

JOURNAL ON RIGHTS OF THE CHILD

VOLUME 1

ISSUE I

2016

Editors' Note

ARTICLES

Child Rights, Poverty and Protection:
An Indian Perspective
Anuradha Palanichamy

Legal Framework Concerning Child
Sexual Abuse in India -A Critical
Assessment
Dr. Jyothi Vishwanath

Human Rights of Children in India
*Dr. Preeti Bhardwaj and
Dr. Rajwanti Sandhu*

Plight of Right to Education of
Underprivileged Children
in India: A Pertinent Outlook
Dr. Sonia B Nagarale

The Child Labour Amendment Bill:
Legal Dilution of Efforts at
Elimination of Child Labour?
Dr. Sophy K.J

Corporal Punishment in Schools:
A Crime against Children
in Human Rights Paradigm
Dr. Vinod Kumar

A Meta-Analysis of the
Juvenile Justice Act 2015
to Identify Policy Gaps in
Addressing Juvenile Delinquency
*Abinaswar Das, Anmol Narain,
Arnab Bose, Mohit Kumar Beberta
and Vedprakash Singh*

Juvenile Justice Amendment Act
2015: Need for Reconsideration
Sourav Chandan Padhi

COMMENTS & REVIEWS

A Child Prodigy v Child Rights:
A Case Study on Budhia Singh
*Manisha Mishra and
Sohini Mahapatra*

Taare Zameen Par - A Review
(Every Child is Special)
Diana John

Rights of the Child to Freedom of
Association in the Light of
Leading Nepalese Case Tilotam
Poudel v Ministry of Home Affairs
et. al.
Prabhat Chhetri



JOURNAL ON RIGHTS OF THE CHILD

VOLUME 1

ISSUE I

2016

PATRON-IN-CHIEF

Prof. (Dr.) Srikrishna Deva Rao
Hon'ble Vice-Chancellor, NLUO

PATRON

Dr. Dolly Jabbal
Registrar (I/c), NLUO

EDITOR-IN-CHIEF

Prof. Babu Mathew

EDITORIAL BOARD

Prof. Sheela Rai
Dr. Kondaiah Jonnalagadda
Mr. Ramakrishna Das
Mr. S. Kannayiram
Mr. Pramod Kishore Acharya

STUDENT EDITORS

Ms. Archita Mohapatra
Ms. Vidhi Tiwari
Ms. Torsha Sarkar
Ms. Anandita Mishra
Ms. Adyasha Nanda

NATIONAL LAW UNIVERSITY ODISHA, CUTTACK

JOURNAL ON RIGHTS OF THE CHILD

Journal on Rights of the Child is published biannually by the NLUO Centre for Child Rights.

NLUO Centre for Child Rights and National Law University Odisha, Cuttack assume no responsibility for the statements and opinions advanced by the contributors.

Copyright over all the articles published in the journal, including the cover and rear photographs and designs, are held by National Law University Odisha, Cuttack. Any type of commercial use of any of the protected materials is strictly prohibited. The articles can be used for non-commercial academic purposes by citing proper reference of this journal.

©National Law University Odisha, Cuttack.

Published By: The Registrar, National Law University, Odisha,
Kathajodi Campus, Sec. - 13, CDA,
Cuttack – 753015, Odisha (India).
Contact Number - 0671 – 2338018
Email: registrar@nluo.ac.in
Website – www.nluo.ac.in

NLUO
CENTRE FOR CHILD RIGHTS

VISION

To ensure justice to children and promote effective implementation of children's laws and governance in the State of Odisha. The Centre will endeavor to create child-friendly mechanisms through the promotion of child rights practices.

MISSION

To support and strengthen child protection structures by leveraging knowledge change and policy reforms at various levels of institutional governance to make juvenile justice system more accountable, efficient and effective for protecting and promoting child rights.

EDITORS' NOTE

Volume 3 of the NLUO Law Journal was dedicated to rights of the child. The response received for the journal through articles highlighting different issues relating to children in India, induced the NLUO Child Rights Centre to bring out a journal on Rights of the Child which would highlight problems relating to children and views of authors on those issues. Many of the problems of children were suppressed in India like child sexual abuse, many of the problems are being debated like child labour and juvenile justice, many of the problems have been taken seriously but are not yet free from solution like lack of education. The journal aims to be a forum where these and many other issues relating to children may be highlighted, discussed and debated.

Response received for the inaugural issue of the journal has been very encouraging. Writers through various methodology have expressed their arguments and concerns and thoughts on issues relating to children in an underdeveloped country. Paper by Dr. Preeti Bharadwaj and Dr. Rajwanti Sandhu compares the international conventions on human rights of children and provisions under Indian laws for safeguarding such rights of children in India. Article by Ms. Anuradha Palanichamy highlights the root of all malady relating to children in India which is poverty. It is poverty which drives children to work at an underdeveloped age. This fact has been acknowledged by Dr Sophy K.J. but she argues that the amendment in legislation relating to child labour would dilute the effort to eradicate child labour as it would allow children to work in family enterprises etc. According to her this would take away compulsion on parents to educate their children and allow them full chance of independent development. Article by Dr. Sonia B. Nagarale also highlights the role of poverty in keeping the children uneducated and the small impact which different government schemes have been able to make on the education of children.

Dr. Jyoti Vishwanath discusses the issue of children who are victim of sexual abuse and the international and Indian legal provisions relating to it. Article by Sourav Chandan Padhi and Abinaswar Das et al discusses the issue to

juvenile offenders and justice to victims of such offenders. Sourav Chandan Padhi argues that the new amendment in the Juvenile Justice Act is arbitrary and unjust while Abinaswar Das et al argue that the Indian Juvenile Justice Act is in accordance with international standards.

Case comment by Prabhat Chhetri highlights an interesting issue of right to association of children. We normally do not think about this right of children as adults are usually used to telling children whom to talk to and whom to avoid. Gap between perception of adults on the one hand and that of children on the other is also highlighted in the two movie reviews. Review of Budhia by Manisha Mishra and Sohni Mahapatra analyses the real case of marathon runner budhia who had all the talents of a promising athlete but whose development is challenged by money hungry relatives, lack of means, death of parents and absence of emotional support etc. Similarly review of the movie Tare Zammen Par questions the notion that whatever parents think and plan about their child is always for the best interest of the child.

Articles of the inaugural issue of the Journal on Rights of the Child have highlighted and discussed diverse issues relating to children. The journal is being inaugurated with the hope that it would be a forum for expressing, discussing and debating diverse problems and interests of children especially in under-developed countries.

Editors

Journal on Rights of the Child

JOURNAL ON RIGHTS OF THE CHILD

Volume 1

Issue I

2016

CONTENTS

ARTICLES

- Child Rights, Poverty and Protection:
An Indian Perspective 1
Anuradha Palanichamy
- Legal Framework Concerning Child Sexual
Abuse in India -A Critical Assessment 18
Dr. Jyothi Vishwanath
- Human Rights of Children in India 34
Dr. Preeti Bhardwaj and Dr. Rajwanti Sandhu
- Plight of Right to Education of Underprivileged Children in India:
A Pertinent Outlook 44
Dr. Sonia B Nagarale
- The Child Labour Amendment Bill: Legal Dilution of Efforts at
Elimination of Child Labour? 65
Dr. Sophy K.J
- Corporal Punishment in Schools: A Crime against Children in
Human Rights Paradigm 75
Dr. Vinod Kumar
- A Meta-Analysis of the Juvenile Justice Act 2015 to Identify
Policy Gaps in Addressing Juvenile Delinquency 91
*Abinaswar Das, Anmol Narain, Arnab Bose,
Mohit Kumar Bebartha and Vedprakash Singh*

Juvenile Justice Amendment Act 2015: Need for Reconsideration <i>Sourav Chandan Padhi</i>	107
COMMENTS AND REVIEWS	
A Child Prodigy v Child Rights: A Case Study on Budhia Singh <i>Manisha Mishra and Sohini Mahapatra</i>	124
Taare Zameen Par - A Review (Every Child is Special) <i>Diana John</i>	134
Rights of the Child to Freedom of Association in the Light of Leading Nepalese Case Tilotam Poudel v Ministry of Home Affairs et. al. <i>Prabhat Chhetri</i>	143

**CHILD RIGHTS, POVERTY AND PROTECTION: AN INDIAN
PERSPECTIVE**

***Anuradha Palanichamy**

ABSTRACT

A child is an invaluable asset of any society and has a definite role to play in the development of the nation. The future of a country depends on how its children are being nurtured to become the future citizens of the country. Some of the children, forced by their socio-economic conditions, take up work at a crucial formative age. Poverty is the major cause of children being sent to work. The hardships arising out of abject poverty coupled with vices like drugs and alcoholism compel illiterate families, especially in rural areas, to initiate their children into back-breaking work under tiring and sometimes dangerous conditions. Abject poverty and the lack of social security network systems are the basis of an even harsher type of child labour – bonded child labour. Therefore, against this rationale and background, this paper is guided by the principles enshrined in the ILO's Minimum Age Convention No. 138 and the Worst Forms of Child Labour Convention No. 182, the ILO In Focus Programme on Child Labour (IPEC) which works to achieve the effective abolition of child labour, aims to portray the gaps and opportunities to reform the "Legislation, Systems and Mechanisms" pertaining to curbing "Child Labour in India" and calls for partnership for development towards this malignant issue.

*The author is a Public Sector Governance Expert (South Asia) and Assistant Professor of Public Policy & Assistant Dean (International Collaborations) at Jindal School of Government and Public Policy, NCR of Delhi (India). Email: apalanichamy@jgu.edu.in , Tel: +91-8396907352

INTRODUCTION

According to the International Labour Organisation (ILO), a whole new generation of children are being deprived of the chance to take their rightful place in the society and economy of the 21st century. The ILO has proposed that 'child labour' will disappear in a decade. But in reality the situation is alarming and in fact, one in every eight children in the world is exposed to the worst forms of child labour which endanger children's physical, mental health and moral well being. Though there are clear provisions in our Constitution to safeguard the interest of children by ensuring that they receive education and are not forced to work for a living, it is unfortunate that the problem of child labour exists at a large extent in our country.

Over-Arching Issue

In many countries children's lives are plagued by armed conflict, child labour, sexual exploitation and other human rights violations. Children living in rural areas have fewer opportunities to obtain good quality education. They have less access to services than children living in cities. The UN Convention on the Rights of the Child (CRC) (Article 38)¹ has explicitly prohibited persons under age of 18 being recruited into the armed forces or directly participating in hostility. In spite of this special provision under CRC, many countries still involve children below 18 years in hostilities. Child labour keeps children out of school and is a major barrier to development. To make the anti child labour law a reality, poverty and unemployment need to be eliminated. Unless the standard of living improves at the lower levels of the society, children will be forced to work. Many middle and upper class families do not hesitate to engage young boys and girls to help them with household chores as they believe that by employing a child below 14 years they are helping poor families to increase their earnings for daily livelihood.

¹ UN Convention on Rights of Children, art 38.

Definition of “Child” in Conventions and Charters

Article 1² of the United Nations Convention on the Rights of the Child defines “the child” as “every human being below the age of 18 years unless under the law applicable to the child, majority is attained earlier”. Other definitions of a “child” under various Indian legislations include the following:

- The Indian Penal Code, 1860 defines the child as being 12 years of age.
- Immoral Traffic (Prevention) Act, 1956 defines a “Minor” as a person who has reached the age of 16 years.
- Section 376³ of the IPC which punishes the perpetrators of the crime of rape defines the age of consent to be 16 years of age.
- Section 82⁴ and 83⁵ of the IPC state that a child under the age of 7 years cannot be guilty of an offence and further a child under 12 years is not considered to have attained sufficient maturity to have an understanding of the nature of the Act and the consequences of his conduct.
- The Juvenile Justice Act, 2002 defines a male minor as being below 16 years and a female minor as being below 18 years of age.

From the above definitions, it can be seen that in the Indian context, the age of an individual in order to be determined as a “child” is not uniformly defined. The consequences of this are that it offers various gaps in legal procedures which are manipulated by the guilty to escape punishment.

Child Labour: The Indian Scenario

According to the UN Study, about 150 million children in age group 5-14 years are working in various industries in India. They are found working in

² ibid art 1.

³ Indian Penal Code 1860 s 376.

⁴ ibid s 82.

⁵ ibid s 83.

road-side restaurants, tea stalls and shops, at construction sites and in factories. Girls suffer labour exploitation to such a degree that millions of girls die before they reach the age of 15. They are paid a pittance which is as low as Rs.20 per day and many live in shops or work places where they are subjected to various forms of exploitation. Besides the work they are abused physically, mentally and sexually by the scurrilous task masters.

Begging is being perpetuated as a common profession by antisocial elements who force children into begging, which is prohibited in some cities of India by local governments. Mafia gangs bring children to urban cities for “begging”. A child beggar aged between five and ten collects the maximum. With a burn scar or decapitation they can earn even more. As they grow older their earnings decrease. As a consequence they grow up to be big -time traders involved in drug peddling, pick pocketing, robbery and prostitution. A child beggar will only be paid 10% of his earnings of Rs.300 to 500 a day. If he fails to meet the target fixed by the contractor he is punished brutally. The girls, by the time they reach 13 years of age, switch over to prostitution.

The Indian government ratified the UN Convention on the Rights of the Child in 1992 and introduced various pieces of legislation to curb child labour. The Labour Ministry of India has imposed a ban on children under age of 14 from working as domestic help in hotels. Under this law any employment of children under 14 will invite imprisonment up to two years and a fine of Rupees twenty thousand. India has also banned employment of children in hazardous industries including the manufacture of fire crackers, carpet making, glass making etc. under Child Labour Act, 2002. However, although India has the second largest child population in the world, there is no single unified separate legislation to deal with all the offences against children. Therefore, it is high time India introduced an all encompassing common legislation to safeguard the rights of a child.

Impact of Child Exploitation

Employing children for labour is an act that endangers a child’s physical/emotional health and development without giving the child an opportunity of

good education, food and shelter. Of the four major types of child abuses, physical, sexual, emotional and neglect, child labour falls under neglect exploitation and emotional abuse. Child labour is the exploitation of children for commercial reasons.

Neglect is a different concept of exploitation and constitutes a failure to provide for a child's basic need. The forms of neglect include physical, educational and emotional. Physical neglect includes inadequate provision of food, housing and clothing, denial of medical care and inadequate hygiene. Educational neglect is the failure to enrol a child at a mandatory school age in school. Emotional neglect is the lack of emotional support such as the failure to provide psychological care, domestic violence and allowing a child to participate in drugs and alcohol abuse.

A child worker becomes alienated from the rest of the family, has low self esteem, and is likely to engage in self destructive behaviour. He or she is likely to have impaired psychological development and develop anti social behaviour including lying and living with fear complex.

Law and Public Policy Pertaining to Child Labour

As per Article 24⁶ of the Constitution of India, no child below the age of 14 years is to be employed in any factory, mine or any hazardous employment. Further, Article 39⁷ requires the States to direct its policy towards ensuring that the tender age of children is not abused and that they are not forced by economic necessity to enter avocations unsuited to their age or strength. Recently, with the insertion of Article 21A⁸, the State has been entrusted with the task of providing free and compulsory education to all the children in the age group of 6-14 years.

Consistent with the Constitutional provisions, Child Labour (Prohibition and Regulation) Act was enacted in 1986, which seeks to prohibit employment

⁶ The Constitution of India, 1950 art 24.

⁷ *ibid* art 39.

⁸ *ibid* art 21A.

of children below 14 years in hazardous occupations and processes and regulates the working conditions in other employments. Realizing the multifaceted and complex nature of this problem, Government had embarked on a holistic and a multi-pronged programme to eliminate child labour from the country in a phased manner beginning with children working in hazardous occupations and progressively covering the children working in other occupations also. The National Policy on Child Labour announced in 1987, emphasizes the need for strict enforcement measures in the areas of high child labour concentration along with appropriate rehabilitative measures to curb this menace.

Although Government is committed to the task of elimination of child labour in all its forms, considering the nature and magnitude of the problem, gradual and sequential approach has been adopted to withdraw and rehabilitate children, beginning with those working in hazardous occupations and processes. Government strategy is multipronged, which involves strong enforcement of the existing Act with simultaneous efforts towards rehabilitation of both parents and children through linkages with the poverty eradication and income generation programmes of the Government. This is because working children are from extremely poor families and are contributing to the meagre income of their families. Therefore, a blanket prohibition on all kinds of child labour without providing an alternate means of financial support is likely to punish parents who are already living in abject poverty.

In order to translate the above policy into action, the Government of India initiated the National Child Labour Project Scheme in 1988 to rehabilitate the working children starting with 12 child labour endemic districts of the country. Under the Scheme, working children are identified through child labour survey, withdrawn from work and put into the special bridge schools, so as to provide them with enabling environment to join mainstream education system. In these Special Schools, besides formal education, they are provided stipend @ Rs.100/- per month, nutrition, vocational training and regular health check-ups. In addition, efforts are also made to target the families of these children so as to

cover them under various developmental and income/employment generation programmes of the Government. The Scheme also envisages awareness generation campaigns against the evils of child labour and enforcement of child labour laws.

The NCLP Scheme is implemented through a district level Project Society, headed by the District Collector. This Project Society, includes prominent NGOs and Trade Unions of the district, in addition to the State Government officials from Education, Health, Rural Development, Labour, Social Welfare and Women & Child Development Departments, etc. The involvement of different departments in the Project Society is to ensure better convergence with these Departments for implementation of the Scheme. As far as possible, running of Special Schools for child labour is entrusted to NGOs. It may, however, be taken up by the Project Society itself, if competent and experienced NGOs are not available in the district for this purpose. The Scheme offers lot of flexibility and decentralization, wherein based on the broad guidelines laid down by the Government of India, all decisions concerning running of the schools or selecting the NGOs etc. are taken at the level of Project Society. The funds under the Scheme are sanctioned by the Ministry directly to the District Collector, who in turn, disburses them amongst the NGOs for running these Special Schools for working children. The funds are also provided under the Scheme for conducting regular child labour surveys, awareness generation programmes and training of instructors/teachers, etc.

The coverage of the NCLP programme, which started with 12 districts has been thereafter progressively increased to cover much larger number of districts in the country. In fact, major thrust to the programme came with the landmark judgement of the Hon'ble Supreme Court in December 1996 in the case of *M.C. Mehta v. State of Tamil Nadu*.⁹ The Hon'ble Supreme Court gave certain directions regarding the manner in which the children working in the hazardous occupations were to be withdrawn from work and rehabilitated, as also the manner in which the working conditions of the children employed in

⁹ *M.C. Mehta v. State of Tamil Nadu* (1991) 1 SCC 283.

non-hazardous occupations were to be regulated and improved upon. The Hon'ble Court specifically ordered withdrawal of children working in hazardous industries and ensuring their education in appropriate institutions. It also prescribed employment of at least one adult member of the family of the child so withdrawn from work; a contribution of Rs.20,000/- per child was ordered to be paid by the offending employer into a corpus of fund set up for the welfare of child labour & their families, failing which, the State Government to contribute to this Welfare Fund Rs.5,000/- per child. The interest earnings of this corpus were to be used for providing financial assistance to the families of these children. The Hon'ble Court also ordered regulation of working hours for the children engaged in non-hazardous occupations, so that their working hours did not exceed 5-6 hours per day and that at least two hours of education was ensured. It further directed that the entire expenditure on education of these children were to be borne by their employers.

In pursuance with the directions of the Hon'ble Court, fresh child labour surveys were conducted in child labour endemic districts of the country and the States were directed to step up enforcement measures. The Supreme Court is monitoring the directions issued in this judgment continuously since then. Based on the reports received from the State/U.T. Governments, the Ministry of Labour & Employment has been regularly filing Affidavits to apprise the Hon'ble Court of the progress in this regard.

The progress of implementation of the NCLP Scheme is monitored by the Ministry through the prescribed periodical reports & regular visits from the officials of the Ministry, State Government and audit departments. A Central Monitoring Committee on Child Labour headed by the Union Secretary (Labour & Employment) and consisting of State Labour Secretaries and representatives from various Ministries connected with the implementation of the project has been set up to look into the important issues faced in implementing the Scheme. The Central Monitoring Committee had recommended setting up of State Monitoring Committees for monitoring the implementation of the Scheme at the State level, which are yet to be set up in most of the States. However, as per the

directions of Hon'ble Supreme Court in 1996, in *M.C Mehta* case,¹⁰ a Child Labour Cell has been formed in most of the States to implement the directions of the Hon'ble Supreme Court. This Cell has also been instrumental in monitoring the scheme.

With the enactment of Child Labour (Prohibition and Regulation) Act, 1986 and enunciation of Child Labour Policy in 1987, the Government has been following a sequential approach towards elimination of child labour in the country. While it is committed for elimination of child labour in all its forms in the country, the focus is on elimination of hazardous forms of child labour in areas of high concentration. With this approach, the NCLP Scheme, which was launched in 1988 in 12 districts of the country, has gradually been expanded to cover 250 districts as per the endemicity of child labour. The list of hazardous occupations and processes are also being progressively expanded to cover more and more sectors. At the time of enactment of Child Labour Act, 1986 there were 6 occupations and 13 processes, where employment of children was prohibited. The list has been expanded to include 13 occupations and 57 processes at present. In addition, Government has recently also included domestic servants and children working in dhabas, hotels etc. in the list of hazardous occupations, which cover a large number of working children in the country.

As per Census 2001, there are 1.26 crores working children in the country in the age-group of 5-14 years, which include about 12 lakh children working in hazardous sectors. The NCLP Scheme in the present form covers children working in hazardous occupations/processes in the age group of 9-14 years limited to the districts where it is being implemented. The scheme at its inception covered children in the age group of 5-14 years. But with the launch of SSA in 2001-02, under the 10th Plan, it was decided to confine the focus of NCLP Scheme to the older children in the age group of 9-14 years, leaving the younger children to be directly covered under SSA. The Scheme was expanded

¹⁰ *ibid*

from 100 to 250 districts in the 10th Plan. However, it failed to bring more than half of the country under its ambit.

Considering the demand from various states for expansion of the Scheme to larger number of districts and the objective of the Government to progressively cover more and more working children under rehabilitation measures, there is a need to cover all the children engaged in hazardous sectors spread over in the country under the NCLP Scheme during the 11th Plan. This would also be in line with ILO Convention No. 182, which recommends urgent measures to be taken for eliminating worst forms of child labour. While ILO Conventions prescribe these actions for children up to the age of 18 years, considering the large number of working children below the age of 14 years in India, and also because of the socio-economic realities the age criteria for child labour will remain at 14 years. This is also in consonance with the Constitutional provisions under Article 21A¹¹ and Article 24¹², which target children up to 14 years of age.

Child Labour being essentially a result of poverty, the Government's approach for their rehabilitation, apart from education also included providing vocational skills to these children which could help them to earn livelihood later in their lives. The well-planned pre-vocational skill education can help the children to link up with vocational training programmes being run in the district once they have completed their education. This is more suitable for those children who, once over 14 years of age would not necessarily exercise the option to be mainstreamed to the formal system of education.

The pre-vocational training being imparted in the NCLP schools at present is not based on the market demand and the Vocational Instructors are also not so well trained in newer and innovative avocations which could be a very important factor for enabling the retention of these children in the special schools. The pre-vocational education in the special schools need to be upgraded to enable the children withdrawn from work to be equipped to retain traditional

¹¹ The Constitution of India 1950 art 21A.

¹² *ibid* art 24.

skills with an added emphasis on theory. The children who do not have any particular skill should receive a first level of sustained exposure to possible trades, which they could link into once they completed education and are of the appropriate age. Therefore in the NCLP schools the focus must move on from education per se to a greater synergy between basic education and well-rounded planned vocational training which would adequately equip them with the requisite skills to enter the job market and thereby generate sustenance income for themselves and for their families at the earliest.

Experience of implementing the INDUS Child Labour Project has shown that there is also a great need to provide employable vocational skill training to adolescents to prepare them to enter the world of work with skills and attitude. It has also shown that providing vocational skills to this age group would also attract child labour families to positively change their behaviour in withdrawing their young children from work and motivate them to complete the primary education and then acquire technical skills. Providing vocational skills to working adolescents would also largely improve the access of vulnerable families to vocational education.

Proposed Macro-Level and Institutional Measures to Curb Child Labour

This is a million dollar question with no specific solution. All sections of the society need to work together to stop misuse and abuse of children. Stakeholders to tackle these issues include:

- National Governmental agencies
- Non-Governmental Organisations (NGOs)
- People's Forums
- Corporate entities
- Individual Social Responsibility / Activism

Role of Stakeholders in Mitigating Child Labour

1. National Government Agencies

- National Agencies need to ratify the UN Convention on the Rights of the Child (CRC).
- An effective legal system needs to be introduced to check employment of children below 14 years through proper legislation.
- Economic sanctions to be enforced on countries that allow the employment of children for the manufacturers of export products.
- Proper monitoring and implementing authorities to be set up to implement various acts passed by the National Government.
- National Social Welfare schemes to be introduced to supplement income for poor families whose children are removed from work sites

2. NGOs

- NGOs have a key role in raising awareness and informing people about the misuse of children, denial of their fundamental rights of shelter, food and education. UNICEF has clarified the role of NGOs as essential players in many of the intervention stages with direct involvement in identification and rescue operations.
- Assist governmental agencies in implementing various pieces of legislation
- Identify areas where child labour exists and bring to the notice of Government.
- Undertake advocacy with national governments for the implementation of strict legislation to ban child labour.

- Organise rehabilitation centres to shelter children removed from work sites.

3. Civil Society / Peoples' Forum

- Civil society can play an active role in identifying and alerting authorities to child labour sites.
- Create awareness among parents and the public about the effect of child labour on children.
- Motivate parents to send their children to school
- Organise counselling sessions for children and parents
- Organise joint protests, rallies, hoardings etc. against employing children below the age of 14.

4. Corporate Entities

- Include banning of child labour in their mission.
- Introduce welfare schemes for children
- Allot separate welfare funds as part of Corporate Social Responsibilities (CSR) to help organisations working for the cause to ban child labour
- Put up hoardings giving messages on the benefits of banning child labour

5. Individual Social Responsibility & Activism

- Resist any form of child labour.
- Openly oppose child labour activities which come to their notice without any fear.
- Be very assertive in expressing displeasure to shop owners and organisations that employ children for labour.

It is worthy to note that in India there are several international and national NGOs campaigning for the abolition of child labour.

Proposed Reforms

Tracking is an important tool to record the progress of the Project beneficiary right from the time of his/her identification as child labour in the survey to his/her enrolment in the special schools, through his/her stay therein and up to mainstreaming. In fact, this monitoring needs to be continued even beyond mainstreaming to determine if the child is continuing with his/her studies in the regular schools or has dropped out. Once a child is rehabilitated under the Project, it is an important follow up step to check if he/she is faring well in the mainstream school. Such a monitoring would ensure that the child does not relapse back to exploitative work. A well-designed Tracking & Monitoring (T&M) system would, therefore, ensure that the beneficiary has been effectively rehabilitated. An effective web-based monitoring would also benefit in keeping track of migrant child labour from one NCLP district to another and would help in continuation of their schooling and rehabilitation in spite of their movement.

This process of Tracking & Monitoring is, therefore, important in determining the real success of the Project in terms of children's actual mainstreaming and continuation in schools thereafter. It would also provide credibility and authenticity of the efforts made under the Project.

While Tracking & Monitoring is possible through Index Cards too, the more efficient and modern way of doing so is through web-based electronic system, particularly since provision has been made for a computer in every NCLP district in the 11th Plan. These computers can be made use of for the purpose of Tracking & Monitoring too with a bit of computer training of the Project Staff. A provision of Rs. 20,000/- for capacity building of the staff in this regard is proposed in the first year of the Plan period for every existing NCLP district or in the first year of their operation in case of new NCLPs. The web-based Monitoring & Tracking software developed under INDUS Project or under the UNICEF Child Protection Programme or that developed by the

Government of Tamil Nadu could be utilized for this purpose, depending on the ease and efficacy of any of them. The customization and trial runs of these softwares are under way.

Convergence

The National Policy on Child Labour enunciated in 1987 recognized the need to focus Government action programmes on income and employment generation to the families of child labour in order to supplement the resources of these hapless families which depended on their children to supplement family income. The scheme of NCLP, therefore, always recommended convergence of efforts with other developmental schemes to help the families of child labour being targeted under the Project. This was emphasized again in the 10th Plan strategy. However, such dovetailing of schemes has been inadequate so far and hence, the imperative need is to have specific component or built-in explicit provision for the families of child labour in these schemes of the Government so as to adequately cover these families and raise their family income in various forms.

This requirement has assumed still greater importance in view of the Government's decision to prohibit employment of children as domestic servants or in dhabas, teashops, restaurants, hotels and recreation centers, where the incidence of child labour is quite widespread and visible. A meeting on the issue of convergence was called to discuss these issues with the Ministries/Departments of Rural Development, Elementary Education & Literacy, Women & Child Development, Housing & Poverty Alleviation and Social Justice and Empowerment. They have also been addressed to take appropriate steps in this direction. The Planning Commission may also insist on inclusion of such provisions in the schemes of these Ministries and Departments in the 11th Plan, so as to maximize the impact of Government intervention in a concerted manner. The efforts towards educational rehabilitation of these working children need to be supplemented by economic rehabilitation of their families, since a boost in their family income will be critical for the success of Government interventions in elimination of child labour from the country.

