiers. This include the provision of support by way of prohibiting such employment at first place and also focuses on the schemes of reintegration after such CAAFGs have been rescued to help them live a normal life.

**Outcome of the International Humanitarian Law Relating to Child Soldiers**

**i. *The Child Act of South Sudan***

The Government of Sudan in April 2009 introduced *the Child Act* offering protection to the children. For the purpose of the present article, the most noteworthy of all the rights conferred upon the children of South Sudan is the bar on recruitment of children below the age of 18 years by an armed group or forces to be a criminal offence. The commission of such an offence shall fall within the jurisdiction of the criminal courts of South Sudan. Further, it prohibits inhumane treatment of children including the practices of torture and also that if cases of violation of child rights are suspected; the same can be reported directly to the authorities who would be proceeded by an investigation by the Children's Commission (also a creation of the Act).

**ii. *Child Soldiers Accountability Act of 2008***

The Act was signed into law by President George W. Bush. *The Child Soldiers Accountability Act of 2008* Act of United States like *the Child Act of South Sudan* incorporates the offence of child soldiers. It makes the crime more specific by adding the element of knowledge to recruiting children below the age

of 15 years. The Act applies to a non US citizen as well and punishes the offenders for a sentence of 20 years upto life imprisonment for associated crimes along with fines.

**iii. Collaborated Efforts of UN Department of Peacekeeping Operations and the Special Representative of the Secretary-General for Children in Armed Conflict**

The UN Department of Peacekeeping Operations and the Special Representative of the Secretary-General for Children in Armed Conflict post adoption of various Security Council Resolutions came together to increase awareness of children's issues among peacekeepers. The collaboration has facilitated practices like training of peacekeepers in child rights and child protection.<sup>39</sup>

**iv. Rehabilitation of the CAAFGs**

The newly emerged responsibility to rehabilitate children was introduced by the UN *Convention of the Rights of the Child* and Optional Protocol to the same convention which emphasize on supporting the physical and psychological recovery and social reintegration of a CAAFG<sup>40</sup> and also to demobilize, rehabilitate and reintegrate them.<sup>41</sup>

Projects like, rehabilitating and reintegrating child soldiers, including girl combatants and abductees through the process of family reunification, improving access to reproductive health services, counselling and psychosocial support for victims of rape, etc., have been introduced.

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<sup>39</sup> United Nations Peacekeeping Best Practices Section, *Lessons Learned Study: Child Protection. Impact of Child Protection Advisers in UN Peacekeeping Operations*, May 2007, available at, [http://www.peacekeepingbestpractices.unlb.org/PBPS/Library/LL\\_CPA\\_PBPS\\_May07\\_Final.pdf](http://www.peacekeepingbestpractices.unlb.org/PBPS/Library/LL_CPA_PBPS_May07_Final.pdf) visited on 3.12.2018.

<sup>40</sup> *Convention on the Rights of the Child*, 20 November 1989, United Nations Treaty Series, vol. 1577, Article 39, available at, <http://www.unhcr.org/refworld/docid/3ae6b38f0.html> visited on 3.12.2018

<sup>41</sup> *Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict*, 25 May 2005, Article 6, available at, <http://www.unhcr.org/refworld/docid/47fdfb180.html> visited on 3.12.2018.

#### v. Release and Reintegration of Children

When CAAFGs are captured by opposing armed forces, the special protections afforded to them by International Humanitarian Law. Separate Chapter has been allotted to Children and disarmament, demobilization and reintegration (DDR) while legislating the DDR processes. Special care has been awarded while applying the processes of DDR. The enforcement mechanisms have been kept as being more important than other routine DDR programmes i.e. it must not wait for the processes being established for adult DDR.<sup>42</sup> Further a child shall be allowed to “access to education, a livelihood, life skills and a meaningful role in society” Although the report recognizes that there is no simple formula for the DDR that can be strictly applied in all circumstances, so a need to frame a situation specific programme has arisen.

#### Conclusion

It has been suggested that, to improve the current situation, a Protocol shall be entered to enhance the minimum age for voluntary enlistment to 18 years along with establishment of an effective system for registering and documentation of births.<sup>43</sup> Fixing of an age by way of an international Protocol would make the differentiation evident between the two types of ‘recruitment’ whereby the children below the age of 18 years cannot by any means be admitted to an armed group.

Following the footsteps of South Sudan, United States and other nations, countries should adopt national policies for prohibiting the practice of child soldiers and provide them adequate protection. International initiatives like the famous DDR shall be carried on in order to bring them back to normal living.

Further, action plans to end this evil shall be signed. The action was recently taken by Philippines – Rebel Group which signed Action Plan to end the use and recruitment of children<sup>44</sup>. The Action Plan lays down “concrete steps to release

<sup>42</sup> 5.30 Children and DDR: Integrated Disarmament, Demobilization and Reintegration Standards 1 August 2006 available at, [http://unddr.org/uploads/documents/IDDRS% 205.30%20 Children%20and%20 DDR.pdf](http://unddr.org/uploads/documents/IDDRS%205.30%20Children%20and%20DDR.pdf) visited on 10.12.2018.

<sup>43</sup> Volker Druba, “The Problem of Child Soldiers”, 48 *International Review of Education*, pp.271-277.

<sup>44</sup> Integrated Regional Information Networks, “Philippines: Muslim Rebels Agree to End Use of Child Soldiers”, 12 December 2008, available at, <http://www.unhcr.org/refworld/docid/4947739ac.html> visited on 3.12.2018.

children and prevent their use, it allows monitoring of activities to ensure compliance with the plan and provides for children to be reintegrated into civilian life.”

Hence, a number of attempts have been taken toward the protection of children during armed conflicts and also as a result of the armed conflict. Laws have been legislated to protect the children from six grave violation against children recognized internationally. However, it is to be understood that unless these children who yet do not know their right know their rights, the implementation of the above legislated processes will be hard to be implemented. There is a need to endorse the laws legislated to the communities and children involved by way of conveying the message on the field thereby targeting the victims.



## **CHILD-FRIENDLY COURT: A MORE PREPONDERANT CONCEPT NEEDS A BETTER IMPLEMENTATION**

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- Ms. Ankita Shaw\* and Ms. Pragya Shrivatsava\*\*

*"Officers and Judges need no imaginative powers, knowledge of developmental psychology, training in cognitive science or, expertise in social and cultural anthropology to account for a child's age. They simply need the common sense to know that a 7-year-old is not a 13-year-old and neither an adult."*<sup>1</sup>

### **Abstract**

*The criminal justice system and the research that is cognate to the juveniles in India has never been attuned to the psychology of the child. The legal system is far from being comprehensible for the juveniles involved either in the crime or is in need of care and protection. It is the judicial system of India that finds it arduous to maintain a balance between the rights of the child and also the rights of the accused. The new era challenges this notion of maintaining balance between the rights of both the child and the incriminated. This delicate balance can be maintained through various small and big developments which protect the rights of the children while maintaining the judicial integrity system and also forfending the rights of the accused.*

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\* 3<sup>rd</sup> Year, B.A., LL.B., KIIT University and

\*\* 3<sup>rd</sup> Year, B.A., LL.B., KIIT University.

<sup>1</sup> *J.D.B. v. North Carolina*, U.S. LEXIS 4557 (2011).

*The paper accentuates the implementation of the great concept of establishing child friendly courts in each districts in three folds: Firstly, the author introduces the concept of child friendly court and also evaluates the idea that the criminal justice system in India has failed to take into consideration the psyche of the child. Secondly, the author makes an endeavor to analyze the laws that are in consonance with the psyche of the child and prevails in India. Furthermore, an attempt has been made to identify the innumerable lacunae in the prevailing law regarding the child friendly laws and courts, both. Additionally, a sincere attempt on the part of the author has been made to analyze the implementation of the already existing laws. And in the last fold, the author makes certain recommendations and suggestions in order to contribute to the field of law that is attuned to the psyche of the child and also recommendations and suggestions have been made regarding establishment of the child friendly court.*

### **Introduction**

The Indian criminal justice system is designed to address the grievances and the transgressions of the adults. The traditional courts were ergo not made in accordance with the special development and the requisite of the desideratum of the children. When an adult may find the legal system daunting and apprehensiveness inducing experience, it must not be fair to verbalize that the child won't. The legal system and its language are farfetched from the comprehensibility of the child. Testifying in a court, by being a witness or even for giving a statement, can be highly stressful and traumatizing for the child. The stress and trauma increases for a child, when they themselves are involved in the crime. This can be attributed to certain factors which are as follows:

- a) The maturity in the construal of the child inconcretely deciphering the court proceedings;
- b) The child may be reluctant to cooperate with the entire legal process concretely when the crime like sexual abuse of the child has been committed by the trusted ones. Last decade has perceived incrimination in the rate of the presence of the children in the court. What indeed is realized in India after 70

years of independence is that, an involution of child witnesses is paramount in order to achieve justice. Consequently, what can be considered as a paramount factor is that there is a pressing need to modify the courtrooms as well as the legal system procedures to forefend and facilitate the children while withal maintaining the judicial integrity of the nation.

The judicial system of India has often found arduous to maintain a balance between forfending the rights of the child and withal the rights of the incriminated. The challenge of maintaining this delicate balance can be met through a sundry minute and astronomically immense development which bulwarks the rights of the child while maintaining the judicial integrity system and withal the rights of the incriminated.

In India, a country where the rate of the child committing crimes have incremented, where the judicial system has apperceived the paramount of vulnerable witness deposition centre for the child, it is additionally paramount that the great concept of child friendly courts be implemented and moreover, in an opportune way so that justice can be achieved. This paper analyses the immediate requirement of such 'Special Court's required for the child. Furthermore, it evaluates the laws cognate to child-friendly courts and its implementation in India.

### **Criminal Equity System not Attuned to the Juveniles**

#### **i. Desideratum for Establishing Special Courts**

Scant attention has been provided to the care and protection of children. The intricacies of the judicial proceeding have very often resulted in the fascinates of the child becoming secondary, an issue which authentically needs to be looked after. The goal of the 'Special Court's is to ascertain the quality of life, dignity, reverence, healing, justice, reparation, normalization and re-integration to the juveniles. The child-friendly court is predicated on these desiderata of the children and the entelechy that the intrigues of the child victims would be better accommodated if offences against children could be dealt with in a dedicated court. These 'Special Court's, ergo, should be equipped to provide child-amicable justice to the juveniles. The prescriptive nature of black letter law does not yield results. It is paramount to fixate on the psycho-convivial dimensions of the proceedings and to ascertain that the law provides for multi-disciplinary approaches

not only in the nature of the court but additionally in the services rendered to the child.

**ii. Importance of the Special Statute (POCSO Act) Lies in the Special Court s**

*Protection of Children from Sexual Offences Act (hereinafter referred as POCSO Act) 2012* was enacted with the purport and objective to bulwark the child from sexual offences act committed by the abuser. The criminal justice system prior to the enactment of the law had no provision to forfend the child from sexual offences. Furthermore, the court procedures and systems were also, ergo, not made in consonance with the intrigues of the child. To ascertain that the interest of the child is maintained and their rights are forfended *the POCSO Act* was enacted. One of the provisions in the act lays down that a 'Special Court' should be established in each State in consultation with the Chief Justice of the High Court of the respective State.<sup>2</sup> This 'Special Court' or 'Child-Friendly Court' *per se* is dedicated only to dealing with the cases that involve sexual offences against children. Though the jurisdiction of the Court is inhibited to dealing only with sexual offence cases against the children and not with the infringement of their rights, it indeed is an important provision in the Act. The consequentiality of *the POCSO Act* as a special statute indeed lies in the 'Special Court's. These 'Special Court's furthermore, has the objective to ascertain an expeditious trial where the justice is not delayed and consequently the interest of the child is additionally not affected. These courts are a step forward towards bridging the gap and ensuring the welfare of the children categorically when the crime rate like sexual abuse against the children have incremented.

**Current State of India's Law Regarding Child Friendly Courtrooms**

Law Makers of India have passed various laws like *Protection of Children from Sexual Offences Act (POCSO)* and *Juvenile Justice Act (amended in 2015)* to formally modify the laws for children both who are in conflict with law and also the ones who need care and protection. Vigorous accentuation is relied upon that the child victims and the child witnesses need special treatment under law to ascertain the truth of their testimony. Certain factors which needs to be taken care of:

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<sup>2</sup> Section 28, *The Protection of Children from Sexual Offences Act, 2012.*

### **i. Competency**

The most consequential quandary facing child witnesses is their lack of understanding of the legal system as well as the legal terminologies. When the adults fail to understand the Court proceedings, the legal system and the legal terminologies it is indeed woeful to expect the child (both child in conflict with law and child in need of care and protection). With child witnesses, however, the absence of developmentally congruous querying may both increase the child's trepidation of testifying and obstruct the truth seeking goal of aurally perceiving the child's testimony. In the present legal system, children in the courts are often asked complicated and perplexed questions about truthfulness that even adults might find it arduous to decipher.<sup>3</sup> The issue that lies ahead of us is that in spite of *POCSO Act* laying down procedures through which less perplexed question is to be asked to the children however, the irony of the situation is that, what strength the implementation of the Act has taken place *per se* in India.

### **ii. Questioning**

The questions are to be posed in a manner which is appropriate to the child's age in order to do away with intimidation or harassment. Children are to be questioned in a way that they understand. However, in India the implementation of the same has not yet taken place.

### **iii. Establishing of Child Friendly Courts or Special Courts in Each District**

In the case of *Sampurna Behera v. Union of India*,<sup>4</sup> the Supreme Court urged all the respective Chief Justices of the High Court to consider establishing child friendly courts and vulnerably susceptible witness courts in each district. Inquiries under various Acts like *Juvenile Justice Act* and trials under other statutes such as *Protection of Children from Sexual Offences Act, 2012*; *Prohibition of Child Marriage Act, 2006*; trials for sexual offences under the *Indian Penal Code, 1860* and other similar laws requires to be conducted with a high degree of

<sup>3</sup> *State v. Hanson*, 439 N.W.2d 133, 137 (Wis. 1989) stating "The type of questions presented to the child witness in this case would have been difficult to answer even by a person much more mature".

<sup>4</sup> *Sampurna Behera v. Union of India*, MANU/SC/1523/2018.

sensitivity, care and empathy for the victim.<sup>5</sup> Juveniles who are accused of an offence or the victim of sexual offence both experience such procedures in the court which is highly traumatic. Thus, the desideratum to have some commiseration towards them including, the juveniles who are in conflict with law (since they have the entitlement to the presumption of innocence unless proved guilty). Establishing child friendly courts in every State and district of the nation is probably one manner in which the justice delivery system can respond to facilitate their pain and suffering.

#### **iv. Designation of a Court as a Special Court v. Establishing a Special Court**

To have a child friendly court and to have child friendly procedures in the court are two different concepts which are often used interchangeably. Setting up a 'Special Court' may require new infrastructure and facilities whereas a designated court merely integrates responsibilities and duties on the subsisting courts. In the present scenario, a Session's Court in most districts are often designated as a 'Special Court'. These designated 'Special Court's lack the fundamental requisites on the part of the juveniles to be treated in a more commiserate manner. Whereas, the demand to establish a 'Special Court' often means to include all the basic requirements which treats the juveniles in a compassionate manner. Some basic infrastructure of the 'Special Court's include a video conferencing room with one wall dissection, where it is made sure that the victim is not confronted with the accused, play rooms to make the court rooms comfortable for the juveniles and many more such infrastructure is included in the establishment of the 'Special Court'.

#### **v. Provisions in *the Protection of Children from Sexual Offences Act, 2012* for Special Courts**

Child Sexual Abuse has been one of the under reported crimes in India. To address the quandary of these child sexual abuse cases, the Government passed a Special Act i.e., *The POCSO Act, 2012*. *The POCSO Act* provided provisions and guidelines for the establishment of the 'Special Court's with the objective of expeditious trial of cases specifically related to sexual offences against the children.

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<sup>5</sup> *Ibid.*

As per Section 28(1) of the *POCSO Act, 2012*, The State Governments in consultation with the Chief Justice of the respective High Court should designate a Sessions Court to try offences under the *POCSO Act, 2012* to facilitate speedy trial and also keeping in mind the interests of the child.<sup>6</sup> Various other provisions also has been laid down for these 'Special Court's. A special prosecutor is to be appointed for every 'Special Court' dealing with cases only under the provisions of this Act<sup>7</sup>. The questions to be asked to the child is to be put forth before the 'Special Court' and The "Special Court" is then supposed to ask the question to the child.<sup>8</sup> Furthermore, the 'Special Court' should be providing with regular breaks during the trial.<sup>9</sup> According to Section 33(5), the "Special Court" should create a child friendly atmosphere which is in the interest of the child.<sup>10</sup> The 'Special Court' should further ensure that the child does not have to testify repeatedly.<sup>11</sup> No aggressive questioning or character assassination of the child should be permitted as per the Section 33(6) of *POCSO Act, 2012*.<sup>12</sup> The 'Special Court' should furthermore ensure that the identity of the child is not disclosed and also that the trial should take place in camera.<sup>13</sup>

#### vi. Implementation of the Provisions Laid Down in *POCSO Act, 2012*

High sounding ideals are found in the enactments and the policies designed to promote the welfare of the children. It is indeed unfortunate, that, non-implementation or inadequate implementation of laws has been a bane in our society. Many laws with lofty objectives and salutary provisions exist in the black letters of law. There is really no machinery worth mentioning to implement the policies envisaged in the Act. There is lack of infrastructure. There is no monitory mechanism.<sup>14</sup> *POCSO Act, 2012* is a special Act enacted for a special reason so

<sup>6</sup> *Supra* note 2., Section 28 (1).

<sup>7</sup> *Ibid.*, Section 32 (1).

<sup>8</sup> *Ibid.*, Section 33(2).

<sup>9</sup> *Ibid.*, Section 33(3).

<sup>10</sup> *Ibid.*, Section 33(4).

<sup>11</sup> *Ibid.*, Section 33 (5).

<sup>12</sup> *Ibid.*, Section 33 (6)

<sup>13</sup> *Ibid.*, Section 36 & Section 37.

<sup>14</sup> Judicial Colloquium on Children's Court Organized by Centre for Child and the Law, National Law School of India University, Bangalore in collaboration with Law Commission of India with the support of UNICEF India Country Office, New Delhi.

that the juveniles and the minors could be protected from the sexual offences. For this purpose the Act laid down several provisions which have been miserably implemented by the State Government as well as the Union Government.

As reported by the NCPCR, since the constitution, as per records, there are 605 'Special Court's and 478 public prosecutors<sup>15</sup> across the country. However, the matter of concern lies in the fact that, only a handful of these are fully dedicatedly functional.<sup>16</sup>

In practice however, even the basic requirements to cater to the juvenile's interest has not been taken care of. The Indian legal system (specifically the Criminal Justice System) has failed to look into the child jurisprudence therefore no special provision regards to children in the Criminal Justice System has been made. It was in 2012 that the special Act was enforced *i.e.*, *the POCSO Act, 2012*. Certain provisions have been laid down in the statute, however, implementation of such provisions has been found to be bleak. Despite the statutory stipulation that every district should have an exclusive 'Special Court' for trying offences under *the POCSO Act, 2012*, the directives have been continuously ignored.

Some of the challenges that are witnessed in the existing Child friendly Courts are: a) the need to change the negative mindset of the Presiding Officer, Prosecutor, Police, Advocates and parents of child victims; b) effective protection of child victims; c) lack of infrastructure; d) no space for child to sit with family till testimony is recorded; e) no place for witnesses to sit till they are called in the Court; f) no regular Presiding Officer to conduct the matters and g) that the Presiding Officer and the prosecutor are not given any training.

The jurisdiction of the child friendly courts extends to only offences committed against the children and fails to include violation of child rights as the court is not competent to provide redressal on those matters. The issue that lies ahead of us is how to develop child rights related jurisprudence to ensure speedy and effective

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<sup>15</sup> "Special Courts' Set Up under The POCSO Act Across the Country" available at, <http://pib.nic.in/newsite/PrintRelease.aspx?relid=137262> last visited on 1<sup>st</sup> March, 2016.

<sup>16</sup> "Role of 'Special Courts' under *POCSO Act*", available at, <http://edhunger.in/2015/12/10/role-of-special-courts/> last visited on 10<sup>th</sup> December, 2015.

justice to the children. The need of the hour is to create such jurisprudence for children which provide them fair and impartial justice keeping up with their interests.

### **Conclusion**

The judicial process and the courtroom design pose an unquestionable difficulty for the child witness. The justice system and the research related to the juveniles continue to search for new and innovative ideas to help reduce the traumatic experience of the juveniles in the court rooms. The considerations herein discussed evaluates and emphasizes upon the importance of establishing child friendly courtrooms that recognizes the specific physical, developmental and emotional needs of the juveniles.

### **Recommendations**

#### **i. Support Person to be Allowed in the Court with the Child**

Allowing the presence of the support person when the child testifies in the court may reduce the feelings of fear and anxiety experienced by the child. Furthermore, the presence of the support person may calm the child and allow the child to provide with accurate testimony. Efforts should be taken by the criminal justice system to reduce the trauma of testifying for child witnesses by allowing the presence of support persons in the court. In spite of the fact that this provision exists in *POCSO Act* still the implementation of *POCSO Act* is in itself a very big question mark. Therefore, the provision of support person to be allowed in the court with the child also requires proper implementation.