Some of the prominent schemes of these Ministries/Departments, which could have an explicit component for child labour and their families are given below and could be utilized for supporting Government's intervention for elimination of child labour. This is however, only an indicative list and could be extended to other programmes too.

I. Schemes of the Department of Elementary Education

- Sarva Siksha Abhiyan (SSA)
- Vastishala
- Shiksha Mitra Yojana
- Mid Day Meal Scheme

II. Schemes of Ministry of Women & Child Development

- Anganwadi Centre/ Day Care Centre
- Extension Services of Anganwadi Workers
- Balika Samridhi Yojana
- Swavalamban
- Mahila Samakhya (Assistance to Voluntary agencies with Mahila Samakhya Women)

III. Schemes of Ministry of Rural Development

- Swarnjayanthi Gram Swarozgar Yojana (SGSY)
- Samporna Grameen Rozgar Yojana (SGRY)
- Indira Awas Yojana (IAY)

CONCLUSION

All stake holders should jointly resist any form of child labour using what ever means available. A networking of international NGOs working in this field has to be created for advocacy with various departments to ban child labour. International funding organisations have to identify a contact organisation

in each country to help NGOs who are working in this field undertaking activities for the banning of child labour and identify national projects to be implemented in a transparent manner with good stewardship.

References

1. Ahmed, I. (1999), "Getting Rid of Child Labour", *Economic and Political Weekly*, Vol. XXXIV, No. 27, pp. 1815 – 1822
2. Anand, Shilpa (2009), "Child Labour in India: Perspective and Policy Imperatives", School of Management and Social Sciences, Thapar University, Patiala, May.
3. Brown, K. Drusilla (2001), "Child Labour: Theory, Evidence and Policy", Discussion Paper No. 474, Research Seminar in International Economics, August.
4. Burra, Neera (1989), *Child Labour and Education: Issues Emerging from the Experiences of Some Developing Countries of Asia*, UNESCO-UNICEF CoOperative Program, Paris.
5. Burra, Neera (2001), "Cultural Stereotypes and Household Behavior: Child Labour in India", *Economic and Political Weekly*, Vol. XXXVI, No.5, P. 481488
6. ILO (2010) *Joining forces against child labour. Inter-agency report for The Hague Global Child Labour Conference of 2010* (Geneva).
7. ILO (2013) *Global Employment Trends for Youth 2013: A generation at risk* (Geneva).

LEGAL FRAMEWORK CONCERNING CHILD SEXUAL ABUSE IN INDIA -A CRITICAL ASSESSMENT

***Dr. Jyothi Vishwanath**

ABSTRACT

Child Sexual Abuse (CSA) postulates abuse of a child by an adult/older person for sexual stimulation. Time has stood witness to exorbitant statistical increase in CSA all around the world despite adoption of innumerable international legal documents, growing national legal and social concern for the horrendous CSA problem. CSA, be it sexual molestation, incest, rape, commercial sexual exploitation or pornography, is undeniably an underreported harsh truth of the Indian society. Irrespective of gender, social strata or class, children in India face the risk of exposure to various forms of sexual abuse. Trauma and after-effects of CSA can be grave enough to fill the life of the victimised child with prolonging horrors diminishing the quality of life forever. Non-indulgent social attitude, double standards towards CSA, poor community and authority response, non-denial and hesitant family response, insensitive police and medical fraternity are greatly responsible in the growth of CSA in India, ultimately leading to the enactment of Protection of Children from Sexual Abuse Act, 2012 for protecting children from sexual assault, sexual harassment and pornography. Amidst this scenario, this research paper sheds light on the global and Indian facts and figures pertaining to CSA and its nature; examines the international documents relating to CSA and evaluates the national legal scenario relating to CSA. It also focuses on the failure of the Indian society as a whole in effectively addressing the issue of CSA and ponders the ways to curb this horrible menace.

* Assistant Professor of Law, Post Graduate Department of Studies in Law & University Law College, Bangalore University, Bengaluru.

INTRODUCTION

“The sexual abuse and exploitation of children is one of the most vicious crimes conceivable, a violation of mankind’s most basic duty to protect the innocent.”

James T. Walsh

Child Sexual Abuse (hereinafter referred as “CSA”) postulates abuse of a child by an adult/older person for sexual stimulation. Time has stood witness to exorbitant statistical increase in CSA the world over despite adoption of innumerable international legal documents, growing national legal and social concern for the horrendous CSA problem. CSA, be it sexual molestation, incest, rape, commercial sexual exploitation or pornography, is undeniably an underreported harsh truth of the Indian society. Of the 39% child population in India,¹ around 53% have been victims of CSA. Irrespective of their gender, social strata or class, they are exposed to various forms of sexual abuse. Growing complexities associated with the urban life style, nuclear families, working parents, poor awareness and social stigma all together render the present day child most vulnerable to sexual abuse. Non-indulgent social attitude, double standards towards CSA, poor community and authority response, non-denial and hesitant family response, insensitive police and medical fraternity are greatly responsible in the growth of CSA in India. Apart from sexual abuse in institutions or workplaces, risk of such abuse by family members and relatives at home, neighbours, care-takers at school exists. Thus, be it schools or streets, homes or institutions, risk of CSA cannot be ruled out. Trauma and after-effects of CSA can be grave enough to fill the life of the victimised child with prolonging horrors diminishing the quality of life forever. Resultantly, the Protection of Children from Sexual Abuse Act, 2012 (hereinafter referred as “POCSO Act, 2012”) was enacted for protecting children from sexual assault, sexual harassment and pornography. Amidst this scenario, this research paper

¹ ‘National Policy for Children, 2013’ <<http://wcd.nic.in/sites/default/files/npcenglish08072013.pdf>> accessed 16 December 2015.

conceptualizes CSA and its nature; the global and Indian facts and figures pertaining to CSA; examines the international documents relating to CSA and evaluates the national legal scenario relating to CSA. It also focuses on the failure of the Indian society as a whole in effectively addressing the issue of CSA and ponders the ways to curb this horrible menace.

CHILD AND CSA: CONCEPTUALIZATION AND NATURE

Unless otherwise legally provided, the term child usually refers to a person less than eighteen years including adults apart from minors.² A person who is of immature intellect and imperfect discretion, is unable to foresee and comprehend the consequences of his own act.³

Child abuse involves four elements *viz.*, physical abuse, sexual abuse, emotional abuse and neglect.⁴ CSA involves an incident wherein an adult engages a minor in a sexual act or exposes the minor to inappropriate sexual behaviour/material. It may involve any incident wherein a child is coerced into performing any sexual activity by another child. It may involve use of threats and physical force but usually involves subtle forms of manipulation in which the child is coerced into believing that the activity is an expression of love.⁵ CSA does not mandate physical contact between a perpetrator and a child.⁶ Some usual forms of CSA include obscene phone calls, text messages or digital interaction, fondling, exhibitionism or exposing oneself (indecent exposure of genitals) to a minor, masturbation in the presence of a minor or forcing the minor to masturbate, intercourse; sex of any kind with a minor including vaginal, oral or anal; producing,

² Rekha Shrivastava, *International Encyclopaedia of Women Rights and Children Rights* (2009) 302.

³ Paras Diwan, Peeyushi Diwan, *Children and Legal Protection* (Deep & Deep Publications, 1994).

⁴ Mahendra Gaur, *The Child Abuse- A Reality* (Alfa Publications, 2008).

⁵ 'Types of Child Abuse' <<http://www.asca.org.au/WHAT-WE-DO/Resources/General-Information/Types-of-child-abuse>> accessed 17 December 2015.

⁶ 'American Humane Association' <<http://www.americanhumane.org/children/stop-child-abuse/fact-sheets/child-sexual-abuse.html>> accessed 16 December 2015.

owning or sharing pornographic images/movies of children;⁷sex trafficking;⁸ asking or pressuring a child to engage in sexual activities; displaying pornography to a child; physical contact with the child's genitals or viewing child's genitals without physical contact;⁹ sexual molestation involving kissing, sexual innuendo, verbal sexual abuse, rape by penile penetration for both heterosexuals and homosexuals; incest;¹⁰ prostitution of children as part of commercial sexual exploitation;¹¹ sex tourism,¹² involving children;¹³ molestation at the time of toileting and meeting bathing needs of the child by the father.¹⁴ CSA is involvement of dependent developmentally immature children and adolescents in incomprehensible sexual activities to which they are unable to give informed consent. It violates the social taboos of social roles and aims at gratifying the sexual demands and wishes of the abuser.¹⁵

Unfortunately, CSA pervades all strata of the society. As opined by Nishita Jha and Revati Laul, "*Child sexual abuse is rampant, indiscriminate and cuts across class, geography, culture and religion. It happens in cities and villages by fathers, brothers, relatives, neighbours, teachers and strangers*".¹⁶ Grandfathers, doctors,¹⁷ priests, paedophiles, tourists, caretakers are also found guilty of sexually abusing children. Perpetrators are mostly males,

⁷ *Osborne vs Ohio* [1990] 495 U.S 103.

⁸ 'RAINN' <<https://rainn.org/get-information/types-of-sexual-assault/child-sexual-abuse>> accessed 15 December 2015.

⁹ Neelam Kumari, *Social Approach to Child Development* (ABD Publishers, 2014) ; Mannat Mohanjeet Singh, 'An Epidemiological Overview of Child Sexual Abuse' (2014) 3 *Journal of Family Medicine and Primary Care* 430.

¹⁰ A.K. Jha, *Child Abuse and Human Rights* (Amol Publications, 2006).

¹¹ Azim Sherwani, *The Girl Child in Crisis* (Indian Social Institute, 1998).

¹² 'Understanding Child Sex Tourism' <<http://www.thecode.org/csec/background/>> accessed 16 December 2015; Neelam Kumari (n 9) 60.

¹³ A.K. Jha (n.10) 107-108.

¹⁴ *In re D.C.* 648 A2d 816 (Vt 1993); *Hicks v Larson* (884 N.E 2d 869 (Ind. Ct. App. 2008).

¹⁵ Tilman Furniss, *The Multi-Professional Handbook of Child Sexual Abuse* (Routledge, 1995) ; Vimala Veeraraghavan, *The Child in the New Millenium* (Mosaic Books, 2002).

¹⁶ 'Global Prevalence of Child Sexual Abuse' (2011) <<http://journalistsresource.org/studies/government/criminal-justice/global-prevalence-child-sexual-abuse>> accessed 15 December 2015.

¹⁷ Kelly Ensslin and Nicole.L. Phillips, "Best Practices for Investigating and Prosecuting Child Abuse: Applying Lessons Learned from Delaware's Earl Bradley Case" (2013) 19 *WLR* 51,72.

related or known faces to the victim in whom he/she invests faith and who are in a position of trust and responsibility.¹⁸

Shamefully and astonishingly, most of the CSA take place in juvenile justice homes *i.e.*, observation homes, special homes/children's homes/shelter homes,¹⁹ schools,²⁰ day care centres. These are the places where the child is supposed to be the safest. Legally, CSA is an umbrella term describing criminal and civil offenses in which an adult engages in sexual activity with a minor or exploits a minor for the purpose of sexual gratification.²¹ Sexual relationships between adults and children constitute child abuse since sexual relationships should be formed only with free will and informed consent without any type of coercion.

Soft targets for the perpetrators are innocent children who can be easily lured and enticed by small presents. Poverty, working parents, child staying at home alone, can be some of the causes of CSA. Additionally, the belief that persons suffering from Syphilis and Gonorrhoea will be cured upon having sex with a minor girl child, perpetrators testing their sexual capabilities,²² marital dysfunction and domestic violence, poor support from the extended family can be other causes of CSA.

CSA is detrimental to a child's mental, emotional or physical welfare. Disbelief and blame compound the negative effects.²³ It could trigger future violent behaviour resulting in criminal convictions, psychosomatic responses, psychiatric disorders, long-lasting emotional problems, youth suicide, regression, sleeping and eating disorders, lack of self-esteem, nightmares, mutilation, self-

¹⁸ 'Child Sexual Abuse' <https://en.wikipedia.org/wiki/Child_sexual_abuse> accessed 15 December 2015.

¹⁹ These Juvenile Justice (Care and Protection of Children) Act, 2000, ss. 8,9,34(3), 37; Asian Centre For Human Rights, *India's Hell Holes: Child Sexual Assault in Juvenile Justice Homes* (ACHR, 2013).

²⁰ Neelam Kumari (n 9) 59; Azim Sherwani (n 11) 85,90, 94,96.

²¹ 'Child Sexual Abuse' <https://en.wikipedia.org/wiki/Child_sexual_abuse> accessed 15 December 2015.

²² Azim Sherwani (n 11) 97-98.

²³ R. Summit, "The Child Sexual Abuse Accommodation Syndrome- Child Abuse and Neglect" (1983) 7, 177,193.

hatred, promiscuous behaviour, aggression, sexual difficulties, inability to form lasting relationships, lack of self-confidence, marital problems and poor parenting skills. Physical effects can be headaches, stomach-aches and sleep disturbances. Emotional effects include depression, fear, anxiety, anger and shame. There might also be behavioural problems which include withdrawal, aggression and inappropriate sexual behaviour.²⁴

CSA: FACTS AND FIGURES

CSA is shrouded in secrecy²⁵ and silence by the victims at individual, familial and societal levels and is also underreported,²⁶ making the task of estimating exact figures difficult. Metastudy from the University of Barcelona, 2009²⁷ analysed 65 research studies across 22 countries and found that around 7.9% of men and 19.7% of women worldwide experienced sexual abuse prior to the age of 18 and the highest prevalence rate of CSA was found to be in Africa (34.4%). While Europe showed the lowest prevalence rate (9.2%), America and Asia had prevalence rates between 10.1% and 23.9%.²⁸ South Africa, India, Zimbabwe, United Kingdom and United States witness the highest rates of CSA.²⁹ As per WHO, around 20% of girls and 5-10 % of boys are victims of CSA.³⁰ A survey conducted in 2007 sponsored by Women and Child Development Ministry and carried out by the NGO Prayas in association with

²⁴ Carol Ronken and Hetty Johnston, *Child Sexual Assault: Facts and Statistics* (Bravehearts, 2012); A.K. Jha (n10) 111,114; Neelam Kumari (n 9) 28,29.

²⁵ Tilman Furniss (n 15) 22, 44.

²⁶ 'Reporting on Child Sexual Abuse' <<https://www.victimsofcrime.org/media/reporting-on-child-sexual-abuse>> accessed 15 December 2015.

²⁷ Pereda N and Guilera G, Fornis M, Gomez-Benito J., 'Prevalence of Child Sexual Abuse in Community and Student Samples: A Meta-Analysis' 2009 Clin. Psychol Rev. 328.

²⁸ 'Global prevalence of child sexual abuse' (n 16).

²⁹ Ludovica Iaccino, 'Child Sexual Abuse: Top 5 Countries With the Highest Rates' (*International Business Times* 12 February 2014)

<<http://www.ibtimes.co.uk/child-sexual-abuse-top-5-countries-highest-rates-1436162>> accessed 15 December 2015.

³⁰ 'Summary Report, Promoting Research to Prevent Child Maltreatment. XIX ISPCAN International Congress on Child Abuse and Neglect' (2012) <http://www.who.int/violence_injury_prevention/violence/child/ispcan_report_june2013.pdf> accessed 15 December 2015.

UNICEF and Save the Children found that more than 53% of children in India are subjected to sexual abuse and are mostly not reported.³¹ In its 2013 Report, the Asian Centre for Human Rights said that sexual offences against children in India have reached epidemic proportions. The report stated that more than 48,338 child rape cases were recorded from 2001 to 2011 and that India saw an increase of 336% of child rape cases from 2001 (2,113 cases) to 2011 (7,112 cases).³² The above statistics prove the existence of CSA worldwide and necessitates for the formation of an immediate action on the part of the legislators, community members, parents and police.

INTERNATIONAL LEGAL SCENARIO CONCERNING CSA

The Worst Forms of Child Labour Convention, 1999 emphasized on the elimination of the worst forms of child labour that included the sale and trafficking of children, offering of a child for prostitution and pornography.³³ The Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography,³⁴ emphasises that State Parties shall prohibit the sale of children, child prostitution and child pornography.³⁵ It stresses on the protection of rights and interests of child victims at all stages of the criminal justice process by recognizing their vulnerability and adapting special procedures, informing child victims of their rights, allowing the views, needs and concerns of child victims to be presented and considered in proceedings, providing appropriate support services to child victims throughout the legal process, protecting the privacy, identity and safety of child victims and their families, avoiding unnecessary delay in the disposition of cases and the

³¹ Mannat Mohanjeet Singh and others (n 9); 'Over 53% children face sexual abuse: Survey' (2007) <<http://timesofindia.indiatimes.com/india/Over-53-children-face-sexual-abuse-Survey/articleshow/1881344.cms>> accessed 16 December 2015.

³² India's Hell Holes (n 20).

³³ The Worst Forms of Child Labour Convention, 1999.

³⁴ United Nations Documents, Optional Protocols to the Convention on the Rights of the Child on the Involvement of Children In Armed Conflict And On The Sale Of Children, Child Prostitution and Child Pornography A/RES/54/263, 2000.

³⁵ United Nations Documents, (n 35) art 1.

execution of orders or decrees granting compensation to child victims.³⁶ United Nations Protocol to Prevent, Suppress and Punish Trafficking in persons especially women and children, supplementing the UN Convention against Transnational Organized Crime, 2000 also emphasises the issue of child trafficking for the purposes of sexual exploitation. UN Convention on the Rights of the Child adopted by the United Nations General Assembly prohibited exploitation and trafficking (Article 35), sexual abuse by parents, legal guardians and caretakers (Article 19). States shall prevent inducement or coercion of a child to engage in any sexual activity, the exploitative use of children in prostitution or other unlawful sexual practices and the exploitative use of children in pornographic performances and materials (Article 34).

INDIAN LEGAL SCENARIO CONCERNING CSA

Prior to POCSO Act, 2012, the legal position concerning CSA was precarious. CSA cases had to be inevitably dealt under Section 354, Indian Penal Code, 1860 which had to be stretched to include indecent assault on minor for outraging modesty of the child; Section 375-376, Indian Penal Code, 1860 dealing with rape of women and minors and Section 377 dealing with unnatural offences. This caused great injustice to the child victims since these provisions suit the adult victims. Prevention of Immoral Traffic Act 1956 focused on organised racket of prostitution and only dealt with the isolated cases of CSA. National Plan of Action for Children, 2005 incorporated many provisions for protecting children against trafficking, sexual abuse and pornography. National Policy for Children, 2013³⁷ obligates the State to protect all children from all forms of abuse, sexual exploitation, sale or trafficking, pornography.³⁸

The major breakthrough came in the form of POCSO Act, 2012³⁹ since it comprehensively provides for protection of children from offences of

³⁶United Nations Documents, (n 35) art 8.

³⁷ 'National Policy for Children, 2013' <<http://wcd.nic.in/sites/default/files/npcenglish08072013.pdf>> accessed 16 December 2016.

³⁸ 'National Policy for Children, 2013', Provision 4.9.

³⁹ 'National Policy for Children, 2013'

sexual assault, sexual harassment and pornography.⁴⁰ Simultaneously, it also attempts to safeguard the interests of the child at every stage of the judicial process by incorporating child friendly mechanisms for reporting, and recording of evidence; investigation and speedy trial of offences through designated Special Courts.

Defining child as any person below the age of 18 years,⁴¹ POCSO Act, 2012 enumerates provisions for punishing varieties of child sexual abuse. They are discussed herein below:

- Penetrative sexual assault⁴² is punishable with imprisonment of minimum 7 years extendable up to life imprisonment along with fine⁴³ Penetrative sexual assault involves penetration/ insertion of penis or object into the sexual organs of the child.
- Aggravated penetrative sexual assault⁴⁴ is punishable with imprisonment of minimum 10 years extendable to life imprisonment along with fine.⁴⁵ Aggravated penetrative sexual assault comes into picture when a police officer, member of armed forces or security forces, public servant, staff of jail, remand home, observation home, staff of hospital or staff of educational institution or religious institution is involved in commission of penetrative sexual assault on the child. It also includes gang penetrative sexual assault on a child; sexual assault of a female child resulting into pregnancy, penetrative sexual assault of a mentally or physically disabled child, repeated penetrative sexual assault on a child, penetrative sexual assault on a child below 12 years of age, attempt to murder the child after committing penetrative sexual assault, or, penetrative sexual assault during communal or sectarian violence and penetrative sexual assault on a child followed by forcing the child to strip naked in public.

⁴⁰ POCSO Act, 2012, Preamble.

⁴¹ POCSO Act, 2012, s 2(1)(d).

⁴² POCSO Act, 2012, s 3.

⁴³ POCSO Act, 2012, s 4.

⁴⁴ POCSO Act, 2012, s 5.

⁴⁵ POCSO Act, 2012, s 6.

- Sexual assault⁴⁶ is punishable with imprisonment of 3 years extendable up to 5 years along with fine.⁴⁷ Sexual assault involves touching the private parts of a child or making the child touch the private parts of some other person with sexual intent *sans* penetration.
- Aggravated sexual assault⁴⁸ is punishable with a term of 5 years extendable up to 7 years along with fine.⁴⁹ Sexual assault is treated as aggravated, if committed by certain persons or under circumstances similar to those specified under Section 5 of POCSO Act, 2012.
- Sexual harassment⁵⁰ is made punishable with an imprisonment for a term of up to 3 years along with fine.⁵¹ Sexual harassment, here, includes utterances of words or sounds, making gesture, exhibiting object or part of body to the child, making child exhibit his body or part of body, showing pictures or videos for pornographic purposes to the child, stalking the child, enticing child for pornographic purposes.
- Using child for pornographic purposes⁵² is punishable with up to 5 years imprisonment along with fine and up to 7 years imprisonment for second/ subsequent conviction.⁵³
- Storing pornographic material involving a child for commercial purposes is punishable with up to 3 years imprisonment/fine/both.⁵⁴
- Even abetment/attempt to commit any of the above offences is punishable with the punishment prescribed for the offence abetted.⁵⁵

⁴⁶ POCSO Act, 2012, s 7.

⁴⁷ POCSO Act, 2012, s 8.

⁴⁸ POCSO Act, 2012, s 9.

⁴⁹ POCSO Act, 2012, s 10.

⁵⁰ POCSO Act, 2012, s 11.

⁵¹ POCSO Act, 2012, s 12.

⁵² POCSO Act, 2012, s 13.

⁵³ POCSO Act, 2012, s 14.

⁵⁴ POCSO Act, 2012, s 15.

⁵⁵ POCSO Act, 2012, ss 16, 17, 18.

- POCSO Act, 2012 adopts a considerate approach towards the child victim by providing that the statement of the child shall be recorded at the residence of the child by a police officer not in uniform and ensuring protection of child from the accused.⁵⁶ Even, recording of the evidence in the CSA cases has been rendered child friendly and child protective in nature.⁵⁷ Detention of the child at police station during night is not permitted. It is mandatory to record the statement of the child *i.e.* when the child is speaking. Further, the burden of proof is shifted on the accused keeping in mind the vulnerability and innocence of children.
- National Commission for the Protection of the Child Rights and the State Commission for the Protection of the Child Rights have been authorized to oversee the proper implementation of the POCSO Act, 2012.⁵⁸ A provision is also made for awarding interim compensation to meet the needs of the child for relief or rehabilitation to be paid by the State Government out of the Victim Compensation Fund established under Section 357A, Code of Criminal Procedure, 1973.⁵⁹ It also provides for mandatory reporting of sexual offences by a person having knowledge about the CSA⁶⁰ failing which he may be punished with six months/fine.⁶¹

ANALYSIS AND WAY FORWARD

CSA ought to be viewed from the perspective of child's right, health and socio-legal issues.⁶² Right from encouraging reporting of the abuse, to believing the victim, to punishing the perpetrator, great integrated and coordinated efforts are required from the professionals involved in investigation, prosecution, adjudication, rehabilitation, counselling in matters of CSA. The responsibility of

⁵⁶ POCSO Act, 2012, s 24.

⁵⁷ POCSO Act, 2012, s 33.

⁵⁸ Protection of Children from Sexual Offences Rules, 2012, r 6.

⁵⁹ Protection of Children from Sexual Offences Rules, 2012, r 7.

⁶⁰ POCSO Act, 2012, s 19.

⁶¹ POCSO Act, 2012, s 21.

⁶² Tilman Furniss (n 15) 3.

supporting the victimised children lies upon the whole community. Prevention of CSA, justice delivery, protection and rehabilitation of victims are not isolated issues. The achievement of these objectives mandates a co-ordinated response of all the key players including police, prosecution, courts, medical institutions, psychologists, counsellors, NGOs and the society. To a great extent, the Model Guidelines issued under Section 39, POCSO Act, 2012 serve this purpose.⁶³ These Guidelines 2012 lay down elaborate guidelines for the proper implementation of the POCSO Act, 2012 and guide the professionals and experts assisting the child victims at pre-trial and trial stages.

Appreciably, POCSO Act, 2012 creates a strong and efficient legal network for protecting children against CSA and for punishing the perpetrators. It punishes almost every known form of sexual abuse and encourages child victims to report the offence and seek redressal for their suffering. The proper implementation of the POCSO Act, 2012 and guidelines are needed. This is possible only by sensitizing the children, parents, schools and caretakers since any untoward and harsh treatment of the victim tends to shatter the confidence of the victim and its family, benefitting the accused. Despite POSCO Act 2012, unless the Central and the State government adopt effective measures for proper implementation of the Act, prevention of CSA and punishment of the concerned offenders will be extremely impossible.

Disbelief, denial and cover-up to preserve family reputation have rendered CSA rampant yet an invisible crime in India.⁶⁴ Fear of indignity, denial from the community, social stigma, inability to trust government authorities and gap in communication between parents and children about this issue⁶⁵ has done great damage by making the issue of CSA a taboo in India. Therefore, reporting of crime has to be encouraged. Further, the most important thing is imposing trust in the victim. This will be the first step towards doing justice to the victim.

⁶³ 'National Policy for Children, 2013' (n 37).

⁶⁴ Neelam Kumari (n 9) 58.

⁶⁵ Mannat Mohanjeet Singh and others (n 9).

Post reporting, great care and delicateness is required on the part of the parents, police, prosecution and the judiciary. Any untoward and harsh treatment of the victim may not only benefit the accused but also shatter the confidence of the victim and his/her family. The prosecution and the judge have to adopt a strict perspective towards the accused in the CSA cases and protect the child victim from the perpetrator. Further, delayed disclosures and reasons for delay ought to be allowed keeping in mind the fact that CSA incidents are reported much later in time, post the occurrence.⁶⁶ Police need to properly investigate the case, preserve evidence and apprehend the accused for further legal procedure. Unfortunately, most of the times, CSA is treated as a lesser offence than rape. However, strict punishment must be meted out to the accused in cases of CSA. Investment in the well-being of a child is relevant and inevitable for a healthy society.

Awareness about the sexual education among the parents and children needs to be enhanced. There is a need to educate students in the school about what constitutes sexual harassment.⁶⁷ School administrators, teachers, parents and students all need to play a proactive role in this direction. Awareness about sexual abuse can go a long way in prevention of horrendous CSA. Early detection, quick identification and punishing the perpetrator, quick intervention and supportive environment at the schools and families need to be nurtured.

References

1. Abrams, Douglas E., & Ramsey, Sarah H, (2007) *Children and the Law- Doctrine, Policy and Practice* (Thomson West, Minnesota).
2. April, Keisha (2012) "Cartoons Aren't Real People, Too: Does the Regulation of Virtual Child Pornography violate the First Amendment and Criminalize Subversive Thought?" Vol.19 *Cardozo Journal of Law and Gender* 241, 271.

⁶⁶ Christopher. T. Fell, 'Crying Out for Change: A Call for a New Child Abuse Hearsay Exception in New York State' [2012] 76.3 *Albany Law Review* 1853.

⁶⁷ Edward.S. Cheng, 'Boys being Boys and Girls being Girls- Student-to-Student Sexual Harassment from the Courtroom to the Classroom' [1997] 7 *UCLA Women's Law Journal* 263.

3. Cheng, Edward.S. (1997) “Boys being Boys and Girls being Girls- Student-to-Student Sexual Harassment from the Courtroom to the Classroom” Vol.7 UCLA Women’s Law Journal 263-321.
4. Diwan, Paras., & Diwan, Peeyushi (1994) *Children and Legal Protection* (Deep & Deep Publications, New Delhi).
5. Ensslin, Kelly., and Phillips, Nicole.L. (2013) “*Best Practices for Investigating and Prosecuting Child Abuse: Applying Lessons Learned from Delaware’s Earl Bradley Case*” Vol.19 Widener Law Review 51-72.
6. Eskbridge, William. N. & Hunter, Nan.D. (1997) *Sexuality, Gender and the Law* (Foundation Press, New York).
7. Fell, Christopher. T. (2012) “Crying Out for Change: A Call for a New Child Abuse Hearsay Exception in New York State” Vol.76.3 Albany Law Review 1853-1889.
8. Furniss. Tilman, (1995) *The Multi-Professional Handbook of Child Sexual Abuse* (Routledge, London).
9. Gardner, Martin.R., & Dupre, Anne. Proffitt (2006) *Children and the Law: Cases and Materials* (Lexis Nexis, New York).
10. Gaur, Mahendra. (2008) *The Child Abuse- A Reality* (Alfa Publications, New Delhi).
11. ‘Global Prevalence Of Child Sexual Abuse’ (2011) <<http://journalistsresource.org/studies/government/criminal-justice/global-prevalence-child-sexual-abuse>> accessed 15 December 2015
12. <<http://wcd.nic.in/sites/default/files/gazettemwcd19122012.pdf>> accessed 16 December 2015.
13. <<http://wcd.nic.in/sites/default/files/POCSO-ModelGuidelines.pdf>> accessed 16 December 2015.
14. <<http://www.americanhumane.org/children/stop-child-abuse/fact-sheets/child-sexual-abuse.html>> accessed 16 December 2015.

15. <<http://www.asca.org.au/WHAT-WE-DO/Resources/General-Information/Types-of-child-abuse>> accessed 15 December 2015.
16. <<http://www.ibtimes.co.uk/child-sexual-abuse-top-5-countries-highest-rates-1436162>> accessed 15 December 2015.
17. Singh, Mannat Mohanjeet., Parsekar, Shradha.S, & Nair, Sreekumaran N. (2014) “An Epidemiological Overview of Child Sexual Abuse” (2014) *Journal of Family Medicine and Primary Care* Oct-Dec; 3(4): 430–435 <<http://www.ncbi.nlm.nih.gov/pmc/articles/PMC4311357/>> accessed 16 December 2015.
18. <https://en.wikipedia.org/wiki/Child_sexual_abuse> accessed 15 December 2015.
19. <<https://rainn.org/get-information/types-of-sexual-assault/child-sexual-abuse>> accessed 15 December 2015.
20. <<https://www.victimsofcrime.org/media/reporting-on-child-sexual-abuse>> accessed 15 December 2015.
21. Asian Centre For Human Rights (2013) *India’s Hell Holes: Child Sexual Assault in Juvenile Justice Homes* (New Delhi).
22. Jha, A.K. (2006) *Child Abuse and Human Rights Volume 1* (Amol Publications, New Delhi).
23. Kumari, Neelam. (2014) *Social Approach to Child Development* (ABD Publishers, Jaipur).
24. Lollar, Cortney. E. (2013) “Child Pornography and the Restitution Revolution” *The Journal of Criminal Law and Criminology* Vol.103 No.2, 343-406.
25. “National Plan of Action for Children, 2005” <<http://www.childlineindia.org.in/CP-CR-Downloads/National%20Plan%20of%20Action.pdf>> accessed 16 December 2015.

26. “National Policy for Children, 2013” <<http://wcd.nic.in/sites/default/files/npcenglish08072013.pdf>> accessed 16 December 2015
27. “Over 53% children face sexual abuse: Survey” (2007) <<http://timesofindia.indiatimes.com/india/Over-53-children-face-sexual-abuse-Survey/articleshow/1881344.cms>> accessed 16 December 2015.
28. Ronken, Carol., & Johnston, Hetty (2012) *Child Sexual Assault: Facts and Statistics* (Bravehearts).
29. Sanderson, Christiane (1995) *Counselling Adult Survivors of Child Sexual Abuse* (2nd Edition Jessica Kingsley Publishers, Pennsylvania).
30. Saxena & Saxena (2013) *Cruelty against Child* (Dwivedi & Company, Allahabad).
31. Sherwani, Azim. (1998) *The Girl Child in Crisis* (Indian Social Institute, New Delhi).
32. Shrivastava, Rekha (2009) *International Encyclopaedia of Women Rights and Children Rights Vol 2*(Anmol Publications, New Delhi).
33. “Summary Report, Promoting Research to Prevent Child Maltreatment. XIX ISPCAN International Congress on Child Abuse and Neglect” (2012). <http://www.who.int/violence_injury_prevention/violence/child/ispcan_report_june2013.pdf> accessed 15 December 2015.
34. Summit, R. “The Child Sexual Abuse Accommodation Syndrome- Child Abuse and Neglect” [1983] 7: 177-193.

HUMAN RIGHTS OF CHILDREN IN INDIA

*Dr. Preeti Bhardwaj

**Dr. Rajwanti Sandhu

ABSTRACT

International Conventions and Indian Constitution has recognized certain basic rights of the child. The main issue is implementation of these rights. India is fast becoming one of the major countries plagued with evils like child trafficking and child labour.

We could never have loved the earth so well if we had had no childhood in it

(George Eliot, The Mill on the Floss (1860))

I'd give all wealth that years have plied,

The slow result of life's decay,

To be once more a little child

For one bright summer day.

(Lewis Carroll, "Solitude")

* Assistant Professor, Department of Law, Kurukshetra University.

** Assistant Professor, Department of Law, Kurukshetra University.

INTRODUCTION

Human rights are the “rights and freedom to which all humans are entitled”. These are the rights that are vested in every person by virtue of his/her being a human. All human beings have human rights. It is not a static or fixed concept, but is constantly evolving or changing. It is like a seed, which, once planted, grows slowly and steadily, putting out roots, shoots, branches, leaves and fruits. In our country we see, hear and read of children dying of starvation, while food in our granaries rots and feeds rats. Female sex ratio is declining, little children are married off, flouting all laws. Little ones are sacrificed, trafficked and sold, while others are locked, abused, sodomised; the list is endless. This is not just the tip of the iceberg, but still we remain mute spectators. Violation of children’s rights is not limited to the poor and downtrodden. They happen in middle class, as well as elite class, where the silence around these incidents is even deeper. It is universally accepted that children are one of the most vulnerable groups of humanity and, therefore, need extra protection. This extra protection has emerged in the form of a well developed system of rights.

SEPARATE RIGHTS FOR CHILDREN

The need to have separate rights for children was felt after the Second World War when many children were orphaned or disabled due to the war and were in need of special protection. Those working with children felt that the existing system was not sufficient to deal comprehensively with the needs of the children. Thus, the UN Convention on the Rights of the Child brought all the rights of the children within one document for the very first time in history. The single most important principle, on which the rights of the children are based, is the ‘best interest principle’, which means any action taken with regard to a child must be in his/ her best interest. The Convention on the Rights of the Child defines basic rights of children covering multiple needs and issues, which India endorsed on December 11, 1992.

NATIONAL COMMISSION FOR PROTECTION OF CHILD RIGHTS

The National Commission for the Protection of Child Rights (NCPCR) was set up in March 2007 under the Commission's mandate to ensure that all laws, policies, programs and administrative mechanisms were in consonance with the child rights' perspectives as enshrined in the Constitution of India and also the UN Convention on the Rights of the Child. Childhood across the world, has broadly been construed in terms of a 'golden age' that is synonymous with innocence, freedom, joy, play and the like. What makes a person 'child' is the person's age, even if the person is under the age of 18 years, or, is married and has children of his/her own, s/he will be treated as child. Children's rights are defined in various ways, and are inclusive of a wide spectrum of civil, cultural, economic, social and political rights. Rights tend to be of two general types, those advocating for children as autonomous persons under the law and those placing a claim on society for protection from harm perpetrated on children because of their dependency. These have been labeled as the right of empowerment and the right of protection.

HISTORICAL BACKGROUND

It is difficult to determine the quality of child protection and care in primitive societies. Children were thought to be a burden on tribes which were frequently visiting different places, or those whose food supply was not enough. However, among people in a higher state of civilization or under less severe economic pressure, children were often greatly admired as a 'possession' for their economic prestige. In the year 1751, no social standards or adequate laws existed to safeguard the working children. Dependent children lived frequently in almshouses under very unsuitable and bad conditions. There were inhuman and intolerable conditions found in factories, slums, and other working places of children which evoked the humanitarian agitation. The United States then had to conduct monumental surveys of social conditions of children and design legislation to regulate those evils.

ROLE OF THE UNITED NATIONS

Under the League of Nations, a Child Welfare Committee conducted research and compiled national laws relating to children. It studied such topics as the infant mortality, the family allowance system, child marriage and child labor. It extended its sphere to consider child delinquency, illegitimacy and influence of theater and pictures. Since 1883, the International Congress started dealing with League of Red Cross Societies. An organization was started in 1920 named "Save The Children Funds", which distributed four million pounds by the end of 1929 for the care of destitute mothers, infants and children in many countries. In the year 1924, the Assembly of League of Nations, adopted Geneva Declaration of the Rights of the United Nations International Children's Emergency Funds. The General Assembly of the United Nations adopted the Declaration of the Rights of the Children on November 20, 1959. The Declaration in its Preamble points out that "The child by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth" and proceeds to formulate various principles¹.

INTERNATIONAL CONVENTION ON HUMAN RIGHTS

Nations are staging special events to mark the 22nd anniversary of the Convention on the Rights of the Child, which came into force on November 20, 1989. It is the most widely ratified international human rights treaty. Every country in the world, with the exception of the United States and Somalia, has ratified it. During the days before Convention, most of the world thought that children should be seen and not heard. Now, after 22 years, some children are making their voices heard. But most of them still remain silent and their human rights continue to be violated. There are several problems which children face in their countries. These are physical abuse of children, child labor and begging. The United Nations Convention on the Rights of the Child, adopted in 1989 to

¹ *The United Nations Today*, (Department of Public Information, 1998) 6.

protect the rights of children, is the most widely ratified document, which includes environment, basic health welfare, education, leisure and cultural activities and special protection measures for children. There are estimated to be between 100 million and 150 million street children in the world, and this number is growing. Of those some 5-10% have run away from or been abandoned by their families².

HUMAN RIGHTS OF CHILDREN AND EDUCATION

Though there are various areas in which the rights of children have been violated, the researchers during the course of the present paper, would be taking up three important areas wherein the violations have been gross and relentless viz. rights of children with regards to education, child labor and child trafficking.

The ability to read and write is an essential element of human capability. Experiences of countries across the world have time and again shown the overall role played by education in national development and in individual and social well being. It is the first step towards acquiring other tools of learning. Not only this, it equips people to make informed choices, empowers them to resist oppression and enables them to claim their rights.³ Also, Right to Education being a right in itself, is an enabling right. Education ‘creates the “voices” through which rights can be claimed and protected’, and without education people lack the capacity to ‘achieve valuable functionings as part of living’. If people have access to education they can develop the skills, capacity and confidence to secure other rights. Education gives people the ability to access information detailing the range of rights that they hold, as well as government’s obligations. It supports people to develop the communication skills to demand these rights, the confidence to speak in a variety of forums, and the ability to negotiate with a wide range of government officials and power holders.

² Lundy Christine, *An Introduction to the Convention on the Rights of the Child*, (Full Circle Press Canada, 1998) 154.

³ Savita Bhakray, *Children in India and their Rights* (NHRC Publication, 2006) 51.

Less than half of India's children between the ages of 6-14 go to school. Mathematically, a little over one-third of all children who enroll in grade one reach grade eight. At least, 35 million children aged 6-14 years do not attend school and around 53% of girls in the age group of 5 - 9 years are illiterate. In India, only 53% of habitation has a primary school. And only 20% of habitation has a secondary school. On an average, an upper primary school is 3 km away from the residing area in 22% of area under habitation.⁴ The statistics on the state of child education in India is disturbing to say at the least, despite the fact that right to education has been universally recognized since the Universal Declaration of Human Rights in 1948 (though referred to by the ILO as early as the 1920s) and has since then been enriched in various international conventions, National Constitutions and development plans. The Indian Constitution also contains several provisions which ensure that the basic human right is available to children in our country.

THE INDIAN CONSTITUTION AND EDUCATIONAL RIGHTS OF CHILDREN

The Constitution is the fundamental law of the country, reflecting the underlying and unifying values of society. It spells out the basic rights of each person; it serves as a framework for all other laws and policies. The following provisions in the Indian Constitution clearly spell out the vision of the framers for making basic education available to the children of India.

Art. 21A. The State shall provide free and compulsory education to all children between the age of six to fourteen years in such manner as the State may, by law, determine. (The Eighty-sixth Amendment Act, 2002)

Art. 41. Right to work, education and public assistance in certain cases. The State shall, within the limits of its economic capacity and development, make effective provision for securing the right to work, education and public

⁴ 7th All India Education Survey (2002)

assistance in cases of unemployment, old age, sickness and disablement, and in other cases of undeserved want.

Art. 45. Provision for free and compulsory education for children.

(1) The State shall endeavour to provide, within a period of ten years from the commencement of this Constitution, free and compulsory education for all children until they complete the age of fourteen years.

(2) The State shall endeavour to provide early childhood care and education for all children until they complete the age of six years. (The Eighty-sixth Amendment Act, 2002).

Art. 46. Promotion of educational and economic interests of Scheduled Castes, Scheduled Tribes and other weaker sections. The State shall promote special care of the educational and economic interests of the weaker sections of the people, and, in particular, the Scheduled Castes and Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation.

Art. 51 A (k). Mandate to parent or guardian to provide opportunities for education to his child or ward, as the case may be, between the age of six and fourteen years. (The Eighty-sixth Amendment Act, 2002)

CHILD LABOUR IN INDIA

Child labour is commonly defined as work done by children under the age of 18, which is considered to be damaging to their physical, emotional, intellectual, social and spiritual development. Child labour encompasses every non-school going child – irrespective of whether the child is engaged in work which provides wages or not; whether he or she is working for their family or for others; whether employed in hazardous or non-hazardous occupations; whether employed on a daily or on a contract basis or a bonded labourer. The tragedy unfolding today is that millions of children worldwide undergo the worst forms of child labour which includes child slavery, child prostitution, child trafficking, child soldiers. In modern era of material and technological

advancement, children of almost every country are being callously exploited. Things have come to such a pass that the laws, which are fairly tough and comprehensive, are rarely put to use.

India has made the dubious distinction of being the nation with the largest number of child labourers in the world. According to Government of India's facts and figures, there are 20 million child labourers in the country while other agencies claim that it is 50 million. Children work for eight hours at a stretch with only a small break for frugal meals; so, they are ill-nourished. Most migrant children, who cannot go home, sleep at work places, which is very bad for their health and development.⁵ According to the International Labor Organization (ILO), 120 million children in the 5-14 age group work fulltime or more; of these, India is responsible for about 44 million. Child labour is a complicated matter, but enough has been discovered over the years to conclude that children are often placed in extremely hazardous areas such as mines and factories with exposure to toxic chemicals and poor ventilation systems. The child labourers endure miserable and difficult lives. They earn little and struggle to make enough to feed themselves and their families. They do not go to school, and more than half of them are unable to learn the barest skills of literacy.

INDIAN CONSTITUTION AND THE PROVISION AGAINST CHILD LABOUR

There are several provisions in the Constitution of India which talk about improving the quality of life of children in general and the prohibition for working in the factories in particular. Article 24 of the Constitution of India, (prohibition of employment of children in factories, etc.) states that, "*no child below the age of fourteen years shall be employed in work in any factory or mine or engaged in any other hazardous employment.*" Then, Article 21A provides for Right to Education. This Article states that "*the state shall provide free and compulsory education to all children of the age of 6 to 14 years in*

⁵ 'The Tribune' < <http://www.tribuneindia.com/2010/20100513/chd.htm> > accessed on 9 May 2010

such a manner as the state, by law, may determine.” Moreover, there is Article 39 which states that “the state shall, in particular, direct its policy towards securing that the health and strength of workers, men and women, and the children at such a tender age are not abused and that citizens are not forced by economic necessity to enter avocation unsuited to their age or strength.”

CHILD TRAFFICKING

Stating simply, trafficking of children may be 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”. Children in India are trafficked for various purposes, but the primary amongst those reasons is “prostitution”. Prostitution is the most documented and visible form of trafficking. Already India enjoys the dubious distinction of having one of the largest numbers of child prostitutes in the world. The figure is almost touching 4 lakhs with neighbours, Nepal and Bangladesh. Reports on child prostitution such as from the International Abolitionist Federation emphasizes the direct link between the growth of child prostitution and the increasing number of male pedophile tourists from Western Europe, U.S.A, Switzerland, Australia, Canada and the Gulf countries who visit Asian Countries every year. While the countries where this problem has been perceived as acute are Philippines, Thailand, Taiwan and Sri Lanka, India is fast catching up with them.

India is also a significant source as a transit country. Many child prostitutes in the brothels of India’s major cities come from rural villages and they are trafficked under the same guise as children from Nepal and Bangladesh. Indian female children are trafficked to the Middle East and Europe, often forced into sexual slavery. This is similar to Bangladesh and Nepalese children who pass through India *en-route* to Middle East and the West. The reasons leading to the occurrence and rise in trafficking are common to all the South-Asian countries. Poverty, lack of education and the low status of females and children from lower socio-economic backgrounds are all contributory factors. Lured by promises of good jobs or marriage, trafficking victims are frequently forced into debt and bondage outside the country. Traffickers living abroad often arrive in a

village and convince a child's family to let her leave with him. For reasons of ignorance, abject poverty and social perception of the girl child, her parents willingly send their children. Upon arrival at the destination location, children are sold to 'friends' or 'husbands' and driven into prostitution. Criminal gangs conduct much of the trafficking and the porous international borders in South-Asia facilitate their activities.

References

1. Bose, A.B, (2003) *The State of Children in India*, (New Delhi: Manohar Publishers).
2. Ministry of Health and Family Welfare, (2000) Annual Report, 1999-2000, (Government of India: New Delhi).
3. Bhakry, S. (2006) *Children in India and their Rights* (Rajika Press Services Pvt Ltd.)
4. Ministry of Women and Child Development, Government of India website, <www.wcd.nic.in> accessed on 26 Jan, 2012
5. Human Rights News Letter, vol 18, no.12, Dec, 2011.
6. <www.indianexpress.com/news/crime-against-children/India> accessed on 25 Nov, 2011.
7. Government of India (2007-2012) *Sub Group Report on Child Protection in the Eleventh Five Year Plan*.
8. Ministry of Women and Child Development, Government of India (2010) *Child Rights in India: Current Status and Challenges*.

PLIGHT OF RIGHT TO EDUCATION OF UNDERPRIVILEGED CHILDREN IN INDIA: A PERTINENT OUTLOOK

***Dr. Sonia B Nagarale**

ABSTRACT

Children being the most vital human resource of the nation, require a more deliberate fostering in terms of education, health and safety. The basic framework of civilised society can't be strengthened in the presence of illiterate and unbridled childhood. With widening disparity in terms of social and economic factors present in the society, to impart free and compulsory education to children has been rightfully prioritized by India. However, to encompass the sizably huge under-privileged population of children under exhaustive educational schemes and to bring them in mainstream, educational conduit is a mammoth challenge before contemporary India. As far as under-privileged children are concerned, poverty, child-delinquency and ultimately deprivation of dignified life are the most devastating repercussions of lack of education. Thus, pertinent aspect of child education warrants more deliberate attention. The paper attempts to recap various perspectives of education and the significance of child education with precise emphasis on under-privileged children such as street children, slum children, transgender children etc. It also endeavours to analyse various national and international instruments craving child education with contemporary illustrations. The devastating repercussions of depriving children from education have been answered with some of plausible legislative and social solutions which the paper craves to encapsulate by the policy makers.

* Assistant Professor, Department of Law, Savitribai Phule Pune University (University of Pune).

*Education promotes equality and lifts people out of poverty. It teaches children how to become good citizens. Education is not just for a privileged few, it is for everyone. It is a fundamental human right.*¹

-Ban Ki-Moon

With changing contours of the development and the means to achieve it, the omnipresent inequality can't be overlooked. Perhaps, the most striking example of such superficial development would be the adjoining slum areas to the sky-scrapers of any city. The bitterness of this truth in world's biggest democracy has been well-accepted and the picture has remained incessant even after the seven decades of the independence of Indian Republic. It's equally true that the Slums are a universal phenomenon and exist in almost all cities across the world. The plight of the under-privileged children residing in the slums often goes unheeded by the metropolitan glitter of modernized civic senses. However, the existence of such ignorance has to be paid in terms of child delinquencies and overall degrading socio-economic ambience of most of the cities of India.

The significance of education at younger age has been considered as very important. Moreover, the right to schooling across the life cycle begins with access to quality preschool education that is compatible with family arrangements. Early childhood is crucial for cognitive and emotional development as well as overall physical and mental health. In the first three years, neuronal connections are formed and the brain reaches 90% of its adult size. Children develop language and motor skills and learn to form social bonds and regulate their emotions. In this sense, the positive effects of comprehensive care during early childhood have a crucial impact on the following phase, from 3-5 years of age. During this phase, access to quality preschool education yields better results and progress during primary education.²

¹ Brainy Quotes <http://www.brainyquote.com/quotes/authors/b_ban_kimoon.html> accessed 10 August 2016.

² Pablo Villatoro and Martín Hopenhayn, 'The Right to Education : An Unfinished Task for Latin America and the Caribbean' (2006) 3 Challenges <http://www.unicef.org/lac/Desafios_Nro3_eng.pdf> accessed 11 August, 2016.

Every child must go to school at his/her appropriate age as everyone has equal rights for education by the birth. The growth and development of any country depends on the quality of education system set for young ones in the schools and colleges. However, the education system in different areas of the country is not same so the proper growth and development of the people and society varies according to the weak and strong education system of the particular region. For solving this massive social problem associated with urban poverty appears to center increasingly on improvement in the methods of educating the culturally deprived children of the slums. Educators have long recognized that such children enter school under handicaps not imposed on children of the middle class, that slum children often seem immune to standard instructional programs, and that a relatively large proportion of them quit school early and become misfits and unemployables. Some inevitably drift into delinquency. Being the most paramount aspect of the society, children and their very education is a matter of high concern. The growth of children in healthy atmosphere and imparting them quality education is a goal of any civilized society. Thus, when a nation lets the sizable quantum of children to be in underprivileged state inclusion deprivation to the even elementary education, the severity of the situation is self-explaining one. Thus, child delinquency and its one of the root cause, i.e. illiteracy cannot go unheeded.

As unswervingly reflected into the NCRB³ statistics, the number of juvenile delinquents from economically weak backgrounds also saw an increase as did the number of illiterate or poorly educated delinquents. According to NCRB data, while 52.9% of juveniles apprehended in 2012 belonged to families with annual income of less than Rs 25,000, the percentage went up to 55.6% in 2014. About 52% of juveniles apprehended in 2012 were either illiterate or educated only up to primary level. This figure went up to 53% in 2014.⁴

³ National Crime Records Bureau.

⁴ Juvenile Delinquency in India (*Indpaedia*)<http://indpaedia.com/ind/index.php/Juvenile_delinquency_in_India>.

As per 2011 Census report in India roughly 1.37 crore households or 17.4% of urban households lived in slums, in Kolkata it was estimated to be 29.6%.⁵ Education plays a pertinent role in laying a proper foundation for the over-all socio-economic development of any region. Right of Children to Free and Compulsory Education Act 2009 provides children the right to free and compulsory admission, attendance and completion of elementary education. Being a quintessential component of the development, Education has become the most potent mechanism for human advancement. The conduit of the education has bridged the eco-socio-politico dimension of the 21st century. Moreover, the education of the younger children is not only the concern of the education field but an integral part of the human resource development of the nation. In contemporary global scenario the preponderance of the child-education can be clearly seen on the agenda of every nation. Education has been defined by European Court of Human Rights (ECHR)⁶ as, ‘*education in a narrow sense as “teaching or instructions... in particular to the transmission of knowledge and to intellectual development” and in wider sense as ‘the whole process whereby, in any society, adults endeavour to transmit their belief, culture and other values to the young.’* Be it developed nation or developing one, the education sector has incessantly remained a pivotal player in the journey of development.

The right to education is the pivotal part of the *Education For All* (EFA) programme being a priority of the UNESCO. It responds to the constitutional mandate of the Organization- ensuring “*Full and equal opportunities for education for all.*” Making good quality basic education accessible to all is an important objective of the EFA.⁷ The wider meaning of

⁵ Rukmini Shrinivasan, ‘17% of Urban India Lives in Slums: Census’ (*Times of India*, 23 March 2013) <<http://timesofindia.indiatimes.com/india/17-of-urban-India-lives-in-slums-Census/articleshow/19118219.cms>> accessed on 11 August, 2016.

⁶ European Court of Human Rights, ‘European Convention on Human Rights’ (*Council of Europe*)<http://www.echr.coe.int/Documents/Convention_ENG.pdf> accessed 12th August, 2016.

⁷ At the fifth meeting of the High Level Group on Education For All (Beijing, November 2005) the Ministers of Education stated that “EFA will only be successful when currently marginalized children and adults complete school and workplace preparation programmes which they can use to improve their lives.” As quoted in ‘Inclusive Dimensions of the Right to Education: Normative

education has been recognized by UNESCO's 1974 *Recommendation concerning Education for International Understanding, Co-operation and Peace and Education relating to Human Rights and Fundamental Freedoms*. UNESCO's report states;

*"[t]he entire process of social life by means of which individuals and social groups learn to develop consciously within, and for the benefit of, the national and international communities, the whole of their personal capabilities, attitudes, aptitudes and knowledge."*⁸

As regards the Dakar goal for universalizing free and compulsory primary education by 2015, the joint Expert Group UNESCO on the Monitoring of the Right to Education suggested a process which needs to be reversed.⁹ The United Nations Committee on Economic, Social and Cultural Rights (CESCR), in its concluding observations has, for example, identified various reasons why some groups have limited access to education, ranging from traditional attitudes preventing girls from attending school¹⁰ to the limited availability of schooling, including teachers, in rural areas. A further ground of exclusion represents the limited financial means of persons living in poverty, who frequently may also be members of minority or indigenous communities.

The International human rights law recognizes everyone's right to an adequate standard of living, including adequate education. Despite the central place of this right within the global system, well over a billion people are not adequately educated. The number of underprivileged children who have been

Bases' concept paper prepared for the eighth and ninth meetings of the Joint Expert Group UNESCO (CR)/ESCOSOC (CESCR) on the Monitoring of the Right to Education- 2008.

⁸ UNESCO, 'Recommendation concerning Education for International Understanding, Co-operation and Peace and Education relating to Human Rights and Fundamental Freedoms' (UNESCO 1974) art 1(a) <http://portal.unesco.org/en/ev.php-URL_ID=13088&URL_DO=DO_TOPIC&URL_SECTION=201.html> accessed 14 August 2016.

⁹ UNESCO, 'Inclusive Dimensions of the Right to Education: Normative Bases' (UNESCO 2008), <<http://unesdoc.unesco.org/images/0017/001776/177649e.pdf>> accessed 10 August 2016.

¹⁰ ENOC, 'Zambia: Children's Rights in UN Treaty Body Reports' (UNOC, 11 June 2013) <<http://enoc.crin.org/en/library/publications/zambia-childrens-rights-un-treaty-body-reports>> accessed 1 August 2016.

deprived of the education is beyond the quantification. Hence, whilst prioritizing the policy framework, the emphasis ought to have been given on the young population who come from the underprivileged strata of the society.

Adequate education was recognized as part of the right to an adequate standard of living in the 1948 Universal Declaration of Human Rights and in the 1966 International Covenant on Economic, Social and Cultural Rights. Other international human rights treaties, conventions and bodies have since recognized or referred to the right to education or some elements of it, such as the protection of one's right to education. The right to education has been recognized in a number of international and regional legal instruments: treaties (conventions, covenants, charters) and also in soft law such as recommendations, declarations and frameworks for action. The Universal Declaration of Human Rights (UDHR), adopted in 1948, states in Article 26: "Everyone has the right to education".

Since then, the right to education has been reaffirmed in various international treaties including: Article 5 of the UNESCO Convention against Discrimination in Education (1960) UNESCO¹¹ Convention against Discrimination in Education and the International Covenant on Economic, Social and Cultural Rights guarantee the right to education generally, that is, for all people. Other treaties apply to specific groups (children, women, persons with disabilities, refugees and migrant) or for specific contexts (for example, education in armed conflicts and education and child labour).

The right to education has also been recognized in ILO¹² Conventions and international humanitarian law as well as in regional treaties. More prominently in "UN Millennium Development Goals¹³" the expressly mentioned goal of 'providing universal primary education' can be said to be a guiding star for nations to keep education on higher pedestal whilst framing

¹¹ UNESCO 'Convention against Discrimination in Education 1960' (UNESCO 14 December 1960) <[http://portal.unesco.org/en/ev.php URL_ID=12949&URL_DO=DO_TOPIC_&URL_SECTION=201.html](http://portal.unesco.org/en/ev.php_URL_ID=12949&URL_DO=DO_TOPIC_&URL_SECTION=201.html)> Art 5(1)(a) accessed 10 August 2016.

¹² International Labour Organisation.