#### **ii. Comfort Items should be Permitted in the Court**

Permitting a comfort item such as toys, blankets or stuffed animals may have a calming effect on the child while the child testifies in the court. A comfort item may provide for security, comfort and confidence specifically when the child is afraid or anxious. Comforting objects helps them children calm themselves specifically when parents are not around.<sup>17</sup>

<sup>17</sup> John E.B. Myers, Karen J. Saywitz, & Gail S. Goodman, "Psychological Research on Children as Witnesses: Practical Implications for Forensic Interviews and Courtroom Testimony", 28 (3)*Pac. L. J.*, (1996)p. 63, citing Ellen Mathews & Karen J. Saywitz, "Child Victim Witness Manual" 12(5)*Center For Jud. Educ. & Res. J.* (1992) p. 34.

**iii. Increased Training for Professionals**

Increased training for professionals who are involved with child including the Presiding Officers, Judges, Police Officers, Special Prosecutors and Advocates dealing with such cases would ensure fair and impartial justice while maintaining the developmental and psychological interest of the child. The training of these professionals would reduce the traumatic experience that is suffered by the children in the court.

**iv. Alter the Physical Environment of the Courtroom to Make it Less Intimidating for the Child**

It is highly recommended on the part of the author that a child friendly court should be set up and established rather than designating a court as a child friendly court. Establishing a child friendly court provides with all together an altered physical set up of the court which is considered to be less intimidating for the child. Alteration in the physical environment of the courtroom makes the court more child friendly and can make a child feel more at ease and thus improve the ability of the child to participate in the Court process. Such alterations do not conflict neither with the black letters of the law nor the spirit of law. So long as the alterations do not compromise with the gravity of the proceedings and is in the interest of the child, all appropriate steps can be taken to make the child feel more comfortable.

**v. Create a Child Friendly Waiting Room**

In such cases where the wait for the juveniles is unavoidable, having a child friendly court room equipped with books, toys, snacks can ease the child's mental state and therefore, would help the child in cooperating with the court procedures. A spectrum of amenities may be displayed in the child friendly court rooms which may be for different ages. However, each object strives to provide a safe, age-appropriate, low stress environment for the children. The creation of a child friendly waiting room can reduce the anxiety of the child over the upcoming court procedures.

**vi. Reduction of Formal Attire**

Altering the attire of the police officers, judges, advocates, other officers dealing with the children may reduce the anxiety of the child and intimidation in the

courtroom. A traditional courtroom is found intimidating by most of the adults. The common man of a state may find it intimidating when confronted for some reason by the Police Officers or Investigating Officers or Judges. Therefore it cannot be expected that the children would not find it intimidating when seeing those officers in the court.

**vii. Phenomenon of Confrontational Stress Should be Attempted to be Reduced**

A screen or some arrangement must be made so that the child does not see the body and face of the accused. Arrangements may be made for a separate entry of the child to take further precautions in preventing the child to come face to face with the accused. The phenomenon of confrontation of the accused and the victim should be avoided in all circumstances to make the child less intimidated and suffer fewer traumas.

**Miscellaneous**

- It is highly recommended on the part of the author that the statement of the child to be taken only once for the purposes of the trial in the court. It is because the more one asks the child to repeat, the statement often has a tendency to get weaker and weaker.
- A special unit may be constituted to record the statement of the child and for cross examination the members of that unit may be questioned for cross examination instead of the child.
- Vulnerable witness deposition centre should be established in every district.
- Training should be provided to each individual dealing with the cases involving children not only at the state level but also district and sub district level.
- Every child friendly court should have at least one child psychiatrist to understand the emotional and psychic condition of the child. Psychic condition of the child is to be understood in order to keep up with the emotional and developmental interest of the child.



## **CHILD TRAFFICKING IN INDIA - A COMPARATIVE STUDY**

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- Mr. Utkarsh Parekh\* and Mr. Vishal K\*\*

### **Abstract**

*"It ought to concern every person, because it is a debasement of our common humanity. It ought to concern every community, because it tears at our social fabric. It ought to concern every business, because it distorts markets. It ought to concern every nation, because it endangers public health and fuels violence and organized crime. I'm talking about the injustice, the outrage, of human trafficking, which must be called by its true name - - modern slavery."*

*-Barack Obama<sup>1</sup>*

*Trafficking is a curse to the human society. On one hand we are going to moon to settle down by our technological and scientific development, but on the other hand at the same stage an unbelievable numbers of people involved in flesh trade denying all the development of the time. Just like the dark ages, women and children are once again treated as properties and goods. Each year thousands of women and children are trafficked into forced labour and sexual exploitation in the Indian sex industry and circuses. Women and children are victims of terrifying*

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\* IV Year, B.B.A.,LL.B.(Hons.), ICFAI Law School, ICFAI University, Jaipur.

\*\* IV Year, B.B.A.,LL.B.(Hons.), ICFAI Law School, ICFAI University, Jaipur.

<sup>1</sup> Barack Hussein Obama II is an American politician who served as the 44th President of the United States from 2009 to 2017.

*abuse, violence, torture and the most evil form of labour called trafficking. One among the said issues that attracts the important part of concern describe as the problem of child trafficking. Child trafficking is an international phenomenon and is not limited to any geographical region or nation. It is a gross infringement of the human rights and fundamental freedoms of children. It contravenes upon the child's physical and mental integrity, which are central to the understanding of human dignity and, poses a significant threat to the child's life.*

*In India, a large number of children are trafficked not only for the sex trade but also for other forms of non-sex based exploitation that includes servitude of various kinds, as domestic labour, industrial labour, agricultural labour, begging, organ trade and false marriage. The children who have been victim of child trafficking have been deprived of their basic fundamental rights which are their human rights. Trafficking has led to severe violation of human rights and human dignity. The trafficked children are considered as a commodity and are used and re-used, purchased and sold a number of times. The exploitation takes place with both girl and boy child. This crime has been one of the most lucrative businesses of the world. The trafficking of human and thereby their exploitation in various forms has really posed a threat to humanity and mankind. Exploitation of the children which are taking place include sexual abuses, physical abuses, psychological trauma due to severe cruel acts being done towards them, use of force or coercion, forcing them to indulge into sexual activities and forced prostitution, giving them inhuman treatment, depriving them of their basic human rights to live with dignity etc. This article focuses on the existing laws in India to counter the child trafficking and a comparative study of India with the other nations in relation to child trafficking in present scenario.*

## Introduction

*“Child slavery is a crime against humanity. Humanity itself is at Stake here.”*

-Kailash Satyarthi<sup>2</sup>

Child trafficking is a serious problem that is prevalent in almost all developing countries including India. According to a report published by the U.S. Department of State:<sup>3</sup>

*“India is a source, destination and transit country for men, women and children subjected to forced labour and sex trafficking. The majority of India’s trafficking problem is internal, and those from the most disadvantaged social strata- lowest caste Dalits, members of tribal communities, religious minorities and women and girls from excluded groups are most vulnerable.”*

Trafficking of human beings is not a new phenomenon. Historically, it has been linked to slavery which involved the sale and purchase of human beings as chattel, treating them as commodities that could be bought and sold. The owner maintained absolute rights over the slaves, who were considered his private property. Brazil was the last to abolish its participation in the transatlantic slave trade in 1888.<sup>4</sup>

In existing campaigning and research literature on child trafficking there are many references to risks related to the age and vulnerability of children, the environmental conditions which promote many forms of child migration the roles of parents who do not account for the dangers which their child will encounter and governments, agencies and individuals who are at best inept, at worst corrupt. India government has produced very little evidence to support the claims that children are being brought into the India for exploitation, and yet they have pressed

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<sup>2</sup> Kailash Satyarthi is an Indian children’s rights activist. He is the founder of Bachpan Bachao Andolan, the Kailash Satyarthi Children’s Foundation, Global March Against Child Labour, and Good Weave International.

<sup>3</sup> U.S. State Department, Trafficking In Persons Report (2012) pp. 184-6.

<sup>4</sup> International Labour Organization, “Forced Labour in Brazil: 120 Years After the Abolition of Slavery, The Fight Goes On,” May 2008, available at [http://www.ilo.org/global/about-the-ilo/newsroom/features/WCMS\\_092663/lang-en/index.htm](http://www.ilo.org/global/about-the-ilo/newsroom/features/WCMS_092663/lang-en/index.htm), last visited on 10<sup>th</sup> December, 2017.

ahead with a raft of legislation and policy guidance. It is not clear to what extent the NGO studies and anti-trafficking campaigns have shaped the direction of policy-making, practice response or working guidance, and this suggests the need for a methodologically and critically informed approach to examining policy and practice. As the study progressed, it became clear that risk theories were entirely relevant to understanding how the issue of child trafficking was socially constructed, particularly in how risk was presented.

The year 2017 marked the 210<sup>th</sup> anniversary of the abolition of slave trade. However, recent reports by the United Nations and NGOs suggest that the slave trade is very much alive and one of the worst manifestations of this is the trafficking of both adults and children. Explaining modern slavery, *The Guardian* says that slavery exists in one form or another in every country and that Asia accounts for more than half of the International Labour Organization's 21 million estimate.<sup>5</sup>

The most significant shift since the HAQ's report is the recognition of multiple forms and purposes of trafficking. More rewarding has been the fact that this recognition has been reflected in law and policy as well. Although, commercial sexual exploitation remains the most widely recognised form, also other forms of trafficking have found their way into public discussion as well as implementation strategies.

The truth of multiple forms of trafficking beyond sexual exploitation worldwide has been highlighted concisely by Piper, Segrave and Napier Moore's article in *Anti Trafficking Review*, 2015:<sup>6</sup>

"Evidence of the shift away from the emphasis on sex work is the International Labour Organization's Protocol of 2014 to the *Forced Labour Convention, 1930* (Forced Labour Protocol) which, in part, recognizes debt bondage, human trafficking and other forms of modern slavery as all forms of forced labour. Arguably such an

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<sup>5</sup> Annie Kelly, "Modern-day Slavery: An Explainer", *The Guardian Humanity United*, 3 Apr. 2013.

<sup>6</sup> N Pieper, M Segrave and R N Moore, "Editorial: What's In A Name? Distinguishing Forced Labour, Trafficking and Slavery" 5 *Anti-Trafficking Review* (2015) pp. 1-9, available at [www.antitraffickingreview.org](http://www.antitraffickingreview.org), last visited on 1<sup>st</sup> December, 2017.

approach recognizes the interconnection between exploitative practices namely the overlap of issues around citizenship, migration status, poor working conditions and/or absence of workplace protections. This may enable a more united global effort to address the broad contributing factors that lead to the occurrence of such exploitation.”

Yet till 2013 the legal framework was limited to defining trafficking only in terms of trafficking for prostitution. There was no comprehensive legal framework to cover trafficking of children for labour, begging, pornography etc. It is important to understand that child trafficking is not just the “moving” of children from one place to another, it is also breach of trust and the pain, agony and trauma suffered by the victim both while being trafficked and thereafter. There is hence a dire need for a law that addresses all these concerns. India is signatory to several important international instruments. Since the last report on trafficking in 2015, India has ratified two very important international instruments:

i. *Optional Protocol to the Convention on the Rights of the Child on Sale of Children and Child Prostitution and Child Pornography in August 2005*;<sup>7</sup> and ii. *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the Convention against Transnational Organised Crime* (popularly known as the Palermo Protocol) (signed in 2002) in May 2011.<sup>8</sup> It was following the ratification of the Palermo Protocol that India further expanded its definition of trafficking. It was included in the Indian law as Section 370 of the *Indian Penal Code* following first the Criminal Law Amendment in 2013.<sup>9</sup>

<sup>7</sup> *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention Against Transnational Organized Crime*, Nov. 15, 2005, 2237 U.N.T.S. 319, available at <http://www.osce.org/odihr/19223> last visited on 10<sup>th</sup> December, 2017

<sup>8</sup> *United Nations Convention against Transnational Organized Crime*, available at, <http://www.unodc.org/unodc/en/treaties/CTOC/index.html>. This was signed by India in December 2002, but not ratified until May 13, 2011 <http://www.mea.gov.in/mystart.php?id=530217625> last visited on 10<sup>th</sup> December, 2017.

<sup>9</sup> *The Criminal Law (Amendment) Act, No. 13 2013* available at, <http://indiacode.nic.in/acts-inpdf/132013.pdf>.

## Child Trafficking

### i. Defining Trafficking

*The Immoral Traffic (Prevention) Act 1956*, the only law still in force for trafficking, deals only with trafficking of girls and women for prostitution. Amendments to this law have been long pending. HAQ's report in 2000, made a salient observation with regard to this –

*“The problem in dealing with this very complex phenomenon begins with its very definition. There is no single definition of trafficking. In the absence of a common understanding, it becomes difficult to design policies, guidelines or even interventions to tackle this issue.”*

For purposes of this analysis, trafficking of children is defined as: *“Sale and purchase of children for gain, within the country (intra-country) and across borders (inter-country), by deceit, fraud or force, resulting in exploitation of the person trafficked.”*

A more comprehensive definition of trafficking and the setting of new international standards emerged following the *United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons* (hereafter referred to as the Palermo Protocol). India had signed it in 2002 but ratified it only in May 2011. The Protocol for the first time provided a comprehensive definition of trafficking<sup>10</sup> – *“the recruitment, transportation, transfer, harbouring or receipt of persons by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or service, slavery or practices similar to slavery, servitude or the removal of organs.”*

The above definition clearly spells out that trafficking covers not only the transportation of a person from one place to another, but also their recruitment and

<sup>10</sup> *United Nations Convention against Transnational Organized Crime*, available at, <http://new.ecpat.org.uk/content/definition-trafficking>, last visited on 10<sup>th</sup> December, 2017.

receipt so that anyone involved in the movement of another person for their exploitation is part of the trafficking process. It further articulates that trafficking is not limited to sexual exploitation only for it could occur also for forced labour and other slavery like practices.<sup>11</sup>

The legal impact of the ratification of the *Palermo Protocol* by India was immense. It helped to build a comprehensive definition of trafficking which has now been adopted in the *Indian Penal Code* under Section 370. However, the adoption of this comprehensive definition of trafficking in the *Indian Penal Code* happened only as recently as 2012 following the criminal law amendments based on the recommendations of the Justice Verma Commission Report.

The *Indian Constitution* prohibits all forms of trafficking under Article 23.<sup>12</sup> The *Suppression of the Immoral Traffic Act, 1956*<sup>13</sup> (amended to the *Immoral Traffic Prevention Act*) was in response to the ratification of the *International Convention on Suppression of Immoral Traffic and Exploitation of Prostitution of Others* in 1950 by India. Trafficking has been an area of concern since the early 20<sup>th</sup> century. It especially attracted attention during the 1980s. More recently, there has been a widening of its focus. However, this was not accompanied by an independent and sustained mass movement, against trafficking in the country.

***Draft Trafficking of Persons (Prevention, Protection and Rehabilitation) Bill, 2016***

The Ministry of Women and Child Development has drafted a new bill on trafficking. It has placed it on its website.<sup>14</sup> Though meant to be a law on trafficking, it does not even define the term “trafficking”. It also does not state what forms and purposes of trafficking it will cover since no offences that amount to trafficking are mentioned in the Bill. There is no section that suggests this Bill is going to repeal the *Immoral Traffic Prevention Act*. There is considerable discussion today

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<sup>11</sup> “Definition of Trafficking - Save the Children Nepal”. Archived from the original on 20 November 2007.

<sup>12</sup> “The Immoral Traffic (Prevention) Act, 1956” available at <http://wcd.nic.in>.

<sup>13</sup> Ratna Kapur, “Leader Article: Sex Workers Need Legal Cover” *The Times of India*, 10<sup>th</sup> September 2007.

<sup>14</sup> Ministry of Women and Child Development. *Draft Trafficking of Persons (Prevention, Protection and Rehabilitation) Bill, 2016*. Government of India, 1<sup>st</sup> June 2016.

on the lack of an adequate definition of sexual exploitation and whether it needs to be clarified in law. This has also been remarked upon in the National Legal Service Authority report where it says:<sup>15</sup>

*“There is no definition of “sexual exploitation” in the ITPA or the IPC. While ITPA says that prostitution means sexual exploitation or abuse for commercial purposes, the IPC merely provides for more severe punishment if a trafficked person particularly a minor is engaged for sexual exploitation in any manner. There is a lacuna in the legislation regarding the definition of sexual exploitation, which is required to be filled.”*

The current bill too does not address this issue. Thus, one does not know whether the Bill is in addition to *the Immoral Traffic Prevention Act* or a replacement of *the Immoral Traffic Prevention Act*. If a replacement of *the Immoral Traffic Prevention Act*, the provisions of act must find a place in the Bill. The definitional section must then certainly contain definitions of ‘prostitution’ and ‘trafficking’ as distinct phenomena and must clarify whether all ‘prostitution’ is declared illegal or not, whether soliciting is an offence or not, whether customers will be penalized or not and in what form, whether massage parlours and escort services will be covered under the Bill, who will investigate the cases, it must specify the role of Special Police Officers, the procedures to be followed for ceiling a premise used for prostitution, *etc.*

There may accordingly be a need to define many more terms such as ‘brothel’, ‘public place’, ‘sexual exploitation’, ‘sex tourism’, ‘pornography’, *etc.* The moot question is, if it is indeed meant to be an addition to *the Immoral Traffic Prevention Act*, then should the provisions of the Bill not be added into *the Immoral Traffic Prevention Act*, instead of becoming a new law, which does not even deal with the offence of trafficking. On the face of it, the Bill seems to focus on rehabilitation and social reintegration of victims and therefore there is all the more reason to ensure that it becomes part of an amendment, instead of a new law in itself.

<sup>15</sup> Report of National Legal Services Authority. Submitted to the Hon’ble Supreme Court of India on 6<sup>th</sup> Dec. 2015 in the Writ Petition (C) No. 56/2004, titled *Prajwala v. Union of India and Others*, pp. 3-15.

### **Emerging Areas of Concern in Trafficking – Their Patterns and Trends**

India is a country of vast dimensions.<sup>16</sup> The formidable challenge is the enormity of the problem, both in number of trafficked persons and increasing number of locations. Recently, there is an expanding market for commercial sexual exploitation through non-brothel based modalities where the trafficked persons are made to pose as attendants, masseurs and as bartenders. Child pornography is another area that requires concerted attention. Sex tourism is also growing whereby India is emerging as a major tourist destination. Central/State Governments, where appropriate, non-governmental organizations and the civil society at large should consider:

Evolving a broad integrated approach for prevention and protection of trafficked victims, especially children of both sexes who are pushed into non-brothel based prostitution. Simultaneously, there is also need to evolve a strategy to prosecute all those who indulge in exploitation of these kinds. Strengthening/Amending existing laws on trafficking related to non-brothel based prostitution.

Spreading awareness about non-brothel based prostitution by organizing campaigns, training/sensitization programs for staff and other functionaries in the hotel and tourism sector as well as children in schools, adolescents and youth groups. Giving special attention to vulnerable areas like massage parlours, escort services, party hostesses, attendants, companions, *etc.* so as to prevent linkage between trafficking and non-brothel based prostitution.

Developing and distributing different kinds of awareness material like posters, hoardings, *etc.* on trafficking linked to non-brothel based prostitution. Supreme Court issued directives for registration of FIR, In cases of missing children *Bachpan Bachao Andolan v. Union of India & Others*,<sup>17</sup> In the Writ Petition filed by *Bachpan Bachao Andolan*, the Apex Court issued certain directives regarding the manner in which a complaint and investigation regarding missing children should be handled by the Police Stations.

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<sup>16</sup> See, *The Bonded Labour System (Abolition) Act*, *supra* note 18, § 4, which abolishes the bonded labour system, defined in Section 2(g) as the system of "forced, or partly forced labour under which a debtor enters, or has, or is presumed to have entered into an agreement with the creditor."

<sup>17</sup> *Bachpan Bachao Andolan v. Union of India & Others*, MANU/SCOR/39836/2014.

All cases of missing children in India to be registered as a cognizable offence (as First Information Report) and investigated. In cases where First Information Reports have not been lodged at all and the child is still missing, an FIR should be lodged within a month. In all missing children cases, there will be a presumption of the crime of kidnapping or trafficking unless proven otherwise from investigation. All complaints regarding children (for non-cognizable offences), to be investigated after referring them to a magistrate. Each police station should have, at least, one Police Officer, especially instructed and trained and designated as a Juvenile Welfare Officer to investigate crimes against children.

National Legal Services Authority will appoint Para-legal volunteers, so that there is, at least, one Para-legal volunteer, in shifts, in the police station to keep a watch over the manner in which the complaints regarding missing children and other offences against children are dealt with. The State authorities shall arrange for adequate shelter homes to be provided for missing children, who are recovered and do not have any place to go to within 3 months.

#### **Comparison with International Standards**

Despite the fact that these reforms have brought India into closer alignment with international standards, gaps still remain in India's current laws. A study by Jindal Global Law School along with Chicago Law School and Cornell Law School on "India's Human Trafficking Laws and Policies and the United Nations Trafficking Protocol: Achieving Clarity", has identified these gaps as has National Legal Service Authority Committee in their report in their meeting on 03.09.2015<sup>18</sup> as:

"India's laws do not explicitly recognise and penalise all forms of labour trafficking to the extent required by the *Palermo Protocol*. The definition of human trafficking in Section 370 excludes forced labour from its definition. As a result, such conduct is not covered by Section 370's trafficking prohibition. Further, the other existing laws on forced labour in India too do not adequately address the intricate problems involved in the trafficking of persons for the purpose of labour. Furthermore, while Section 370 punishes

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<sup>18</sup> *Supra* note 15.

those who engage victims of sex trafficking, it does not similarly criminalise the acts of those who engage victims of labour trafficking.”