¹³ UN, 'The Eight Millennium Development Goals (MDGs)' (*We Can End Poverty*) < <http://www.un.org/millenniumgoals/> > accessed 14 August, 2016.

policies. The right to education is also covered in various United Nations instruments such as, the General Comment 13 on Article 13 of the International Covenant states that “education must be accessible to all, especially the most vulnerable groups, in law and fact, without discrimination on any of the prohibited grounds.”¹⁴ Under Indian scenario of child, education has been kept on higher pedestal since pre-independence era. The footprints of the same can be seen through Maharaja Sayaji Rao Gaikwad reign in Baroda province, wherein under 9 villages of Amroli district the compulsory education was made operative as a pre-test in the year 1893.¹⁵ After getting positive results, State of Baroda was first to introduce law on Compulsory Education in 1906. This law provided for compulsory education for boys and girls in the age groups of 7 to 12 years and 7-10 years respectively. The first documented use of the word right in the context of elementary education appears in a letter written by Rabindra Nath Tagore to the International league for the Rational Education of Children in 1908.¹⁶ In 1911, Gopal Krishna Gokhale moved a bill for compulsory education in the Imperial legislative council, albeit unsuccessfully.¹⁷ The next landmark development of pre-independence era about free and compulsory education was post war plan of educational development popularly called as Sargent plan 1944. The Sargent Scheme, formally known as the Report of the Sargent Commission on Post-War Education Development in India, was a 1944 memorandum prepared at the behest of the British-run Government of India that outlined the future development of racy and education in India.¹⁸

¹⁴ Committee on Economic, Social and Cultural Rights, ‘CESCR General Comment 13: The Right to Education (Article 13)’ (*Right to Education Project*1999) <<http://www.right-to-education.org/resource/cescr-general-comment-13-right-education-article-13>>accessed 13 August 2016.

¹⁵ The Information Office, ‘Baroda : A Guide Book(1942)< file:///C:/Users/admin/Desktop/education/GIPE-012585.pdf>accessed 12 August 2016.

¹⁶ Planning Commission, ‘Report of National Development Council Committee on Literacy-Elementary and Adult Education in India – Historical Perspective’ (*MHRD* 1993), <<http://education.nic.in/cd50years/y/3P/45/3P450401.htm>>accessed 12 August 2016.

¹⁷ Right to Education, ‘When Was the First Demand for RTE Made in the Country?’ <<http://righttoeducation.in/when-was-first-demand-rte-made-country>>accessed 12 August 2016.

¹⁸ Ram Nath Sharma, Rajendra Kumar Sharma, *History of Education In India* (Atlantic Publishers & Distributors 1996) ISBN 81-7156-599-9.

However, in the post-independence era, with myriad plans, theories and schemes, India has progressively marched towards the goal of 'Education for All.' Generally, the education sector in India has been divided into three categories such as Primary, Secondary and Higher Secondary education. The underpinning of the modern educational set up of the India, i.e. "10+2+3" can be traced from the 'Indian Education Commission' most popularly known as the Kothari Commission of 1964-66.¹⁹

*The National Policy for Children, 1974*²⁰ recognised that programmes for children should find prominent place in national plans for the development of human resources, so that children grow up to become robust citizens, physically fit, mentally alert and morally healthy, endowed with the skills and motivations provided by society. The Policy also laid emphasis on equal opportunities for the development of all children during the period of growth.

In consonance with this, the education sector of India saw a drastic change by virtue of the Forty-Second Amendment, 1976 which changed the pertinent entry of 'Education'. Before 1976, Education as a whole was a State Subject and the Central Government used to play only an advisory role. However, by the Constitutional Amendment under Schedule VIIIth the "Education" became a subject matter of the 'Concurrent List'.²¹ Thus, earlier strand of union Government to be a merely advisor to the State Governments had replaced with a more participatory one to the nation's education sector.

The reforms in education which further resulted into the *National Policy on Education 1986* (as modified in 1992) is an extensive document that covers all aspects of education from elementary to university level and even adult education. The Following section is an overview of all aspects of the policy that directly deals with children aged between 0 and 18. The 1992 revised NPE

¹⁹ Daulat Singh Kothari, 'Annual Report 2009-10' (UGC) <http://www.ugc.ac.in/oldpdf/pub/annualreport/annualreport_0910.pdf> accessed 15 August 2016.

²⁰ Childline, 'Child Protection and Child Rights National Mechanisms Child Related Policies, National Policy on Education 1986 (as modified in 1992)' (Childline) <<http://www.childlineindia.org.in/National-Policy-on-Education-1986.htm>> accessed 12 August 2016.

²¹ Constitution of India 1950, Schedule VII, Concurrent List, entry 25.

states that aim of education is to keep intact India's long accepted values of secularism, socialism, democracy and professional ethics. Being a most paramount consideration the child education has also been annexed with the programmes such as, "Education for All" in India. It has intensified since the 1990s. For example, external aid, especially World Bank loans to primary education, significantly increased in the 1990s due to the implementation of "Adjustment with a Human Face" under economic liberalization in 1991. National Policy on Education 1986 has rightly remarked that "The Constitution embodies the principles on which the national system of Education is conceived of."²²

With the proposed arrival of NEP 2016, some of the fundamental issues of child education are expected to be resolved. More particularly as has been pinpointed in 'Some inputs for Draft NEP 2016, prepared by the MHRD²³, "Nationally the percentage of out-of-school children aged 6-13 years has declined significantly since 2000. However, the absolute number of out-of-school children remains high. The relatively lower enrolment rates in upper primary and secondary education as compared to primary education are also a matter of concern. Ensuring upward transition/mobility of students from elementary to secondary to achieve universal secondary education and from secondary to higher secondary and tertiary education continues to be a challenge."

Every Constitution has a philosophy of its own which embodies the ideals, values, hopes and aspirations of its people. So Education should find an important place in this Constitution. In India, the footprints of the holistic development of each and every strata of the society in equal manner can be well founded into the Preamble to the Constitution of India itself. The connotation such as, Justice; Social, Economic and Political enshrined under the Preamble ensures justice through myriad conduits of the development, and it can't be gainsaying that, education for all is an integral and foundational mean to achieve justice. Similarly, equality of status and opportunity also guarantees the various

²² The National System of Education, <<http://www.educationforallinindia.com/page52.html>>accessed 12 August 2016.

²³ Ministry of Human Resource Development, Government of India.

rights and privileges of the citizen of free India. Education of children can be well founded through the conduit of this connotation. It's quite obvious that if younger children of the nation cannot get adequate opportunity of education then, the very purpose of the Constitution essentially frustrates. Hence, being the supreme law of the land, Constitution embarks and craves the holistic development of each individual of free India, which essentially includes the children of under-privileged strata.²⁴

Children on account of their tender age and immature mind need special care and protection. They have certain special rights and legal entitlements that are being acknowledged nationally and internationally. The constitution of India recognized the rights of children for the first time and included several articles dealing with their liberty, livelihood, and development of childhood, non-discrimination in educational spheres and compulsory and free education. Moreover the express mention of the child-education into the directive principles of state policy, under Article 45²⁵ which states, 'State shall endeavor to provide, within a period of ten years from the commencement of the Constitution, for free and compulsory education for all children until they complete the age of fourteen years'. However this goal has not been achieved even after fifty years of the commencement of the Constitution. It was held that there was nothing to prevent the State from discharging that solemn obligation through the government and aided schools, and Article 45 does not require the obligation to be discharged at the expense of minority communities. In the case of *Mohini Jain v. State of Karnataka and others*,²⁶ the Supreme Court in its liberal interpretation of life and liberty as under Article 21 held that the term life not only includes livelihood but also the right of human beings to live with dignity and that also includes the right to education, and therefore, right to education is a fundamental right under

²⁴ NCERT, 'National Policy on Education 1986' <http://www.ncert.nic.in/oth_anoun/npe86.pdf> accessed 12 August 2016.

²⁵ Provision for free and compulsory education for children- 'the State shall endeavor to provide, within a period of ten years from the commencement of the Constitution, for free and compulsory education for all children until they complete the age of fourteen years.'

²⁶ *Mohini Jain v. State of Karnataka and others* AIR 1992 SC 1858.

the constitution. The case of Mohini Jain came to be fortified by the Supreme Court in subsequent constitution bench in *Unnikrishnan's case*,²⁷ which held that right to education, can be restricted to primary educational level and not to higher and secondary level. However, by virtue of 86th Constitutional Amendment, 2002²⁸ it now provides that, the State shall endeavor to provide early childhood care and education for all children until they complete the age of six years. Thus, pre-school education of the children has been ensured by the Constitution itself. Article 45²⁹ casts the obligation on the State to ensure the early childhood care and education to children below the age of six years which states that the State shall endeavor to provide early childhood care and education for all children until they complete the age of six years. Article 45 has thus further converted into fundamental right the Right to education through manifestation of Constitution (Eighty-Sixth amendment) Act, 2002.³⁰ By this amendment a new Article 21A providing for right to education has also been inserted. This is now also a fundamental duty of parents and guardians to educate such children as provided in fundamental duties, which casts the duty on the parents to send children at schools under clause (k) of Article 51A.³¹

Similarly, *the Sarva Shiksha Abiyaan* (SSA), which has been implemented since 2000/01 to universalize primary educational by 2010, especially mentions urban deprived children as one of the four specially targeted groups. The National Literacy Mission targets the most productive and reproductive age group of 15 to 35, which has been enlarged to include 9 to 14

²⁷ *Unni Krishnan v. State of Andhra Pradesh* AIR 1993 SC 2178.

²⁸ The Constitution (Eighty-Sixth Amendment) Act 2002 <<http://indiacode.nic.in/coiweb/amend/amend86.htm>> accessed 10 August 2016.

²⁹ Provision for free and compulsory education for children The State shall endeavour to provide, within a period of ten years from the commencement of this Constitution, for free and compulsory education for all children until they complete the age of fourteen years.

³⁰ The Constitution (Eighty-Sixth Amendment) Act 2002 <<http://indiacode.nic.in/coiweb/amend/amend86.htm>> accessed 12 August 2016.

³¹ To provide opportunities for education by the parent the guardian, to his child, or a ward between the age of 6-14 years as the case may be <<http://www.clearias.com/fundamental-duties/>> accessed 11 August 2016.

year olds outside formal and non-formal schooling.³² The Sarva Shiksha Abhiyan is a historic stride towards achieving the long cherished goal of Universalisation of Elementary Education (UEE) through a time bound integrated approach, in partnership with the State. SSA, which promises to change the face of the elementary education sector of the country, aims to provide useful and quality elementary education to all children in the 6 -14 age group by 2010. The SSA is an effort to recognize the need for improving the performance of the school system and to provide community owned quality elementary education in mission mode. It also envisages bridging of gender and social gaps.

In 2006 the Ministry of Women and Child Development (MWCD) proposed the adoption of the Integrated Child Protection Scheme (ICPS). In 2009 the central government took the scheme for its approval and has begun the extensive task of providing children with a protection and safe environment to develop and flourish. The purpose of the scheme is to provide for children in difficult circumstances, as well as to reduce the risks and vulnerabilities children have in various situations and actions that lead to abuse, neglect, exploitation, abandonment and separation of children. Under the umbrella of ICPS, Integrated Programme for Street Children was started as initiatives to help children living on the street fulfil their rights. The programme provides for shelter, nutrition, health care, education, recreation facilities to street children, and seeks to protect them against abuse and exploitation. The programme aims at building society's awareness of the rights of the child enshrined in the UN Convention on the Rights of the Child (CRC) and in the Juvenile Justice (Care and Protection of Children) Act, 2000. This can be achieved through capacity building of the government organizations, NGOs and the larger community these children live in.³³

³² Committee on the Rights of Child, 'Convention on the Rights of the Child' (UN, 16b July 2003) <<http://www.childlineindia.org.in/CP-CR-Downloads/UNCRC%20India%20periodic%20report%202001.pdf>> accessed 11 August 2016.

³³ Childline, 'Child Protection and Child Rights National Mechanisms Child Targeted Schemes and Programmes Balika Samridhi Yojana (BSY)' (*Childline*) <<http://www.childlineindia.org.in/Integrated-Child-Protection-Scheme-ICPS.htm>> accessed 19 August 2016.

It's pertinent to note that, the right to education being a fundamental right has been further annexed and extended through the full-fledged legislation i.e. The Right of Children to Free and Compulsory Education Act, 2009. Hence, the canvass of the right to education of children has been widened by numerous legislative endeavors. Since the inception of the right to education as the fundamental right within the Constitution itself, the judiciary has paved the broader way to enforce the very right of education. This can be well observed through the meritorious decision of the Apex Court in the case, *Society for Unaided Private Schools of Rajasthan v Union of India & Another*.³⁴ In this decision, the Supreme Court of India upheld the constitutionality of section 12 of the Right of Children to Free and Compulsory Education Act (RTE Act)³⁵, which requires all schools, both state-funded and private, to accept 25% intake of children from disadvantaged groups. However, the Court held that the RTE Act could not require private, minority schools to satisfy a 25% quota, as this would constitute a violation of the right of minority groups to establish private schools under the Indian Constitution.

There are some other provisions on the right to education. They are, Article 21A and The Right to Education Act, 2009 which came into force on 1st April, 2010. The title of the RTE Act incorporates the words 'Free and Compulsory'. 'Free education' means that no child, other than a child who has been admitted by his or her parents to a school which is not supported by the appropriate Government, shall be liable to pay any kind of fee or charges or expenses which may prevent him or her from pursuing and completing elementary education. 'Compulsory education' casts an obligation on the appropriate Government and local authorities to provide and ensure admission, attendance and completion of elementary education by all children in the 6-14 age group. With this, India has moved forward to a rights based framework that casts a legal obligation on the Central and State Governments to implement this

³⁴ *Society for Unaided Private Schools of Rajasthan v Union of India & Another* (2012) 6 SCC 102.

³⁵ The Right of Child to Free and Compulsory Education Act 2009 s 12 <<http://indiacode.nic.in/amendmentacts2012/The%20Right%20to%20Free%20and%20Compulsory%20Education%20Act.pdf>> accessed 11 August 2016.

fundamental child right as enshrined in the Article 21A of the Constitution, in accordance with the provisions of the RTE Act, 2009.

This Act provides, right of children to free and compulsory education till completion of elementary education in a neighborhood school. Further it clarifies that ‘compulsory education’ means obligation of the appropriate government to provide free elementary education and ensure compulsory admission, attendance and completion of elementary education to every child in the six to fourteen age group. ‘Free’ means that no child shall be liable to pay any kind of fee or charges or expenses which may prevent him or her from pursuing and completing elementary education. It also makes provisions for a non-admitted child to be admitted to an age appropriate class. It specifies the duties and responsibilities of appropriate governments, local authority and parents in providing free and compulsory education, and sharing of financial and other responsibilities between the Central and State Governments. It lays down the norms and standards relating inter alia to Pupil Teacher Ratios (PTRs), buildings and infrastructure, school-working days, teacher-working hours. This Act also provides for rational deployment of teachers by ensuring that the specified pupil teacher ratio is maintained for each school, rather than just as an average for the State or District or Block, thus ensuring that there is no urban-rural imbalance in teacher postings. It also provides for prohibition of deployment of teachers for non-educational work, other than decennial census, elections to local authority, state legislatures and parliament, and disaster relief. It provides for appointment of appropriately trained teachers, i.e. teachers with the requisite entry and academic qualifications. It prohibits (a) physical punishment and mental harassment; (b) screening procedures for admission of children; (c) capitation fee; (d) private tuition by teachers and (e) running of schools without recognition, It provides for development of curriculum in consonance with the values enshrined in the Constitution, and which would ensure the all-round development of the child, building on the child’s knowledge, potentiality and talent and making the child free of fear, trauma and anxiety through a system of child friendly and child centered learning.

Whilst assessing the precise ambit of the connotation “Child with disadvantaged group, it becomes highly warranted to look into amendment to the RTE. The Right of Children to Free and Compulsory Education (RTE) Act 2009 originally defined a ‘child belonging to a disadvantaged group’ as one belonging to a Scheduled Caste, Scheduled Tribe, socially and educationally backward class or such other group facing disadvantage owing to social, cultural, economic, geographical, linguistic, gender or other similar factors. Mentally and physically challenged children, entitled to free education in special schools, were included in the definition through an amendment in 2012. However, to broaden the concept of children belonging to a disadvantaged group, there is need to include the other under-privileged children. There are various states in India which have progressively included the orphans, HIV-affected children, transgender and children of scavengers.³⁶

To affirm the Government’s commitment to the rights based approach in addressing the continuing and emerging challenges in the situation of children, the Government of India adopted Resolution on the National Policy for Children, 2013. This Policy is to guide and inform all laws, policies, plans and programmes affecting children. All actions and initiatives of the national, state and local government in all sectors must respect and uphold the principles and provisions of this Policy.³⁷

The programme will lend support to projects in urban areas not already being covered by the existing schemes of Ministry of Labour, which provide support for the whole development of child workers and potential child workers especially those who have none or ineffective family support such as children of slum/pavement dwellers/drug addicts, children living on railway platforms, children working in shops, dhaba, children engaged as domestic workers, children

³⁶ State of Tamil Nadu, through a Governmental Order on 8th November 2011 expanded the ambit of the term “Child with Disadvantaged Group.’ also the Government Order also defined a ‘child belonging to weaker section’ to mean one whose parents or guardians earned less than Rs. 2 lakh a year.

³⁷ The National Policy for Children, 2013 <<http://www.childlineindia.org.in/pdf/The-National-Policy-for-Children-2013.pdf>>accessed 14 August 2016.

whose parents are in jail, children of migrant labourers, sex workers, leprosy patients etc.

In consonance with the national level attempts to ensure education of children a recent incidence is noteworthy wherein, The Maharashtra State Commission for Protection of Child Rights (MSCPCR) has directed the state government to provide schooling to children residing in slums and ensure that public transportation services is made available to them. The majority of the children who reside in these slums are between the age group of 6 to 8 years and therefore, cannot travel on their own. Their parents being daily wage workers are unable to accompany them. Accordingly, BEST bus services are required to be given at concessional rates to them. As BEST has hiked fare from Rs 30 to Rs 100 per month. Therefore, we see that for want of financial support and inaccessibility of the bus service, the children are being deprived of school, which is against the provision of the Right to Education (RTE) Act.”³⁸

The National Plan of Action for Children includes goals, objectives, strategies and activities for improving the nutritional status of children, reducing Infant Mortality Rate, increasing enrollment ratio, reducing dropout rates, universalisation of primary education and increasing coverage for immunization.

The Government has also adopted various other Schemes for welfare of children, applicable to slum children like the Balika Samridhhi Yojana (BSY)³⁹ The Balika Samridhhi Yojana started in 1997 is an important initiative of the Government to raise the status of the girl child. The scheme’s aims at changing the negative attitude of families and communities towards the girl child, to increase enrollment and retention of girls in schools, to raise the marriage age of girls and to create income opportunities and activities. A series of incentives are incorporated into the Yojana, such as a gift of Rs. 500/- to the mother on delivery

³⁸Express News Service, ‘Give Schooling, Public Transport to Slum Children: Rights Panel Tells State’ (*The Indian Express* 23 April 2015) <<http://indianexpress.com/article/cities/mumbai/give-schooling-public-transport-to-slum-children-rights-panel-tells-state/>> accessed 12 August 2016.

³⁹Childline, ‘Child Protection and Child Rights National Mechanisms Child Targeted Schemes and Programmes Balika Samridhhi Yojana (BSY)’ (*Childline*) <<http://www.childlineindia.org.in/Integrated-Child-Protection-Scheme-ICPS.htm>> accessed 19 August 2016.

of a baby girl and an annual scholarship for the girl child education. In 1999-2000 the scheme was changed to benefit the girl child. Hence now the girl child can receive a post birth grant amount of Rs. 500/ and is eligible for annual scholarships for education according to class. Part of the money given to the girl child at birth or in scholarships can be put aside for paying the premium on an insurance policy in the name of the girl child under the Bhagyashri Balika Kalyan Bima Yojna. Under this scheme the girl child can withdraw the scholarship amount and interest when she turns 18. If she marries or dies before she is eighteen the amount incurred in interest bearing account will be withdrawn.

Though there are various steps taken by both central and state governments, as well as by the local authorities and various NGO's in organization and implementation of programs and policies like child line, policy for street children, children education policy, Sarva Shiksha Abhiyan etc. to address the education, health and other problems of slum children, still more concrete strategies are required to render rights of slum children and make their life more secure. India has set in place various forms of public policy concerning street children over the past two decades, but they have largely been ineffective because they are uniformed by sociological, anthropological, and geographical research on street children, meaning they do not always correctly assess and address needs. The endeavors of National Commission as well as the State commission for the protection of child rights are commendable but still the problems of slum children are enormously deep-rooted and there is an urgent call to redress it. More pertinently, to deprive the under-privileged children from the basic education and care is nothing but to deprive them from the very essence of 'Life' by violating their right to life in every sense. The plight of under-privileged children with regard to education, thus warrants a more diligent and strict adherence at the implementation of contemporary legal framework.

The most severe impediment in this regard is to sensitize the slum people regarding importance of their children's right to education and imparting information to them about various governmental schemes and policies. Thus, a well-established network has to be framed in consonance with Government

and NGO participation in order to bring out more effective awareness in under-privileged population. In most common parlance the term under-privileged children has been used to denote the slum area and low income strata of the society. However, the inclusion of street children, transgender and religious-socio deserted children, children of scavengers and other downtrodden strata of the society are to be included into the ambit of child with dis-advantaged groups. In this regard the State Governments should identify with the help of Local Authorities, intensive areas to be approached earliest and which are still ignored in cities. The more prominent example is set by the State of Tamil Nadu, which has incorporated the above changes. In order to mitigate the crucial issues of executive drawbacks, merely passing of welfare legislation and thereby recognizing the rights of the under-privileged children won't suffice the purpose. Whereas, to fill the vacuum of non-implementation the State should make it mandatory on local authorities to conduct survey about the situation of slum children from education and health perspective, twice in a year and ask them to show the progress made by the local authorities in this regard. To ensure more social and cultural participation of medium and higher income strata with under-privileged population the participation from the college students, academicians and professionals can be sought. Moreover, by organization of social and cultural programmes in such areas can be beneficial in this regard.

When it comes to free and compulsory education of children some crucial aspects such as the number of out-of-school children (OOSC) has declined significantly since 2000, the number and proportion of out-of-school children remain much higher than the national average in some states. The proportion of OOSC has been higher than the national average for SC children, ST children and Muslim children. This indicates that these children need greater and focused attention. Most states have successfully integrated inclusive strategies to facilitate enrolment and retention of disadvantaged population groups in primary education. Despite these efforts, children from certain sections of the population, such as children with disabilities, children in remote locations, children belonging to nomadic families, migrant children, and other vulnerable/

disadvantaged groups have not been able to take full benefit of the educational opportunities. Urban poor children constitute another group of children whose participation in education remains low. Ensuring access to education for the hardest-to-reach section of population remains one of the key priorities in the context of efforts to achieve universal elementary and secondary education. In 2014-15, the retention rate at primary level was 83.7 per cent and it was as low as 67.4 percent at the elementary level. This indicates that roughly, four in every 10 children enrolled in grade I leave the school before completing grade VIII.⁴⁰ Thus, more deliberate efforts are required to overcome this impediment.

The migration of the slum from place to place is a crucial aspect of bringing out the effective implementation of the welfare schemes. In order to seek daily employment, a sizable population of India belonging to daily waged labors does the migration from place to place. Hence, to consolidate their data and thereby provide them adequate facilities such as education becomes inconvenient. Thus, a well-equipped set up of mobile school vans can be arranged for the children belonging to such population. Within the parameters prescribed by the RTE Act, States will have the flexibility to design and plan for the infrastructure keeping in view the local conditions. Local norms, appropriate for local conditions, will be evolved, if necessary through amendment in RTE Act, for 'alternate schools' which offer educational interventions for specific categories of very deprived and migrating children, and those living in difficult circumstances.

As an innovative initiative to overcome the scarcity of classrooms, the Maharashtra State Road Transport Corporation (MSRTC) will donate the scrap of its buses to be used as classrooms at schools in tribal areas.⁴¹

⁴⁰ Ministry of Human Resource Development, 'Some Inputs for Draft NEP 2016' (MHRD) <http://mhrd.gov.in/sites/upload_files/mhrd/files/Inputs_Draft_NEP_2016_0.pdf> accessed 12 August 2016.

⁴¹ PTI, 'ST Bus Scrap to Serve as Classrooms in Tribal Areas' (Free Press Journal, 16 August 2015) <<http://www.freepressjournal.in/mumbai/st-bus-scrap-to-serve-as-classrooms-in-tribal-areas/646866>> accessed 12 August 2016.

The NEP 2016 craves to cover the issue of pre-schooling of under-privileged groups by prioritizing a programme for pre-school education for children in the age group of 4 to 5 years which will be implemented in coordination with the Ministry of Women and Child Development. However, to reach more efficiently at the ground level into the slum and street children, the aid and advice can also be sought from the NGO and other entities in concerned areas. The Integrated Child Development Services (ICDS) programme of the Ministry of Women and Child Development is intended to provide early childhood education. Such efforts from government are to be welcomed by the social entities and NGO's with maximum participation.

Experience has shown that tribal children have difficulty in understanding and learning in the regional language which is usually the medium of instruction. To overcome this impediment, steps should be taken to ensure that, wherever required, multi-lingual education should be introduced. Such a language friendly education can reach and inculcate vocational training to such tribal children. Similarly, such an initiative can also be extended to the children staying at slum areas along with street children.

The discourse regarding the under-privileged children and their very right to have access to the education thus warrants more deliberate attempts than framing merely the legislations. At the initial level it shows that the street children in India choose to leave their families and homes for considered reasons. The main reasons are family conflict, alcoholic parents, earning of family, taking care of sibling etc. as a result of which they are constrained to spend life on the streets and take on the full responsibilities of caring for themselves, including working to earn livelihood for themselves and their family as well. Though street children do sometimes band together for greater security, they are often exploited by employers where they work and sometimes by the Police. Such vulnerabilities of under-privileged children does require specific legislations. Although such a move may depart them from the mainstream Child Education Programme, however, to meet with such challenges, the setting up of independent child-education programme is required to be made. The special vigilance ought to be

kept by the government and concerned entities to observe the effective implementation of the various programmes, schemes and policies of the child-education. These efforts will hear the voice of the underprivileged children for right to education

**THE CHILD LABOUR AMENDMENT BILL: LEGAL DILUTION OF
EFFORTS AT ELIMINATION OF CHILD LABOUR?**

***Dr. Sophy K.J**

ABSTRACT

Governmental efforts at eliminating child labour are not yielding results due to faulty approach ineffective implementation. Children above 14 years are not covered under the Child Labour Prohibition and Regulation Act, which is at odds with other laws and international practices. There is arbitrary difference between child labour and child work. It is difficult to define what is a hazardous work and what is not. Moreover, without welfare provisions like compulsory education for children, elimination of child labour is not possible. The paper critiques the laws and policies of the Government of India regarding elimination of child labour in light of international practices, experiences and opinions of experts.

* Assistant Professor of Law, National Law University, Delhi.

INTRODUCTION

The new Amendment Act, ‘the Child Labour and Adolescent (Prohibition and Regulation) Act, 1986 (hereinafter, “CLPRA”) with its radically-faulty approach has challenged the constitutional objective of elimination of child labour in India. The CLPRA has been enacted ignoring the reality of insurmountable number of child labourers in India. According to Census 2011, there are 35.3 million child labourers in the total population (within completion of 18 years of age). The data states that 8.2 million are children in the age group of 5-14 years and 27.1 million are children in the age group of 15-19 years.¹ Though India hasn’t ratified two core conventions of ILO relating to Child Labour titled, Minimum Age Convention, 1973 and Convention on the Worst Forms of Child Labour, 1999, it was expected that the State would move towards complete prohibition of child labour. The CLPRA, instead of critically revising the existing legislation, has created exemptions within the prohibitive legislation.

There is an important discourse on differentiating between child work and child labour. The former indicates children engaged in work, whether paid, unpaid, in economic or non-economic, at homes or outside homes, whereas the latter denotes involvement of children in labour market.² The child work is not completely confined to economic benefit, but child labour points out their direct involvement in spaces of production/service and contribution towards economy. Based on this construction, it is complex to understand the concept of ‘regulated child labour’ included under the child labour prohibitions laws of India, for economic and commercial benefit of the society in a ‘welfare’ state.

The introduction of the Amendment as ‘historic bill’ by the Minister of Labour raises critical question relating to child rights in India. The argument that ban of child labour is unrealistic as they contribute to family income completely negates its real outcome of perpetual ill health and poverty among young children

¹ ‘National Commission for Protection of Children, 2014’, <<http://ncpcr.gov.in/showfile.php?lid=930>> accessed 30 July 2016..

² Lieten, G K, ‘Child Labour and Poverty: The Poverty of Analysis’ (2002) 45 *The Indian Journal of Labour Economics* 394. .

and adults.³ The meagre income that the child brings into the family may be crucial for the survival of the family. However, the easy subjects of exploitation at workplace because of lack of assertion are children and they are paid lesser and put to harsher conditions at work. The role of being the economic source of the family pressurises them to depend on their employment and this also leads to bonded labour of children. The poverty, unemployment, socio-cultural exclusion and lack of social security programmes are noted as reasons for child labour.

This paper would critically comment on the Amendment Act, *i.e.*, the CLPRA legislation and would discuss certain provisions in detail. The exemption to child labour is a flood gate that dilutes the efforts in eliminating child labour. The argument that CLPRA could be challenged for its constitutionality as it violates the fundamental rights embodied under Part III of the Constitution would form major argument in this paper. The ‘age discourse’ in child rights paradigm is a major and old debate that is still unresolved and debated because of political unwillingness. The critical evaluation of provisions relating to enforcement and penalty would be dealt with in context considering the debates around these provisions.

CHILD LABOUR AT ‘FAMILY ENTERPRISE’: CONSTITUTIONAL CHALLENGE?

The much criticized provision, Section 3 of the Bill allows for employment of children below 14 years in family or family enterprises other than hazardous enterprises and it permits employment of adolescents in occupations other than hazardous occupations or processes. The major criticism of the existing legislation was that it only tries to eliminate child labour in hazardous industries, which incidentally do not include family or household enterprises. Rather than addressing the critical omission in the existing legislation, the present bill allows child labour in family and family enterprises. Although, it mentions that the work is after school hours or during vacations, it hasn’t taken into consideration the

³ ‘Legislating on Child Labour’ (2012) 47 Economic and Political Weekly 9.

right to rest and recreation for fuller development of their personality. A legal provision that allows child labour in family enterprises also paves way for forced labour against his/her wish to pursue other interests in life.

The early exposure to a pattern of employment/work also takes away their innovative or recreational minds and results in waste of young talents. The justification for this provision is a conservative argument that a child is supposed to help the elderly or support the family considering the socio-economic reality of the family. There is problem with the legalisation of value system which is natural and obvious to family environment as its misuse would be large in the Indian context. The argument that economic condition of an average family in India is poor and hence contribution of a child towards the family is appropriate is a flawed premise. The scholars have challenged the argument that child labour would financially empower the family to survive poverty. Kiran Bhatta has argued that child labour is less a phenomenon of poverty than of social attitudes and sensibilities.⁴ It is absurd to impose labour on a child for the economic benefit of the family.

Sec. 3 (2) (a) allows child labour in “family enterprise” which is defined as “any work, profession, manufacture or process performed by the family in engagement with others”. The broad, ambiguous,⁵ and loosely worded section would definitely lead to forced child labour considering the socio-economic reality of our country. Also, the phrase in the definition ‘performed by the family in engagement with others’ leads to an understanding that a child may be employed in the family wherever his family works or is engaged for work. There is no precision on the point that, if the work should be owned/controlled by the family. This would lead to engagement of family along with children to work in employer’s factory (other than mentioned in Schedule), agricultural work, home based work, artisanship or other production/services. It would lead to promotion

⁴ Kiran Bhatta ‘Child Labour: Breaking the Vicious Cycle’ (1996) 31 Economic and Political Weekly 384.

⁵ The words such as “any work, profession, manufacturing, process” does not define the kind of employment and nature of work. Any technical, mechanical, operational, manual and mobile work would come under these definite words.

of pattern of bonded labour existing in India where the generations are in bondage of a landlord/employer. In both rural and urban space, this provision would lead to promotion of caste based occupation and hegemonic social structure. There is no provision relating to monitoring and inspection of children at work and safeguarding of children from engaging in discrimination based occupations.

The exceptions to allow child labour in certain employment, becomes more regressive when it is read with certain other safeguards in the CLPRA for employers to employ children in various employments. Children below eighteen years but above fourteen years (a new category of children invented by the law-adolescents) are prohibited from being employed in scheduled employments.⁶ The Schedule lists out only three employments such as Mines, Inflammable Substances or Explosives and Hazardous Processes. The CLPRA has, in total 83 items in the Schedule where a child shall be prohibited from employment.⁷ Instead of enlarging the prohibition to adolescents as well in such scheduled employments as per the CLPRA, it has come with a schedule only containing prohibition of employment in three employments. By virtue of this, adolescents would be working in employment except these three which definitely would have serious ramifications on their mental and physical health.

While analysing this provision of employment of child in family enterprise, it raises a question of constitutionality. Article 24 of the Constitution prohibits employment of children in factories or mines or hazardous employment. The definition of ‘factory’ is provided under the Factories Act as premises where manufacturing process is going on with or without the aid of power.⁸ Further, the manufacturing process is defined in the same Act.⁹ The Factories Act prohibits child labour in factories where manufacturing process is carried out,¹⁰ but it doesn’t prohibit non-adult workers above fourteen years from employment in

⁶ The Child Labour (Protection and Regulation) Act, 2016, schedule

⁷ The CLPRA, schedule

⁸ The Factories Act, 1948, s 2(m).

⁹ *ibid* s 2(k).

¹⁰ *ibid* s 67.

factories.¹¹ The CLPRA defines ‘family enterprise’ as a space where manufacture or business is going on and a space where a manufacturing process is going on is essentially a factory as per definition of ‘factory’ in the Factories Act. While reading together the fundamental right enshrined in the Constitution regarding elimination of children in factories or mines and the provision in the CLPRA permitting children to work in family enterprises that includes work in manufacture or business raises the challenge of constitutionality. This provision of allowing child labour could be challenged for its unconstitutionality as it results in child labour in factories or other hazardous employment which is prohibited under ‘enforceable rights’ chapter, Part III of the Constitution.

‘AGE’ OF THE CHILD IN DISCOURSE RELATING TO CHILD LABOUR

The Indian law is divergent when it comes to the discourse on age of the child for protection, care and development. The Convention on the Rights of the Child, 1989 states that every human being below the age of eighteen shall be treated as a child¹² and he/she shall be protected from any work that interferes with his/her physical, mental, intellectual, spiritual, moral and social development¹³. As a country that has ratified this Convention, domestic legislation on child labour, the Child Labour (Prohibition and Regulation) Act, (CLPRA), 1986 should define a ‘child’ as any human being below 18 years. But it defines a ‘child’ as a person who has not completed fourteen years of age.¹⁴

The other labour legislations such as the Factories Act, 1948 and the Plantation Labour Act, 1951, the Motor Transport Workers Act, 1961 and the Beedi and Cigar Workers (Conditions of Employment) Act, 1966 defines ‘child’ as a person who has not completed fourteen years of age and fifteen years of age, respectively. This framework needs to be relooked at considering the ‘Right to Education’ movement and the argument that every child out of the school is a potential child labourer.¹⁵ While there is a constitutional right to education under

¹¹ *ibid.*

¹² Convention for the Rights of the Child, 1989 Art 1.

¹³ *ibid* Art 32.

¹⁴ The CLPRA, s 2(ii).

Article 21A for children from the age six to fourteen years, neither CLRA nor CLPRA has taken note of the fundamental right of children to education.

The National Policy for Children, 2013 adopted by the Indian Government and Juvenile Justice Act, 2000 defines 'child' as a person below the age of 18 years. CLPRA, the new law, instead of defining the child from 'rights' perspective and prohibiting employment of children below the age of 18 years, has affirmed the older definition and further divided the child below 18 years into two categories, child below fourteen years and adolescent aged above fourteen years but below eighteen years. The disheartening aspect of these legislations is that there is no mandatory prohibition on child labour, but the legislations have regulated child labour in industries.¹⁶ The implementation of constitutional right to education of children would not be possible without outlawing child labour. Therefore, it is a constitutional duty cast on the Parliament to read the fundamental right under Article 21-A into child labour legislation and new Act, CLPRA should ideally take note of the same.

Further, in CLPRA, the "adolescent labour" is prohibited only in three work spaces- in Mines, Inflammable Substances or explosives and Hazardous processes as per the Factories Act, 1948. The Factories Act does not differentiate between hazardous processes where an adult and adolescent works.¹⁷ Therefore, application of standards of an adult is imposed on adolescents. The logic of dividing children as "child" and "adolescent" itself is illogical and unreasonable as these are stages of development which require different parameters of care and protection. It does not mean that the latter doesn't require any protection for development. The repressive provisions in CLPRA really challenge core labour standards of elimination of forced child labour.¹⁸

¹⁵ Shantha Sinha, 'Emphasising Universal Principles towards Deepening of Democracy' (2005) 40 Economic and Political Weekly 2569.

¹⁶ Prohibition only on certain occupations and processes mentioned under Part A and Part B of the CLPRA, 1986. CALPRA allows child labour in family enterprises.

¹⁷ Kavita Ratna, 'Failing Child Labourers' (2016) 51 Economic and Political Weekly 4.

¹⁸ Core Labour Standards of ILO includes 1) Freedom of Association and Effective recognition of collective bargaining, 2) Elimination of Child Labour, 3) Elimination of Discrimination in occupation

CURIOUS LACK OF 'ENFORCEMENT MACHINERY'

One of the predominant problems that child rights movement has noted is lack of enforcement of laws relating to child labour. The question of law enforcement can be approached from two points of view- firstly, by looking at technical provisions contained in the specific legislation, the legal machinery of enforcement such as inspection departments and court procedure and secondly, considering the impact study of the existing legislation and suggesting recommendations for better enforcement.

The current CLPRA has provisions relating to inspectors and judiciary for enforcement of the provisions of the legislation. The enforcement mechanism seems to be half hearted for the reason that the power of inspector is only in relation to verification of the age of the child in the establishment. Inspector is not provided with any express power to investigate working and living conditions at regulated work places. Although Sec. 13(2) of the Act directs the Rules to deal with items relating to health and safety, the Child Labour (Prohibition and Regulation) Rules, 1988 has not provided any provision on the same. The lack of provisions on protection of children from health and occupational hazards in regulated work and on checks in their working conditions leaves their lives in the hands of the employer.

This has led to loopholes in 'penalty' provisions. The penalty is being prescribed only for employment of children but not for worsened conditions at work. As this legislation regulates/permits child labour in certain occupations, the enforcement mechanisms should be given powers to inspect conditions at work of children. The existing legislation fails to care and protect by providing express provisions relating to rights of children at work. There is no mention about their welfare, social security benefits or protective rights.

CLPRA expressly allows for employment of children below 14 years in family or family enterprises other than hazardous enterprises and it permits

and employment and 4) Elimination of all forms of Forced or Compulsory Labour. *See also* 'Core Labour Standards Handbook, ILO, 2006', <[http://www.ilo.org/wcmsp5/groups/public/—asia/—](http://www.ilo.org/wcmsp5/groups/public/—asia/)

employment of adolescents in occupations other than hazardous occupations or processes. The Bill has ignored the recommendations of the Parliamentary Standing Committee on Labour in its 40th Report of December, 2013, that such a provision would lead to misuse of the provision and increase in child labour considering the lack of monitoring mechanisms and laborious process of checking children working in their homes.¹⁹ It was even pointed out that proving of the fact whether the children were merely helping the parents or working to supplement the family income would be difficult. In order to deal with this criticism, it has been provided under Sec. 17B of CLPRA that there would be periodic inspection of employment places where child labour is prohibited and monitoring of issues relating to provisions of the Act. The section is very general and loosely worded without any specifics. Neither has it talked about inspection and monitoring of conditions at work of children and adolescents where their work is only regulated nor about inspection of children at work in family enterprises. The exemption under CLPRA that even filing of notice to the inspector informing the employment of child by the employer where his/her family is engaged is still continued in CLPRA to worsen the situation of children.

CONCLUSION

The above analysis of three aspects of CLPRA clearly shows that it would dilute efforts of elimination of child labour in India. It has been successfully argued through studies that education enhances exposure to various skills and breaks the cycle of low income and perpetual poverty. The state of Kerala stands as an example to it where participation of children at work is comparatively low compared to the better off states like Maharashtra and Gujarat. The Universal Education Scheme has played its part in eradication of child labour in Kerala.²⁰

ro-bangkok/—ilo-manila/documents/publication/wcms_126253.pdf> accessed on 20 August 2016.

¹⁹ Alex George and Sameet Panda, 'Child Labour Law Amendment' (2015) 50 Economic Political Weekly 16.

²⁰ 'Child Labour: Flies in the Ointment' (1999) 34 Economic Political Weekly 1740.

Our Constitutional consciousness agrees with the fact that education of children prevents child labour. However, the legislative schemes or objectives don't seem to be in agreement with the same and rather promotes their engagement in labour for short term benefits to family. The futuristic benefit to the child and long term benefits to the community could not be thought over while deliberating over this new Act. In the Constitutional context, it challenges fundamental rights of the children ensured under Article 24.

The regulation of child labour instead of complete prohibition poses this important question. The rationale behind making occupational distinctions between hazardous and non-hazardous situations to deploy a child at work is anti-thetic to the elimination of child labour. Regulated child labour system only regulates working conditions, does not help them to creatively invest their time for future. It is more deplorable in the context of lack of enforcement machinery in place. The inspection and monitoring systems to regulate child labour is not mentioned under law. The emphasis is only on determining the age of a child labourer under inspection related provisions of the law. Without efficient inspection, monitoring, reporting and enforcement machinery, neither prohibition nor the flawed concept of 'regulation of child labour' would be enforced. These efforts of prohibition and regulation of child labour is discussed on the verge of this amendment without even resolving the decade old debate of 'age' of the child in child protection laws. The labour law framework on the 'age' aspect is really primitive and does not follow international and domestic legal standard of '18' years. The recent law on Children against Sexual Abuse titled, 'the Protection of Children against Sexual Offences Act, 2012,' defined 'child' as a person below 18 years of age. Despite the significant and successful efforts to protect children against sexual abuse and exploitation through these laws, there is lack of political will to take up the issue of child labour as priority and protect the children below 18 years of age, from exploitation and abuse at work. The three aspects within CLPRA requires thorough reconsideration and timely modification to break the vicious cycle of child labour, ill-health, poverty and forced labour.

**CORPORAL PUNISHMENT IN SCHOOLS: A CRIME AGAINST
CHILDREN IN HUMAN RIGHTS PARADIGM**

***Dr. Vinod Kumar**

ABSTRACT

School corporal punishment refers to causing deliberate pain or discomfort in response to undesired behaviour by students in schools. Corporal punishment in schools is an ineffective, dangerous, and unacceptable method of discipline. Nonviolent methods of classroom control should be utilized in all our school systems. Corporal punishment has historically been justified by the common law doctrine 'in loco parentis', whereby teachers are considered authority figures and are granted with the same rights as parents to punish children in their care. Corporal punishment has major deleterious effects on the physical and mental health of students punished in this manner. It severely reduces and does not enhance the academic success of students who are subjected to corporal punishment in schools. The use of corporal punishment in schools reinforces physical aggression and promotes violence in society. Corporal punishment should be considered as a crime against children and should be prohibited in schools. This article takes into consideration legal aspects of corporal punishment.

*The Author is Assistant Professor (Law), Faculty of Law & Legal Studies, Uttarakhand University, Dehradun, Uttarakhand. Email: vinodvkfzr@gmail.com.

INTRODUCTION

The term “corporal” or “physical” punishment as defined by the UN Committee on the Rights of the Child means “*any punishment in which physical force is used and intended to cause some degree of pain or discomfort, however light. Most involves hitting (“smacking”, “slapping”, “spanking”) children, with the hand or with an implement - a whip, stick, belt, shoe, wooden spoon, etc. But it can also involve, for example, kicking, shaking or throwing children, scratching, pinching, biting, pulling hair or boxing ears, forcing children to stay in uncomfortable positions, burning, scalding or forced ingestion (for example, washing children’s mouths out with soap or forcing them to swallow hot spices).*”¹ The Committee was of the view that corporal punishment is invariably degrading. In addition, there are other non-physical forms of punishment that are also cruel and degrading and thus, incompatible with the Convention. These include punishments which belittle, humiliate, denigrate, scapegoat, threaten, scare or ridicule the child.²

School corporal punishment refers to causing deliberate pain or discomfort in response to undesirable behaviour by students in schools. It often involves striking the student either across the buttocks or on the hands, with an implement such as a rattan cane, wooden paddle, slipper, leather strap or wooden yardstick. Corporal punishment has historically been justified by the common law doctrine *in loco parentis*,³ whereby teachers are considered authority figures, granted with the same rights as parents to punish children in their care.

¹ Committee on the Rights of the Child, *The Right of the Child to Protection from Corporal Punishment and Other Cruel or Degrading Forms of Punishment* [U.N. Doc. CRC/C/GC/8 (2006)] Arts. 19; 28, para. 2; and 37.

² *ibid.*

³ The term *in loco parentis* is a Latin word which means “in the place of a parent.” It refers to the legal responsibility of a person or organization to take on some of the functions and responsibilities of a parent.

INTERNATIONAL AND INDIAN LAWS AGAINST CORPORAL PUNISHMENT IN SCHOOLS

The U.N. Convention on the Rights of the Child, 1989

This U.N. Convention is a comprehensive convention on child rights which provides that in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.⁴ Similarly, State Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.⁵ This Convention clearly indicates that the school discipline should be administered in a manner consistent with the child's human dignity and the Convention.⁶ Further, State Parties shall ensure that no child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment.⁷ India being a signatory to the U.N. Convention on Rights of Child is under an obligation to remove cruelty towards children by prohibiting the canes from schools.

The Constitution of India, 1950

The Constitution of India is the basic law of the land which guarantees various fundamental rights. The 'Right to Life' which is a fundamental right given under Article 21 of the Constitution of India has been expanded to mean a life of dignity and a life protected against cruelty, physical or mental violence, injury or abuse, exploitation including sexual abuse. Article 21 is meaningless if corporal punishment is inflicted upon the children in schools. Further, Article 39 of the Constitution imposes a duty upon the State to direct its policy towards children

⁴ UN Convention on the Rights of the Child, 1989 Art 3(1).

⁵ *ibid* Art 19(1).

⁶ *ibid* Art 28(2).

⁷ *ibid* Art 37(a).

so that their tender age is not abused and children are given the opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment.

The Indian Penal Code, 1860

Under section 82⁸ of the Indian Penal Code, 1860, children below seven years of age are exempted from any kind of criminal liability. Their act is not treated as an offence at all. This means that there can be no corporal punishment even under penal provisions based on the principles of *doli incapax*. Similar exemption is extended to children of above seven years and under twelve years of immature understanding under section 83⁹ of IPC. Thus, for being a student and having committed a wrong in the name of school discipline should not invite any corporal punishment. Section 88¹⁰ of the IPC protects an act which is not intended to cause death, done by consent in good faith for person's benefit. A teacher who administers in good faith a moderate and reasonable corporal punishment to a pupil to enforce discipline in school is protected by this section and such act is not a crime under section 323¹¹ of the IPC. Similarly, section 89¹² of the IPC protects an act by guardian or by consent of guardian done in good faith for benefit of child under 12 years. However, the same section says that this exception will not extend to causing death and causing grievous hurt. These provisions extend to teachers having quasi-parental authority i.e. consent or delegation of authority from parents. Using excessive force, causing serious injury, the purpose of which is unreasonable can turn the act of the guardian or teacher with the consent of guardian, an offence, because such incidents are outside the scope of "good faith."

⁸ Indian Penal Code 1860 (IPC 1860) s 82.

⁹ *ibid* s 83.

¹⁰ *ibid* s 88.

¹¹ *ibid* s 323.

¹² *ibid* s 89.

The Juvenile Justice (Care and Protection of Children) Act, 2015

This newly enacted The Juvenile Justice (Care and Protection of Children) Act, 2015 defines the term ‘corporal punishment.’ It defines ‘corporal punishment’ as the subjecting of a child by any person to physical punishment that involves the deliberate infliction of pain as retribution for an offence, or for the purpose of disciplining or reforming the child.¹³ Similarly, section 3 (vi)¹⁴ of the Act talks about “Principle of Safety.” It says that all measures shall be taken to ensure that the child is safe and is not subjected to any harm, abuse or maltreatment while in contact with the care and protection system, and thereafter.

Section 82¹⁵ of the Act provides punishment for corporal punishment. It provides that any person in-charge of or employed in a child care institution¹⁶, who subjects a child to corporal punishment with the aim of disciplining the child, shall be liable, on the first conviction, to a fine of ten thousand rupees and for every subsequent offence, shall be liable for imprisonment which may extend to three months or fine or with both.¹⁷ It also says that if a person employed in an institution is convicted of an offence under this section then such person shall also be liable for dismissal from service, and shall also be debarred from working directly with children thereafter.¹⁸ Further, in a case where any corporal punishment is reported in any child care institution and the management of such institution does not cooperate with any inquiry or comply with the orders of the Committee or the Board or Court or State Government, the person in-charge of the management of the institution shall be liable for punishment with imprisonment for a term not less than three years and shall also be liable to fine which may extend to one lakh rupees.¹⁹

¹³ The Juvenile Justice (Care and Protection of Children) Act 2015 s 2(24).

¹⁴ *ibid* s 3(vi).

¹⁵ *ibid* s 82.

¹⁶ *ibid* s 2(21) “Child care institution” means children home, open shelter, observation home, special home, place of safety, Specialised Adoption Agency and a fit facility recognised under this Act for providing care and protection to children, who are in need of such services.

¹⁷ *ibid* s 82(1).

¹⁸ *ibid* s 82(2).

¹⁹ *ibid* s 82(3).

One of the drawbacks of these provisions is that the definition of ‘child care institution’ does not cover schools within its ambit.

The National Policy on Education, 1986

The National Policy on Education, 1986 talks about “Child-Centered Approach.”²⁰ It provides that corporal punishment will be firmly excluded from the educational system.²¹

The National Charter for Children, 2003

Article 7(f) of the National Charter for Children provides that the State shall ensure that school discipline and matters related thereto do not result in physical, mental, psychological harm or trauma to the child.²²

The National Policy for Children, 2013

Para 4.6(xv) of the National Policy for Children, 2013 provides that the State shall take all necessary measures to ensure that no child is subjected to any physical punishment or mental harassment. It should promote positive engagement to impart discipline so as to provide children with a good learning experience.²³

Draft National Plan of Action for Children, 2016

One of the objectives of the earlier National Plan of Action, 2005 was to secure for all children, legal and social protection from all kinds of abuse, exploitation and neglect.²⁴ Now, one of the objectives of Draft National Plan of

²⁰ Ministry of HRD, ‘National Policy on Education, 1986 (as modified in 1992)’ (1998) <<http://education.nic.in/policy/npe86-mod92.pdf>> accessed 15 July 2016.

²¹ *ibid.*

²² Ministry of HRD, ‘National Charter for Children, 2003’ (2003) <<http://nicp.nisd.gov.in/pdf/National%20Charter%20for%20Children.pdf>> accessed 10 July 2016.

²³ Ministry of Women and Child Development, ‘The National Policy for Children 2013’ (2013) <<http://www.childlineindia.org.in/pdf/The-National-Policy-for-Children-2013.pdf>> accessed 6 August 2016.

²⁴ Ministry of HRD, ‘National Plan of Action for Children, 2005’ (2005) <wed.nic.in/NAPAug16A.pdf> accessed 5 August 2016.

Action for Children, 2016 is to ensure that no child is subject to physical or mental harassment or any form of corporal punishment. It also talks about public advocacy campaigns against corporal punishment and physical and mental abuse of children in all forms.²⁵

The Goa Children’s Act, 2003

The Goa Children’s Act, 2003 provides that corporal punishment is banned in all schools.²⁶ Further any contravention or non-adherence shall be dealt with by the Competent Authority only and shall be punishable with a fine which may extend to Rs. 50,000/-.²⁷

The Right of Children to Free and Compulsory Education Act, 2009

The Right of Children to Free and Compulsory Education Act, 2009 provides that no child shall be subjected to physical punishment or mental harassment.²⁸ It also provides that whosoever contravenes this provision shall be liable to disciplinary action under the relevant service rules of that person.²⁹

Central Board of Secondary Education (CBSE)’s Directives

The CBSE in the year 2002 wrote to all Heads of Institutions (HoIs) affiliated to CBSE to avoid corporal punishment at any cost in the schools as there is no scope for these punishments in the learning environment.³⁰

Children’s Bill of Rights in NCERT Books

A Children’s Bill of Rights in NCERT books is included in Class VIII Social Science Text books for NCERT. One of such rights of children is that “I

²⁵ Ministry of Women and Child Development, ‘Draft National Plan of Action for Children, 2016’ (2016) <http://wcd.nic.in/sites/default/files/National%20Plan%20of%20Action_0.pdf> accessed 8 July 2016.

²⁶ The Goa Children’s Act 2003 s 4(12).

²⁷ *ibid* s 4(15).

²⁸ The Right of Children to Free and Compulsory Education Act 2009 s 17(1).

²⁹ *ibid* s 17(2).

³⁰ Letter from CBSE to HoIs of affiliated schools (7 July 2002).

have the right to live without violence and corporal punishment (verbal, physical, emotional), and everyone has the responsibility not to be violent to others.”³¹

The Ministry of Human Resource Development (MHRD), Government of India’s Advisory

The Ministry of HRD has written to Chief Secretaries of all States/ Union Territories to abolish the practice of corporal punishment in all educational institutions as it affect the human dignity of the child, thereby reducing his/her self esteem and self confidence.³²

The NCPCR Guidelines on Corporal Punishment

The National Commission for Protection of Child Rights (NCPCR) was set up in March 2007 under the Commissions for Protection of Child Rights Act, 2005. From its inception, the Commission issued a set of guidelines from time to time on ‘corporal punishment’ and the efforts needed to abolish it from within the educational system. The Commission is of the view that there is no room for corporal punishment in any deliberation with the child. These guidelines have been received well by states. The Commission noticed that corporal punishment in schools, both government as well as private is deeply ingrained as a tool to discipline children and as a normal action. The Commission is of the view that all forms of corporal punishment are a fundamental breach of human rights. A slap is as detrimental to the child’s right as any grievous injury. The first guidelines were issued in August, 2007. The gist of guidelines is as follows:³³

1. Inform children of their rights against corporal punishment through campaigns and publicity drives.

³¹National Commission for Protection of Child Rights, ‘Children’s Bill of Rights’ <www.ncpcr.gov.in/Guidelines/NCPCR_Corporal_Punishment_Guidelines_adopted_by_NCERT.pdf> accessed 7 August 2016.

³² Letter from MHRD to Chief Secretaries of States/UTs (17 December 2007).

³³ Letter from NCPCR to Chief Secretaries (9 August 2007).

2. Institute forums for expression in every school, including hostels, JJ Homes, shelter homes and other public institutions meant for children.
3. Provide a complaint box where children can drop their complaints.
4. Hold monthly meetings of the PTAs/SEC/VEC to review complaints and take action.
5. Encourage PTAs to act immediately on any complaints made by children.
6. Empower parents and children to speak out against corporal punishment without any fear of adverse impact on children's participation in schools.
7. Establish review procedures of responses taken to complaints at Block, District and State level and monitor action taken.³⁴

The NCPCR in May, 2009 had issued supplementary guidelines and it also requested the Secretary (School Education) of State Governments/Union Territories, to issue necessary instructions to ensure that children, especially first generation learners, are treated with respect and dignity in schools and to submit a consolidated report by September, 2010.³⁵ The NCPCR Additional Guidelines are as follows:

1. Conduct Block meetings for school headmasters on corporal punishment highlighting that serious action would be taken against the school for violence on children.
2. Issue instructions to District and Block Education Officers and Cluster Resource Centers Staff holding them accountable for any violation of children's right.
3. Inform School Education Committees/PTAs about NCPCR guidelines and the procedures adopted for protecting children and their rights.

³⁴ *ibid.*

³⁵ National Commission for Protection of Child Rights, 'New Government Brings New Hope' (2009) 2 (3) Infocus National <www.indianet.nl/pdf/infocus_aug09.pdf> accessed 25 July 2016.

Recommendations of NCPCR Jury on 23rd January, 2008

The NCPCR conducted a public hearing on “Corporal Punishment, All Forms of Torture & Degrading Treatment, Sexual Abuse and Neglect of Children in Schools and Hostels in Tamil Nadu” on 23rd January, 2008, in Chennai. The jury was dismayed to find that there were about 10 children who had committed suicide after being subjected to corporal punishment and more than 8 children were subjected to rape. The hearing brought to light some very important issues which need to be addressed at the level of policy formulation. The jury recommended following recommendations which are very important for every institutions dealing with children.³⁶

General Recommendations:

1. The Institution (school/hostel/children’s home) should be held responsible for the welfare of the children enrolled in it. In case of any injury/ill-health/assault/death the institution will be held summarily responsible for the same, in the same manner as the police is held responsible for the inmates in the police stations/prisons etc.
2. The institution management shall pay compensation in the event of death/injury and hospitalization of any child, due to any incident that happens in the institution.
3. In every case of violence against children, the respective Education Department/Board has to conduct a parallel investigation. The PTA has to be involved in such an investigation.
4. In any case of child sexual abuse, if the parent withdraws the case, the Government must take cognizance of the offence and proceed without harming the child and taking strict action against the accused.
5. Whenever a child has made a statement of discrimination, a case needs to be booked under the SC/ST (POA) Act.

³⁶ NCPCR, ‘Protection of Children against Corporal Punishment in Schools and Institutions’ (2008) <<<http://harprathmik.gov.in/pdf/rte/corporal%20punishment%20ncpcr.pdf>>.

6. In cases of corporal punishment, the Education Department/Board shall conduct a social audit on corporal punishment with the children.
7. The Child Welfare Committees in each district have to be supported and strengthened to protect children's welfare.

In Case of Child's Death or Attempt to Suicide, and Hospitalization:

1. Every case of suicide shall be treated as 'abetment of suicide', and the management of the institution will be held accountable.
2. It should be noted that an 'attempt to suicide' by a child cannot be registered as an 'attempt to suicide' under law, as it would be doubly victimizing the child.
3. In case of suicide/sexual harassment/hospitalization resulting due to the action of a teacher(s), the accused shall be suspended pending enquiry.
4. Whenever a child has been admitted to a hospital with suspicious injury/ill-health, the hospital must record a medico-legal case and record the child's statement.
5. The Education Department of the State shall devise protocols to follow whenever a child takes ill in any hostel, such as how will the child be transported to the hospital (make budgetary provisions); will parents be provided monetary support to travel to the school and take the child home etc.