There is no definition of ‘commercial sexual exploitation’ in *the Indian Penal Code, the Immoral Traffic Prevention Act* or the “*the Protection of Children from Sexual Offence Act, 2012*”. India’s laws (including the Amendment Act) do not provide an effective system for the safety, recovery and compensation of human trafficking victims as required by the Palermo Protocol. It requires that State Parties should ensure the safety of trafficked victims after rescue as well as consider instituting measures to assist victim recovery and re-integration into society. In addition, *the Palermo Protocol* requires that domestic legislation and systems be established to offer victims of human trafficking “compensation for damage suffered.” Such compensation systems are necessary to provide trafficking victims with the economic resources and protection to avoid being re-trafficked, the financial resources to afford psychological recovery services, and the means to reintegrate into society.<sup>19</sup>

#### **Special Measures for Identification and Protection of Trafficked Child Victims**

The physical, psychological and psychosocial harm suffered by trafficked children and their increased vulnerability to exploitation require that they be dealt with separately from adult trafficked persons in terms of laws, policies, programmes and interventions.<sup>20</sup> Children who are victims of trafficking should be provided with appropriate assistance and protection and full account should be taken of their special rights and needs, in addition to the measures outlined under:

Ensuring that, the definitions of trafficking in children, in both law and policy, reflect their need for special safeguards and care, including appropriate legal protection. In particular, and in accordance with the 2000 Palermo Protocol,<sup>21</sup> evidence of deception, force, coercion, etc. should not form part of the definition

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<sup>19</sup> Trafficking In Persons Report. Rep. U.S. Department of State, (June 2005) p. 123.

<sup>20</sup> Section 16, *The Bonded Labour System (Abolition) Act, 1976*.

<sup>21</sup> United Nations Office on Drugs and Crime, International Framework for Action to Implement the Trafficking in Persons Protocol (2009) p.20 available at, [http://www.unodc.org/documents/humantrafficking/Framework\\_for\\_Action\\_TIP.pdf](http://www.unodc.org/documents/humantrafficking/Framework_for_Action_TIP.pdf).

of trafficking where the person involved is a child. The mere presence of a child with a trafficker of any kind should connote that the child is trafficked or is being trafficked.

Ensuring that, the procedures are in place for the rapid identification of child victims of trafficking. Ensuring that children who are victims of trafficking are not subjected to criminal procedures or sanctions for offences related to their situation as trafficked persons. In cases where children are not accompanied by relatives or guardians, steps should be taken to identify and locate family members. Measures should also be taken in consultation with the child to facilitate the reunion of trafficked children with their families where this is deemed to be in their best interest.

In situations where the safe return of the child to his or her family is not possible, or where such return would not be in the child's best interests, establishing adequate care arrangements that respect the rights and dignity of the trafficked child. A child who is capable of forming his or her own views enjoys the right to express those views freely in all matters affective him or her, in particular, concerning decisions about his or her possible return to the family, the views of the child be given due weightage in accordance with his or her age and maturity.

Adopting specialized policies and programmes to protect and support children, who have been victims of trafficking. Children should be provided with appropriate physical, psychosocial, legal, educational, housing and healthcare assistance. Adopting measures are necessary to protect the rights and interests of trafficked children at all stages of criminal proceedings against alleged offenders and during procedures for obtaining compensation. Protecting, as appropriate, the privacy and identity of child victims and taking measures to avoid the dissemination of information that could lead to their identification. Taking measures to ensure adequate and also to provide appropriate training; in particular, legal and psychological training, for persons working with child victims of trafficking.

### **Conclusion**

The phenomenon of child trafficking is a depressing and conceptually challenging aspect of the huge global industry in human trafficking. It is part of this

larger picture, but distinct from it as well. What distinguishes child sex trafficking is the issue of a demand that startle by being as common place, harsh, and fatally destructive as it is. If, as it would seem, thousands of persons, primarily, and possibly exclusively, men, are driven to purchase the sexual services of children wherever they are available, the legal institutions in every country should mobilize in support of critical protective measures. There are implications for culture, education, and regulation of internet pornography.

Broader understanding of this horrid demand could alter the nature of how global governance issues are approached. Defining child trafficking as a violation of the human rights of children would extend our understanding of human rights violations in general, and liberate us from our narrow view of human rights law as variations on the theme of “victors’ justice.” National Governments should be understood as having important obligations to suppress demand for and access to vulnerable children.

This research has brought out the fact that poverty and illiteracy are the main elements constituting the substratum for trafficking. Here it operates the demand factor. This demand is fuelled by several other factors like the impunity with which the traffickers can operate, thanks to the distortions in law enforcement. The low risk enjoyed by the exploiters, coupled with the high profit in this world of gross commercialization, ensures continuation of trafficking. Whereas the traffickers and his cronies have no restriction on court jurisdictions or the boundaries between police stations, districts, states, and even nations in carrying out their ‘trade’, the enforcement agencies are bogged down by restrictions and limitations of all sorts, which are effectively capitalized by the traffickers. The response by the Government agencies and even civil society has established that they have been able to address only the tip of the iceberg. The trends and dimensions of the problem, which emerge from this study has exposed the decisive human rights violations that exist before, during and after trafficking, and has accordingly brought out certain suggestions and recommendations in addressing them.



## PLIGHT OF CHILDREN OF WOMEN PRISONERS

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- Ms. Aarya Jha\*

### Abstract

*This paper has been worked upon to understand the plight of children of women prisoners. It aims to analyze the status of these children under the Indian Constitution and all areas where India lacks and reforms are necessary in order to encourage the growth of these children. The research paper also takes a look at the German Constitution and the condition of jails in Germany. It also sees the possibility of implementing the German principles in India in order to improve the conditions of Indian jails, which will further encourage the growth of children of women prisoners. The situation demand note of the problems of these children, who have been ignored so far and necessary action be taken to uplift their status. In spite of numerous facilities being provided to children of women prisoners, still there is a long way to go to ensure that these children enjoy their basic rights like right to education, right to health, proper medical facilities, a clean environment, etc. Apart from these, it is also essential to have a well established system of foster care institutions to nurture the children once they leave their mothers after 6 years of age. A good foster care institution also helps the child to recover from the trauma they had faced at such an early age.*

**Keywords:** Indian Consitution, German Consitution, Jails, Children and Foster Care Institutions.

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\* 2<sup>nd</sup> Year Student at National Law University, Odisha.

### Introduction

“History will judge us by the difference we make in the everyday lives of children.”<sup>1</sup>

This topic has come into light these days, because of the fact that Supreme Court has ordered for the formation of a Committee, which will be headed by a retired Supreme Court judge, to look into the issues relating to children of women prisoners. The condition of the children of women prisoners has attracted the attentions of many. It has become the need of the hour to find out the lacuna in the policies and their implementation and to take corrective action for the same. In order to understand where exactly one lacks, one must first analyze the provisions in *the Indian Constitution* and the stand of the Indian Judiciary. A reform can be brought about by learning something from a foreign nation with similar conditions. There are no special rights for children of women prisoners mentioned in *the Indian Constitution*. However, that does not lead to the conclusion that the children have no rights. Articles 14, 15, 21 and 21A have always acted like a protection shield against any encroachment on the rights of these children. The Indian Judiciary is also played an active role in this regard.

#### Provision of *the Indian Constitution*

*Indian Constitution* has no explicit provision with respect to rights of children of women prisoners. But, there are some provisions, the implied meaning of which would cover the rights of these children. Some of them are:

“Equality before law - The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.”<sup>2</sup>

“Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth - Nothing in this article shall prevent the State from making any special provision for women and children.”<sup>3</sup>

“Protection of life and personal liberty - No person shall be deprived of his life or personal liberty except according to procedure established by law.”<sup>4</sup>

<sup>1</sup> Nelson Mandela, Address at Luncheon hosted by United Nations (UN) General Secretary Kofi Annan, 9May, 2002,(Sept. 9, 2018), [mandela.gov.za/mandela\\_speeches](http://mandela.gov.za/mandela_speeches)

<sup>2</sup> Article 14 of *the Indian Constitution*.

<sup>3</sup> *Ibid.*, Article 15(3).

<sup>4</sup> *Ibid.*, Article 21.

“Right to education - The State shall provide free and compulsory education to all children of the age of six to fourteen years in such manner as the State may, by law, determine.”<sup>5</sup>

The provision of equality before the law ensures that the children of women prisoners also enjoy the same rights which other children of their age group are enjoying. As an extension to this article, the State has been given the right to make special provisions for women and children, which yet again provides a right to children of women prisoners to avail any special benefit which the State provides to children. Protection of life and personal liberty is one of the most important rights for any person. By virtue of this Article, children of women prisoners have ‘right to good health (both physical health and mental health)’<sup>6</sup> ‘right to dignity’<sup>7</sup>, ‘right to food, clothing, decent environment and reasonable accommodation to live in’<sup>8</sup>, etc., ‘Right to health is so integral to right to life that the Government has a Constitutional obligation to provide health facilities.’<sup>9</sup> Right to education ensures that even if the child spends the initial years of his/her life in jail (6 years in case of India), still the child gets elementary education.

So, in spite of there being no express provision for rights of children of women prisoners, there are some general provisions covering them.

### **Outlook of Indian Judiciary**

The Indian judiciary has been considerate enough to take into account the needs of both women prisoners and their children. For instance, according to the Supreme Court, ‘a child shall not be treated as an under trial/convict while in jail with his/her mother.’ Such a child is entitled to food, shelter, medical care, clothing, education and recreational facilities as a matter of right. Before sending a woman who is pregnant to a jail, the concerned authorities must ensure that jail in question has the basic minimum facilities for child delivery as well as for providing prenatal and post-natal care for both, the mother and the child. Births in prison, when they

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<sup>5</sup> *Ibid.*, Article 21(A)

<sup>6</sup> *Bandhua Mukti Morcha v. Union of India.*, AIR 802, (1984).

<sup>7</sup> *Francis Coralie v. Delhi.*, AIR 746, (1981).

<sup>8</sup> *Shantisar Builders v. Narayanan Khimalal Totame.*, 1 SCC 520, (1990).

<sup>9</sup> *State of Punjab v. Mohinder Singh Chawla.*, 2 SCC 83, (1997).

occur, shall be registered in the local birth registration office. But the fact that the child has been born in the prison shall not be recorded in the certificate of birth that is issued. Only the address of the locality shall be mentioned. As far as circumstances permit, all facilities for the naming rites of children born in prison shall be extended.

**Female Prisoners and Their Children:**

- a. Female prisoners shall be allowed to keep their children with them in jail till they attain the age of six years.
- b. No female prisoner shall be allowed to keep a child who has completed the age of six years. Upon reaching the age of six years, the child shall be handed over to a suitable surrogate as per the wishes of the female prisoner or shall be sent to a suitable institution run by the Social Welfare Department. As far as possible, the child shall not be transferred to an institution outside the town or city where the prison is located in order to minimize undue hardships on both mother and child due to physical distance.
- c. Such children shall be kept in protective custody until their mother is released or the child attains such age as to earn his/her own livelihood.
- d. Children kept under the protective custody in a home of the Department of Social Welfare shall be allowed to meet the mother at least once a week. The Director, Social Welfare Department, shall ensure that such children are brought to the prison for this purpose on the date fixed by the Superintendent of Prisons.
- e. When a female prisoner dies and leaves behind a child, the Superintendent shall inform the District Magistrate concerned and he shall arrange for the proper care of the child. If the concerned relative(s) be unwilling to support the child, the District Magistrate shall either place the child in an approved institution/home run by the State Social Welfare Department or hand the child over to a responsible person for care and maintenance.

**Food, Clothing, Medical Care and Shelter:**

- a. Children in jail shall be provided with adequate clothing suiting the local climatic requirement for which the State/U.T. Government shall lay down the scales.

- b. State/U.T. Governments shall lay down dietary scales for children keeping in view the calorific requirements of growing children as per medical norms.
- c. A permanent arrangement needs to be evolved in all jails, to provide separate food with ingredients to take care of the nutritional needs of children who reside there on a regular basis.
- d. Separate utensils of suitable size and material should also be provided to each mother prisoner for using to feed her child.
- e. Clean drinking water must be provided to the children. This water must be periodically checked.
- f. Children shall be regularly examined by the lady medical officer to monitor their physical growth and shall also receive timely vaccination. Vaccination charts regarding each child shall be kept in the records. Extra clothing, diet and so on may also be provided on the recommendation of the Medical Officer.
- g. In the event of a woman prisoner falling ill, alternative arrangements for looking after any children falling under her care must be made by the jail staff.
- h. Sleeping facilities that are provided to the mother and the child should be adequate, clean and hygienic.
- i. Children of prisoners shall have the right of visitation.
- j. The Prison Superintendent shall be empowered in special cases and where circumstances warrant admitting children of women prisoners to prison without court orders provided such children are below 6 years of age.

**Education and Recreation for Children of Female Prisoners:**

- a. The child of female prisoners living in the jails shall be given proper education and recreational opportunities and while their mothers are at work in jail, the children shall be kept in crèches under the charge of a matron/female warder. This facility will also be extended to children of warders and other female prison staff.

- b. There shall be a crèche and a nursery attached to the prison for women where the children of women prisoners will be looked after. Children below three years of age shall be allowed in the crèche and those between three and six years shall be looked after in the nursery. The prison authorities shall preferably run the said crèche and nursery outside the prison premises.

In many States, small children are living in sub-jails that are not at all equipped to keep small children. Women prisoners with children should not be kept in such sub-jails, unless proper facilities can be ensured which would make conducive environment for proper biological, psychological and social growth.

The stay of children in crowded barracks amidst women convicts, under trials, offenders relating to all types of crimes including violent crimes is certainly harmful for the development of their personality. Therefore, children deserve to be separated from such environments on a priority basis.<sup>10</sup>

The Supreme Court has laid down extensive guidelines to be followed. But, two major questions arise here: First, how far these guidelines are being followed and second, are these guidelines enough?

#### **Languishing State of Children of Women Prisoners**

Every child's growth, survival and development depend largely on his/her environment. So, it becomes highly important that we reduce the trauma faced by a child of a woman prisoner during his/her life. One must realize that the children are in jail for no fault of theirs. According to National Crime Records Bureau's 2014 Prison Statistics, there are 1,817 children that are living with their under trial or convicted mothers in prisons across India.

*"Two out of three prisoners in India are still undergoing trial, and a quarter of them have been in prison for over a year without being convicted of any crime because of routine violations of their legal rights, a new report has found. According to the report, tens of thousands of people are trapped in jails because they don't have access to good lawyers (in some cases any lawyers), or simply because there is not enough infrastructures for them to actually have a court hearing*

<sup>10</sup> *R.D. Upadhyay v. State of A.P.*, SCC OnLine 1624, (2014).

*in time .... This proportion has not budged for several years despite various Supreme Court judgments, executive guidelines and legal reforms,”*

- Said Asmita Basu, Programmes Director, Amnesty International India, in a press statement while launching the report on pre-trial detention in the country. For instance, in many States, there is a severe shortage of police ‘escorts’ to take under trials to court for their hearings. On an average, over 5,000 under trials miss their trial hearings in Rajasthan because, lack of such escorts. The number is around 1,500 for Uttar Pradesh and almost 2,500 in Karnataka. As a result, Amnesty found that between September 2014 and February 2015, in over 1,10,000 instances, under trials were not produced for their hearings in court either in person or through video-conferencing facilities, in effect hampering their right to trial within a reasonable time.

Under India’s *Constitution*, prison management is the responsibility of State Governments. Yet, many home ministry guidelines to reduce overcrowding in jails are not followed.<sup>11</sup>

The responsibility of managing prisons is given to the State Government as fourth item in the State List talks about “Prisons, reformatories, Borstal institutions and other institutions of a like nature, and persons detained therein; arrangements with other States for the use of prisons and other institutions.”<sup>12</sup> But as already pointed above in the report of Amnesty International, that, in spite of there being guidelines to reduce overcrowding in jails, those are not being followed. As a result, along with the prisoners, even their children are forced to live in an overcrowded environment, which in turn seriously affects their growth and development. There is an extreme delay as pointed out by the above report in trying of under-trials. The impact of this inefficient system has its bearing even on the children of women prisoners, as the child is also forced to live for that time in the jail.

<sup>11</sup> HuffPost Staff, “Jails In India Are Overflowing Because These Basic Legal Rights Are Denied To Prisoners”, available at, <https://www.huffingtonpost.in/2017/07/13/jails-in-india-are-overflowing-because-these-basic-legal-rights> visited on 10.09.2018.

<sup>12</sup> Schedule 7, *the Indian Constitution*.

The most harmful impact of this is that the child is inside the jail for a longer period, which has a devastating effect on the communication of the child with the outside world. This is because when a child is in jail, he/she is not able to communicate with the environment outside the jail, which keeps the child totally unaware about the world outside. The child has no news of his near and dear ones. This causes an additional trauma on the child apart from the impact of the pathetic condition of the jails, where the child is living.

Another issue with the prisons in India is that maximum of the prisons in India are male structured, which results in many issues of the women being overlooked. One of the reasons for this could be that women prisoners in India are far more less than male prisoners. But, this cannot be an excuse, as rights of no one should be violated. Due to this structuring of the prison, the growth of a child is at stake because there is no special infrastructure for children, which means that a child lives in the same environment as that of any ordinary prisoner. The mental health of a child due to this gets seriously affected.

Children till 6 years of age are allowed to live with their mothers. Educational facilities have been provided for them by the Government. "Children of age 3-6 years enjoyed the informal preschool-education by a professional teacher in all working days but crèche was found to be non- functional to cater the educational and recreational needs of young children below 3 years and there were no prison staff specially trained to look after children in jails."<sup>13</sup> It is not that, all children have the opportunity to enjoy the fruits of being educated. At the same time, those who are being taught also do not avail much because, practical knowledge is equally required. Take for instance, children have been taught what is a garden, but they, have not seen one ever. This somewhere slows down the pace of learning of these children when compared to other children of same age living outside the prison.

Coming to medical services, "children have to receive the same medical facility as was available to the adult prisoners."<sup>14</sup> This leads to the conclusion that an ill child will be treated at the same place by the same doctors as that of an adult

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<sup>13</sup> Shilpi Sarkar and Sandhya Gupta, "Life of Children in Prison: The Innocent Victims of Mothers' Imprisonment", *IOSR Journal of Nursing and Health Science*, (2015) p.86

<sup>14</sup> *Ibid.*,

prisoner, which again brings to the earlier conclusion that there are no separate facilities for children of women prisoners.

The role of the Government extends to ensuring proper development of the child, once the child leaves the prison after 6 years of age. After 6 years of age, when a child is forced to leave his/her mother, it becomes highly important that the child is taken care well off to help the child recover from the trauma. This can be ensured by a well functioned system of foster care institutions. But, unfortunately, India lacks here also.

#### *German Constitution*

Germany followed *Weimar Constitution* until it adopted *Basic Law* from 1949 onwards.

The provisions in both *Weimar Constitution* and *Basic Law* state that-

“It is the supreme obligation and natural right of the parents to raise their offspring to bodily, spiritual and social fitness; the governmental authority supervises it.”<sup>15</sup>

“Youth is to be protected against exploitation as well as against moral and spiritual dissipation, bodily neglect. State and communities have to take appropriate measures.

Measures which interfere by the means of force in the parents’ right to raise their children may only be taken if based on a law.”<sup>16</sup>

In 1949, West Germany was formed and *Basic Law* was adopted for *the Federal Republic of Germany*.

“No person shall be favored or disfavored because of sex, parentage, race, language, homeland and origin, faith or religious or political opinions. No person shall be disfavored because of disability.”<sup>17</sup>

“The care and upbringing of children is the natural right of parents and a duty primarily incumbent upon them. The State shall watch over them in the

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<sup>15</sup> *Weimar Constitution*. Article. 120.

<sup>16</sup> *Weimar Constitution*. Article. 122.

<sup>17</sup> Article 3(3). *Basic Law for the Federal Republic of Germany*.

performance of this duty.”<sup>18</sup> “Children may be separated from their families against the will of their parents or guardians only pursuant to a law and only if the parents or guardians fail in their duties or the children are otherwise in danger of serious neglect.”<sup>19</sup>

Both *the Weimar Constitution* and the *Basic Law for the Federal Republic of Germany* have provisions clearly indicating that the State will supervise the upbringing of children by their parents. Not only this, if the parents fail to raise their children in an efficient manner, the responsibility will be taken by the State of the same. A unique feature is seen in Article 3 of *the German Basic Law*, which talks about equality before law. This article prohibits discrimination on grounds of parentage, which actually makes a huge difference. Due to this provision, children of women prisoners stand on equal footing with other children and it further obligates the State to take care of children of women prisoners and take every possible step to give these children equal opportunities as that of other children.

In this area, India does lack, as there are no specific provisions making it an obligation for the State to take responsibility of children if their parents fail in parenting. Parentage is not a prohibited ground for discrimination in India. This results in complete distortion of the childhood of children of prisoners because for no fault of theirs, they are looked down by people surrounding them and are taunted for being child of a prisoner. This often results in these children also becoming prisoners in future. These children are not orphans, so they do not have any place in orphanage. So, it is the duty of the State to step in here and help the child to grow by providing him/her with all the necessary facilities. This will reduce the chances of the child resorting to crimes in future to survive.

Apart from the State taking responsibility for the upbringing of the child, some amendments are essential within the jails also to encourage the development of a child. In Germany, “at Freudenberg Prison, women and children under the age of six are permitted to reside together in units equipped with a kitchen, bathroom, bedroom, and living room. These units, which are outside the conventional prison facilities, are intended to resemble apartments or cottages. Staff members wear

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<sup>18</sup> *Ibid.*, Article 6(2).

<sup>19</sup> *Ibid.*, Article 6(3).

plain clothes. Children older than two years of age attend daycare while their mothers work. Mothers can leave the facility for day trips. They also receive 21 days to visit children outside of prison. Freudenberg Prison considers parenting and housework to be labor that is comparable to any other job. Thus, mothers granted work release can apply to work for their own families.”<sup>20</sup> “Preungesheim prison has a separate unit where mothers and children live together in an apartment, like setting away from the general prison population. Many mothers focus on childcare, while others work within the general population using the unit’s daycare. If the prisoner has high security, her child can remain with her in prison until the age of three. The children of low security inmates can remain in the facility until the age of 5.”<sup>21</sup> These are two of the many case studies on jails in Germany, which clearly shows that maximum efforts are being put in by the State there to reduce the adverse impact on a child being brought up in his/her initial years in a prison.

#### **India and Its Way Ahead**

India can incorporate many features from Germany and improve the state of its jails which further will ameliorate the lives of children of women prisoners. The foremost being the State should provide for separate buildings within the prison premises itself for women prisoners having children. This will somewhere down the line keep the child separate from the environment of all other adult prisoners. It would reduce the trauma faced by the child right from birth. Also, the building should be well equipped with things to give the child a feel of an ordinary home. For instance, the building should have different rooms for each mother and her child, the rooms should have some toys for recreation of the children, the prison staff employed in these buildings for children and the mothers of these children should wear ordinary clothes in order to give the child the same feel as that of other children living outside the prison.

As far as medical facilities are concerned, each jail should provide for separate hospitals for children and pregnant women, unlike the *status quo*, where

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<sup>20</sup> Melanie Paurus, “International Report on the conditions of Children of Incarcerated Parents” (2017) p. 16.

<sup>21</sup> *Ibid.*

the children are treated in the same hospital as that of all other adult prisoners. Also, child specialists or pediatricians should treat children.

In order to encourage better learning among the children, the children should be taken out of the jail at fixed intervals of time so that they can see the world outside. This will help the children in understanding things better and will make them acquainted with the environment outside the jail. Playtime should be organized for children, which should be as far as possible similar to the one experienced by children of the same age group outside prison.

The State must stimulate the growth of foster care institutions in India in order to help the children after 6 years of age when they leave their mothers. Also, this could help the children below 6 years of age if their mothers cannot take care of them. A well established foster care institution plays a pivotal role in shaping the lives of these children and helps them to recover from the trauma of leaving their mothers or the trauma faced by these children in the prison.

### **Conclusion**

It can be concluded from the above that, India lacks in providing for children of women prisoners and appropriate measures are necessary for the growth and development of these children. Reforms are needed in many fields, like, infrastructure of the jails, medical facilities available for these children, educational and recreational facilities for children of women prisoners. Apart from these reforms inside the prison, reforms are also the need of an hour outside the prison in the form of development of foster care institutions. A good foster care institution not only nurtures the child well but also, helps the child recover from the trauma of leaving his/her mother. One must realize that it is high time to understand the plight of children of women prisoners and adopt the required course of action.



## **CHILD ABUSE IN SHELTER HOMES -THE IMPERATIVE NEED TO PROTECT ORPHANS IN INDIA**

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**-Ms. Bhavana M\* and Ms. Pranamy Hegde\*\***

### **Abstract**

*About one third of India's population comprise of children (between the ages of 0-14 years). Not all these children are privileged enough to be raised under the protective care of guardians in suitable homes. Associated with poverty and illiteracy are children being orphaned, abused or abandoned. Around 2.11 percent of the country's children are abandoned by parents who do not want to raise them.<sup>1</sup> Around 0.3 percent of this population has children whose parents have died. These children are usually left to find for themselves, exposed to the harsh realities of the world at a very tender age. The responsibility ultimately rests on society's shoulders to provide for such children. The Government has the responsibility to assume the role of parents and ensure that these children, who are exclusively under the State's care, get the best facilities and are given every opportunity to integrate themselves into the society as potential citizens.*

*But the recent incidents of children being abused at shelter homes have exposed the cruel reality of how vulnerable homeless children*

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\* 4<sup>th</sup> Year, B.A., LL.B., BILS, Bengaluru.

\*\* 3<sup>rd</sup> Year, B.A., LL.B., BILS, Bengaluru.

<sup>1</sup> National Crime Records Bureau, "Crime in India 2011", available at, [ncrb.gov.in/StatPublications/CII/CII\\_2011/Statistics2011.pdf](http://ncrb.gov.in/StatPublications/CII/CII_2011/Statistics2011.pdf) last visited on 10.02.2019

*are in the Indian society. The horrifying incidents of various sexual abuse cases in shelter home also drawn the Supreme Court's attention and have alerted the nation about the pressing need to protect children.*

*This paper discusses child abuse in context of the recent incidents in India and the judicial intervention and observations made with regards to safeguard the children from abuse in shelter homes. Lack of cumulative framework or regulations, which can hold shelter homes and orphanages accountable for their activities, is the primary reason why the children are being mistreated. The paper also concentrates on making a comparative study with legal frameworks/guidelines prevalent in other countries that can help India to legislate a more dependable and unfailing law that can protect homeless children.*

**Keyword -** Child Abuse, Shelter Homes, Legislations and Regulations

### **Introduction**

Ordinarily children who are orphans are believed to be homeless children of the society. It would be a misjudgement to believe that orphans are mostly those children whose parents or either of the parents are dead. This is because in most cases orphans are children who have been abandoned by their parents. A study by an International Children's Charity has found that India is home to 20 million orphans. Most of the children have been abandoned by their own parents, exposing them to the harsh realities of the world at a younger age. The study has also estimated that only 0.3% of these orphans are children whose parents have actually died.<sup>2</sup>

The high proportion of abandoned children among orphans highlights the fact that poverty can be the major reason behind the situation. Indeed, that cannot be the only vindication, to the high rate of desertion. The attitude towards single mother or unmarried women (not forgetting the women involved in prostitution), kidnapping of children, the most pivotal being the abhorrence towards the girl child. A PIL filed by Central Adoption Resource Authority mentioned that, of the 11 million abandoned children 90% are girls. These statistics raise serious worry

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<sup>2</sup> SOS children village study, "India Home to 20 million orphans", available at, [www.soschildrensvillages.ca](http://www.soschildrensvillages.ca). last visited on 26.07.2011.

towards the increasing abandonment of female children.<sup>3</sup> The protection of orphans is of prime concern in any country that upholds and values Human Rights. The State has the primary responsibility of protecting, nurturing and aiding in the development of these children, who are the future of the Nation. But, the recent happenings in India have exposed the very grim situation of children being exploited in State run organisations. The Bihar shelter home case has yet again brought back the focus on the plight of children in Government sponsored foster care homes and the need for strict law enforcement.

### **Recent Incidents**

Sexual abuse scandals at orphanages and shelter homes have raised an alarm over the management of shelter homes in India.

The Mumbai's Tata Institute of Social Sciences (TISS) carried out a social audit of shelter homes across Bihar for the year 2017. In May 2018, reports of inmates being sexually abused surfaced, Medical examination confirmed that girls were abused repeatedly in the shelter home in Muzaffarpur. Following a FIR being filed on 31<sup>st</sup> May, 2018, the girls were later rescued from the shelter home and shifted to Madhubani, Patna and Mokama.<sup>4</sup> The case has made National headlines and the State Government has been severely criticised. The Supreme Court took *Suo moto* cognizance of the issue, making serious observations and has issued immediate orders for further probe into the matter.

As reported by 'The Hindu'<sup>5</sup> the Central Government reported to the Supreme Court that a survey of 9,589 child care institutions across the country found that 1,575 inmates suffered sexual abuse before they were rescued.

Child line India foundation in survey mapping 9,589 Child care institutions found that around 3,68,267 of them still needed care and adequate protection. Out of this figure 1,98,449 were boys, 1,69,726 were girls and 92 were transgender.

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<sup>3</sup> "90% of 11Million Abandoned Kids are Girls", *Times of India*, available at, m.timesofindia.com. last visited on 22.4.2011

<sup>4</sup> *Nivedita Jha v. The State of Bihar*

<sup>5</sup> Krishnadas Rajgopal, "575 children in shelter homes were sexually abused: Centre to SC", *The Hindu*, August 14, 2018.

This survey is part of the Centre's affidavit submitted in the Supreme Court. The report submitted highlights of the fact that the children under the ambit of various surveys are orphaned, abandoned, surrendered, sexually abused, victims of child pornography, trafficked for domestic work, for labour/rescued from labour, trafficked for commercial sexual exploitation, HIV-AIDS infected children, child marriage, affected by natural disasters, conflict, homeless, runaway/missing, special or differently abled children. The major concern regarding the current statistics is that, there are estimations concluded through reported crimes or under licensed institutions. But, there are huge part of unlicensed institutions and occurring exploitations that go unreported.

Similarly, reports of sexual abuse at an illegally- run shelter home at Deoria, Uttar Pradesh in which the complainant was a ten-year-old, who escaped to bring to the police's attention to the abuse happening at the shelter home<sup>6</sup> has just confirmed the fact that India has yet to deliberate on protecting minors and the need for strict legislations.

On January 18, 2012, a 11-year-old orphan named Arya Anthala was admitted to the hospital complaining of fatal diarrhoea. But, the doctors were shocked to report that the orphan was sexually abused and raped for several years. This raised serious allegations against the NGO-orphanage, where the little girl was residing. The investigation report conducted by the Delhi police and Centre for Child Rights revealed sordid details on the abuses happening in the NGO. The reports revealed that not only the children were sexually abused by the staff of the NGO but the older boys residing in the NGO also teased and sexually abused their fellow girl inmates.

There was also the case of a 14-year-old boy taking a 2-year-old to the hospital who was battered and bruised and both of them were the inmates of the same NGO that ran an orphanage. The investigation also reported that there were 1,100 children residing in the NGO and suspected most of them being victims of sexual abuse.

Similar case was observed in Kerala, where seven orphan girls were lured by some men and were raped and sexually abused for two months. The case was

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<sup>6</sup> Omar Rashid, "24 Girls Rescued from Shelter Home", UP, *The Hindu*, August 6<sup>th</sup>, 2018.

investigated by the police and the orphanage functioned under the name, Yateemkhana situated in Kalpetta, Wayanad.<sup>7</sup> In 2007, a case was registered against the managing trust of an NGO by name Preet Mandir, The trustee was charged for kidnapping poor and abandoned kids for illegal inter-country adoption and extorting huge money from the parents adopting these children.<sup>8</sup>

These alarming incidents reverts one's attention to the laws prevalent in currently to govern and regulate activities in the shelter homes sponsored by the Government.

Section 37 of the *Juvenile Justice (Care and Protection) Act, 2015* provides for-

#### **Shelter Homes**

1. The State Government may recognize reputed and capable voluntary organizations and provide them assistance to setup and administer as many shelter homes for juveniles or children as may be required.
2. The shelter homes referred in sub-section (1) shall function as drop-in-centers for the children in the need of urgent support who have been brought to such homes through such persons as are referred to in sub-section (1) of section 32.
3. As far as possible, the shelter homes shall have such facilities as may be prescribed by the rules.

The Act also provides for frequent audits and inspection. The Act gives the construction and running of the homes to the respective State Government. Much of the funding, however, comes from the Union Ministry of Women and Child Development, which has a supervisory power in these matters. But, what is amiss are clear regulations and solid rules that serve as a standard for all State Governments to enforce their powers in running shelter homes and provisions for frequent inspection to be made and reports to be scrutinised by the Central Government.

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<sup>7</sup> Saritha S Balan, "7 Minor Girls in Kerala orphanage sexually abused by men luring them with candies", *Deccan Chronicle*, March 7<sup>th</sup>, 2017.

<sup>8</sup> Writ Petition No.1945/2006 in Bombay High Court.

**A Cumulative Framework is the Need of the Hour which Addresses the Following Issues**

1. Regular counselling to be provided to the children of these shelter homes and undertaking frequent awareness sessions where children are educated to recognise and report sexual violence and exploitation.
2. Standard of hygiene, infrastructure and facilities are to be explicitly provided. Most of the shelter homes are found to be in deplorable conditions with almost no or very poor levels of hygiene and facilities available.
3. There should be strict compliance of rules in order to secure a license for running shelter homes and regular renewal of these licenses must be made mandatory.
4. Strict rules must be made to check overcrowding and under staffing of the Shelter homes. The staff appointed should meet a required professional standard in qualification and experience. They should be appointed only after proper interview and background verification.
5. Nodal officers need to be appointed to make frequent visits and inspections to review conditions of these care centres.
6. Misappropriation of funds needs to be curbed, which can only be achieved by making rules for strict submissions of audit reports.

The Landmark case of *Childline India Foundation and Anr v. Allan John Waters and Ors*,<sup>9</sup> known widely as the Anchorage Case of 2011 has already highlighted the plight of orphaned children who were subjected to sexual crimes in an organization that involved itself in running foster care homes. Allan John Waters and Duncan Grant were the two main accused who were later convicted for sexually exploiting children in the Shelter home set up by Duncan Grant at Colaba, Mumbai.

The Supreme Court restored the conviction and sentence of six-year rigorous imprisonment imposed on two British nationals who were acquitted by the Bombay High Court and in 2011; the Court convicted both the accused and sentenced them

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<sup>9</sup> *Childline Foundation and Anr v. Allan John Water and Ors*, (2011) 6 SCC 261.

to complete their remaining sentences. The bench comprising Justices P Sathasivam and B S Chauhan made the observation-

*'Children are the greatest gift to humanity. The sexual abuse of children is one of the most heinous crimes. It is an appalling violation of their trust, an ugly breach of our commitment to protect the innocent. There are special safeguards in the Constitution that apply specifically to children. The Constitution has envisaged a happy and healthy childhood for children who are free from abuse and exploitation.....'*<sup>10</sup>

Thus, in spite of Judicial decisions and past history of child abuse in shelter homes in India, the situation remains grim, given that there is lack of a clear legislation and mostly because of poor enforcement of the already prevalent laws.

These recent happenings also suggest that majority of children have not only been abused sexually/physically, but also have been subjected to trafficking. Shelter homes seemed to have acted as a source from where minor girls and boys are trafficked. In India, a large number of children are trafficked not only for the 'sex', 'trade' but also for other forms of non-sex-based exploitations that includes servitude of various kinds such as labour, which includes various sectors like bonded labour, domestic labour, export sites etc.

India effectively needs to protect homeless children and in order to achieve a secure environment to these children; inspiration has to be drawn from legislations in force in other developed countries. A comparative study with the various guidelines issued by prominent Governments across the globe to regulate the conditions and working of shelter homes can help to understand the shortcomings of the legislations and improvise on issuing better guidelines.

The State of New Jersey, United States, has cumulative rules to regulate the activities of shelter homes/ children's homes. 'Manual of Standards for Children's Shelter Facilities and Homes'<sup>11</sup> published by the 'Department of Children and Families, New Jersey' describes facilities as such –

<sup>10</sup> *Supra* note 4, Para 24.

<sup>11</sup> State of New Jersey, *Children and Families*, Vol-3A (Department of Children and Families), Chapter 53.

(a) A shelter facility or shelter home provides care for children who are:

1. Abused; 2. Abandoned ; 3. Dependent ; 4. Neglected ; 5. In need of temporary emergency care ; 6. Runaways or otherwise in need of temporary care; and/or 7. Charged as a juvenile delinquent, pursuant to State law, and who would not be a threat to the physical, social, or emotional well-being of the other children at the shelter facility or shelter home.

The manual describes 'shelter facility' as a facility which provides care for a minimum of six and a maximum of 25 children. However, a shelter facility established after February 28, 1974, shall not exceed a maximum capacity of 12 children, unless approved by the department.<sup>12</sup> Shelter home is described as a home which provides care for a maximum of five children, including the shelter home parent's children.

As it can be noticed, the rules make a distinction between shelter homes and shelter facilities and most importantly there is restriction on the number of children who can be admitted in one shelter home. In India, there are no fixed capacity specified for the number of children to be housed in shelter homes and whatever regulations that are passed by the respective State Governments in this regard, are not strictly adhered to. This has resulted in overcrowded facilities, which has further worsened the condition of children and exposed them to various problems.

The rules make provision for another interesting aspect of including public scrutiny and activism for protecting the interests of these abandoned children. Rule 3A:53-1.7 of the manual provides for 'public access to office records for children's shelter facilities and shelter homes'. The provisions make the records maintained by the shelter home, can be readily accessible to any member of the public. This gives concerned citizens the right to peruse the documents maintained by facilities, paving way for public activism. Any citizen who finds discrepancies in the records can alert the authorities and bring to their attention any deficient service or mal practice prevalent in shelter homes.

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<sup>12</sup> 3A:53-1.7.

Provisions on similar lines need to be incorporated in the Indian scenario. Further, improvising on this, citizens should be allowed to volunteer in shelter homes in any capacity in order to effectively contribute to the welfare of the children. Orphans are the children of the society at large and hence, every person has the responsibility to cater to their needs. Citizens, when involved to cater to the needs of these children, can help solve a lot of issues existing in shelter homes. But of course, strict regulations concerning volunteer activities need to be in place in order to avoid any kind of abuse of these children at the hands of the public.

Another important provision made possible by this manual is the option of providing grievance redressal mechanisms, where children can voice their difficulties that they are facing in shelter homes- The Act provides –‘The shelter facility or shelter home shall prepare, post, or give to all staff members and children written grievance procedures governing how the children may raise questions about or voice disagreements with and concerns about procedures, care, and specific incidents. The shelter facility or shelter home shall not take or threaten to take retaliatory or disciplinary action of any kind against a child who uses the grievance procedure or files a grievance. The shelter facility or shelter home shall establish a procedure to explain these grievance procedures to children who are developmentally disabled’. This provides for an effective way to counter abuse at these centres. India needs to effectively and precisely inculcate such a provision and in this regard, improve its strict enforcement.

Germany has a comprehensive framework for even children placed in the Refugee camps. Shelter homes that take up the responsibility of providing protection to refugee children need to adhere to certain guidelines published by the Government. This highlights the aspect that Germany has not just spared thought for its own orphan children but also refugee orphans.

United Kingdom has a comprehensive legislation published for providing children in need with good standards of living. *The Children Act of 1989* makes provision to recognise those children who require State’s help and such children are recognised and placed under the protection of the local authorities in Community homes.

**Some of the Key Provisions of *the Children Act* are as follows –**

Part III of the Act deals with -Support for children and families provided by local authorities in England - which discusses the situation of families or children that might require help and the procedure by which they can apply to seek help from local authorities. This section also discusses the standard of accommodation to be provided to these children and the general duties of their care takers. An independent reviewing officer is appointed for periodical review and inspection of these centers for providing care to children and for ensuring that the object of the Act is achieved and fulfilled. Part VI of the Act discusses in detail the provisions in relation to community homes run by local authorities and the rules they should adhere to, in dispensing their duties. The subsequent chapter deals with voluntary organizations that are interested to help the needy children and the necessary regulations that need to be complied with. The Act also provides for making private arrangements to foster children.

The Act<sup>13</sup> defines it as such -

- (a) “a privately fostered child” means a child who is under the age of sixteen and who is cared for, and provided with accommodation [in their own home]by , someone other than—
- (b) a parent of his;
- (c) a person who is not a parent of his but who has parental responsibility for him; or
- (d) a relative of his;

The law extends to regulating the activities of private foster homes, disqualifying certain persons from being foster parents. It also defines the standard of care, private foster homes should adopt and the consequences for contravention of them.

It is reassuring to see such exemplary piece of legislations that define and regulate every minute aspect of child care and protection. Our aim should be, to draw inspiration and invigorate on legislating on similar lines. Only precise and

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<sup>13</sup> Section 66, *The Children Act 1989*.

comprehensive regulations can go a long way to address child abuse and ensure enhanced compliance by community homes/shelter homes. Although in India, *the Orphanages and Other Charitable Homes (Supervision and Control) Act, 1960* has provisions to achieve certain objectives in this regard. India needs a more sophisticated rule book that exclusively concentrates on catering to homeless children in both State run shelter homes and voluntary organizations catering to needy children. But, more importantly, India needs to focus on effectively implementing the law when it comes to protecting children in shelter homes.

### **Conclusion**

The recent events pertaining to sexual abuse at shelter homes should be a grave reminder to realise that children are still not safe in a fast-developing country like India. Children are the future of the country, and one can guarantee a better future only if there is assurance to their safety today. Children in residential child care should be happy, loved, healthy and safe from harm, in order to thrive and live up to their full potential. Shelter homes, whether run by Government or voluntary organisations should value each child as an individual with interests, strengths and capabilities. They should aim to culture amongst them, positive relationships, encouraging strong relationship between children and staff in the shelter home. A harmonious childhood, provided with utmost care will go a long way in making responsible citizens. Child care should reciprocate to children's need, supporting their emotional, mental and physical needs, aiming to boost self-confidence and esteem. Shelter homes should involve more professional staff who can cater to the overall development of children. Better infrastructure, improved hygiene and establishing more such State run facilities is the need of the hour in India. Stringent action against offenders should serve as deterrence to child abusers. Effective and strict enforcement of law is the only solution to protect children.