Private Institutions:

The Commission recommended that government should constitute a committee to review the licensing procedures of private child care/educational institutions and institute procedures of regulation and monitoring of these private institutions.³⁷

³⁷ National Commission for Protection of Child Rights, 'Make Juvenile Justice a Reality' (2008) 1 (3) Infocus National < http://www.indianet.nl/pdf/infocus_feb08.pdf> accessed 25 July 2016.

JUDICIAL APPROACH ON CORPORAL PUNISHMENT

Corporal punishment in schools has been a subject of debate since long times. In *Regina v. Hopley*,³⁸ the defendant was a school master and he got written permission from his pupil's father to chastise his pupil. The father replied agreeing to the course of action. The defendant subsequently beat the boy repeatedly for two and a half hours with a thick stick and in consequence thereof the boy died. The defendant was liable for manslaughter and sentenced to four years imprisonment. Lord Cockburn CJ held: "By the law of England, a parent or a schoolmaster (who for this purpose represents the parent and has the parental authority delegated to him), may for the purpose of correcting what is evil in the child inflict moderate and reasonable corporal punishment, always, however, with this condition, that it is moderate and reasonable. If it be administered for the gratification of passion or of rage, or if it be immoderate and excessive in its nature or degree, or if it be protracted beyond the child's powers of endurance, or with an instrument unfitted for the purpose and calculated to produce danger to life or limb; in all such cases the punishment is excessive, the violence is unlawful, and if evil consequences to life or limb ensue, then the person inflicting it is answerable to the law, and if death ensues it will be manslaughter." So, it was held that punishment should not be excessive.

The English Courts in *Cleary v. Booth*,³⁹ *Mansell v. Griffin*⁴⁰ and *Fitzgerald v. Northcote*⁴¹ held that when a child is sent by his parent or his guardian to a school, the parent or guardian must be held to have given an implied consent to his being under the discipline and control of the school authorities and to the infliction of such reasonable punishment as may be necessary for the purposes of school discipline for correcting the child. The English law also recognized that while the child is at school, the school master is in the

³⁸ *Regina v. Hopley* [1860] 2 F&F 202.

³⁹ *Cleary v. Booth* [1893] 1 QB 465.

⁴⁰ *Mansell v. Griffin* [1908] 1 KB 160.

⁴¹ *Fitzgerald v. Northcote* [1898] 1 QB 465.

position of a parent, that the parental authority is delegated to the school master and the school master represents the parent for the purposes of correction.

In India, corporal punishment was also accepted at some point of time, as is reflected by the review of the following case laws. The Madras High Court has, in *Sankunni v. Venkataramani*,⁴² held that a school teacher as delegate of the parent may for the purpose of correcting the child inflict moderate and reasonable corporal punishment. Further, *King Emperor v. Maung Ba Thaung*,⁴³ is a case where a schoolmaster was prosecuted under section 323⁴⁴ of IPC for caning a school boy under his charge. It was not suggested that the schoolmaster was actuated by improper motive, or that he was not acting bona fide in the interest of the school discipline, or that the punishment was unduly excessive. It was held by the Rangoon High Court that the schoolmaster had committed no offence, in view of the provisions of section 89⁴⁵ of Indian Penal Code. Another case came before Bombay High Court in *G. B. Ghatge v. Emperor*,⁴⁶ where a revision application was filed by one G. B. Ghatge, who was the Principal of the Hume High School, Victoria Gardens Road, Bombay, against his conviction under section 323 of Indian Penal Code, and the sentence of fine of Rs. 1 imposed on him because he inflicted corporal punishment upon his student. The High Court held that the applicant's act in administering corporal punishment to the complainant is covered by section 88⁴⁷ of IPC. The applicant

⁴² *Sankunni v. Venkataramani* AIR 1922 Mad 200.

⁴³ *King Emperor v. Maung Ba Thaung* AIR 1926 Rang 107.

⁴⁴ IPC 1860, s 323.

⁴⁵ *ibid* s 89. It states that an act done in good faith for benefit of child or insane person, by or by consent of guardian.—Nothing which is done in good faith for the benefit of a person under twelve years of age, or of unsound mind, by or by consent, either express or implied, of the guardian or other person having lawful charge of that person, is an offence by reason of any harm which it may cause, or be intended by the doer to cause or be known by the doer to be likely to cause to that person.

⁴⁶ *G. B. Ghatge v. Emperor* AIR 1949 Bom 226.

⁴⁷ IPC 1860, s 88. It states that an act not intended to cause death, done by consent in good faith for person's benefit.—Nothing which is not intended to cause death, is an offence by reason of any harm which it may cause, or be intended by the doer to cause, or be known by the doer to be likely to cause, to any person for whose benefit it is done in good faith, and who has given a consent, whether express or implied, to suffer that harm, or to take the risk of that harm.

was found not guilty of any criminal offence and it set aside his conviction and the sentence passed upon him. Further, in *Ganesh Chandra Saha v. Jiw Raj Somani*,⁴⁸ the petitioner, a head master of a school, was tried under section 323 of IPC by the lower court for canning a student for stealing another student's notebook. He was punished with a fine of Rs 15/- and 3 days simple imprisonment. But section 88 of the Indian Penal Code was used as a defence in the case which says that nothing which is not intended to cause death, is an offence by reason of any harm which it may cause to any person for whose benefit it is done in good faith, and who has given consent, whether express or implied, to suffer that harm. The same was duly acknowledged by the court and held that the petitioner had committed no offence under section 323 of IPC.

But a radical shift has occurred after these cases which show that courts are no more willing to tolerate corporal punishments in the schools. So, the Delhi High Court in *Parents Forum for Meaningful Education and Another v. Union of India and Another*⁴⁹ held that imposition of corporal punishment on the child is not in consonance with his right to life guaranteed by Article 21 of the Constitution. Besides, it is cruel to subject the child to physical violence in school in the name of discipline or education. The High Court struck down Rule 37(1)(a)(ii)⁵⁰ and Rule 37(4)⁵¹ of the Delhi School Education Rules, 1973,⁵² holding them to be violative of Articles 14 and 21 of the Constitution. In *Kishor*

⁴⁸ *Ganesh Chandra Saha v. Jiw Raj Somani* AIR 1965 Cal 32.

⁴⁹ *Parents Forum for Meaningful Education and Another v. Union of India and Another* AIR 2001 Delhi 212.

⁵⁰ This Rule says that corporal punishment shall be the disciplinary measure which may be adopted by a school in dealing with all students.

⁵¹ (a) Corporal punishment may be given by the head of the school in cases of persisting impertinence or rude behavior towards the teachers, physical violence, intemperance and serious form of misbehavior with other students.

(b) Corporal punishment shall not be inflicted on the students who are in ill-health.

(c) Where corporal punishment is imposed, it shall not be severe or excessive and shall be so administered as not to cause bodily injury.

(d) Where cane is used for inflicting any corporal punishment, such punishment shall take the form of strokes not exceeding ten, on the palm of the hand.

(e) Every punishment inflicted on a student shall be recorded in the Conduct Register of such student.

⁵² Framed under the Delhi School Education Act, 1973.

Guleria v. The Director of Education,⁵³ where the petitioner was a physical education teacher at New Era School, Mayapuri, New Delhi, subjected corporal punishment upon a few students (boys and girls). Taking cognizance of the gravity of the offence the Delhi School Tribunal after due proceedings dismissed the petitioner from service. The petitioner appealed to the court to set aside the disciplinary order passed by the tribunal. Noting that a child is a 'Precious National Resource' and subjecting a child to corporal punishment for reforming him cannot be a part of education, the Court dismissed the petition.

CONCLUSION

Children belong to the most vulnerable section of the society. We don't have patience to guide for a positive discipline neither at home or school. Adult members should be equipped with a set of skills for creating a child friendly environment everywhere. Corporal punishment is not a way to inculcate discipline amongst children. Therefore, after going through various provisions of Indian laws, rules, regulations and above all the guidelines and recommendations of the NCPCR on corporal punishment in the schools, we can draw an inference that all forms of corporal punishment are a fundamental breach of human rights and a grave form of child abuse and a sort of crime in the human rights paradigm. The Indian society is not conversant with the ideology of teaching with affection and persuasion. We still have parents and teachers who believe in beating children to discipline them. Corporal punishment is a criminal offence. Parents can file a complaint at the police station or with the local magistrate, with the knowledge of district education authorities. A slap is as detrimental to the child's right as any grievous injury. Neither any religion nor parenthood provided under any legal authority allows to physically injure the children for their so called 'indiscipline' and to enforce morality and character. The corporal punishment interferes with the right to development and participation as it leads to anti-social behaviour. Practicing non-violence as a highest form of culture begins

⁵³ *Kishor Guleria v. The Director of Education* (2012) 195 DLT 189.

with seeing children as children. It is necessary for adults to behave with them in a manner that they are not subject to violence of any kind. It is in this context, that the onus of responsibility in safeguarding children from punishment lies with the school teachers, education administration at all levels as well as all those responsible for management equally.

**A META-ANALYSIS OF THE JUVENILE JUSTICE ACT 2015 TO
IDENTIFY POLICY GAPS IN ADDRESSING JUVENILE
DELINQUENCY**

***Abinaswar Das, Anmol Narain, Arnab Bose,
Mohit Kumar Bebartta and Vedprakash Singh**

ABSTRACT

This paper presents an ontological meta-analysis of the Juvenile Justice (Care and Protection of Children) Act, 2015 as a method of mapping and visualizing the policy framework therein cumulatively, logically, and systemically. The method highlights issues within the Act as bright spots which are heavily emphasized, light spots which are lightly emphasized, blind spots which have been overlooked and blank spots which may never be emphasized. The purpose is to highlight the biases and asymmetries in the Act from a child rights perspective by considering international standards like those set within the United Nations Convention on the Rights of the Child. The Act is studied in this backdrop in order to recommend possible realignments to make it more in line with standards followed around the world. The paper begins with the ontology for juvenile delinquency, then, moves on to map the Act onto the ontology, and highlights its bright, light, and blank/blind spots in an ontological map. The paper concludes with recommendations for the policy gaps thus identified.

* Students, National Law School of India University Bangalore.

INTRODUCTION

Background

A juvenile or child is considered to be, as per Section 2(12) of the Juvenile Justice (Care and Protection of Children) Act, 2015 which defines “juvenile” or “child”, a person who has not completed eighteen years of age.¹

Children in India have been increasingly coming into conflict with the law. As per the 2011 census data, juveniles between the ages of seven to eighteen years constitute about 25% of the total population of India. According to the National Crime Records Bureau (NCRB), the percentage of juvenile crimes as a proportion of total crimes has increased from 1% to 1.2% from 2003 to 2013. During the same period, 16-18 year olds accused of crimes as a percentage of all juveniles accused has increased from 54% to 66%. In light of this data and rape cases that have been covered extensively by the media, especially in the aftermath of the *Nirbhaya*² case, the larger sentiment has been to administer stronger doses of punishment to those that could not be sentenced to imprisonment or be awarded the death penalty, earlier by law. This outrage culminated into an amendment to the Juvenile Justice (Care & Protection of Children) Act, 2000. The new Juvenile Justice Act was introduced as a bill by Ms. Maneka Gandhi, Minister of Women & Child Development in 2014 which was enacted as a law in 2015. The Act permits juveniles between the ages of 16 and 18 years to be tried as adults for heinous offences, unless under any special circumstances. Also, any 16 to 18-year-old who commits a lesser, i.e., serious offence may be tried as an adult only if he is apprehended after the age of 21 years. This seems to mark a serious move away from a policy of reform and rehabilitation to that of retribution and deterrence.³ The current policy shift is in line with the assumption that such a strategy would mark a move towards

¹ Juvenile Justice (Care and Protection of Children) Act, 2015, s 2(12).

² Nizam A Sait, ‘Juvenile Justice Act 2015; An Emotional Aftermath of the Dreaded ‘Nirbhaya Incident’; A Step Backward’ Live Law.in <<http://livelaw.in/juvenile-justice-act-2015-emotional-aftermath-dreaded-nirbhaya-incident-step-backward/>> accessed 15 May 2016.

³ Bhowmick Soma, ‘A Critical Evaluation of the Protection, Treatment and Rehabilitation of Children in The Juvenile Justice System in India’ (2013).

a greater incidence in the fall of crime rates within these categories. However, critics, such as child welfare activists, argue that this shift is not in the interest of children.⁴ This debate raises issues that require a deeper examination of the principles and values of the juvenile justice system in the country and an evaluation of the effectiveness of the current policy framework to address juvenile delinquency.

Motivation for Study

In light of the Juvenile Justice (Care and Protection of Children) Act of 2015 (hereinafter referred to as the “Act”) receiving widespread criticism for the government’s haste in passing such an Act without much deliberation in Parliament in order to appease the larger public sentiment, an indication that the Act fails to address issues that deal with justice to juveniles in contrast with providing justice to victims of juvenile delinquents may be inferred. The effectiveness and merit of this critical view is important to scrutinize as part of our meta- analysis, primarily focusing on the provisions within the JJ Act of 2015. We take interest in analysing through the study of the sections of this Act (as it is too early to study instances of the practice of this new law) the impact it could have on juvenile delinquency figures, and whether it adequately addresses matters concerning the well-being of children in the backdrop of controversial sections of the law that have been criticized as being counteractive to children’s welfare, the spirit of the Indian Constitution as well as international standards,⁵ of dealing with juvenile crimes.

Problem Statement

Our study seeks to conduct a meta-analysis on the new Juvenile Justice Act of 2015 in order to understand policy gaps in addressing the problem of juvenile delinquency from a child rights perspective. The focus of the study is juveniles, who are either in conflict with the law or in need of care and protection,

⁴ ‘The Juvenile Justice (Care & Protection of Children) Bill, 2014’ (*PRS Legislative Research*, 2015) <<http://www.prsindia.org/uploads/media/Juvenile%20Justice/Legislative%20Brief%20Juvenile%20Justice%20Bill.pdf>> accessed 15 May 2016.

⁵ United Nations Convention On The Rights Of The Child, 1989.

or both, as defined by the Act. The study will map the provisions within the Act onto the ontology of juvenile delinquency.

Through this study we intend to highlight the bright, dark and blind spots within the current policy framework.

Ontology for Juvenile Delinquency

Figure 1 shows the ontology of juvenile delinquency in India. The ontology has been arrived at by considering 5 dimensions that cover the domain. The dimensions being considered are scope, instrument, children, risk factors and outcomes. The taxonomy of each of the dimensions is based on the domain of crime with special focus on juvenile needs from a child rights perspective. The instruments are defined in terms of the type of instrument applied, their focus and outcomes. The policy instruments could be Legislative, Regulatory, Economic, Fiscal, Information or de facto/de jure in nature. The scope of the instruments could be at National, State or District level depending on where the jurisdiction lies. The risk factors leading to juvenile delinquency are categorized into individual, environmental and those pertaining to child care institutions. The instruments are directed towards managing these risk factors associated with the three categories of children as defined in the Act. The instruments could have the following five outcomes – rehabilitation, social re-integration, restoration, adoption and penalty/imprisonment. A glossary, further explaining the taxonomies of individual is as follows:

Scope	Instrument	Children	Risk Factor	Outcome
National	Legislative	in need of care and protection	Individual	Rehabilitation
State	Regulatory	in conflict with the law	- Psychological	Social Re-integration
District	Economic	in conflict with the law & in	- Physical	Restoration
	Fiscal	need of care & protection	Environmental	Adoption
	Information		- Family	penalty/imprisonment
	de Facto/de Jure		- Community	
	- Social		Child Care	
	- Cultural		Institution	
	- Ethical		-educational	
			-vocational	
			-recreational	
			-safety related	

Figure 1

GLOSSARY

Scope

1. **National** -The jurisdiction of the Juvenile Justice Act comes under the national territory of India, except the state of Jammu and Kashmir.
2. **State** – Certain implementation provisions under the Act comes under the jurisdiction of the respective State Governments.
3. **District** – Bodies such as the District Child Protection Unit and the Special Juvenile Police Unit are implemented by the Act through State government rules on the district level.

Instrument

1. **Legislative** - Legislative measures dealing with juveniles in conflict with the law and in need of care and protection
2. **Regulatory**- Regulatory mechanisms dealing with juveniles in conflict with the law and in need of care and protection
3. **Economic**- Economic instruments for security, treatment and development of juveniles in conflict with the law and in need of care and protection
4. **Fiscal**- Fiscal measures (budgetary) to support juveniles in conflict with the law and in need of care and protection
5. **Information**- Information dissemination to change societal attitudes and norms leading to juvenile delinquency in India.
6. **De Facto/ De Jure**- of right, by right, according to law/ in fact/in reality (best practices)
 - a. **Social**- Social norms affecting juvenile delinquency
 - b. **Cultural**- Cultural norms affecting juvenile delinquency
 - c. **Ethical**- Ethical considerations in dealing with juvenile delinquency

Children

1. **Children in conflict with the law:** as defined in Section 2(13) of the Juvenile Justice (Care and Protection of Children) Act 2015
2. **Children in need of care and protection:** as defined in Section 2(14) of the Juvenile Justice (Care and protection of Children) Act, 2015
3. **Children in conflict with the law & in need of care and protection:** as defined in Section 8(3)(g) of the Juvenile Justice (Care and Protection of Children) Act 2015

Risk Factors

1. **Individual:** Risk factors due to the individual's psychological and physical disposition (affected by experience of sexual abuse/violence and/or other external factors)
2. **Environmental**
 - a. **Family:** Risk factors arising out of family influence
 - b. **Community:** Risk factors arising out of the environment experienced by a child within peer circles and othercommunity factors
3. **Child care institution**
 - a. **Educational:** Whether the child care institution provides for education for residents
 - b. **Vocational:** Whether the child care institution provides for vocational training for residents
 - c. **Recreational:** Whether the child care institution provides for recreational facilities

- d. **Safety related:** Whether the residents are provided a safe environment protecting them within and without the child care institution

Outcome

1. **Rehabilitation:** Rehabilitation that caters to drug abuse and mental illness in the child.
2. **Social Re-integration:** Post intervention return to general society through integration into the original social and economic position of the child, unless it isn't in the best interests of the child, in which case, a move is made towards economic help by the state, which would eventually help the social aspect of re-integration.
3. **Restoration:** A move towards restoring the fabric of family life before conflict and/or violence that makes a child vulnerable to be in need of care and protection and or in conflict with the law
4. **Adoption:** The procedure by which a child becomes the legal property of a new guardian through the mechanisms prescribed in the Act
5. **Penalty/Imprisonment:** Doled out to children of age 16-18 that are guilty of having committed heinous offences as prescribed by the Act and the Indian Penal Code.

Illustrative Components: (Total= $3*8*3*8*5=2,880$)

The method to calculate the total number of components, each of which make up one component derived from the entire ontological framework, is to multiply the individual components of each of the taxonomies. The following examples illustrate the possible components of the ontology of juvenile delinquency:

Component 1

District level regulatory instruments for children in need of care and protection, concerning safety related risk factors, that have bearing on penalty/imprisonment.

Instantiation: District State Police Units that are regulatory instruments responsible to provide a safe and secure environment for the children's transportation to courts and segregated living spaces suited specifically to a particular child, as specified in the JJ Act, 2015.

Component 2

State level regulatory instruments for children in need of care and protection concerning, psychological risk factors, which have bearing on rehabilitation.

Instantiation: Psychological treatment and therapy sessions are provided to children undergoing trial or kept in safe homes in order to ensure that they are in a mentally sound position to enter society.

Component 3

State level regulatory instruments for children in conflict with the law concerning, physical risk factors, which have a bearing on rehabilitation.

Instantiation: State governments are tasked, as part of the JJ Act 2015 provisions, with designing rules to ensure that a child's personal history is known to the court during trial. It is done through an assessment study that is to be completed within fifteen days after the child has been first brought to the court. This study aims at establishing whether the child comes from a background of physical stress (abuse, trafficking or sexual violence). These factors are calculated in designing the individual care plan of the child which in turn aims at rehabilitating the child in a proper manner.

Corpus

Search for Documents

Our literature review spanned several dimensions of the issue, including governmental and intergovernmental rules, independent research findings and advocacy documents of non- governmental organizations. Our initial study was aimed at formulating the ontology of juvenile delinquency in India for which a review of some pertinent literature was a necessity.

Selection of Documents

The following documents were finally shortlisted to be included in the mapping of available documents to the ontology:

1. The Juvenile Justice (Care and Protection of Children) Act, 2015
2. The Juvenile Justice (Care and Protection of Children) Act, 2000
3. United Nations Convention on the Rights of the Child, 1989
4. United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules), 1985
5. United Nations Rules for the Protection of Juveniles Deprived of their Liberty, 1990
6. The Hague Convention on Protection of Children and Co-operation in Respect of Inter-Country Adoption, 1993

Rationale for Selection

From the above selection of documents, one document was mapped against the ontology of juvenile delinquency in India. It is the Juvenile Justice (Care and Protection of Children) Act, 2015. The rationale for selection of this document and exclusion of the others has been explained below.

Basis for Exclusion

1. The Juvenile Justice (Care and Protection of Children) Act, 2000: Although, this Act is a landmark legislation for juvenile justice in India, was repealed by the recently passed Act in 2015, which not only made some amendments to the existing Act but also introduced some controversial sections that marked a shift in the government's policy. Keeping this in mind, this Act would be redundant in the current scenario and mapping it against the ontology would have no bearing on our current understanding of the issue.
2. United Nations Convention on the Rights of the Child, 1989: Most legislations and guidelines, including the Indian Acts on juvenile justice

follow, to a great extent, the guidelines given within the UNCRC. Therefore, this becomes a pervasive document that makes up a large part of the ontology developed for the purpose of this meta- analysis. It would be difficult to find gaps if this document was to be mapped against the ontology of juvenile justice.

3. United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules), 1985: The Beijing Rules also act as guiding principles for member states to develop their domestic laws in accordance with international standards like this document and the UNCRC, both of which have contributed to the ontology of juvenile delinquency. This document cannot be mapped against the ontology as the standard minimum rules have long been surpassed and benchmarks for ensuring juvenile justice have been set higher. Therefore, limited perspective could be gained from its mapping.
4. United Nations Rules for the Protection of Juveniles Deprived of their Liberty, 1990: As this document addresses juveniles deprived of their liberty on the whole, the parts covering our chosen issue are too little in number for this document to become vital for mapping. Therefore, these Rules were not taken into further consideration for mapping against the ontology.
5. The Hague Convention on Protection of Children and Co-Operation in respect of Inter-Country Adoption, 1993: This Convention was not selected for mapping due to reasons similar to those given for the document above. Apart from the references to juvenile delinquency being few in this document, it also loses relevance in light of its focus on inter-country adoption. As most of the guidelines within this document lie outside the mandate of our current study, mapping it against the ontology would yield errors.

Validity of the Selection

The Juvenile Justice (Care and Protection of Children) Act, 2015 claims to have been formulated with due consideration having been paid to India's international obligations with respect to ensuring justice to juveniles as well as provide for adequate care and protection to children in need of the same. To this effect, the Act claims to also include Constitutional principles such as the right to life and the right to be protected against child labour. This Act came in the aftermath of a brutal gang-rape of a student inside a Delhi bus. It sought to address the issue of children who have attained an age where they are cognizant of the crimes they have committed and of their consequences; and may be tried and punished as adults if such an understanding can be established. The Act of 2015 retains relevant portions of the older Act and consequently repeals the same. The Act seems to be relatively comprehensive in nature, as it contains several principles and definitions that abide by international standards. It also contains dedicated sections for crimes committed against women and rules governing adoption in and between our country.

In order to effectively carry out the meta-analysis of juvenile delinquency in India, it is important to map the most recent and therefore the most relevant legislation concerning the issue. This is especially, due to the Act's elaborate provisions of establishing several restructured institutions in order to carry out justice to juveniles.

Description of the Corpus

The Juvenile Justice (Care and Protection of Children) Act, 2015 is the only document which deals with juvenile delinquents of the country. The main objective of this act is to cater to the basic needs of the children through proper care, protection, treatment and development. The document stresses on taking decisions in the best interest of the child while ensuring the fulfilment of his/her basic rights and needs, identity and social wellbeing.

It talks about the functions of the board at the district level, the role of the state governments and also the central government in detail. Several outcomes are addressed in the JJ Act, 2015 with special focus on rehabilitation and re-integration into society – two aspects that appear to be of utmost importance to prevent the occurrences of juvenile crime and recidivism.

MAPPING THE POLICIES

The Juvenile Justice (Care and Protection of Children) Act of 2015 is the primary central government document focusing on juvenile delinquency and therefore considered for this meta-analysis. The document was mapped onto the ontological framework described in Figure 1.

Methodology

The methodology adopted for the mapping process was to first directly map the ontological components and collate the resulting instantiations. Additionally, known synonyms and contextual references were formulated by the team and mapped in the document. The formulation was based on terms in the Act as well as other general documents, most of which are mentioned in our corpus above.

Process

From the methodology, following is a description of the mapping process followed by our team:

1. Search for the words/terms/phrases and mark them on the document.
2. Post marking, go to each section and sub-section to verify that the word/term/phrase that was marked earlier matches the context of the ontology.
3. If the marked word/term/phrase passes the context verification stage, add it as an instantiation of the ontological component. Else, the marking is removed and the word/term/phrase remains to be irrelevant to the ontology.

Units

Each sub-section of the Juvenile Justice (Care and Protection of Children) Act, 2015 was selected as a unit for the mapping process. The number of sub-sections totalled to 112. As most sections of the Act contained sub-sections, components have been mapped under their corresponding sub-sections.

Tool

The mapping tool employed by our team for this project was Microsoft Excel 2016.

Results

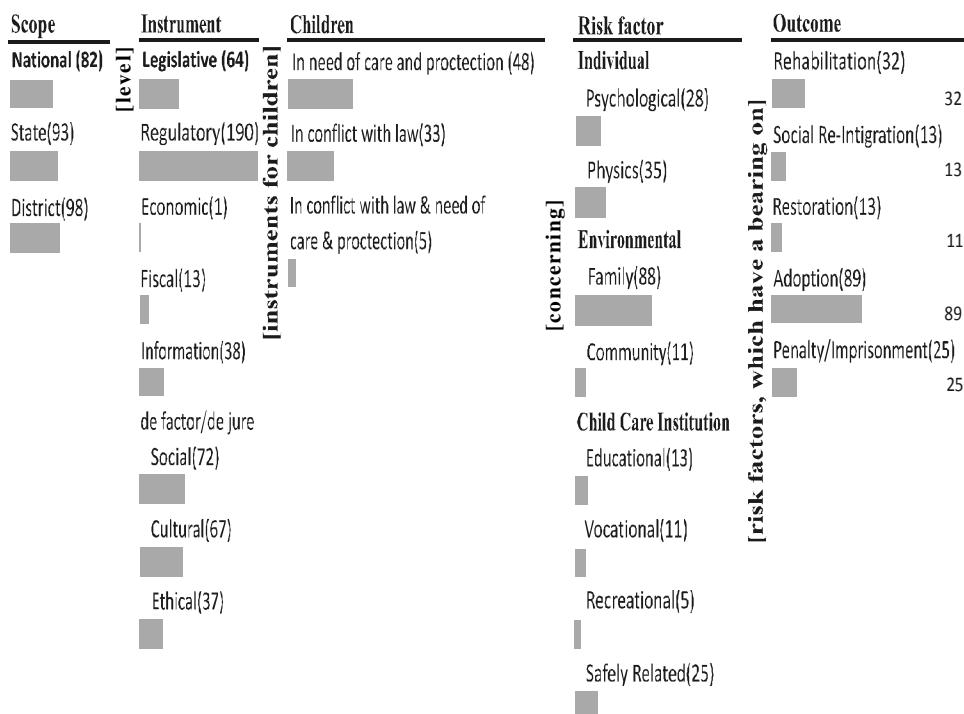


Figure 2

Legend (Instantiations given within Curved Parentheses):

1. Blind spot: 0-20 instantiations
2. Light spot: 21-80 instantiations
3. Bright spot: 81 and above instantiations

In the mapping results shown in figure 2 above, we observed that the most instantiated component of the ontology is ‘regulatory’ instrument, with 190 instantiations across the Act. Other highly instantiated components that may also be referred to as bright spots are national (82), state (93), district (98), family (88) and adoption (89). Somewhat frequently instantiated components that may be called light spots include legislative (64), social (72), cultural (67), etc. Less instantiated components that may be referred to as blind spots include economic (1), fiscal (13), in conflict with law & in need of care and protection (5), etc.

CONCLUSION AND RECOMMENDATIONS

The above process of systematically processing the information contained within the Act has led us to conclude that the Act does indeed hold its ground vis-à-vis international standards of juvenile justice. It is comprehensive in the manner in which rules and procedures have been laid out within the Act with respect to the treatment of children in conflict with the law, or children in need of care and protection, or both. The detailed regulatory mechanisms seem to be effective means to achieve justice for juveniles. We find that it not only meets internationally laid out procedures, but also exceeds them in a few instances.

The distribution of responsibilities between government authorities, as per the provisions of the Act, is relatively even, though in practice we have seen that the inability or the inefficiency of one government agency is directly or indirectly but invariably linked to the failures of another agency to deliver on its responsibilities. Space has been diverted to children in need of care and protection and thrust is placed within the Act on adoption as an outcome through assessment of family risk factors.