## **THE CRIMINAL LAW AMENDMENT ACT 2018: A RETRIBUTIVE APPROACH TO CHILD RAPE OFFENDERS**

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-Ms. A.Udhaya Sweetline\*

### **Astract**

*Reforms and changes are soul of law and lawmakers. In order to promote security and safety to all persons in the country, the law being dynamic in nature has to undergo changes to be in par with the current scenario of the society. The increase in the intensity of the nature of crime and emergence of new crimes results in amendments. Currently in India the intensity and crime of rape against children are immensely increasing at a larger rate day by day. The scenario is worsening as many children sexual assault and rape cases can be seen almost daily in the media, newspapers and social media. The rape culture prevailing in India is dangerous and threat to not only girls but also to newborns. The provisions and punishments are not effective, brutal and vicious to curb this burning issue. The two horrendous cases of Kathua and Unnao led to the promulgation of criminal law amendment bill ordinance, 2018 to protect the daughters of the country as tweeted by our prime minister. The author has structured this paper into three parts. The first part discusses the concept of child rape, its aftermath and the major loopholes in the previous legislation. The second part critically analysis the criminal law amendment act 2018 and the third part suggests ways to curb this never-ending crime.*

**Keywords:** POCSO, Inhumane, Child Rape, Rape Culture and sexual Abuse.

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\* V Year B.B.A, LL.B.(Hons.), Saveeta School of Law, Chennai.

### Introduction

The menace of child rape has intensified in the current scenario creating a major roadblock for every child to have a conducive environment for survival and peaceful living as the abusers is not only strangers but their own family members. Previously, though these offences prevailed there was a very less chance for it to come into light as the major tool to reach out to a larger number of people that is the media was not present unlike in recent times, where, there are various cases of child abuse and rape been reported and seen in the media, newspapers and social medias frequently. In some events child rape and abuse will stay hidden when the child may not be able to understand whether the act done by the abuser is right or wrong.

In general sense child rape occurs when a child below the age of 18 years before the eyes of law is either forced or persuaded to take part in sexual activity. These crimes against children have an immense effect on their lives as the scars may fade but the dark days will forever keep haunting their memories.

Under *the Indian Penal code* certain provisions such as 3,75,354 and 377 provide protection to children on Crimes of rape and sexual abuse. In order to bring in a specific legislation to curb and govern child rape and sexual abuse against children in India as the crime of child rape has become very inhumane and ruthless, *the Protection of Child Against Sexual Abuse Act of 2012 (POCSO)* was brought in. As how the old saying goes, every coin has two sides, likewise, every Act or legislation have both positive and negative aspect associated with it. In the year 2016, almost 36,000 cases have to be recorded under the protection of children from sexual offences but no steps were taken by the law framers to overcome or deal with the loopholes of *the POCSO Act*, unless the occurrence of the two brutal rape cases of Kathua and Unnao.

### Objectives of the Study

- ◆ To know the concept of child rape and the lacunas in the previous legislations;
- ◆ To trace the history and reason for the emergence of the criminal law amendment act;

- ◆ To critically analyse the Act of 2018; and
- ◆ To suggest ways to curb the never-ending crime of child rape.

### **Scope of the Study**

The study is curtailed to the Indian scenario of child rape and focuses to bring out the negative and positive aspects of the Criminal Law Amendment Act of 2018.

### **Source of the Study**

The research has used secondary sources for the study by referring to books, research articles, e-sources, articles, journals, newspapers.

### **Child Rape**

Child rape is a never ending and burning issue in the recent times. Child rape is one type of child sexual abuse. The concept of child sexual abuse is where a child below the age of eighteen under the eyes of the law is forced or persuaded to take part in sexual activities. Most cases of abuse of a child don't come into notice or is not revealed as the child may or may not know whether the act done is wrongful or not.

Child sexual abuse is categorized into two types:

- a) Contact/ physical abuse; and
- b) Non-contact/ nonphysical abuse.

### **Contact Abuse**

In such cases the abuser makes physical contact with the child, that is, a physical touch is involved in this abuse:

- ◆ Sexual touching of any part of the body whether the child is wearing clothes or not;<sup>1</sup>
- ◆ Rape or penetration by putting an object or body part inside a child's mouth, vagina or anus;

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<sup>1</sup> The NSPCC, "what is sexual abuse, sexual abuse, The National Society for the Prevention of Cruelty to Children" available at: <https://www.nspcc.org.uk/what-is-child-abuse/types-of-abuse/child-sexual-abuse/>, last cited on 14.02.2019.

- ◆ Forcing or encouraging a child to take part in sexual activity; and
- ◆ Making a child take their clothes off, touch someone else's genitals or masturbate.

#### **Non Contact Abuse**

There is absence of physical contact or touch with the child, that is, the child forced to perform sexual acts over the internet and flashing which includes:

- ◆ Encouraging a child to watch or hear sexual acts;
- ◆ Not taking proper measures to prevent a child being exposed to sexual activities by others;
- ◆ Meeting a child following sexual grooming with the intent of abusing them;
- ◆ Online abuse including making, viewing or distributing child abuse images;
- ◆ Allowing someone else to make, view or distribute child abuse images;
- ◆ Showing pornography to a child; and
- ◆ Sexually exploiting a child for money, power or status.<sup>2</sup>

#### **Effects or Aftermath of Child Sexual Abuse**

- ◆ Physical injury to the child;
- ◆ Depression;
- ◆ Post-traumatic stress disorder;
- ◆ Psychological trauma;
- ◆ Anxiety; and/or
- ◆ Propensity to further victimisation in adulthood.

The specific legislation that previously governed the crime of rape against children had certain loopholes in the implementation and provisions of the Act. The loopholes in the are:

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<sup>2</sup> Sahayog, "Child sexual abuse", *Sahayog care for you*, available at: <http://www.sahyogcare4u.org/csa/>, last cited on 14.02.2019.

- ◆ The failure to implement courts judgment and *Protection of Children from Sexual Offences Act*;
- ◆ The lack of basic infrastructure for the courts established under this act to deal with sexual abuse of child;
- ◆ The numerous cases registered under *the POCSO Act* are pending for disposal;
- ◆ “In my experience, when such incidents occur, schools often look at it as a scandal that has to be handled quickly rather than addressing the problem of child sexual abuse in a deeper way,” said Satish. “So, you have a situation now where there is a mismatch between the stringency of the *POCSO* laws, which make reporting the incident mandatory, and a lack of understanding of the issue itself”;
- ◆ Offenders easily obtain bail by using the loopholes in the *POCSO Act*;
- ◆ When Sections 3, 4, 5 and 6 of the Act is read it is clearly evident that there is gender bias as the pronoun used for the accused under these provisions is ‘he’. The ideology that always prevails is that only male come under the purview of sexual offences which is not true as even females commit child sexual abuse; and
- ◆ Child sexual abuse is still not reported due to family reputation and issues though it is mandatory under this act.

### *Criminal Law Amendment Act, 2018*

#### **History and object**

The brutality and intensity of rape and murder cases of Kathua and Unnao resulted in the parliament in the passing of Criminal Law Amendment Ordinance 2018 on child rape. An eight-year-old Muslim girl of Kathua, small town in Jammu and Kashmir was raped and murdered, which has erupted protests supporting the accused by a local Hindu nationalist group and it was a shocking scenario. After conducting the investigation, the crime branch stated that the intention behind the rape and murder was to hound the Muslim nomads out. As per the investigation agency, the child was drugged and kept at the place of worship - *Devasthanam* at

Rasana village.<sup>3</sup> While in Unnao, the girl was persuaded to the rapist house with a promise to give her a job and raped the girl in a room in his house, while an accomplice was outside. It did not stop with that, after seven days three men in a SUV abducted her and continuously and repeatedly gangraped her for a period of nine days by intoxicating her. The outcry of the two horrendous rape cases reached as far as the United Nations.

On 6<sup>th</sup> August 2018 the *Criminal Law (Amendment) Bill* on child rape was passed in the parliament, providing stringent punishment provisions in the major criminal legislations for persons convicted for committing the crime of rape against a child. The bill was passed in the Lok Sabha on August 6, 2018 further it was unanimously passed by voice vote in Rajya Sabha. The Bill amends criminal legislations namely the *Criminal Procedure Code*, *Indian Evidence Act*, *Protection of Children from Sexual Offences and Indian Penal Code*.<sup>4</sup>

The main reason for the birth of *Criminal Law Amendment Act 2018* was to upgrade and intensify the punishment of rape of a child by amending certain provisions of all the major provisions governing the crime of rape against a child.

The Act amended four major Acts namely:

- i) *Indian Penal Code, 1860*;
- ii) *Code of Criminal Procedure, 1973*;
- iii) *Indian Evidence Act, 1872*; and
- iv) *Protection of Children from sexual offences Act, 2012*.

### Key Amendments

The Key essential aspects and amendments of the Act are:

- ◆ In cases of rape against a girl less than 12 years is sentenced to imprisonment for a minimum period of 20 years or life imprisonment or death;

<sup>3</sup> Sheikh zaffar Iqbal, "Behind 8-Year-Old Girl's Rape and Murder, Story Of A Divided Village", available at: <https://www.google.com/amp/s/www.ndtv.com/india-news/behind-8-year-old-kathu-girls-rape-and-murder-story-of-a-divided-village-1836859%3famp=1&akamai-rum=off/>, last cited on 14.02.2019.

<sup>4</sup> Saumya Sinha, "The Criminal Law (Amendment) Act 2018", *IPLEADERS*; available at: <https://www.google.com/amp/s/blog.ipleaders.in/criminal-law-amendment-act-2018/amp/>, last visited on 15.02.2019.

- ◆ While, in cases of gang rape of girl below 12 years, imprisonment for life or death sentence;
- ◆ The Act also prescribes the period of investigating of all rape cases to be completed within a period of two months from the date of recording the information by the officer in charge of police station;
- ◆ Pertaining to inquiry or trial of child rape cases, it has to be completed within a period of two months;
- ◆ The time limit as provided by the cabinet for appeal in rape cases is to be disposed by six months; and
- ◆ To exclusively deal with rape cases, fast track special courts are to be set up or established and cases of rape will be presided and heard by a female judge and the statement of the rape victims is to be recorded by a woman police officer.

#### **Various Factors of the Act**

- ◆ The Act stipulates a time period of 2 months, when the victim of the rape is a female girl child, but the law provides no provision relating to male victims in child rape cases;
- ◆ The NCRB records a case under murder when the rape victim is raped and killed by the abuser, which is a false veil shielding crime of child rape;
- ◆ To overcome the negative image of the government, *the Criminal Law Amendment Act 2018* was brought in to retain their government;
- ◆ The introduction of death penalty of the act will pave way for the death of the rape victims to cover the crime by the offender;
- ◆ No Anticipatory bail to accused in case of rape of child under the age of 16 years is a major problem when a person is booked falsely;
- ◆ More convictions have to be done as it is clearly evident through the large amount of pending cases; and
- ◆ The judiciary and the legislature have to focus on protecting not only the rape victim and survivors, but also the witnesses, because even they may face threat through the offender.

### **Conclusion**

The prevalence of the crime of rape against children is shattering the beautiful and happiest phase of life of the childhood. Instead of playing happily and making new friends the child is stuck inside the house with the memories haunting them and the scars of the incident remaining in their hearts forever. The legislature has to implement the changes and amendments brought in to curb this never-ending phenomenon as mere amendments to important Acts is not going to make any difference. The judiciary has to take measures to dispose the pending rape cases against child. Moreover, the victim as well as the witnesses has to be given protection and also to create awareness to report rape cases.

In the present time, the court does not easily award death penalty, hence, conviction in rape cases will be still less and the main object of judiciary to render and upheld justice will fail as only in rarest of rare cases death penalty is imposed. There is absence of best interest of child principle. The retributive theory will come into play only when the accused is convicted with death penalty.

Mere death penalty is not to be an effective way to curb this never-ending phenomenon as even murder is still prevailing in the society and in more heinous and gruesome manner.

### **Suggestions**

- ◆ Rape comprises of various other factors such as intoxication, vengeance, watching of pornographies which induces the person to commit rape. Only when measures are taken to prohibit porn sites and liquor in the country, the menace of child rape will reduce.
- ◆ Sex education must be made mandatory in all educational institutions.



## CHILDREN: TOP PRIORITY UNDER PRINCIPLE OF DISTINCTION

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-Ms. Alisha Behera\*

### Abstract

*Youngsters are the most powerless in the general public. They need the most extreme consideration and backing for a superior future. In any case in the event that they face circumstances like furnished clash and war which have the most negative effect on them. In most extreme cases, they free everything in that capacity their folks as well. Standard of qualification discusses no assault on the regular folks who are not specifically engaged with the war. In any case, the ascent in the quantity of outfitted clash has brought about more obliteration. Presently citizens are increasingly influenced in the war then the activists. The idea of urban outfitted clash is emerging where struggle goes on in the region where individual lives. This paper primarily discusses the insurance of kids from furnished clash and furthermore from the misuse that occurs after the war. They endure in each circle of their life and the post war impact is entirely terrible. They are the coming up and eventual fate of the earth. Subsequently, presently it is imperative to secure them first. In the event that they will be hurt, at that point the eventual fate of the world will be dark.*

**Keywords:** Child Protection from Combat, Recognition to Child Rights and More Security to Children.

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\* III Year KIIT Law School, Bhubaneswar, Odisha.

## Introduction

The laws of war were conceived of encounter of the military on the combat zone. Since nineteenth century, these guidelines have been developed by each sort of human progress which endeavoured to limit the uprising of brutality. The reason of such enactment is the expansion of demolition. The guidelines and constraint to armed conflicts has additionally been confined as control for any equipped clash under International Humanitarian Law. Principle of distinction is viewed as one of the impediments under outfitted clash.

### Principle of Distinction: The Concept

Principle of distinction discloses not to attack the regular citizens rather that must be constrained between two military powers. It puts a commitment to segregate amid a furnished clash between soldiers, who are fitting focuses of assault and destruction, non-warriors, that is regular citizens who are inappropriate for wrong assault. State practice has set up guidelines of refinement as an issue of standard global law, appropriate to the two classes of contentions that are universal or non-worldwide clashes. The essential calculated component of the principle of distinction is the possibility of defence of impedance in human undertakings.<sup>1</sup> The statute of ICJ in the nuclear weapons instance of the ICTY especially in the *Tadic case*, *Kupreskic case* and of the Inter American Commission on Human rights for the situation in respect to the occasions at La Tablada in Argentina gives additional proof that the commitment to make a refinement among regular people and the soldiers is standard in both universal and non-global furnished clashes.<sup>2</sup>

#### 1. Distinction between Civilians and Combatants

It is important to comprehend the contrast between the civilians and the combatants during the warfare. Combatants are both international and non-international military. Combatants are portrayed as those individuals with a direction to straight forwardly take part in any threats between States. They are the

<sup>1</sup> Karumi, B.Bukar, D. and A.Haruna, "Principle of Distinction in Armed Conflict: An analysis of the Legitimacy of 'Combatants and Military Objectives' As a Military Target" *International Journal of Humanities and Social Science Invention* (2014).

<sup>2</sup> L.Doswald-Beckand J.Henckaerts, "*Customary International Humanitarian Law*" (Cambridge University PressNew York, 3rd edn., 2005) pp.7-8.

individuals from the military and furthermore from different State armies and other volunteer cops. Barely any attributes were set somewhere around ICRC that warriors are dependable to act under their subordinate. They wear a settled particular sign conspicuous at separation and furthermore convey their arms transparently. They are additionally the members in *levee en masse*. It is the commitment with respect to the warriors to separate themselves from the civilians. Civilians are the general population who are not an individual from armed forces. They are ensured against direct attack as long as they are not engaged with the armed conflicts. In the judgment of *The Public Committee against Torture in Israel Case*<sup>3</sup>(2006), methodology for standard universal law is that civilians are the individuals who are not soldiers. In the *Prosecutor v. Blaskic*(2000),<sup>4</sup> ICTY held that civilians are those individuals who are not or no longer an individual from the military. The definition of civilians as individual is put forward in Article 50 of *Additional Protocol I of Geneva Conventions*.

## 2. Indiscriminate Attack

Indiscriminate attack characterized as an assault which isn't coordinated at a particular military or utilizes a technique or methods for battle whose impact can't be constrained by International Humanitarian Law.<sup>5</sup> Article 51(4) and Article 51(5) of *Additional Protocol I of Geneva Convention* describes indiscriminate attack and puts forward the confinement on indiscriminate attack. In fact, the nearness of individuals for military live in the midst of an extensive number of civilians doesn't imply that they will be attacked, because of the nearness of military staff.

By virtue of Syria, the fundamental edge of the push to rename International Humanitarian Law on a basic level like, target ways are the growing use of the word 'unpredictable'. In the International Syria Support Group Statement of November 14, 2015 "reaffirmed the stunning effects of the use of non-military personnel on the customary resident people", referring to Security Council objectives

<sup>3</sup> [2006] IsrLR 2 (High Court of Justice), p.459.

<sup>4</sup> IT-95-14-A (29 July 2004)

<sup>5</sup> J.Weiner, *Discrimination, indiscriminate attack and the use of nuclear weapons*(2011).

2139, though somewhat ambiguous which did not by any stretch of the imagination blame 'aimless' rather the eccentric work of weapons in populated regions.<sup>6</sup>

Military guide book which are important in or have been associated in non-worldwide prepared conflicts decide the confinement of unpredictable assaults. Additionally, the UN and other International Organizations have likewise censured infringement of this standard, for instance with regards to clashes in several countries.<sup>7</sup>

The 25<sup>th</sup> International Conference of Red Cross of 1986 regretted that indiscriminate attack caused on non-military personnel populaces is in the infringement of the laws and traditions in war. ICRC has dependably reminded armed conflicts both to international and domestic of their obligation to abstain from such attacks.

## 2. System of Protection under IHL

As the development of guideline of aimless assault occurred, the arrangement of assurance of these regular folks came up. The arrangement of assurance under International Humanitarian Law has been separated into three, known as general insurance, unique security and improved security. General security is where the regular people and the non-military personnel targets were ensured and which is broadly known as the guideline of refinement. In an equipped clash, it is under commitment to comprehend the distinction in a regular citizen and the warriors. There has been developing of in excess of 60 military over the most recent six years,<sup>8</sup> which may prompt progressively furnished clashes that can cause enormous harm, which is a more noteworthy test to helpful people. One of the purposes behind such insurance is that the regular folks persevere through astonishing enduring in equipped clash and they are frequently the prime casualties of annihilation, ethnic purging, constrained dislodging and unpredictable assault.

<sup>6</sup> S.Townley, "Indiscriminate Attacks and the Past, Present, and Future of the Rules/Standards and Objective/ Subjective Debates in International Humanitarian Law" 50(5) *Vanderbilt Journal of Transnational Law*, pp.1257-1258.

<sup>7</sup> L. Doswald-Beck, and J.Henckaerts, *supra* note 2, pp.39.

<sup>8</sup> International Committee of the Red Cross, *ICRC: Study shows more the conflicts, greater the danger for people.* (2019).

In *Prosecutor v. Jean Paul Akayesu*,<sup>9</sup> the ICTR held that the demonstration of sexual brutality against women in conflict times add up to massacre since it is mostly executed as a weapon against women amid strife zones and as a weapon to wreck them and its long-haul repercussion is tragic for any women. In *Prosecutor v. Captain Johnny Paul Koroma*, where the culprit was engaged with carrying out gross atrocities, violations against mankind in Sierra Leone. For the procedure of the case, warrants were issued against him by International Criminal Tribunal for Sierra Leone, however, it was discovered that he was dead and consequently the case was shut. Charles Taylor being the principal African leader of the State was arraigned by International Criminal Tribunal for Sierra Leone for carrying out atrocities and was condemned to 50 years of sentence in 2012.

It has been noticed that following seven years, the setbacks of Syria's Civil war have developed from the primary bunch of dissenters shot by government powers to thousands to death. As per most worldwide observing, the contentions utilize a general figure of more than 500,000 demise, yet recognize that changing conditions and confined zones make it difficult to know the accurate number of losses. In view of that gauge, the all-out number of regular people and soldiers' demise is 22 million.<sup>10</sup>

UNAMA, detailed that there were 5,122 non military personnel losses in the initial a half year.<sup>11</sup> The Iraq war of 2003 took 85,000 Iraqi regular folks' life however, the neighbourhood individuals assessed that the absolute was higher. Somewhere in the range of 2001 and 2016, around 31,000 afghan regular people have been executed in light of the outfitted clashes.

#### **Children under Such Protection.**

Kids are influenced by war and outfitted clashes in two habits: they are helpless against the effect of war on their homes and families and are regularly selected to be executes of the contention as child soldiers. UNICEF talks about

<sup>9</sup> ICTR-96-4-T, International Criminal Tribunal for Rwanda, 2 September 1998

<sup>10</sup> B.Hubbard, "In a Syrian Town, People started shouting 'Chemicals! Chemicals!'", *The New York Times*, 11.04.2018.

<sup>11</sup> F. Waezi, "Civilians death in Afghanistan hit record high- UN", *UN News*, 2018, available at: / <https://www.bbc.com/news/world-asia-44837612/>, last cited on 08.02. 2019.

the two gatherings: securing kids amid furnished clash just as youngsters related with outfitted gatherings. War and struggle leave populaces of individuals powerless against extraordinary types of viciousness. Kids are influenced by this separate of assurance frameworks. They are powerless against assault, snatching, detachment from their families, inabilities and intolerable wounds, and long haul psycho social impacts. Kids in strife zones are at a hazard for ailment, relocation and demise. Kids live in the helpless age and as they do have no physical and mental capacity to pass judgment on the best way to escape from struggle regions, they ought to be given the most extreme need of security under rule of qualification. A large number of kids move over the worldwide outskirts escaping from savagery and struggle, fiasco or neediness in quest for better.

#### **Children: First Priority under the Rule**

Children move along and face especially grave dangers. In parts of the world, the quantity of youngsters proceeding onward their own has soar. On the perilous Central Mediterranean Sea Passage from North Africa to Europe, 92% of kids who landed in Italy in 2016 and the initial two months of 2017 were went with up from 75% in 2015. No less than 3,00,000 unaccompanied and isolated youngsters moving crosswise over outskirts were enrolled in 80 nations in 2015-2016, which is a close fivefold increment from 66,000 out of 2010-2011. The all-out number of unaccompanied and isolated kids moving is likely a lot higher.<sup>12</sup>

Youthful colleagues living in nations influenced by outfitted clash have been misfortunes of wide infringement in 2016, as recorded in the Secretary-General's Annual Report on Children and Armed Conflict. The disturbing scale and truth of infringement against young people in 2016, including amazing segments of butchering and misshaping, use and renouncement of empathetic access, is a genuine worry for the Secretary-General. Teenagers from nations, drive forward through a prohibited part of infringement by social events to hardship, with under 4,000 attested infringement displayed by Government forces and more than 11,500 by non-State equipped parties in the 20 nation conditions canvassed in the report. Control of young people by government controls or equipped get-togethers has

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<sup>12</sup> Groje, "A Child is a child"(UNICEF, New York) p.6, available at: [https://www.unicef.org/publications/files/UNICEF\\_A\\_child\\_is\\_a\\_child\\_May\\_2017\\_EN.pdf](https://www.unicef.org/publications/files/UNICEF_A_child_is_a_child_May_2017_EN.pdf), last cited on 8.02. 2019.

likewise been boundless amidst the announcing time portion uniting into Afghanistan, DRC, Iraq, Israel and State of Palestine, Libya, Nigeria and Somalia. The report underscored that children ought to be overseen basically as abused people, not as liable gatherings, and that comprehensive adolescent esteem measures ought to apply.

#### **a. Psychological Impact of Violence**

War influences youngsters in huge numbers of a similar ways that it influences grown-ups. There are, in any case, explicit impacts on youngsters. Right off the bat, youngsters' entrance to the consideration, compassion, and consideration of grown-ups who adore them is frequently confined or non-existent. In the midst of war, the loss of guardians, the partition from guardians, the guardians' outrageous distraction with verifying and finding subsistence for the family, and the energetic detachment of debilitated or involved gatekeepers lead to noteworthy and visit disturbance in their connections. Sometimes, youngsters might be in substitute or brief consideration with somebody who has constrained associations or recognition with them (far off relatives or neighbours, a shelter). Kids between the ages of 12-18, having had more years presented to rough clash, battle to recoup from long stretches of intensifying injuries. Many war-influenced kids lose all grown-up assurance and move toward becoming in the displaced person. This separation from their precious ones at the time of childish prompts negative mental effect. The manner by which kids react to the worry of outfitted clash will rely upon their own specific conditions. These incorporate individual factors, for example, age, sex, identity type, individual and family ancestry and social foundation. Different elements will be connected to the idea of the horrible accident, including their recurrence and the length of the presentation. Youngsters who experience the ill effects of pressure show a wide scope of indications including expanded detachment nervousness and formative deferrals. Aside from them, sleep unsettling influences and bad dreams, absence of hunger, pulled back conduct, absence of enthusiasm for play, and in more youthful youngsters learning challenges happen. In other kids and teenagers, reactions to stress can incorporate on edge or forceful conduct and despondency.

Youngsters do take such pressure transformed into passionate weight till their adulthood which winds up in a negative way. A sentiment of vengeance dependably remains in them and for which they pick a wrong way to render retribution or some other method to overlook that misfortune. They do entertain themselves into wrong acts, for example, taking medications, wind up addictive to other alcoholic substance and furthermore turned out to be progressively inclined to criminal exercises. In fact, the PTSD of such war has similarly found in those youths after delayed stretch of time since the war happened. As demonstrated by the WHO, the larger section a million children in Iraq may require clinical help, including psychotherapy.<sup>13</sup>

#### **b. Child Rights Violation**

Net human rights infringement happens when kids are not oppressed under insurance.

They are denied of the major and essential rights. Today, one of every four kids live in a nation influenced by strife or catastrophe, and 2017 saw an expansive increment in the quantity of recorded infringement against youngsters in these zones. Amid struggle, essential administrations like water, wellbeing and instruction, just as family wages, are altogether affected.<sup>14</sup> Amid clashes and post-strife circumstances, youngsters are the most influenced by savagery. A large number of them lose their families and others are isolated from their relatives in their dislodging. Their danger of enduring grave human rights infringement is unimaginably high. Regardless of their identity and where they originate from, the infringement and maltreatment against these youngsters must stop.

#### **i. Rights to Medical and Proper Health Facility**

Nourishment, well-being and haven, being the most vital need at the season of contention. The impact of furnished clash on tyke improvement aggregate and communicate with one another. The phase of physical, mental, intellectual and good improvement that a tyke has come to specifically influences his or her capacity to adapt to these effects. Steady with Article 39 of *the Convention on the Rights*

<sup>13</sup> Ibid.

<sup>14</sup> Unicef.org, *Fighting for the rights of children in armed conflict*, available at: <https://www.unicef.org/stories/fighting-rights-children-armed-conflict>, last cited on 9.02. 2019.

*of the youngster* that puts commitment on the state to advance the physical and physiological recuperation and social reconciliation of the influenced kids. The interference of sustenance supplies, demolition of nourishment crops, annihilation of wellbeing administrations and absence of water and sanitation offices take an overwhelming toll on kids. They experience the ill effects of hunger, intense and unending ailments, diseases from the inaccessibility of such administrations.

A large number of the present clashes occur in a portion of the world's most unfortunate nations, where youngsters are as of now defenceless against ailing health and illness and the beginning of equipped clash expands passing rates up to 24 times. All youngsters are in danger when clashes break out, yet, the most powerless are the individuals who are as of now malnourished.

#### **ii. Right to Education**

"Training is a human right and an open decent and schools and colleges ought to be places where educating and learning can happen in safe conditions," said van Leeuwen. Training is viewed as the fundamental directly of a tyke. With no training, the youngster isn't finished and the person can't stand anyplace on the planet. Instruction makes individuals right and draw them from doing wrongs.

The youngsters are qualified for all rights ensured, for example, directly of instruction by the famous traditions of Human Rights and the different pledges that have created from it. Training is characterized as a basic human right which is reaffirmed by reference to instruments of global law, for example, UDHR (1948) and *the United Nations Convention on the Rights of the Kid* (1989). The directly to instruction is viewed as official under all conditions and to be ensured in all circumstances including emergencies and crises coming about because of common furnished clash (Pigozzi, 1998). Article 28 of *the Convention on the Rights of the Youngster* underlines the directly to instruction and the Article 29 expresses that training ought to build up the kid's identity, gifts, mental and physical capacities to their fullest potential. Instruction is especially critical on occasion of furnished clash. The affected youngsters can profit by their educators who can screen their physical and their mental change. In addition, they will get an opportunity to blend with their new companions and make the most of their help and support. Instructors

can grow new abilities and learning require for survival, mine mindfulness, critical thinking and data about different medical problems.<sup>15</sup>

### iii. More Prone to Exploitation

All kids because of their age are viewed as in danger for misuse, savagery and disregard. In any case, defencelessness can't be characterized essentially by age. In spite of the fact that age is one segment, vulnerability is additionally estimated by the youngster's capacity for self-assurance. The issue that emerges is youngsters are not equipped for securing themselves. A youngster's defencelessness originates from different variables that frustrate a kid's capacity to work and develop typically. Consequently, self-insurance is increasingly about the capacity of the youngster to have a sound existence inside a kid security framework that is simply the capacity to shield or get assistance from individuals who can give assurance. They are weak and exposed. All through the ages, kids have been utilized and mishandled from numerous points of view – from shabby work to oppression, mutilating, torment, assault and murder.

Assault and rape are massively under-revealed aspect of contention, as in actuality it is outside of contention settings. Sexual brutality against the two grown-ups and youngsters has been utilized as a strategy war over all landmasses, from Afghanistan to Syria to Colombia to Myanmar and the Central African Republic. The patterns and numbers recognized here are probably going to be noteworthy and think little of the truth. The Sexual Violence in Armed Conflict (SVAC) information base, which incorporates assault, sexual bondage, constrained prostitution, constrained pregnancy, constrained disinfection/premature birth, sexual mutilation and sexual torment, demonstrates that all-inclusive approximately 35 % of contentions included a few types of sexual brutality against kids between 1989 and 2009, yet the genuine numbers are probably going to be higher.<sup>16</sup> Child labour was an issue in Syria before the war, however, the philanthropic emergency that followed has exacerbated the issue. Regardless of whether in Syria or in neighbouring nations, youngsters are currently compelled to work in conditions that are rationally, physically, and socially unsafe situations. In Syria, youngsters (a

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<sup>15</sup> *Ibid.*

<sup>16</sup> H.Thorning-Schmedt, "The War on Children" *Save The Children International* (2018).

large portion of them young men) are persuasively enrolled and utilized as fighters by all gatherings of the contention, regularly without the assent of their folks, and half of them being younger than 15 years of age. These youngsters have a functioning influence in the battling and can be utilized to kill, now and again being allocated assignments that jeopardize their lives. Since 2014, there has been an expansion in the quantity of announced instances of sexual savagery sustained by psychological militant gatherings, specifically ISIL. In August 2014, ISIL snatched several Yazidi ladies and young ladies from Sinjar, in northern Iraq. A portion of these ladies and young ladies were taken to Syria and sold into sexual subjection. In Bekaa Valley, Lebanon packs are accounted for to abuse displaced persons, ladies and youngsters.<sup>17</sup> Around 1,80,000 Syrian exile kids in Lebanon have been constrained into tyke work.<sup>18</sup> In Syria, children who are not ready to sustain themselves are being compelled to move their organs at an extremely high cost. For the most part, these occurrences occur in Lebanon where the general population from Syria fled to Lebanon as outcasts. Displaced person and transient pirating have turned out to be progressively common as an immediate aftereffect of the war.

#### iv. Reconstruction is Difficult

Loosing family, companions and chiefly father and mother is the most exceedingly awful involvement in a tyke's life. The effects of this lose stays till his or her life time. It is a sentiment of blame that dependably stays with the kid. Overlooking everything and beginning another life is a most exceedingly terrible test that a kid can confront. No help at this age will affect the tyke more. At this age, individuals are hesitant to acknowledge and bolster these kids. There are a colossal number of predators moving out that preys on such delicate matured kid. It winds up incomprehensible for them to return to a decent condition in the event that they couldn't get such help and love from others. The present world is loaded with such youngsters, however, not many are there who ventures forward to acknowledge these kids to instruct them, feed them, support and urge them to

<sup>17</sup> P.Sinha, "Children of Syria –Humanium", available at: <https://www.humanium.org/en/syria/>, last visited on 10.02. 2019.

<sup>18</sup> L.Khoury, "*Special report: 180,000 young Syrian Refugees are being forced into Child Labour in Lebanon*" (2015), available at: <https://www.vox.com/world/2017/7/24/15991466/syria-refugees-child-labor-lebanon/>, last visited on 10.02. 2019.

have another existence. After loads of negative mental impact, it takes an enormous measure of guts to carry on with another life for a grown-up then in what capacity can a youngster do it? Henceforth, they need all the more help and help for such remaking which is troublesome at the mental, physical and affordable dimension. Youngsters are once in a while referenced in remaking designs or harmony understandings, yet kids must be at a focal point of modifying. However, there are programs structured amid recreation can establish framework for kid insurance and can improve social foundation. Remaking dependably need not mean coming back to the manner in which things were, however, can offer chances to jump into future as opposed to pursue a moderate yet consistent way of advancement. Kids with incapacities, kids living or working in the lanes and who are in establishments because of contention ought to end up some portion of this program. Appropriate guide and clinician ought to be designated for their recreation plan.

### **Conclusion**

People in a general public where individuals are vital than material, where kids are valuable. Kids improve the general public. The impact of war on youngsters has been overpowered and inconceivable however this can be levelled out. The activists must be advised and taught about the global law that oversees the outfitted clashes and their confinements and guidelines like the rule of refinement. The Universal Humanitarian Law must centre youngsters as the particular topic to manage. In addition, it is basic that we perceive that these youngsters are all the more frequently unimaginably flexible and have an extraordinary want to endure and flourish. They need the correct condition, appropriate assurance, care and backing. When they experience such amazing condition after such colossal demolition, they recuperate, recoup and conquer the genuine troubles. In spite of the fact that it is trying to put a conclusion to clashes, UN part states do be able to scale up the helpful help offered to youngsters experiencing immediate and aberrant assaults. The universal network ought to desperately put resources into assurance programs and in an incorporated methodology towards emotional wellness and mental help for kids. Let these sprouting fowls to proceed with their life gently, they need love not scorn. The brutality against them needs to stop or else one day they will advance to render retribution for what annihilation struck them.



## DELHI SMOG AND CHILD'S RIGHT: A FUTURE PERSPECTIVE

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-Mr. Akshay Bohra\*

### Abstract

*The Constitution of India envisages right to life and personal liberty as fundamental right, the proposition of law is backed by International Conventions; the basic rights of children include viable nurture, health, environmental health and pollution free air. The increase in pollution and heavy smog in the capital of India is alarming and infringing children's right to healthy environment. The article is an attempt to understand the present situation of violation of right to health and discusses the similar incidents and steps taken to curb pollution by Ministry of Environment, Forest and Climate Change. The article also gives a note on the judicial response to the environmental issues and reflects on effective implementation of legislations to save the future generations from environmental pollution in Delhi.*

**Key Words:** Delhi Smog, Pollution and Children's Right to Health.

### Introduction

The basic rights of children include viable nurture, health, environmental health, pollution free air. The present situation of Delhi is very harmful for every living being residing there. As per the article 24 of *Convention on Right of Child* which places a high value on the children's right to survival,

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\* 2<sup>nd</sup> Year Student of Law at NLU&JA, Assam.

“Children have the right to good quality health care, to safe drinking water, nutritious food, a clean and safe environment, and information to help them stay healthy.”

Children are the future of the nation and it's hard for them to sustain in this situation. Current scenario in the capital city and in other areas is very severe. Heavy fog and pollution surrounding the capital city, infringes the basic right of children and also, smog reduces the life expectancy of every child by 8 years.

“Right to life” the connotation as secured by Article 21 of *the Indian Constitution* includes a person's right of not being killed or murdered by anyone. The present situation of the Indian capital is harsh for the upcoming generation who is going to lead the future. The basic and also Fundamental Right of not only children but every being residing in India is to live in a wholesome healthy environment, free from pollution and the present situation of Delhi seems to be violating the same set of rights. In addition, research shows that air pollution has potential to lower children's intelligence quotient and increase the risks of autism, epilepsy, diabetes and even Adult onset diseases like multiple sclerosis.<sup>1</sup> Adults have reduced lung capacity, headaches, sore throats, coughs, fatigue, and early deaths as a cause of unhealthy air quality. The child's right to life also comes through the necessity of assuring that children have the possibility to grow and develop under favourable conditions.

The existence of life on earth could only become possible because of harmonious relation between ecology and the human environment. People are at the centre of concerns for sustainable development and a healthy and productive life in harmony with nature. With the rapid acceleration of science and technology, there are numerous ways to achieve an unprecedented scale; but the ability to transform the environment has reached a level. Humanity's ability to transform his surroundings, if used wisely all people have an opportunity to improve the quality of life.

The natural environment is dependent not only upon the ecosystem but also upon people. There are many, who were living in Paris or Washington or even

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<sup>1</sup> Pankaj Jaiminy, “Smog In The Air: How To Safeguard You And Your Family”, *Businessworld*, 24 Mar. 19,

the urban rich may be under the illusion that modern technology buffered by properties.<sup>2</sup> But the practical reality is in the absence of healthy ecological conditions people will suffer. For example, in the most Industrializing cities in the world, millions of people of all classes are suffering from the lung and skin diseases, water-borne diseases, and congenital abnormalities infected from their food and water toxics, which is hundreds of kilometers away from the origin may be.

*The Constitution of India* gives various rights which are included in respective Articles that prohibits the deprivation of the given rights except in accordance to an established procedure fixed by law. Article 21 is one among them consist of rights in a single domain corresponds to *the American Constitution's* Magna Carta of 1215, the Fifth Amendment, Article 40(4) of *the Constitution of Eire 1937*, and Article XXXI of *the Constitution of Japan, 1946*.

The applicability of Article 21 is wider as it applies to natural persons. This right is an absolute right as it is available to every person, citizen or alien. Thus, even a foreigner can claim this right. It, however, does not entitle an alien the right to reside and settle in India, as mentioned in Article 19 (1) (e).

#### **Right to Get Pollution Free Water and Air**

In the leading case of *Subhas Kumar v. State of Bihar*, it was held that a Public Interest Litigation(PIL) is maintainable for insuring the enjoyment of pollution free water and air which consisting in 'right to live' under Article 21 of *the Constitution*. In the case the court observed that

“Right to live is a fundamental right under Article 21 of *the Constitution* and it includes the right of enjoyment of pollution free water and air for full enjoyment of life. If anything endangers or impairs that quality of life in derogation of laws, a citizen has right to have recourse to Article 32 of *the Indian Constitution* for removing the pollution of water or air which may be detrimental to the quality of life.”

In this case court recognised that the right to wholesome environment is part of the fundamental right to life. This case also indicated that the municipalities

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<sup>2</sup> V.N. Shukla, *Constitution of India* (Eastern Book Company, Lucknow, 1998) pp. A-50 to A-51.

and a large number of other concerned governmental offices could no longer rest with unimplemented measures for the abatement and prevention of pollution. They may be bound to take positive steps to improve the environment.<sup>3</sup>

### **Right to Clean Environment**

The "Right to Life" under Article 21 means a life full of dignity to live in a proper environment which is free from the dangers of diseases and also infection. Maintenance of mental and physical health, preservation of the proper sanitation and environment have been held to fall within the purview of Article 21 as it adversely affects the life of the citizens and it amounts to slow poisoning and reducing the life of the citizens because of the hazards created if not checked. Thus it is very important to take proper care and cautions while creating implementable measurements.

*The Constitution (Forty Second Amendment) Act, 1976*, shifted certain aspects to the concurrent list, more particularly the protection of forests and wildlife, from seventh Schedule and inserted specific provisions in Part IV<sup>4</sup> and IVA<sup>5</sup> of the *Constitution*.

### **Article 21 and Right to Pollution Free Environment**

In recent years, some remarkable judicial pronouncements have been derived from Article 21 of *the Constitution*, *i.e.*, the right to life, one of the most important articles of *the Constitution of India*. It envisages a procedure established by law and any person of his life or personal liberty except deprived of that goal. Here, the right to life, right to pollution-free environment, *etc.* simple words, the right food, the right to health, the right to live with human dignity, in Article 21, a person is an inbuilt guarantee.

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<sup>3</sup> Ibid.

<sup>4</sup> Part IV: Principles of State Policy Guidelines (Section 48A): the protection and development of forests and wild life and protect the constitution specifically to environmental protection and nature conservation are the following provisions: State to protect and improve the environment and to protect the country's forests and wild life shall be seeking.

<sup>5</sup> Article 51 (g): It shall be the duty of every citizen of India to protect the forests, lakes, rivers and wild life and the natural environment, including advanced, and to have compassion for living creatures.

**Laws for Environment Management**

In India, Ministry of Environment and Forest is responsible for environmental protection and conservation. Some of the important legislation covering environmental aspects are:

- I. *Water (Prevention of Pollution Report Releases and Control) Act, 1974.*
- II. *The Water (Prevention and Pollution Control of the release of the report) cess Act, 1977.*
- III. *Air (Prevention and control of pollution and the release of the report) Act, 1981.*
- IV. *Environment (Protection) Act, 1986.*
- V. *Hazardous Waste (Management and Handling) Rules, 1989 as amended in 2000.*
- VI. *Manufacture, Storage and Import of Hazardous Chemical Rules, 1989 as amended in 2000.*
- VII. *Public Liability Insurance Act, 1991.*
- VIII. *Environment Impact Assessment Notification, 1994 as the 4th of May, 1994 and April 10, 1997 has been amended on.*
- IX. *The National Environment Tribunal Act, 1995.*
- X. *Chemical Accident (Emergency Planning, Preparedness and Response) Rules 1996.*
- XI. *Biomedical Waste (Management and Handling) Rules, 1998.*
- XII. *Recycled plastics manufacture and usage rules, 1999.*
- XIII. *Fly Ash Notification, 1999.*
- XIV. *Municipal Solid Waste (Management and Handling) Rules, 2000.*
- XV. *Batteries (Management and Handling) Rules, 2001*
- XVI. *Water (Prevention and Control of Pollution) Act, 1974*

These are the other Acts, statues, regulations and codes which are enacted by the legislation of the country in order to protect various facets of environment.

Rapid rate of reduced human health due to degradation in water quality led to enactment of specific legislation in the mid-seventies, called Water Pollution (Prevention and Control) Act. This law was enacted to prevent water pollution and to maintain wholesomeness of environment. Subject to the provisions of the Act, the State Pollution Control Board (SPCB) was empowered to control any activities which amount to pollution.