Most instruments within the Act have the statutory authority of an institution that serve a fundamental regulatory function. However, they are also found to serve social, cultural and ethical purposes through implied understanding of their specified work. Further, onus is placed on the child care institutions for regulating the behavioural outcomes of the children placed under their care and

protection. This is achieved through instruments of command and control that are carefully fitted to each one of the children placed in a child care institution.

The sky is, however, not entirely bright and blue. The Act fails to employ economic instruments in its quest to achieve justice for juveniles. Rehabilitation does not talk about providing the juveniles with assistance to find employment, or to explicitly provide them with employment soon after their release from a child care institution or other means of protective custody.

Further, crucial decisions such as whether a child charged under a heinous offence is fit to be tried as an adult is left to one regulatory body, the Juvenile Justice Board, alone. By giving it such autonomous power and making its decision final and binding on the trial, the Act opens itself up to criticism for propagating arbitrary and unquestionable decision-making on part of a quasi-judicial body. Although several criteria have to be fulfilled before such a decision is taken, we believe that a better system of checks and balance is an absolute necessity and should be included as an amendment to this Act.

Lastly, the Act does not speak enough about the finances of the practice of juvenile justice system in the country. There is no clear funding mechanism, apart from the mention of a Juvenile Justice Fund, from which money may be utilized for any purpose whatsoever by wilfully misinterpreting the law. State funding and voluntary contributions towards the juvenile justice system hardly find mention in the Act. This also calls for better specification of the same through amendments.

References

1. Ministry of Law and Justice, Government of India, 'Juvenile Justice (Care and Protection of Children) Act' (Gazette of India 2015).
2. PRS Legislative Research, 'The Juvenile Justice (Care & Protection of Children) Bill, 2014' (PRS Legislative Research 2015) <<http://www.prsindia.org/uploads/media/juvenile%20justice%20Legislative%20Brief%20Juvenile%20Justice%20Bill.pdf>> accessed 15 May 2016

3. Sait, N. 'Juvenile Justice Act 2015; An Emotional Aftermath of the Dreaded 'Nirbhaya Incident'; A Step Backward' [2016] Live Law.in <<http://www.livelaw.in/juvenile-justice-act-2015-emotional-aftermath-dreaded-nirbhaya-incident-step-backward/>> accessed 15 May 2016.
4. Soma, B. 'A Critical Evaluation of the Protection, Treatment and Rehabilitation of Children in The Juvenile Justice System in India' (2013).
5. United Nations, 'United Nations Convention On the Rights of the Child' (United Nations 1989).

**JUVENILE JUSTICE AMENDMENT ACT 2015: NEED FOR
RECONSIDERATION**

*** Sourav Chandan Padhi**

ABSTRACT

There are few international covenants and treaties like the UN Convention on the Rights of the Child (UNCRC) 1989, the UN Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules) 1985, the UN Rules for the Protection of Juveniles deprived of their Liberty, Vienna Guidelines for Action on Children in the Criminal Justice System 1997 and International Covenant on Civil & Political Rights 1966 (ICCPR) for ensuring all round development of Children. In order to keep the children out of the criminal justice system prescribed for adults, a separate piece of legislation has been enacted for children who come in conflict with the law. The Juvenile Justice (Care and Protection of Children) Act 2000 (JJ Act 2000) was enacted keeping with the standards for child protection provided by the UNCRC. The Act was amended in the year 2006 to strengthen the Juvenile Justice process. This paper tries to examine the evolution of juvenile justice system in India.

* Advocate, Odisha High Court. Email—sourav.padhi@gmail.com

INTRODUCTION

Children are considered to be the greatest asset of a nation.¹ Their nurture and solicitude are nation's responsibility. It's the duty of the State to devise programmes, frame policies, enact laws and duly implement them to protect the rights and interests of the children. The Indian Constitution has a framework wherein ample provisions exist for the protection, development and welfare of children such as Article 21A, which says that the State shall provide free and compulsory education to all children within the ages of 6 to 14 in such manner as the State may by law, determine.² Article 45 of the Constitution specifies that the State shall endeavour to provide early childhood care and education for all children until they complete the age of 6.³ Article 51(k) lays down a duty that parents or guardians should provide opportunities for education to their child/ward between the ages of 6 to 14 years. Furthermore, Article 39(f) guarantees the right to equal opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and guaranteed protection of childhood and youth against exploitation and against moral and material abandonment.⁴ There are a wide range of laws that guarantee children their rights and entitlements as provided in the Constitution of India and in the UN Convention.

Rationale behind Juvenile Justice System

The essence of a different or 'distinct' system of 'justicing' for juveniles lies in providing and dealing with children in accordance with a system that gives due regard to their abilities and mental capacities. Juvenile justice, as opposed to criminal justice, recognises children who come into conflict with the law as victims. It takes into account the fact that children lack the maturity of adults (morally and cognitively, physically and emotionally).

¹ National Policy for Children, Resolution No. 1-14/74 CDD (1974)

² P. M. Bakshi, *The Constitution of India* (8th edn, 2007) 16

³ Constitution of India 1950, art 45

⁴ Constitution of India 1950, art 39

It recognises the vulnerability of children to experimentation, victimisation and to becoming involved in crime and that the problems experienced in childhood or adolescence can have life long implications. The overwhelming majority of children coming into conflict with the law are victims of neglect, exploitation, and social & economic hardship. This kind of justice system is premised on two basic assumptions, namely: children below a certain age (18 years as per Article 1 of the Convention on the Rights of the Child, 1989) have lower cognitive capacities and decisional abilities; and children are more amenable to reform and corrective actions. The aforesaid assumptions are integrally interrelated, but they relate to two different aspects of justice, namely the moral basis for creating children's accountability and utilitarian justifications of the juvenile justice system. These children need and have a right to proper care, guidance, protection and the opportunity of social reintegration – needs on which the juvenile justice system should be based.

In this spirit the Government of India enacted the Juvenile Justice (Care and Protection of Children) Act, 2000 (and Amendment Act 2006) which is a comprehensive legislation to provide justice and opportunities to children for their growth and development. The Act is based upon the provisions of the Indian Constitution and four broad rights of the UN Convention on the Rights of the Child. The Act lays down the primary law for not only the care and protection of children in need but also for the adjudication and disposition of matters relating to children in conflict with law. It conforms to the UN Convention on the Rights of the Child (UNCRC) 1989, the UN Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules), 1985, the UN Rules for the Protection of Juveniles deprived of their Liberty , UN Guidelines for the Prevention of Juvenile Delinquency 1990 (Riyadh Guidelines), UN Rules for Non-Custodial Measures (Tokyo Guidelines), Vienna Guidelines for Action on Children in the Criminal Justice System 1997, International Covenant on Civil and Political Rights 1966 (ICCPR), Convention against Torture 1984 (CAT) and all other relevant national and international instruments.⁵

⁵ UNICEF, 'Report on Situation for Children in Conflict with the Law in Afghanistan' <<http://>

EVOLUTION OF JUVENILE JUSTICE SYSTEM

In 1899, the U.S. made legal history when the world's first juvenile court was opened in Chicago. The court was founded on two basic principles. First, juveniles lacked the maturity to take responsibility for their actions the way adults could. Second, because their character was not yet fully developed, they could be rehabilitated more successfully than adult criminals. More than a century later, these principles remain the benchmarks of juvenile justice in the United States.

India has come a long way since its independence in 1947. The present juvenile justice system in India is⁶ a product of a long history of concerns put forward by civil society, and of enactments, policies and programmes of the Government that came into existence over a period of time. Traditionally, the joint family, the caste groups and the village community played a key role in looking after a child in need of care and protection. However, with the spread of urbanization and industrialization, the break-down of family structures and religious sanctions, population explosion, prospects of adventure and excitement in cities, this traditional system was no longer able to provide for care of needy children.

The first legislation on juvenile justice in India came in 1850 with the *Apprentice Act* which required that children between the ages of 10-18 convicted in courts to be provided vocational training as part of their rehabilitation process.⁷ This Act was transplanted by the *Reformatory Schools Act*, 1897, the *Indian Jail Committee*.⁸ In order to provide for care and protection of children in need, the Government of India came up with the first uniform national law for children titled "Children's Act" in 1960 followed by the Juvenile Justice

w.unicef.org/media/files/Juvenile_Detention_Study_engl.pdf> accessed 20 August 2016

⁶ Ved Kumari, 'Juvenile Justice: Securing the Rights of Children during 1998-2008' (2009) NUJS L. REV. (Vol. 2) 557, 558

⁷ Bureau of Police Research and Development, (*Bureau of Police Research and Development*) <<http://www.bprd.nic.in>> accessed 10 January 2016

⁸ Maharukh Adenwalla, *Child Protection and Juvenile Justice System for Juvenile in Conflict with Law* (2006) 13.

Act 1986.⁹ One of the fundamental changes the new India is seeing is a realization that governance is not a matter of welfare but a matter of right. In all this good news there is one challenge, which calls for greater attention than has been possible so far, and that is “Child Protection”.¹⁰

Indian Context

The Govt. of India ratified the UN Convention on the Rights of the Child (UN-CRC) and amended the Juvenile Justice Act of 1986 in 2000 and 2006. This Act consolidated and amended the law relating to juveniles in conflict with law and child in need of care and protection, by providing proper care, protection and treatment by catering to their needs, and by adopting a child-friendly approach in the adjudication and disposition of matters in the best interest of children and for their ultimate rehabilitation. The JJ Act 2000 invokes the international obligations of India under the CRC in its preamble. Whether the JJ Act 2000 conforms to the protections in the Convention with regard to children being confronted with the juvenile justice system will be examined hereunder. There are two kinds of provisions under the CRC which are applicable in case of children being confronted with the juvenile justice system. They are:

- General principles of the CRC; and
- Specific protections for children being confronted with the juvenile justice system under the CRC

The general principles are Best Interest Principle¹¹, Right to Participation¹², Non- Discrimination¹³, and Right to Life, Survival and Development¹⁴. The specific protections are provided under Articles 37 and 40 of the CRC which aim at providing protection to the rights of children in

⁹ R. N. Choudhary, *Law Relating To Juvenile Justice In India* (3rd edn, 2010) 345

¹⁰ T. Chakraborty, ‘An International Comparison of Juvenile Justice Systems’ (2008) *The Indian Police Journal* (Vol. 3)

¹¹ UN Treaty Collection, *Convention on the Rights of the Child*, 1577 (UN General Assembly 1989) 3 (UNCRC) Art 3

¹² *ibid* art 12.

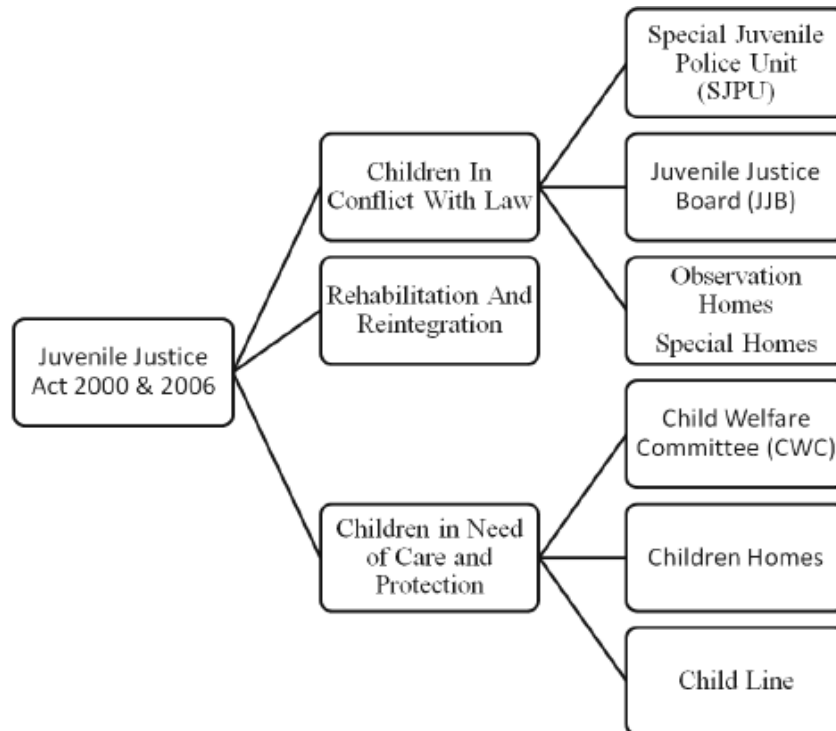
¹³ See n 12, art 2.

¹⁴ See n12, art 6.

conflict with the law. The principles under Articles 37(a) and 37(c) state that capital punishment and imprisonment are not to be imposed on children committing offences¹⁵ and that every such child while being deprived of their liberty shall be housed separately from adults.¹⁶ These have been incorporated in the JJ Act, 2000.

The Juvenile Justice system in India is based on the principle of promotion, protecting and safeguarding the rights of children up to the age of 18 years. The Juvenile Justice Act has been broadly divided into three parts (1) Juvenile in conflict with law (2) Child in need of care and protection, (3) Rehabilitation and social reintegration.

STRUCTURE OF JUVENILE JUSTICE SYSTEM IN INDIA



¹⁵ See n 12, art 37

¹⁶ ibid

There are three institutions which come in contact with Juvenile in conflict with law. They are Juvenile Justice Board (JJB), Observation Homes, the Special Homes and Special Juvenile Police Unit. The basic aim of the Act is to adopt a child-friendly approach in the settlement and disposition of matter in the best interest of children and arrange ways for their ultimate rehabilitation through various established institutions under this Act. The observation homes are the place where juveniles are kept before the hearing of case. The special homes are the place where the juveniles are kept after the final order is passed and are kept under probation and supervision. The JJB consists of 3 members. They are the Chief Judicial Magistrate and two Social Workers (one of them must be a female)¹⁷. Special juvenile police unit are personnel's trained to specifically deal with juvenile in conflict with law and they are present in each police station.¹⁸

There are two institutions which come under the child in need of care and protection. They are Child Welfare Committee (CWC) and Children homes. The Children Homes are the places where children belonging to the vulnerable groups are kept. The CWC consists of 5 members.¹⁹ One of them is the chairperson and other members are Social Workers. Rehabilitation and social reintegration²⁰ deals with the rehabilitation of children in children homes and special homes. It defines the procedure for adoption, foster care and sponsorship of child.

This Act broadens the ambit of the law to groups of children who may need care and protection in view of the fast changing socio-economic conditions, and includes in its scope such categories of children who could be street children, child laborers, child victims of the flesh trade, children affected by conflict, child victims of natural disasters and children affected by drugs and HIV/AIDS. Importantly, the Act encourages partnerships with voluntary agencies and outlines mechanisms for monitoring its implementation. While providing for institutional

¹⁷Juvenile Justice (Care and Protection of Children) Act 2000 (JJA 2000) s. 4

¹⁸ *ibid*, s. 2(55)

¹⁹ *ibid*, s. 27

²⁰ *ibid*, s. 47

care for children in conflict with law and the abandoned, destitute and orphaned, it stipulates mobilization of community support for outreach programs and sponsorship for the needy, to strengthen the capacities of families to provide better care and protection.

DRAWBACKS AND SHORT COMINGS OF JUVENILE JUSTICE ACT 2000

Period of Inquiry - Section 14 mandates that any inquiry regarding a juvenile, needs to be completed within a period of four months unless there are some special circumstances in special cases.²¹ This discretion is being mis-utilised by the Boards and extension of the period is granted in all cases. This leads to arbitrariness in JJB action and to the pendency of cases in the system for indefinite period of time.

Adequate Training for the Officials Dealing with Juveniles - Section 63 provides for specially instructed and trained special juvenile police unit²², this is nothing more than mere lip service to the requirement of special training because no proper guidelines have been provided in this respect.

Training in Child Psychology Required for Magistrate and Members of Juvenile Justice Board - Section 4(3) of the Act provides that any Magistrate shall not be appointed as a member of the JJB unless he has special knowledge or training in child psychology or child welfare. Similarly, any social worker shall not be appointed as a member of the JJB unless he has been actively involved in health, education, or welfare activities pertaining to children for a minimum of seven years.

Lack of Accountability - Accountability mechanism of the statutory bodies under the JJ Act, 2000 i.e. CWC's and JJB's are poorly defined and there is no monitoring or performance appraisal of these bodies and other support mechanisms for building their capacities.

²¹ See n 17, s. 14

²² See n 17, s. 63

Lack of Monitoring - There is no institution nominated either at state level or at national level to monitor the progress and provide support to the child protection institutions. The JJ Act requires concurrent training and capacity building of CWC, JJB, Police, Child care institution officials and other stakeholders. However there is no such training institution at the state level.

Lack of Infrastructure - lack of adequate number of Juvenile Justice Boards and Child Welfare Committees.²³ To add to this, many JJBs and CWCs exist only on paper and are not functioning. JJB and CWC in many districts do not have a proper place for conducting sittings and hearings.²⁴ The capacity of children homes, observation and children for accommodating juvenile is inadequate in number. Lack of homes as well as trained manpower has blunted the whole objective of this legislation.

Lack of Rehabilitation - Rehabilitation facilities are very poor and psychological counselling and treatment are practically non-existent. There has been gross failure in the existing juvenile justice²⁵ system primarily because its provisions relating to rehabilitation, vocational training and social reintegration have not been implemented in letter and spirit.²⁶

Procedural Loop Holes - The police and probation officers are the stakeholders who come in contact with the juvenile in conflict with law. The police are responsible for reporting to the child's parents after apprehending him or her.²⁷ They are also obligated under the JJ Act, 2000 to immediately

²³ Parliamentary Standing Committee, *The Juvenile Justice (Care and Protection of Children) Bill, 2014*, (Rep No 264, 2014) 39

²⁴ Arvind Narrain, 'A Critique of the Juvenile Justice Act 2002' (Alternative Law Forum) <<http://altlawforum.org/publications/a-critique-of-the-juvenile-justice-act-2002/>> accessed 4 August 2016

²⁵ Shantha Sinha, *National Commission For Protection Of Child Rights (NCPCR)- The First Six Years (2007-2013)* (2013)

²⁶ M. Dasgupta, 'Rehabilitation through Education for Juveniles in Conflict with Law' (Working Paper No 238, Centre for Civil Society 2010)

²⁷ Erika Rickard & Jason M. Szanyi, 'Bringing Justice to India's Children: Three Reforms to Bridge Practices with Promises in India's Juvenile Justice System' [2010] UC Davis Journal of Juvenile Law & Policy 107, 147

produce the apprehended child before a member of the JJB.²⁸ This procedure, however, is not always followed. Duties and reasonability of probation officers are enshrined in model rules of JJ Act 2000.²⁹ The most important requirement by the Model Rules is the social investigation report i.e. a mandatory component of a juvenile's case before an order is rendered.³⁰ However, this becomes the focus of the probation officers' duties, resulting in their transformation to courtroom clerks and not field investigators in several cases.

JUVENILE JUSTICE AMENDMENT ACT 2015

The Amendment Act 2015 seeks to achieve the objectives of the United Nations Convention on the Rights of the Child as ratified by India on December 11, 1992. It specifies procedural safeguards in cases of children in conflict with law. It seeks to address challenges in the existing Act such as delays in adoption processes, high pendency of cases, accountability of institutions, etc. The Bill further seeks to address children in the 16-18 age group, in conflict with law, as an increased incidence of crimes committed by them have been reported over the past few years.

Salient Features of the Juvenile Justice Amendment Act 2015³¹

- It provides for the possibility of children between the age of 16 and 18 years to be tried as adults for heinous crimes.
- It seeks to make Central Adoption Resource Authority (CARA) a statutory body, which means it can regulate adoption and issue guidelines. The Bill also gives detailed eligibility criteria for adoption.
- Expands the definition of child in need of care and protection to include those who are found in contravention to labour laws and children who may be married before legal age.

²⁸ JJA 2000, s 13(a)

²⁹ Model Rules, Rule 71(1)(a)

³⁰ *ibid*, rule 71(1)(j).

³¹ Juvenile Justice (Care and Protection of Children) Amendment Act 2015.

- Corporal punishment in a Child Care Institution by person in charge is also made punishable by this Act.
- In this paper the author has tried to focus on the following controversial issues that are being debated after the enforcement of the Juvenile Justice Amendment Act 2015.
- Reducing the age of juvenility for juvenile in conflict to 16 years of age.
- Singling out of heinous offenders from the Juvenile Justice System to criminal justice system
- Overburdening of Juvenile Justice Boards
- Trial and sentencing of juvenile in the 16-18 age group by adult courts
- Constitutionality of transfer system under the JJ Act.

Reducing the Age of Juvenility for Juvenile in Conflict to 16 Years of Age

‘Child’ and ‘Child in Conflict with Law’ in the JJ Act has been defined in Section 2(12) & (13) i.e. as any child involved in offending when he was below 18 years of age. The age was raised to 18 years in the JJ Act of 2000 in order to have compliance with UNCRC. The committee on the Rights of the Child in making its concluding remarks with reference to India stated that State was bound to ‘ensure that persons under 18 are not tried as adults’³². Thus the Amendment Act 2015 completely destroys the rehabilitative foundation of the existing juvenile justice system in India by adopting a retributive approach for heinous crimes committed by children in this age group. Retributive because it contains provisions for teenager who commits heinous crime (give punishment seven\ years or more³³) shall be tried like an adult³⁴.

³² Committee on the Rights of Child, 23rd session on February 23, 2000

³³ Juvenile Justice (Care and Protection of Children) Act 2015, s 2(33)

³⁴ *ibid*, s 18(3)

The Act discriminates by reducing the age to 16-18 ages of children involved in heinous offences. This is in violation to Article 2 of the UNCRC as well as Article 1 that defines ‘child’ as those persons below the age of 18. It should be borne in mind that what cannot be done directly may be prohibited to be done indirectly. This would reduce the age of juvenility of boys and girls below 16 years and would limit the applicability of JJ Act to a large majority of offending children and make the age determination criteria more complicated.

Singling Out of Heinous Offenders from the Juvenile Justice System to Criminal Justice System

The Act has classified offences into three broad categories. Those are petty offences entailing punishment up to 3 years, serious offences those with punishment up to 7 years and heinous offences those with punishment above 7 years. It has allowed the transfer of children offenders accused with heinous crimes from JJB to Special Courts and other offences matter to be decided by JJB. The apex court has held in the cases of *Salil Bali v. Union of India*³⁵ and *Dr. Subramanian Swamy v. Raju*³⁶ that all children in conflict with the law to be dealt with under the beneficial juvenile justice system irrespective of the gravity of the offence. In *Salil Bali*, the Supreme Court emphasized that, “[t]he essence of the Juvenile Justice (Care and Protection of Children) Act, 2000, and the Rules framed thereunder in 2007, is restorative and not retributive, providing for rehabilitation and re-integration of children in conflict with law into mainstream society.”³⁷

This treatment towards juveniles with heinous offences is in violation of Article 15(3) of the Constitution of India that enables the State to make any special provision for women and children. Whether the state is justified in making any special provision *against* children under Article 15(3)? It also violates Article 14 of the Constitution which ensure equality before law and equal treatment of

³⁵ *Salil Bali v. Union of India* [2013] 7 SCC 705

³⁶ *Dr. Subramanian Swamy v. Raju* [2014] 8 SCC 390

³⁷ *Subramaniam Swamy v Union of India*, Special Leave Petition (Cri.) 1953/2013

law. By transferring heinous offenders, we are differentiating a particular class of offenders from the rest. This is violation Article 14, a fundamental right guaranteed under the Constitution of India.

Undoubtedly, children require special attention and they cannot be treated as adults. But when their actions are as horrifying as in the above case, the distinction on the basis of age between them and adults seems superfluous. The differentia in such serious offences should not be on the basis of age but rather on the nature of crime committed and the understanding of the accused concern. A strait jacketed distinction on the basis of age, as is evident from the above case, leads to injustice. The Constitution of India certainly provides³⁸ that the State is empowered to make special provision for women and children but the same should pass the test of reasonable classification as put forth by S. R. Das, J. in *State of West Bengal v Anwar Ali Sarkar*³⁹ i.e. there must be reasonable classification that separates the class and such a differentia must have a rational nexus with the object of law. However, in case of serious offences, the distinction as put forth by the JJ Act 2015 seems irrational and arbitrary.

Finally, upon turning 21 years of age, the fate of the person will lie in the hands of the Children's Court as per S. 20 of the Act. It says that court will decide whether or not a person has 'undergone reformatory changes' or 'can be a contributing member of the society'. Such an inquiry is highly subjective and prone to arbitrariness i.e. violation of Article 14 of the Indian Constitution. This transferring system reduces the possibilities of re-socialization of children who go astray during childhood and adolescence and requires establishment of different kinds of rehabilitating institutions to be established for compliance of the Act.

Over Burdening of Juvenile Justice Board

JJB under the 2000 Act were overburdened with multiple duties and tasks to be performed under S.9 of the act. The primary issue faced by the JJB,

³⁸ Constitution of India 1950, Art 15(3)

³⁹ *State of West Bengal v Anwar Ali Sarkar* [1952] SCR 284.

that there was no full time principal magistrate to head the sittings and unavailability of proper infrastructure. Age determination inquiry have been one of the most debated issues in juvenile justice system. JJB have been struggling hard to resolve age determination. Now the amendment imposing additional task of characterization of 16-18 group, determination of age is likely to be even more keenly contested.⁴⁰

JJB being the key agency for handling the heinous offences for juveniles of 16-18 age group. This will require not only looking at the age, but also the nature of crime and level of maturity of the concerned child. This requires the board to make categorical findings and clear rulings, by which the JJBs will lose the child friendly and non-adversarial method of adjudication by the board. Ultimately the whole objective of establishment of JJB and child friendly method of adjudication would be lost in this process and JJBs would become a normal adult court.

Finally, by this move, the JJBs would assume more adversarial character, the adjudication process would take longer time and passing of juvenile cases to adult courts would lead to losing the objectives of the JJ Act 2000.

Trial and Sentencing of the 16-18 Age Group by Adult Courts

The process of transfer of juveniles from JJB to normal court would lead to similar methods of sentencing and liability determination of criminal justice system for juvenile in conflict with law. Section 21 of the Act lays down that 'no child in conflict with law shall be sentenced to death or life imprisonment without the possibility of release for any such offence, either under the provision of the Act or under the provision of Indian Penal Code' is paradoxical in nature. Under the Act, we first transfer the Juvenile to adult court but we don't sentence him/her as an adult but continue to treat him/her as a child. This leads to clear confusion on the issue of applicable laws and jurisdiction of courts and JJB. It

⁴⁰ D. Das, 'Determining the Age of a Juvenile: A Controversial Approach' (Bureau of Police Research and Development) <<http://bprd.nic.in/>> accessed 6 August 2016

would lead to greater complications in sentencing of the juvenile in conflict with law.

If the above transfer system is followed then there are chances that guilt determination in the adult court by the standards of children's impaired capacity and mental abilities would lead to greater chances of acquittal in transferred cases which would lose the retributive objective of transfer.

Constitutionality of Transfer System under the JJ Act

The preliminary assessment and the trial before the Children's Court would compromise the principles of dignity and worth, best interests, positive measures, non-waiver of rights, non-stigmatizing semantics, equality and non-discrimination, and institutionalization as a measure of last resort, all of which are "fundamental" to the understanding, interpretation, implementation and application of the Act. Transfer of juveniles to the adult system will also violate the principle of right to privacy and confidentiality, resulting in them being denied access to the very means by which they can be rehabilitated or re-integrated into the community as persons capable of making a 'meaningful contribution to society'.⁴¹

The process of assessment for transferring juvenile in conflict with law and transfer to adult court is arbitrary in nature because in the process we first determine the culpability prior to establishment of guilt. This is in complete violation of the presumption of innocence - a central tenet of the juvenile justice as well as the criminal justice system. Similarly in the case of *Maneka Gandhi v. Union of India*⁴² the Supreme Court had held that procedural fairness is an integral part of due process.

This is in violation to fundamental rights guaranteed under article 14 and 21 of the Constitution. The assessment of mental capacity is impossible

⁴¹ *Reforming Juvenile Justice: A Developmental Approach* (The National Academies 2012) <http://www.njjn.org/uploads/digital-library/Reforming-Juvenile-Justice-A-Developmental-Approach-Brief_NationalResearchCouncil_11.2012.pdf>

⁴² *Maneka Gandhi v. Union of India* AIR 1978 SC 597, [1978] 2 SCR 621. Professor BB Pande, 'Juvenile Justice Reforms' (2014) Journal of National Law University Delhi, 2

and will inevitably lead to arbitrary transfers. Differential treatment of children who have completed or are above sixteen years of age and below eighteen years of age and are in conflict with law as a result of commission of heinous crimes is also in complete contravention to the CRC.

CONCLUSION

The JJ Act is one of the important legislation in the history of child legislation in India. The JJ Act provides for the rehabilitation of juveniles in conflict with law thereby helping them to reintegrate into the society as a better individual. The amended JJ Act of 2015 is clearly against the philosophy enunciated in the JJ Act 2000. The amended Act sees children and childhood as nothing more than miniature adults, those need to be handled as any adult criminals through a system i.e. a sub set of general criminal justice system. It is of view that juvenility does not lie much in the age but in the level of mental maturity as projected in serious and heinous offences. On the other hand, the 2000 Act was based on the premise that children constitute a social entity that lack mental capacity and decisional ability till the age of majority and protect childhood and the juvenile justice system need to be isolated from the general criminal justice system.