The following are some of the landmark cases on environment under the ambit of Article 21:

*M. C. Mehta v. Union of India* (Vehicular Pollution Case)

The Apex Court in this case held that it is the duty of the centre and the state Governments that the air didn't become contaminated because of pollution stemming out of vehicles. The Supreme Court confirmed the right to healthy environment as basic right of human and laid down that right to clean air is stemmed from Article 21 Right to life. This judgment of the Apex Court lead to introduction of lead free petrol in Delhi and also there was complete phasing out of old commercial vehicles which were more than 5 years old.

In *M. C. Mehta v. Union of India* (2006), the Court held that the flagrant and large-scale misuse of domestic residential premises for commercial use in Delhi violated the right to salubrious and decent environment. Taking note of the problem the Court issued directives to the Government on the same.<sup>6</sup>

In *M. C. Mehta v. Union of India* (1988), the Supreme Court ordered for the closure of tanneries that were polluting water in nearby areas. The extent of which was very higher as it was contaminating the rivers and other connecting natural chains in nearby areas.<sup>7</sup>

In *M.C. Mehta v. Union of India* (1997), the case is related to the famous Indian monument which is situated in Agra and taken as a pride of India. In the case the Supreme Court issued several guideline and directions for the protection of the Taj Mahal, an ancient monument, from environmental degradation.<sup>8</sup>

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<sup>6</sup> *M.C. Mehta v. Union of India*, SC 8530, 2006.

<sup>7</sup> *M C Mehta v UOI*, AIR 1115,SCR (2) 530. 1988.

<sup>8</sup> *M C Mehta v UOI*, 9 SCC 93.1998

In *Vellore Citizens Welfare Forum v. Union of India*, the Court took cognizance of the environmental issues being caused by settled tanneries that were polluting the natural water resources such as canals, rivers, underground water and agricultural land. The Court issued several directions to deal with the problem.<sup>9</sup>

In *Milk Men Colony Vikas Samiti v. State of Rajasthan*, in this case the Supreme Court held that the right to life also includes properly cleaned surrounding which lead to healthy body and a healthy mind. It includes right to freedom from stray cattle and animals in urban areas.<sup>10</sup>

*T.N. Godavarman Thirumulpad v. Union of India*, in this case honourable Justice Y.K. Sabharwal, held that, considering the compulsions of the States and the current situation of increasing depletion of forest, legislative measures have shifted the responsibility from States to the Centre. Moreover, any threat to the ecology can lead to violation of the right of enjoyment of healthy life guaranteed under the Art 21, which is required to be protected. *The Constitution* enjoins upon this Court have a duty to protect the environment.<sup>11</sup>

*Murli S. Deora v. Union of India* in the instant case, it was pointed out by the apex court that: "Since Article 21 of *the Constitution* guarantees that no-one should be deprived of their life and personal liberty, then why should a non-smoker become the victim of the whole process? The persons not indulging in smoking cannot be compelled to or subjected to passive smoking on account of act of smokers. Right to Life under Article 21 is affected as a non-smoker may become a victim of someone smoking in a public place".<sup>12</sup>

*Rural Litigation and Environment Kendra, Dehradun v. State of Uttar Pradesh*, in this matter, the Petitioners wrote to the Supreme Court alleging that illegal limestone mining in the Mussoorie-Dehradun region which was constantly resulting in damage to the fragile eco-systems in the area. The Court treated this letter as a public interest petition under Article 32 of *the Constitution* and also

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<sup>9</sup> *Vellore Citizens Welfare Forum v. UOI*, AIR 1996 SC 2715.

<sup>10</sup> *Milk Men Colony Vikas Samiti v. State of Rajasthan*, 246 of 2007. rowther, onal Journal o11.55 PM. ronmentv nvironmental aspects are: onditions people will suffer. e sovereign or through .

<sup>11</sup> *T.N. Godavarman Thirumulpad v. UOI*, Writ petition no. 202 of 1995.

<sup>12</sup> *Murli S. Deora v. Union of India*, Writ no. 316 of 1999 (2001).

appointed several committees for the full inspection of illegal mining sites. All the committees came at the conclusion that only those lime stone quarries whose adverse effects are very less, should be allowed to operate but that too after further inspection and all. Therefore, the Court ordered during trial to the closure of a number of limestone quarries. Though the Court did not mention any violation of fundamental right explicitly but ad impliedly admitted the adverse effects to the life of people residing in the nearby locality.<sup>13</sup>

Landmark judgment in *M. C. Mehta v. State of Tamil Nadu*, Court held that the children below 14 years of age, are prohibited from working in the dangerous industry, mine, or another industrial establishment. In a Public litigation under Art 32 of *the Constitution*, a public-spirited lawyer Mr. M. C. Mehta brought to court the Sivakasi cracker factory case involved the working of minor children in this factory.<sup>14</sup>

So in the above article, under the full protection of the fundamental rights of children, it is quite clear that - The guardians of the law regarding the rights of children are very shallow. After going through all the cases we see that perhaps, at that time of framing of *the Indian Constitution* environment was not given much significance. However, in fact it contained only a few Directives to the State on some aspects relating to public health, agriculture and animal husbandry. These Directives were and are still not judicially enforceable<sup>15</sup>. Some of the Directive Principles of State Policy showed a slight inclination towards environmental protection *i.e.*, Article 39(b), Article 47, Article 48 and Article 49 individually and collectively impose a duty on every single State to create conditions that guaranteed to improve the general health level in the country as well as to protect and improve the natural environment. Later through various constitutional amendment two specific provisions *i.e.*, Article 48-A & Article 51-A(g) were included which imposes

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<sup>13</sup> *Rural Litigation and Environment Kendra, Dehradun v. State of Uttar Pradesh*, AIR 359, 1987 SCR (1) 641, 1987.

<sup>14</sup> *M C Mehta v. State of Tamil Nadu*, AIR 1997 SC 699, (1996) 6 SCC 756, 1997.

<sup>15</sup> Daniel Augenstein, Study of the Legal Framework on Human Rights and the Environment Applicable to the European Enterprises operating outside the European Union, The University of Edinburgh.

duty on state as well as the citizens of the state to protect and conserve the natural environment to ensure proper mental and physical health.

### **Bhopal Gas Tragedy Ambit of Ignorance and Consequences**

The Bhopal disaster is a devastating scenario in the pages of history which took place in the early morning hours of 4 December, 1984 is undoubtedly the worst industrial accident in timeline. A highly toxic chemical namely methylisocyanate escaped from the Union Carbide India Limited plant in Bhopal four thousand died a terrible death and many were crippled for life.<sup>16</sup> The survivors of this disaster are still struggling for their lives, dignity, compensatory relief and rehabilitation. There is also uncertainty about the long-term effects of the gas exposure on the victims. Besides total or partial human disablement there was loss of cattle, vegetation, work hours. The disaster led to general impoverishment and community disruption.<sup>17</sup> The over-all impact of this disaster on the general environment is yet to be assessed. This tragic accident has raised several issues of immense significance and questions such as:

- ◆ Whether the present laws are inadequate to control future Bhopals ?
- ◆ What should be the safety arrangements in industries producing toxic substances ?
- ◆ Whether international law has developed sufficient legal mechanism to control Bhopal type mass environmental disasters ?

The Bhopal disaster has also raised serious questions respecting unregulated industrialisation in developing countries, inadequate licensing policies, faulty industrial planning, the complicity of government officials, the absence of strict corporate accountability, weaknesses of national statutes and the lack of relevant and appropriate information.<sup>18</sup>

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<sup>16</sup> Edward Broughton, The Bhopal disaster and its aftermath: A review, *Environmental Health: A Global Access Science Source*, 10 May, 2005.

<sup>17</sup> <http://www.scribd.com/doc/55412373/Bhopal-Gas-Tragedy-Project>, last cited on 5th Feb 2019.

<sup>18</sup> Harnabdeeo Singh and Arvind Rehalia, "Bhopal Gas Tragedy" 2(6) *International Journal of Advanced Engineering Research and Application* (2006).

A common approach to this problem is the comparison of disease frequencies across two or more groups with differing levels of estimated exposure and the establishment, in this way, of an exposure-response relationship. A number of the studies cited above have employed this technique. A higher prevalence of respiratory symptoms has been described among those resident less than two kilometres from the factory at the time of the disaster and an increased frequency of obstructive changes on spirometry has been reported in this group, although this is not consistent with published figures. Another study categorised the subjects into three groups of estimated exposure, again based on distance of residence from the plant, but unfortunately failed to correlate this with morbidity. On the other hand, another study reported findings from an unusually elaborate and carefully followed cohort of survivors, sampled using a cluster technique and comprising eight exposed and two non-exposed groups. Although this study aimed primarily to examine ophthalmic outcomes, some information on respiratory disease three years after the disaster is available. Reported symptoms of breathlessness, cough and chest pain were each more common across three categories of estimated exposure, although the trend was statistically significant only for the first of these. The gradients were not explained by differences in cigarette smoking. No measurements of lung function were made, and it remains possible that the findings were influenced by differential reporting across the exposure gradient. Irritant eye symptoms and the reported frequency of eye infections showed similar findings. Broncho alveolar lavage was carried out in 36 exposed survivors, and demonstrated a trend of increasing (macrophage) cellularity across three categories of self-reported exposure intensity. Again, no functional measurements were made and the clinical implications of the findings of this study are unclear.

According to the ICMR report, in addition to eye and respiratory problems, they suffered from multi organ involvement, coma, gastrointestinal disturbances, lesions in the central nervous system, psychological trauma, and retarded intra-uterine growth of babies born to gas exposed mothers.<sup>19</sup> Industrial Toxicological Research Centre has detected evidence of damaged immune systems in survivors

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<sup>19</sup> David Crowther and Renu Jatana, *Corporate Social Responsibility Theory and Practice with Case Studies*, (Deep & Deep Publication Pvt. Ltd. New Delhi).

making them vulnerable to infections. Dr. Krishna Murthy, Chairman, Scientific Commission on Bhopal opined in 1987 that babies of gas victims may suffer from genetic defects. According to Medico Friend Circle gas exposer caused more abortions.<sup>20</sup> Infants were most affected victims with death rate of 33 per thousand. Gas affected patients also suffered compensatory elevation of the haemoglobin level. There were neurological manifestations like hearing loss, tremors and vertigo. Large number of people suffered from mental disorders like neurotic depression. There were more instances of spontaneous abortions, still birth rate and new born with congenital malformations.<sup>21</sup>

#### ***Parens Patriae and Bhopal Act***

The Bhopal Gas Leak disaster affected a large number of people. Since complex technical and legal issues were involved, it was not easy for every victim to file a separate claim. Thus the Central Government was to take the role of *parens patriae*. This was done through the instrumentality of *the Bhopal Act*. *The Bhopal Act* aimed to ensure that claims arising out of or connected with the Bhopal Gas Leak Disaster were dealt with speedily, effectively, equitably and to the best advantage of the claimants and for matters incidental thereto. The Act confers the Central Government the exclusive right to, represent, and act in place of (whether within and outside India) every person who has made, or is entitled to make, a claim for all purposes connected with such claim. This general power included institution or withdrawal of any suit or entering into a compromise. The Act substituted the Central Government as the statutory agent of the claimants. But Section 4 of the Act puts some limitation, by giving claimants the right to be represented by a legal practitioner. The Central Government's power to represent and act for the claimant is not unlimited. While taking any action, Government will have to act to the best advantage of the claimant. If the Government compromises,

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<sup>20</sup> Management in India", Water Global Common and Global Problems, 2006.

<sup>21</sup> CSR Surinder Kumar, "A Condition Precedent for Appropriate Response in Case of Industrial Disaster," *Proceedings of International Conference on CSR and Industrial Disasters*, (Bhopal, 2009).

contrary to the best advantage of the claimant, this will be against the mandates of the Act. If it is proved that the Government has paid due regard to the relevant considerations and acted in good faith towards securing the best advantages of the claimants, the requirements of the Act would be satisfied.<sup>22</sup>

In *Charanlal Sahu v. Union of India*<sup>23</sup> the Supreme Court defined the *parens patriae*<sup>24</sup> theory as the obligation of the state to protect and take into custody the rights and the privileges of its citizens for discharging its obligations. The Court said that *the Indian Constitution* makes it imperative for the state to secure to all its citizens the rights guaranteed by *the Constitution*.

### The Judicial Verdict

The Bhopal Act virtually divested the victims of all standing to sue and its constitutionality was challenged before the Supreme Court in *Charanlal Sahu v. Union of India*. The Supreme Court while declaring the Act as constitutionally valid, gave its opinion on different issues involved. It declared that the taking over the claims of victims by the Government was not illegal. It also said that the victims have been divested of their standing because the victims were disabled. According to the court, the Bhopal victims could not be considered to be any match to the multinational companies or in a position by themselves to look after their own interest effectively. It further added, that in the prevailing situations they needed the state's protection to assert, establish and maintain their rights against the wrong doers in this mass disaster.

Under Articles 39, 47 and 48 of Part IV of *the Constitution*, legislative enactments food safety law, labour law and environmental law and many others have been made and implemented in factories, large-scale industrial enterprises and mines, people employed in the health of women and children for protecting human health and environment. The right to health has been recognized by the Supreme Court under Article 21 as a different indivisible right.<sup>25</sup>

<sup>22</sup> [http://lawprofessors.typepad.com/mass\\_tort\\_litigation/2007/12/bhopal-revisite.html](http://lawprofessors.typepad.com/mass_tort_litigation/2007/12/bhopal-revisite.html), last cited on 5<sup>th</sup> Feb 2019.

<sup>23</sup> AIR 1990 S.C.1480

<sup>24</sup> *Parens patriae* is the important power and authority of a legislature to provide protection to the person and property of persons *non sui juris*, such as minor, insane and incompetent persons.

<sup>25</sup> "The Bhopal Catastrophe: Politics, Conspiracy and Betrayal", *Economic and Political Weekly*, (26<sup>th</sup> June 2010) pp 68- 75.

Justice Ranganath Mishra observed that Article 21 of *the Constitution* guarantees the right to life and assured citizens the opportunity to live a good life with a guarantee to cover the defined disease, and the usual expectation longevity treatment, which is included in the ambit of life.

### **Conclusion**

Child right are one of the integral facets of human right. The rights discussed till date are dealing with the direct physical intervention in their right but the unveil side of generation or transitional infringement and causal relationship whose effects are still harming the core structure of health are ignored by the academicians. Advancement in the new aspects of the environment linked with human health must be consider as the need of the hour. If the pollution level in the metropolitan continue to be the same it will endanger the life span and health of individuals. Legislation and implementation must focus on some urgent solution to the problem to save the mankind and future generation.



## SEXUAL HARASSMENTS AND RAPES

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Mr. Rohit Gupta\*

### Abstract

*The offence of child rape and sexual harassment are offences that violate human rights. It is reported that India is ranked 7<sup>th</sup> worst country in the crime of rapes against minor. These observations are unhealthy indications in a civilised society. The article notes series of incidents of sexual harassments, child rape and some instances of murder. The author also attempted to address on the inadequacy in the Indian Penal Code and response of Indian Judiciary to curb the evil of sexual harassment and rapes of minor and steps incorporated by the State to improve the conditions of children.*

**Key Words:** Sexual Harassment, Child Rape and *The Indian Penal Code*.

### Introduction

India has been ranked 7<sup>th</sup> worst country for crime of rapes against minors.<sup>1</sup> The following cases are related to a few recent incidents which shook the whole nation.

#### **Chennai Rape Case, 2018:<sup>2</sup>**

On 16<sup>th</sup> July 2018, an 11-year-old child was sexually assaulted by multiple people at a gated community in the *Ayanavaram* area. In total 17 alleged

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\* 1<sup>st</sup> Year, Teachers Law college, Bengaluru

<sup>1</sup> [https://en.wikipedia.org/wiki/Rape\\_in\\_India](https://en.wikipedia.org/wiki/Rape_in_India).

<sup>2</sup> <https://www.thenewsminute.com/article/shocked-silence-simmering-rage-chennai-gated-community-grapples-Child-rape-case-84940>.

perpetrators (up to 66 years of age, a liftman) including many security guards in their twenties were arrested by the All Women's Police station in the locality. Shock swept across the city over the sheer impunity of the crime.

The victim lived in a gated community having at least 350 houses in many blocks. Earlier a liftman regularly harassed her when she came from school. This man later invited many other security guards and other employees of the society. They have been sexually harassing her for 7 months. They also blackmailed her by making her video and showing it to her. The crime was disclosed by the victim to her elder sister when the latter came home from another city. Then they all approached the police.

After investigation many other incidents came to light:

- a. The minor was threatened at knife point too.
- b. A few of them used to rape her, others used to fondle her during the act.
- c. Some of the accused used to sexually harass her and others used to make video.
- d. Rajeshwari, Inspector (Law and Order) from the *Ayanavaram* station was the investigating officer. She arrested 17 men. "This is the worst crime this world has seen yet, as far as I am concerned. They are all guilty because not one of them tried to stop this brutality. They will all be punished," she declared angrily.

The accused were charged under section 6 (punishment for aggravated penetrative sexual assault), 10 (punishment for aggravated sexual assault) and 12 (punishment for sexual harassment upon a child) of the *POCSO Act* and sections 307 (attempt to murder) and 506 (punishment for criminal intimidation) of the Indian Penal Code.<sup>3</sup>

#### **Kathua Rape Case, 2018:<sup>4</sup>**

An 8-year-old girl, Asifa Bano was abducted, raped and murdered. The trial for the murder and rape case began in Jammu and Kashmir on 16 April 2018

<sup>3</sup> *Ibid.*

<sup>4</sup> [https://www.business-standard.com/article/pti-stories/sc-seeks-j-k-govt-s-reply-on-alleged-custodial-torture-of-kathua-case-witness-118080800924\\_1.html](https://www.business-standard.com/article/pti-stories/sc-seeks-j-k-govt-s-reply-on-alleged-custodial-torture-of-kathua-case-witness-118080800924_1.html).

before the Principal Sessions Court judge, Kathua. The second hearing was scheduled for 28 April 2018. The Supreme Court sought a response from the Jammu and Kashmir government regarding shifting the trial to Chandigarh by 27 April 2018. A demand by Bhim Singh, leader of the Panthers Party, for an independent inquiry by the CBI was heard and denied by the Supreme Court of India.

On 7<sup>th</sup> May 2018, the Supreme Court of India shifted the case from Jammu and Kashmir to Pathankot. The Supreme Court instructed the trial to be fast-tracked. The trial is closed to the public and press according to orders from the Supreme Court. The trial also is being held in-camera as per instructions from the Supreme Court.

The trial is being held under *the Ranbir Penal Code*, according to laws in Jammu and Kashmir. In April, 2018 an ordinance was passed by India's cabinet that offenders who rape girls under 12 may now be subject to the death penalty in India after a nationwide furor over the rape and killing of an 8-year-old girl in Kathua.

- a. After this case, the Government approved an amendment to the law protecting children from sexual offenses:
- b. The minimum penalty for the gang rape of a child under 12 was set to life imprisonment or death;

The minimum penalty for the rape of a child to 20 years was set up to a maximum sentence of life or death.

- c. The new law also doubled, to 20 years, the minimum punishment for the rape of a child under 16.
- d. The new ordinance also called for rape cases to be investigated within two months and trials to be concluded in the same span, as well as for new forensic labs and fast-track courts to be added.

The Indian Nobel laureate Kailash Satyarthi called rape and child sexual abuse in India a "national emergency," with 1,00,000 such cases pending in courts.<sup>5</sup>

<sup>5</sup> [https://www.washingtonpost.com/world/asia\\_pacific/india-institutes-death-penalty-for-child-rape-in-wake-of-8-year-olds-brutal-death/2018/04/21/0d5c0ba2-4578-11e8-b2dc-b0a403e4720a\\_story.html...](https://www.washingtonpost.com/world/asia_pacific/india-institutes-death-penalty-for-child-rape-in-wake-of-8-year-olds-brutal-death/2018/04/21/0d5c0ba2-4578-11e8-b2dc-b0a403e4720a_story.html...)

Kathua rape case became extremely political and polarized due to Hindu-Muslim accused-victim case.

**UP Rape Case, 2017:<sup>6</sup>**

A 16-year-old girl was allegedly raped by a legislator of Uttar Pradesh. Victim attempted to immolate herself near the CM's residence to protest inaction by the police. Next day her father was beaten by people and he died in a government hospital. Finally her case was registered on April 12, 2018. The accused was charged under many sections of POCSO, many police officers were suspended for negligence and collusion.

The Kerala Police had registered 1,101 cases of child rape in 2017 while the total number of child rape cases in the State in 2008 was 215.<sup>7</sup>

India has one of the highest number of laws to protect children against sexual harassment and rapes. Yet the number of cases of child rape, gang rape of minors, sexual harassment of children is one of the highest in India.

Sadly, a large number of sexual assault cases are not reported due the following reasons:

Sometimes there is lack of awareness among parents. Parents are not able to take preventive actions. They do not notice the change in behavior of child victim. Or they think that the child's reaction is due to other academic problems or it is an excuse.

Rape is considered a social stigma. Due to social embarrassment the guardians do not report the case and try to hide the information. If the accused is a very powerful person e.g. a politician, a bureaucrat, a very rich person etc. then the cases are not reported due to fear or gratitude. It's more common in towns and villages.

Police is, most of the times, not cooperative. Even if a case is reported to police, instead of taking action police try to take advantage of it.

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<sup>6</sup> <https://www.aljazeera.com/indepth/opinion/child-rape-cases-shook-indian-politics-180416091103385.html>.

<sup>7</sup> <https://www.dailypioneer.com/2018/india/shocking-rise-in-child-rape-cases-in-kerala.html>.

The main reasons for such a large number of sexual assault crimes against minors are given below:

- a. There are so many laws for children for their protection and security. However the Government has not developed a system for safety of children. This leads to a crime unnoticed or difficult to prove. We have the cure, not the prevention. For the prevention of crime all those places where children study or play or spend some time must have CCTV surveillance, crime against children must be reported to, investigated by and tried by a separate special team having at least 50% women.
- b. An atmosphere of crime is developed where there is negligence, lack of transparency and lack of control of public authorities. Many institutes are started by great scholars and social activist. Over the time when institutes expand and grow, number of people working there increase, control and surveillance by founders decreases. First, one person in the institute dares to commit a crime. If he is successful, he repeats it. Then either he invites more people to commit the same or similar crime. Or else other people who were earlier more or less apprehensive of consequences of the crime now become more confident of committing the crime. As more people join hands to commit a crime, the crime increases exponentially. Slowly they all try to take Police in confidence or prepare some other safeguards for themselves. Finally the whole system becomes corrupt and it becomes extremely difficult to expose the criminals. Transparency is the key to a clean society. Special teams working against child rape and harassment must have authority to inspect an institute, apartment, government rehabilitation centers, NGOs, hospitals etc. an any time.
- c. Obscenity and vulgarity in entertainment channels, multimedia, internet and advertisements arouse a large number population. Obscenity and vulgarity has increased by many fold during last 2 decades and more than that ways to spread their sources have increased dramatically during last 1 decade. Today almost everything is available in YouTube to watch. There are thousands of pornographic websites available. People from the age of 14-15 years start having the need of sex. A few of them have sex with

consensus. A considerable number of them are able to control their hunger being from civilized and cultured family or knowing the consequences of rape and forced sex. A few of them get access to sex workers. A large number of them start looking for sex by force. Somehow they do not have sufficient fear of law or they feel that they can escape. Paid sex is a crime in India. Consensual sex is not a crime under certain conditions. Making the paid sex legal is a big question of debate. Those who oppose the idea of making paid sex legal may not be able to defend the idea of making, selling and drinking alcohol and smoking cigarettes legal too. Drinking and smoking is legal subject to conditions. Government does not completely stop it despite of its horrifying consequences because somewhere they know that stopping it completely may have even worse consequences. So instead of completely stopping it Government rather regulates it. Government imposes very high taxes on drinks and cigarettes, prohibits smoking in public places and continues to run campaign to spread awareness. For last 8-10 years perhaps the most consistent advertisements shown in public interests are against smoking and drinking. Even the packet of a cigarette has statutory warning that smoking causes cancer. It is quite surprising for a common man. A common man may ask why Government does not completely stop smoking and drinking by making them illegal instead of spending so much on awareness campaigns and allowing to sell and buy drinks and cigarettes on the other hand. The reason is quite simple. First there will be a huge reduction in the income of Government from cigarettes and drinks. Secondly if Government absolutely stops smoking and drinking then people will start producing drinks and manufacturing cigarettes secretly. In that case there will be adulterated drinks consumed by people and more number of people will start dying than how much they do now. Similar is the idea of paid sex to a great extent. It can't be denied yet it's debatable. It's an open secret that almost every town and city in India has brothels and prostitutes. Paid sex goes on secretly. Sex workers get sexually transmitted diseases and further spread them. Their conditions are pathetic. Their social status is the lowest. Their family and children are either pushed in the same act or they live a very

shameful life. Going to a sex worker, being a sex worker and running a brothel are not only illegal but also considered anti-social. Customers at brothels are many times blackmailed. Overall despite of paid sex being illegal the business of paid sex is running very well in the whole country with an extremely bad state of sex workers. If the Government controls and regulates paid sex instead of completely stopping it then the legislation may not only improve the condition of sex workers but also reduce the crime against children to a great extent. Legislation for Paid Sex Regulation should contain the following rules:

- i. Making the license mandatory for sex workers given by a public authority
- ii. Health Checkup of sex worker declaring them physically fit to become a sex worker
- iii. Same required for a person going to a sex worker too
- iv. Use of contraception, prohibition of unnatural sex must be mandatory
- v. Right of refusal of sex should be with both the parties

Sex workers' rights should be protected, they should get health insurance and all other benefits just like any other profession

License for a brothel or for a sex worker must be subject to conditions like place of work, years of work, age etc.

#### **Important Cases related to Child Rape and Sexual Harassment:**

*Muzaffarpur* shelter home rape case, Bihar: “*Wake up, somebody is raped in India every 15 min*”, said Supreme Court in this case. The Court said that Bihar would have to take responsibility for the rapes that occurred in *Muzaffarpur* shelter home.

The Supreme Court heard the *Muzaffarpur* shelter home rapes and termed it to be “horrific”. It pulled up the state government for funding an institution without verifying its credentials. On August 2, 2018 the court took *suo moto* cognizance of this incident at the shelter home and immediately issued notices to the Government of Bihar and the Union Ministry of Women and Child Development.

“Were the credentials of this NGO which runs the shelter home been verified? If you are doling out funds to NGOs without verifying their credentials, it almost amounts to state involvement.” The Supreme Court added.<sup>8</sup> Slamming the government of Bihar for its complete failure to prevent sexual assaults on minor girls in Muzaffarpur shelter home run by an NGO, the Supreme Court expressed serious concerns about women’s safety, saying “nobody is bothered”.

In this case, Justice Madan B Lokur said, “What is going on in our country? Girls and women are getting raped left, right and centre. As per NCRB figures, in the year 2016 astonishing number of 38,947 rapes were committed - which means 106 rapes a day, every 15 minute somebody is raped. Look, somebody has to wake up these incidents must stop.”

In *M. Veersamy v. State of Tamil Nadu*,<sup>9</sup> on 7 March, 2012: In this case Arockiasamy, the accused was abusing the girl children for over three years. When some of the girl children were not keeping well, they used to go to the restroom. The said Arockiasamy used to go inside the room and used to press their breast as if putting a cross on them so as to get well soon. He used to call the girl children to his room for washing his tiffin box and used to make them to sit on his lap after unzipping his pant’s ply. He used to insert his hand inside the dress of the children in the name of forecasting their future. The girl children were made to clean his room. He used to take pictures in his cell phone in different angles when they bend their bodies while at work. Further, he used to bring the girl children to his room and give a bear hug. Likewise, they suffered innumerable abuses at the hands of the said Headmaster. The committee noted the experiences faced by several children. Due to the sensitivity of the issue, they did not name the children in their report. The committee also found that when children made complaints to other teachers, they casually stated that these incidents were reported to them before and there was a long delay in making the complaints. They also added as teachers working under the headmaster, they could have hardly done anything about it.

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<sup>8</sup> <https://www.livelaw.in/somebody-has-to-wake-upsc-pulls-up-bihar-govt-over-muzaffarpur-shelter-home-rapes/>.

<sup>9</sup> <https://www.casemine.com/judgement/in/560905c8e4b0149711161fa9>.

It was also found that when students complained to Amala Rose (who is none other than the niece of the Headmaster Arockiasamy), she told them that they should adjust with the Headmaster. If they go and tell outside, their future will be spoiled. The fact-finding committee found that between 2009-2011, around 100 girl children were affected by the sexual abuses made by the headmaster. He had also taken their pictures in wrong angles when the children cleaning the floor and doing Yoga. He also touched the inner part of the children. Unmindful of their age, he had satisfied his lust by hugging them and by doing bizarre acts. Even in the presence of the other students, he had committed such acts. The children who went to the restroom were also not spared by him. He threatened them that he would fail them in the examination and write adverse report in the transfer certificate. Even a girl child who came along with her blind grandmother for school admission was sexually abused. Some girl children unable to bear his abuses had left the school. Most of them were psychologically affected by his conduct. Even some children were unable to understand the impact of his activities. The teacher Amala Rose, who was actively in connivance with Arockiasamy and the other teachers who were in the know of things, were unable to protect the children from the harassment done by the headmaster. The children have gone through untold miseries and their experiences were similar to that of a prison camp. One boy who was not good in study was kept as a helper by the Headmaster. He had also inflicted corporal punishments to the extent of breaking their hands.

Found guilty under Section 354 (outraging modesty of women) and Section 506 (criminal intimidation) of *the Indian Penal Code, 1860* and under various Sections of *the SC/ST (Prevention of Atrocities) Act, 1989*, and the *Tamil Nadu Prohibition of Harassment of Women Act, 1998*. Arockiasamy will serve a sentence of 55 years. Third Additional District Judge R. Shanmugasundaram sentenced Arockiasamy to imprisonment for five years each for sexually abusing five children belonging to Scheduled Caste under *the SC/ST (Prevention of Atrocities) Act*. He also got two years each for abusing 15 other students. The 25 years in the first part of the sentence and the 30 years will run consecutively.

The sadist took such pleasure in abusing the girls, that in one instance, he assaulted a minor in front of her blind grandmother. The judge, however, acquitted the other teachers, *C Amali Rose, Shanmuga Kumarasamy* and *Victor* who were charged with aiding and abetting the headmaster in the crime.

*In the State of Punjab v. Gurmit Singh & Ors*, the prosecutrix (name withheld), a young girl below 16 years of age, was studying in the 10<sup>th</sup> class at the relevant time in Government High School, Pakhowal. The matriculation examinations were going on at the material time. The examination center of the prosecutrix was located in the Boys High School, Pakhowal. On 30<sup>th</sup> March, 1984 at about 12.30 p.m. after taking her test in Geography, the prosecutrix was going to the house of her maternal uncle, Darshan Singh, and when she had covered a distance of about 100 karmas from the school, a blue ambassador car being driven by a Sikh youth aged 20/25 years came from behind. In that car Gurmit Singh, Jagjit Singh @ Bawa and Ranjit Singh accused were sitting. The car stopped near her. Ranjit Singh accused came out of the car and caught hold of the prosecutrix from her arm and pushed her inside the car. Accused Jagjit Singh @ Bawa put his hand on the mouth of the prosecutrix, while Gurmit Singh accused threatened the prosecutrix, that in case she raised an alarm she would be done to death. All the three accused (respondents) drove her to the tube well of Ranjit Singh accused. She was taken to the 'kotha' of the Tubewell. The driver of the car after leaving the prosecutrix and the three accused persons there went away with the car. In the said kotha Gurmit Singh compelled the prosecutrix to take liquor, misrepresenting to her that it was juice. Her refusal did not have any effect and she reluctantly consumed liquor. Gurmit Singh then got removed her salwar and also opened her shirt. She was made to lie on a cot in the kotha while his companions guarded the kotha from outside. Gurmit Singh committed rape upon her. She raised alarm as she was suffering pain but Gurmit Singh threatened to kill her if she persisted in raising alarm. Due to that threat, she kept quiet. After Gurmit Singh had committed rape upon her, the other two accused, who were earlier guarding the kotha from outside, came in one by one, and committed rape upon her. Jagjit Singh alias bawa committed rape on her after Gurmit Singh and thereafter Ranjit Singh committed rape on her. Each one of the accused committed sexual intercourse with the prosecutrix forcibly and against her will. They all subjected her to sexual intercourse

once again during the night against her will. Next morning at about 6.00 a.m., the same car arrived at the tubewell kotha of Ranjit Singh and the three accused made her to sit in that car and left her near the Boys High School, Pakhowal near about the place from where she had been abducted. The prosecutrix had to take her examination in the subject of Hygiene on that date. She, after taking her examination in Hygiene, reached her village Nangal- Kalan, at about noon time and narrated the entire story to her mother, Smt. Gurdev Kaur, PW7. Her father Trilok Singh PW6 was not present in the house at that time. He returned from his work late in the evening. The mother of the prosecutrix, Smt. Gurdev kaur PW7, narrated the episode to her husband Tirlok Singh PW6 on his arrival. Her father straightaway contacted Sarpanch Joginder Singh of the village. A panchayat was convened. Matter was brought to the notice of the Sarpanch of village Pakhowal also. Both the Sarpanches, tried to affect a compromise on 1.4.1984 but since the panchayat could not give any justice of relief to the prosecutrix, she along with her father proceeded to the police station Raikot to lodge a report about the occurrence with the police. When they reached at the bus adda of village Pakhowal, the police met them and she made her statement, Ex. PD, before ASI Raghbir Chand PW who made an endorsement, Ex. PD/1 and sent the statement Ex. PD of the prosecutrix to the police station Raikot for registration of the case on the basis of which formal FIR Ex. PD/2 was registered by SI Malkiat Singh. ASI Raghbir Chand then took the prosecutrix and her mother to the primary health centre Pakhowal for medical examination of the prosecutrix. She was medically examined by lady doctor Dr. Sukhwinder Kaur, PW1 on 2.4.84, who found that the hymen of the prosecutrix was lacerated with fine radiate tears, swollen and painful. Her pubic hair was also found mated. According to PW1 intercourse with the prosecutrix could be "one of the reasons for laceration which I found in her hymen". She went on to say that the possibility could not be ruled out that the prosecutrix "was not habitual to intercourse earlier."

All the 3 accused were convicted under Sections 363, 366, 368 and 376 of the *Indian Penal Code, 1860*.

### **Inadequacy In IPC Laws**

Current laws in IPC are inadequate to protect the children who become victims of the sexual abuse. The IPC sections do not include the common forms of

child sexual abuse nor their impact on the children. For example the restrictive interpretation of penetration in the explanation of Section 375 is an obstacle to Child Sexual Abuse. In case of children, the definition of rape and molestation must become broader so that it can cover various types of sexual assault on children. Actually there should be separate sections for sexual assault of children with strict punishments. The testimony of the child victim becomes arguable. Trained personnel should interview the children. Special courts are needed to be set up. The delay in court cases further increases the trauma of the child. Child cases must be fast track.

**Child Labor:**

Child labor is one of the most debatable problems of India. Extreme cases are easy to judge, however as the cases move towards more common and ordinary situations of child labor, they become very complicated and are not easy to declare as an offence. If a child of 13 years is working in a mine, it is certainly wrong and the manager or owner of the mine have committed a crime by employing the child in the mine. Other negative extreme cases of child labor are children working in extremely hazardous industry e.g. manufacturing of crackers, manufacturing of arms and explosive etc., children working in bars, children working in dangerous construction sites involved in dangerous tasks e.g. hanging from 14th floor for painting the walls, carrying the long steel bars etc. In these examples children are prone to get hurt. They become physically weak. Their safety and security is at risk. Sometimes they are exploited by others in these situations.

A child artist playing the role of son of a person in a movie is not an offence. Other positive extreme cases, where child labor is certainly not an offence, are children working as models in advertisements, children working as artists, children working as anchors of functions etc. In these cases children are mostly working due to their intellectual ability. These works are considered highly artistic and are appreciated by general public. Children are mostly safe and protected while working in these situations.

However the following situations are very difficult to judge and classify as offence or no offence. Most of these cases arise due to extreme poverty and lack

of manpower. The motive and intention of people who put children in these situations is most of the times good:

A child selling paintings in shop with his father

A child assisting his father in his small tea shop

A girl accompanying her mother and helping her when she goes to people's house to clean the utensils and wipe the floors

A boy accompanying his father and helping him when he goes to sell soaps and detergents door to door

A child working as an accountant or a cashier in his father's showroom.

A child working in an institute like a receptionist

In most of the above cases, children are not harassed or exploited. However it is difficult to decide. If we make strict and blind laws to simply stop child labor then it can actually weaken the financial support of a large number of families in India and many times it may simply break down a family. If given a choice along with sufficient financial help, a large number of families who sent their children to work and earn will prefer to send children to school and stop them to work and earn.

### **Important Cases Related to Child Rape and Sexual Harassment**

*M.C. Mehta v. State of Tamil Nadu*,<sup>10</sup> (1996): This judgement is a historic judgement on child labour, which elaborated the situation of child labour in India. It outlines the vision of Constitution with respect to children. The judgement highlighted the relation between poverty and child labour and also shed light on how the state has failed to eradicate child labour, and its lack of zeal to deal with it. The judgment also deliberated on possible solutions to eradicate the child labour.

An activist lawyer filed a petition with the court claiming that the fundamental rights of children were being grossly violated in contravention of Article 24 of *the Constitution of India*, which provides that "no child below the age of fourteen years shall be employed to work in any factory or mine or engaged in any other hazardous employment." The Court noted that child labour is a "big problem"

<sup>10</sup> <https://hrln.org/mc-mehta-vs-state-of-tamil-nadu-and-ors/?textsize=normal>.

in India, and examined the history of child labour laws in India, including a decision by the court in 1991 in which it gave certain directions as to how the quality of life of children employed in factories in Sivakasi could be improved.

The court ordered that employers illegally employing children must pay Rs. 20,000 into a fund known as the “Child Labour Rehabilitation-cum-Welfare Fund” to be used only for the benefit of that child. The court also ordered the government to either (a) provide employment for an adult member of every family with a child who is employed in a factory or mine or other hazardous work or, if not possible to provide an adult family member with a job, (b) contribute Rs. 5,000 to the Child Labour Rehabilitation-cum-Welfare Fund for each child employed in a factory or mine or other hazardous employment. Adults who are offered jobs in this way would also have a duty to ensure that their children entered full-time education and did not continue to work.

**Court Reasoning:**

Under the national Constitution and international instruments, including the Convention on the Rights of the Child, the Indian government is required to ensure that children do not engage in hazardous work. Looking to the causes of child labor, poverty is the basic reason that compels parents to employ their children, and unless alternative income is assured to families, these children will continue to work. Because the fines imposed on employers would not be enough to prevent a poor parent from having to put their child to work, the government owes these parents a duty of assistance to help remove their children from hazardous employment.

Every day, a large number of Indian children are subjected to bonded labor and forced employment, depriving them of their childhood, education and overall mental and physical development. According to the 2011 census released by the Government of India, the number of children working in the 5-14 year age group stood at 43.53 lakhs. While this is an improvement from the 2001 census figure of 1.26 crores, the structural problems that act as an impetus to child labor such as poverty and poor enforcement and regulation, remain as it is.<sup>11</sup> The

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<sup>11</sup> [http://www.clraindia.org/view\\_post.php?article=child-labour-in-india-a-judicial-perspective](http://www.clraindia.org/view_post.php?article=child-labour-in-india-a-judicial-perspective).

Constitution of India has several articles that protect the rights of children, which include Article 24 that prohibits the employment of children under the age of 14 in factories and other hazardous employments, Article 21A that says the state shall provide free and compulsory education to all children of the age of six to fourteen, and Article 39 clauses (e) and (f) that say the State shall safeguard health of children and offer opportunities and education to them.

Parliament has supplemented the safeguard of child rights by passing several legislations to combat the problem, which include among them *the Factories Act of 1948* which prohibits the employment of children below the age of 14 years in any factory, *the Mines Act of 1952* which prohibits the employment of children below 18 years of age in a mine, and *the Child Labor (Prohibition and Regulation) Act of 1986* (amended in 2012) which prevents children below the age of 14 being employed anywhere, except in non-hazardous family enterprises or the entertainment industry.

Historically, the Judiciary has played a pivotal role in guarding the constitution, and it has played a similarly integral role in enforcing child rights. There have been several important cases where the judiciary has played a proactive role in preventing the employment of children and forced labour.

In the case of *People's Union for Democratic Rights v. Union of India*,<sup>12</sup> the Supreme Court observed that it was a clear breach of Article 24 of the Constitution to employ children below the age of 14 in construction work. The court proceeded to prohibit any kind of violation of Articles 23 and 24 and further laid emphasis on strict observance of fundamental rights by private individuals and spoke strongly against any form of forced labor. The Supreme Court, in the case of *Bandhua Mukti Morcha v. Union of India & Others*, took into cognizance the employment of children in the carpet manufacturing industry in Mirzapur, Uttar Pradesh. It instructed the District magistrate to conduct raids, and subsequently got 144 children, who were under the forced custody of the owners, released. In the case of *Sheela Barse & Others v. Union of India*, under the direction of the Supreme Court, children who were being exposed to chemical fumes and coal

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<sup>12</sup> *Ibid.*

dust from working near furnaces in the glass industry were released from their employment.

**Laws relating to Children in India:**

*The Child Labor (Prohibition & Regulation) Act, 1986*

*The Child Marriage Restraint Act, 1929*

*The Children Act, 1960*

*The Children (Pledging of Labor) Act, 1933*

*The Commissions for the Protection of Child Rights Act, 2005*

*The Infant Milk Substitutes Act, 1992*

*The Infant Milk Substitutes Act, 2003*

*The Infant Milk Substitutes, Feeding Bottles & Infant Foods (Regulation of Production, Supply & Distribution) Act, 1992*

*The Infant Milk Substitutes, Feeding Bottles & Infant Foods (Regulation of Production, Supply & Distribution) Amendment Act, 2003*

*The Juvenile Justice (Care & Protection of Children) Act, 2000*

*The Juvenile Justice (Care & Protection of Children) Amendment Act, 2006*

*The Prohibition of Child Marriage Act, 2006*

*The Reformatory Schools Act, 1897*

*The Young Persons (Harmful Publications) Act, 1956*

Offences against children in *the Indian Penal Code, 1860:*

Abandonment of child under 12 years of age

Buying minor for purpose of prostitution

Causing death of quick unborn child by act amounting to culpable homicide

Causing miscarriage or miscarriage without the woman's consent

Concealment of birth by secret disposal of dead body

Importation of girl from foreign country

Preventing a child from being born alive or causing its death after birth

Procreation of minor girl

Selling minor for purpose of prostitution.

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