The government has legitimate right to legislate and amend any law for ensuring proper governance to its citizens. But the laws enacted should be constitutionally valid and it should not violate any rights enshrined under the Constitution of India which is the supreme law of the land. Similarly, the law should be in consonance with international and national norms of juvenile justice.

In this case the most important sources of international norms are the UN Conventions ratified by India. Similarly, the constitutional rights, directive principles and fundamental duties relating to children would constitute fundamental norms. As discussed above, the amended Act is violating the principle of UNCRC and other international conventions. It is also violation fundamental rights enshrined under the Constitution. Therefore, according to the author, the amendment requires reconsideration by the Government and the Supreme Court.

SUGGESTIONS AND RECOMMENDATIONS

1. Instead of singling out 16-18 age group, juvenile involved in heinous offences should be reconsidered in the light of official statistics released by the National Crime Records Bureau (NCRB).⁴³ The records of 2013 show that out of total children apprehended, 3883 were arrested for human bodily injury. It would be better if we subject these children to preventive programs than punitive measure. This would protect societal interests as well as the spirit of juvenile justice system.
2. The JJB would be over burdened with new and additional functions. Some of the functions could be passed on to the probation officers, child protection unit and CWC. There should be better infrastructure in place for JJB functioning.
3. The transfer system from children court to adult court should not be allowed, rather it should be dealt in children court. This would ensure trial and sentencing as per procedure established by law.

⁴³ Professor BB Pande, 'Juvenile Justice Reforms' (2014) Journal of National Law University Delhi, 2.

A CHILD PRODIGY V CHILD RIGHTS: A CASE STUDY ON BUDHIA SINGH

*Manisha Mishra &

**Sohini Mahapatra

ABSTRACT

The recent movie “Budhia Singh: Born to run” brings in its wake many issues related to the rights of a child. While the biopic is eulogising Budhia’s coach Biranchi Das, the serious issue is that of a six-year-old caught in the shackles of poverty, declared a prodigy, and a victim of being denied basic child rights. Budhia Singh’s early childhood is a paradox, which brings to the surface many inherent and interconnected problems that hover over many children in this country. Article 3(1) of the Convention on Rights of the Child states that “in all actions concerning children, ...the best interest of the child shall be a primary consideration” – the ‘best interest’ in case of Budhia Singh is very debatable. While being declared the youngest marathon runner in the world put him on the potential road to achieve what is unthinkable for most from his strata, on the other hand curbing his ‘wonder child’ quality to ensure that his rights as a child are not violated seem to be at a tussle consequently leading him nowhere.

The paper is an attempt to analyse the various perspectives involved in the case of Budhia Singh as portrayed in the movie and the real case, and also how far the ban imposed on his running under Section 23 of the Juvenile Justice (Care and Protection of Children) Act, 2000 and Section 336 Indian Penal Code was justified. The authors further aim to explore whether the ‘best interest of a child’, under exceptional circumstances can/should override certain other rights of the child.

* Assistant Professor (English) National Law University Odisha.

** Research Associate, National Law University Odisha.

INTRODUCTION

Most people say the movie “Budhia Singh: Born to Run” (2016) was released at a very ripe juncture, during the eve of Rio Olympics. The ban on Budhia, the child prodigy and “youngest marathon runner” continues and one wonders what would have been the outcome if he was not banned from running. But the important issue here is not just the ban; the movie brings to the surface much more pertinent concerns relating to a child.

BUDHIA IN REEL

The movie shows that when Biranchi Das, the coach of Budhia, finds him using abusive words, he punishes him to keep running around his courtyard. He expects Budhia to stop when he is tired. So, Biranchi goes away to oversee his dhaba business along with his wife Gita. On his return in the evening, he finds Budhia still running. He is shocked and at the same time impressed with Budhia’s running skills. The movie definitely exaggerates but in real life, though the manner of discovering Budhia’s skill by Biranchi Das was the same, the duration of the punishment of Budhia was from morning till noon, not evening. Keeping this fact apart, it is ironical that Biranchi uses the same running (that he uses as punishment) now as a measure to his success. However, the essential question here is: did Biranchi use Budhia for his own success or for the success of the child? And secondly, does this question of ‘whose success’ matter in the overall picture of retaining ‘the best interest of the child’?

Whenever Biranchi asked Budhia to run, he would run. But was he ever asked if he liked to run, or did he want to do what other children of his age did in their leisure. Did Budhia like to wake up in the wee hours of the morning and run groggy-eyed, even before he could think of anything else? It is futile to think that a five-year-old had ambition. He probably did not even know the meaning of the word ‘ambition’. Budhia was given the best of amenities right from food, clothes, bicycle to education. And in school, when asked by the teacher what all he did since morning, he nonchalantly replies: “*Hagga aur*

bhagga” [“Used the washroom and ran”]. Running had become a part of his daily life, as routine as daily ablutions. The question remains: did he enjoy it? And did he actually have a choice? Not running might have meant to him a life of abject poverty with his mother, who had sold him for Rs. 800 to a bangle-seller. Or would coach Biranchi have kept him, like other kids in his judo training centre, if he did not take interest in running. Nowhere in the movie are we exposed to the psychology of the child: what is Budhia thinking or what he is enjoying. Maybe, running to Budhia symbolized food and other material comforts, which he could never have if he did not obey the orders of his coach. And running was not despicable as begging for all those things he would never otherwise have access to.

At a point in the movie, when Biranchi and Budhia are surrounded by the media, Biranchi goads Budhia to respond to the questions of the press by saying: “*Aur bhagunga*” [I will run more]. It is at this juncture we realise that the five-year-old is completely oblivious of the sensationalism, the sense of importance and the politics surrounding him. However, it is the ambition of Biranchi Das that comes to the fore. It seems that he is in a possessive state of mind, where nothing can stop him from further fame, which can only be achieved by the running of Budhia. He seems to behave like a parent whose failed ambitions harp on the future of his child.

However, it cannot be entirely said that the relationship of Biranchi Das and Budhia Singh was based only on the lure of ambition of the coach. The separation of Biranchi and Budhi was an emotional one. When Biranchi came to meet Budhi at the sports hostel, he was definitely shown to be sad. Budhia, while with his mother, was remembering his coach Biranchi and wanted to go back to his ‘sir’. But whether the longing of each one for the other was because of their mutual need for ambition (Biranchi), and food-cum-materialistic pleasures (for Budhia) is debatable. Whether there was any further emotional attachment or not is not much explored in the movie. Director Soumendra Padhi has preferred to keep his focus elsewhere. There is only one playful, affectionate moment between Biranchi-Budhia in the movie- when Biranchi hides Budhia

under his blanket during the time his wife Gita searches for the child to admonish him because of his bed-wetting habit.

There has been much hue and cry in the movie reviews on “Budhia Singh: Born to run” on Biranchi just showing Budhia a water bottle (like a bone to a dog) but not giving him water during his marathon from Puri to Bhubaneswar. However, it is to be noted that Biranchi explains that giving water to the runner during the marathon could be detrimental to him. Maybe that was not convincing enough. But if Biranchi was not concerned about the health of Budhia, he would not have bothered to arrange for ambulances and other health safety measures during the marathon. Also, one cannot deny the fact that Biranchi was not concerned for Budhia. Even when Biranchi’s wife Gita was rushed to the hospital for delivery, he was busy arranging for Budhia’s sponsors.

In a review on the movie, writer Renuka Vyavahare writes: “The biopic provokes you to question if Biranchi was right in pushing Budhia to break insurmountable records at such a young age? With child labour rampant in the country, somewhere, you do tend to agree with the coach, when he nonchalantly states that even if the excessive running was to take Budhia’s life, he would have died with dignity and honour than hunger and poverty. On the other hand, would Biranchi have pushed his own child in a similar way?”¹ Here, the writer brings us to a very important issue: was a life of hardships and misery inevitable for Budhia? Whether it was the hardship of running or the misery of poverty, Budhia had to face either. There was no running away from either of the two.

LEGAL PERSPECTIVE

The Convention on Rights of Child (CRC) is the most extensively ratified international treaty related to children as well as a paramount authority for rights of children across the globe. Article 3 of the CRC states that in all actions concerning children, the ‘best interest of the child’ shall be a primary

¹ Renuka Vyavahare, ‘Budhia Singh: Born to Run Movie Review’, The Times of India, (August. 4, 2016), <<http://timesofindia.indiatimes.com/entertainment/hindi/movie-reviews/Budhia-Singh-Born-To-Run/movie-review/53543505.cms>> accessed August 14, 2016

consideration.² Although the CRC has not given a specific definition or explanation of what constitutes ‘best interest’, the United Nations High Commissioner for Refugees (UNHCR) has stated that the ‘best interest’ as used in CRC implies the well-being of a child, which is determined by a variety of individual circumstances, such as the age, the level of maturity of the child, the presence or absence of parents, the child’s environment and experiences.³ Additionally, a UN Committee on Rights of Child while deliberating over Article 3(1) has stated that this particular article is one of the four general principles of the CRC based on which all rights of the child are interpreted and implemented. The concept of the child’s best interests is aimed at ensuring both the full and effective enjoyment of all the rights recognized in the Convention and the holistic development of the child, where holistic development means embracing the child’s physical, mental, spiritual, moral, psychological and social development.⁴ The committee further states that the concept of ‘best interest’ of a child is threefold:⁵

- A substantive right – Meaning that whenever different interests of a child are being considered, the child’s best interests should be given primary consideration.
- A fundamental, interpretative legal principle – If a legal provision is open to more than one interpretation, the interpretation which most effectively serves the child’s best interests should be chosen.

²Convention on Rights of Child. Article 3(1): In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

³ ‘UNHCR Guidelines On Determining the Best Interests of the Child’ <http://www.unhcr.org/protection/children/4566b16b2/unhcr-guidelines-determining-best-interests-child.html?query=best%20interest%20of%20child>.

⁴ ‘General comment No. 14 (2013) On the Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration’ (art. 3, para. 1), Committee on the Rights of the Children 2013, United Nations CRC/C/GC/14 Convention on the Rights of the Child, http://www2.ohchr.org/English/bodies/crc/docs/GC/CRC_C_GC_14_ENG.pdf.

⁵ *ibid.*

- A rule of procedure - Whenever a decision is to be made that will affect a specific child, an identified group of children or children in general, the decision-making process must include an evaluation of the possible impact (positive or negative) of the decision on the child or children concerned. State parties shall explain how the right has been respected in the decision, that is, what has been considered to be in the child's best interests; what criteria it is based on; and how the child's interests have been weighed against other considerations, be they broad issues of policy or individual cases.

This connotes that when a child is placed in any particular situation which needs to be looked into, whether it is beneficial or detrimental to him in certain ways, in order to determine his 'best interest' several other factors encircling the child have to be taken into consideration to promote his inherent human dignity. It is not beyond the bound of possibilities that under certain circumstances, two or more rights of a child might be in conflict with each other. In such circumstances, a particular right or a particular violation cannot be taken in isolation; rather all-encompassing factors should be given adequate weightage in order to arrive at the best interest of the child. Depending on the magnitude of the decision for the child, different procedural safeguards need to be in place in order to identify which among the available options is in his or her best interests.⁶ Besides, the UN has emphasized that in giving full effect to the child's best interests, short, medium and long-term effects of actions related to the development of the child over time must be borne in mind.⁷

In case of Budhia Singh, although there were claims that his rights as a child were being violated, nevertheless his exceptional journey as a five-year-old prodigy was neither refuted nor can be entirely ignored. Research has shown that the most effective interventions to improve human development and break the cycle of poverty occur in children's earliest years.⁸ Budhia was a victim of

⁶ *ibid.* at 3.

⁷ *ibid.* at 4.

⁸ UNICEF, *Early Childhood*, <http://www.unicef.org/earlychildhood/index_bigpicture.html>.

acute poverty, to the extent that he was sold off by his biological mother for a meagre sum of eight hundred rupees. The transition in his life from being a victim of child trafficking to the global platform as youngest marathon runner in the world makes it incumbent to analyse the rights of child involved from an unconventional perspective. UNICEF under its Millennium Development Goals talks about combating poverty and extends the same to its Early Childhood Development programme expressing that it is important to ensure that children who survive are able to reach their full potential and become productive members of society.⁹ Amidst all the controversy that surrounded him, one fact which cannot be negated remains that if not for his coach, the training and being projected as a marathon runner, Budhia would have remained in the chains of poverty in far more deplorable conditions.

The Child Welfare Committee (CWC), Khurda District imposed the ban relying on Section 23¹⁰ of the Juvenile Justice (Care and Protection of Children) Act, 2000 and Section 336¹¹ of the Indian Penal Code on health grounds on the basis of medical tests conducted on him. The medical board constituted on the basis of complaint filed by the CWC stated that Budhia suffered from under-nourishment, anaemia, high blood pressure and cardiological stress.¹²

Furthermore, it was also argued that Budhia was under-aged to go through such intensive trainings and participate in marathons. The age at which Budhia completed the mammoth 65 kilometres marathon still remains debatable

⁹ *ibid.*

¹⁰ Juvenile Justice (Care and Protection of Children) Act, 2000, § 23 - Punishment for Cruelty to Juvenile or Child.— Whoever, having the actual charge of, or control over, a juvenile or the child, assaults, abandons, exposes or wilfully neglects the juvenile or causes or procures him to be assaulted, abandoned, exposed or neglected in a manner likely to cause such juvenile or the child unnecessary mental or physical suffering shall be punishable with imprisonment for a term which may extend to six months, or fine, or with both.

¹¹ Indian Penal Code, § 336 - Act endangering life or personal safety of others.—Whoever does any act so rashly or negligently as to endanger human life or the personal safety of others, shall be punished with imprisonment of either description for a term which may extend to three months, or with fine which may extend to two hundred and fifty rupees, or with both.

¹² Sandeep Sahu, 'Health Fears Ground Marathon Tot', BBC News, (May 8, 2006), <http://news.bbc.co.uk/2/hi/south_asia/4984406.stm>

between whether he was five or six years old, with innumerable articles quoting the age with discrepancies between them. The International Association of Athletics Federations (IAAF) launched the Kids' Athletics in 2005, where the starting age for participation in various events including running/sprinting was seven years with the objective to promote a balanced and healthy lifestyle, and to attract and sustain the potential sporting stars of tomorrow.¹³ It can easily be contended that the difference in age between what Budhia was at the time of marathon and that for entering athletics as per international standards is not quite wide. Most sports scientists discourage specialization in any particular sport before the age of thirteen; however do not shy away from the fact that child prodigies in sports do exist, like Tiger Woods, William sisters, and what really makes these prodigies-turned-superstars stand out is that they are the exception to the rule.¹⁴ Hence, it can be inferred that the general rules can be bent in case of exceptional child prodigies thereby bringing Budhia within the same category having been declared a 'wonderboy' with an entry into the Limca Book of Records.

In a sport like gymnastics, which is considered one of the most dangerous sports, there is intensive physical training with approximately at least twenty – thirty hours of practice in a week. The risk of injuries that can be sustained is far higher compared to marathon running. Nevertheless, children begin training in gymnastics at a tender age of mere two or three years. Olympic gymnast, Gabby Douglas, who has been adorned with several medals as well, began her training at the age of three.¹⁵ Therefore, it would not be wrong to deduce that subjecting Budhia to the kind of training that he was, was altogether incongruous.

¹³ 'IAAF Kids' Athletics' <<https://www.iaaf.org/development/school-youth>>

¹⁴ Carl Honore, 'Under Pressure: Recuing Our Children From the Culture of Hyper-Parenting', <https://books.ggle.co.in/books?id=aTUN1pG9prYC&pg=PT77&lpq=PT77&dq=budhia+singh+cardiological+problem&source=bl&ots=NsbM8nn6_&sig=NyKUBHLZmFbr9MqgtEcc8jCEbqI&hl=en&sa=X&ved=0ahUKEwivkOnfxcvOAhWLr48KHRY_BKoQ6AEISDAH#v=onepage&q=budhia%20singh%20cardiological%20problem&f=false>

¹⁵ 'Gabby Douglas', <<http://www.biography.com/people/gabby-douglas-20900057>>

Moreover, the UN Committee on Child Rights has expressly pointed out that the concept of a child's best interests is complex and its content must be determined on a case-by-case basis.¹⁶ It has further stated that this concept is flexible and adaptable and hence cannot be applied in strict water-tight compartments rather should be adjusted as per the specific situation of the child, taking into consideration his personal context, situation and needs.¹⁷ Thus, it has been repeatedly reiterated that the best interest of a child should be assessed in the light of his/her individual specific circumstances instead of applying a common rule to every child. In this context, it can be argued that Budhia's situation was not assessed on the basis of his specific situation.

Following the ban, the same was challenged in the Orissa High Court, which had issued a show-cause notice to the CWC to clarify its stand on the ban.¹⁸ Subsequently, the CWC and the State government were directed by the Court to furnish all records on the basis of which the ban had been imposed. However, eventually with the murder of Biranchi, the entire matter gradually fizzled out and Budhia, who by then had been admitted into the Sports Hostel in Bhubaneswar, was left to his fate.

CONCLUSION

It is worth reflecting over the entire journey of Budhia from acute poverty to global fame and then plummeting into the darkness of anonymity. Even though it has been reiterated time and again to attempt at achieving best interest of child, taking into consideration the specific circumstances of the child, the same was not done in the case of Budhia Singh, who could have potentially developed into a star athlete. Unarguable rights of a child, whether it is right to health, right to education or others, cannot be compromised but when there are two rights locking horns with each other, it is crucial to decide which should be given more

¹⁶ *ibid.* at 4.

¹⁷ *ibid.*

¹⁸ 'Orissa HC Issues Notices to CWC Over Budhia Ban', The Times of India, (June 12, 2007), <<http://timesofindia.indiatimes.com/india/Orissa-HC-issues-notices-to-CWC-over-Budhia-ban/articleshow/2117716.cms>>

importance in order to have an overall beneficial impact over the child. Critics of the ban, expressly and impliedly hinted at politically motivated reasons behind the entire issue; whether or not there is any credibility to the same is debatable but the fact that it held back a child prodigy from possibly turning into a world-class sportsman cannot be questioned.

TAARE ZAMEEN PAR - A REVIEW
(EVERY CHILD IS SPECIAL)

***Diana John**

ABSTRACT

'Taare Zameen Par - A Review' revolves around the situations in the life of a boy aged eight to nine years suffering from dyslexia. Beginning with a brief introduction, the author narrates the storyline mentioning the roles played by each character, highlighting emotions and problems faced by the boy, who is exceptionally talented in painting. In the backdrop of the movie's theme, the author has stressed on the need for families to put their children before other things and understand them with patience and kindness. The author also narrates how the boy's spirit to paint and to be creative gets crushed by the harshness of his father in the beginning, but later on like a balm on a wound, his teacher's sincere efforts yield fruit when Ishaan, the boy picks himself up slowly gaining confidence to discover himself and his happiness finally. The review states emphatically the social relevance of the film. The review also explicitly highlights the core fact that the roles played by parents and teachers in a child's life can go a long way in affecting the child positively or negatively. The review also mentions in brief the awards and accolade coveted by the movie by various actors and other contributories from behind the scenes and concludes with the author's view in matters relating to children based on the theme of the movie.

* LL.M. (University of Mysore) and Independent Researcher

INTRODUCTION

India, also fondly referred to as our motherland, is home to innumerable children coming from different strata of life who vary in their economic, cultural, educational, religious and social backgrounds. Unity in diversity is the hallmark of our nation. Despite the multifarious factors and backgrounds of people, be it children, youth, adults or the elderly considered as senior citizens; there is a strangely one, strong unifying factor, that brings everyone nationally and globally together rather enthusiastically. It is none other than feature films which are the heart and soul of the entertainment industry; in legal parlance, motion pictures. If a film is sensitive to family, societal, economic, gender or child issues, it transcends boundaries of the states and the country to be welcomed, received and remembered nationally and internationally. Today we also seem to have come to terms with the concept of one global village or *vasudhaiva kutumbakam*.¹ Also the world with the internet is just a click away so that any person in any part of the world can access movies in any language. In such technologically advanced times some films emerge in the film industry and expose people of different age groups to different perspectives by conveying important message. One such important, soul stirring, socially relevant, inspiring and sensitive movie was released in the year 2007 with the tag line which said '*Every child is special*.' It was none other than the Hindi movie '*Taare Zameen Par*'.² Moving on further, we see why this movie needs to be reviewed and the specialty that can be attributed to it.

What is Taare Zameen Par All About?

Taare Zameen Par is an Indian film directed and produced by actor Aamir Khan.³ The Medha Lotlikar Saraswati Mandir Trust, Tulips School and

¹ The "World is a Family" verse of Maha Upanishad is engraved in the entrance hall of the Parliament of India. *Vasudhaiva Kutumbakam* is a Sanskrit phrase found in Hindu texts such as the Maha Upanishad, which *means* "the world is one family." extracted from Wikipedia.org, 'Vasudhaiva Kutumbakam' <https://en.wikipedia.org/wiki/Vasudhaiva_Kutumbakam> accessed 15 August 2016

² Wikipedia.org, 'Taare Zameen Par' <<https://en.m.wikipedia.org>> accessed 10 August 2016

³ Ibid

Kate Currawalla (Maharashtra Dyslexia Association) were involved in supporting and researching various aspects for the film. The specialty is the director's commentary accompanying the film which gives an insight into the making of various scenes.⁴ *Taare Zameen Par* translates to 'The Stars on Earth' and the reference to 'stars' here being children who like stars twinkle always, be it night or day though we do not see them when the sun is bright. In the movie a song has been included which makes special reference to children who are differently abled.

The movie begins with a scene showing a boy of eight to nine years of age named Ishaan Awasthi blissfully watching tiny fishes swim in a tank and collecting them to put them away in his fish tank at home which he considers as one of his prized possession apart from collection of eclectic articles. His world is filled with wonders that no one else seems to appreciate; colors, fishes, dogs and kites are just not important in the world of adults who are much more interested in things like homework, marks and neatness.⁵ The movie goes on to expose the thoughts, struggles, interests, passions, academic and domestic life of this child. Ishaan's family consists of his very enthusiastic, busy father, Mr. Awasthi, his zealous brother Yohaan Awasthi who is a topper in class and an ardent badminton player and mother Mrs. Maya Awasthi, a home maker, each living their lives by the clock and discipline and trying to excel in their respective areas.⁶

But, Ishaan is in no hurry to wake up early or run to school. It is an ordeal for him. Instead, he is a day dreamer. Studying his school books least appeals to him and he is seen having difficulty in identifying letters of the alphabet, which he says are 'dancing' when he looks at them; coupled with teasing by his classmates and children in the neighborhood who seem to think that little Ishaan is an idiot. Interestingly, his room is filled with a variety of drawings, pictures

⁴ These facts are noted from the movie watched on DVD.

⁵ TaareZameen Par, 'My Story' <www.taarezameenpar.com> accessed 15 August 2016

⁶ ibid

with vibrant colors of paints and beautiful puzzles which interests him the most. Problems begin when his parents find out that he was hiding a test paper in which he had failed and a special note sent by the class teacher asking to meet his mother to speak about how the boy is very poor at studies. His parents are devastated when they learn from the teachers that Ishaan is repeatedly getting punished for not doing his homework and on one such day he has roamed the Mumbai streets all by himself. However, for Ishaan, it was a day of freedom.

The movie takes a turning point when the young and very reluctant Ishaan is sent away to a boarding school in order to learn discipline and excel in studies. His adamant and harsh father refuses to yield to Ishaan's protests and decides to send his son away to a boarding school far away. Accompanied by his mother in tears and sad elder brother, Ishaan is boarded on the taxi to his school. The thought that he is being punished for being bad constantly haunts Ishaan, who terribly misses his mother and on the first night, sleep eludes the boy who is overcome by fear and depression. From his first day in class and onwards, Ishaan is lost and totally petrified at questions showered on him, and remains silent enduring the teasing of other students. But, Rajan Damodaran the topper in his class and a handicapped boy firmly believes that there is something special about Ishaan and befriends him. Ishaan's mind goes into total darkness and he abstains from talking to his mother and ends up giving up painting activities that he used to joyfully pursue. He stoically puts away the painting box gifted by his elder brother on a visit to his boarding school on one occasion.

Days pass by mechanically, when Ram Shankar Nikhumb, a teacher working in a school for differently abled children makes an entrance as a temporary art teacher in the school where Ishaan is studying, and immediately captures the liking of his class boys because of his gentle, jovial and broad minded approach. He also notices that Ishaan is the only boy in his class who couldn't paint a picture when asked by the teacher. The movie goes on forward showing the budding of a beautiful relationship between a teacher and his pupil, where the teacher painfully realizes that Ishaan is a dyslexic student. In the beginning, the teacher finds it difficult to take the boy into his confidence, and

decides to go to Ishaan's house to know more about the boy's background and inform his parents about their son's condition. His father reacts unsympathetically at Ishaan's plight, brushing it aside as the boy's excuse for being lazy. Sad and taken aback, but determined, the teacher decides to take Ishaan's matter into his own hands. The teacher is awed by the drawings and paintings of Ishaan which he sees at his house and tries to convince the parents the brilliance and intelligence in Ishaan's paintings. According to him the portrayal of such beautiful and thoughtful themes is exceptional for a boy of eight to nine years old, and at the same time feels heartbroken that the child has left painting.

The movie continues when the teacher reveals to Ishaan that he himself was dyslexic and faced his childhood with an unsupportive father, and also quoting the names of famous personalities like Albert Einstein etc., who were dyslexic in order to lift the boy's spirit. The teacher with the moral support of his principal uses techniques in art - colors, moulds, and things in nature as remedial techniques used for children with developmental disabilities, to help Ishaan learn all his subjects which results in boy showing increased progress day by day. Little Ishaan learns to read and write without confusion, button his shirt and bind his tie properly. When Ishaan's father Mr. Awasthi comes to meet the teacher to tell him that they are well aware of the boy's condition the teacher helps Ishaan's father realize how a child like Ishaan can turn out to be a miracle, no less a wonder, if handled with love and care instead of scolding, restrictions and compulsions, which was the way it always was with Ishaan. The father is seen leaving in tears and regretting the mistakes he made, but he is a man transformed in thoughts and gentler in heart determined to treat the boy with affection and understanding.

When the art teacher decides to hold an annual drawing competition, Ishaan also decides to participate as his teacher had expected. Rising early that day, the boy goes to the side of the river and looks at the stars and spends a long time at his favorite riverside which he eventually portrays it in his painting. While Ishaan is engrossed in his painting, his teacher paints Ishaan's portrait which leaves the little boy speechless. When Ishaan hands over his painting to

his art teacher for submission, Ram Shankar Nikhumb realizes that the star which was lost has been found. In a tie between the duo Ishaan gets chosen over his dear teacher to win the coveted prize for the best painting which is also selected to be the front cover of the school magazine and his teacher's painting to be the back cover. Emotionally overwhelmed, Ishaan and Ram Shankar Nikhumb embrace each other. Ishaan realizes the depth of the love his teacher has in his heart for him. The movie ends on a positive note when Ram Shankar Nikhumb is appointed as a permanent teacher and Ishaan has progressed as his teacher wanted him to eventually become the pride of his school and his parents. His parents remain thankful to Ram Shankar Nikhumb for doing what they couldn't achieve, for bringing back their son to a world of knowledge, colors and self-esteem.

The Social and Technical Relevance of the Film

The movie is an eye opener emphasizing on the importance of teacher's quality of being compassionate, sensitive and attentive to slow learners and weak students instead of neglecting and admonishing them. A teacher should have patience in trying to find the lost sheep in a big flock. For children and students, it shows how important it is not to tease or jeer at weaker students, which is a very bad trend, as it is never possible to assess the impact on the other person. The movie has successfully conveyed a sincere message that life is not only about competition, but co-operation, helping one another and picking oneself up. It gives a clear moral message that education is not knowledge or smartness alone but it involves a thousand other faculties of mind and body. It emphasizes the truth that creativity has equal place in life though it may not yield profits as expected by a stereotypical parent, like Ishaan's father who has been portrayed as one such person in the movie. The movie depicts the helplessness of a little boy who wants to study but never seems to be able to process in his mind or understand what is taught.

A child is compared to a tree in Solomon Islands⁷ which wilts under constant abuse and admonitions.⁸ The movie conveys the concept of approach to children, that they too see the world but differently from the way we do and they need time. Every scene in the movie has succeeded in bringing out the beautiful colors of a child's feelings. Especially so, in the songs where Ishaan looks at a manual laborer buying his child a piece of ice candy and carrying his child on his shoulders. The expression on Ishaan's face shows a yearning to be loved the same way by his father which unfortunately he never experienced. The movie has succeeded in enlightening people of all ages about a different dimension in life through the dyslexic condition of a boy and his empathetic teacher who eventually becomes his mentor. The movie is a touching and equally thought-provoking one that gets you deeply involved and keeps you glued to the screen from the beginning to the end. It is so sincere in its theme that it is capable of bringing about a desirable inner change in people of all age groups. On the technical side depiction of Ishaan's thoughts in the form of animation objects has been innovative.

In the words of our Hon'ble Late President Dr. A.P.J. Abdul Kalam, "Education with a Value System has to be so designed that righteousness is developed in young minds; that should be the mission of education". He brings to our attention an old Greek saying namely, 'give me a child for seven years; afterwards let God or Devil take the child. They cannot change the child'.⁹ According to him, this saying indicates the great power of teachers and what they can inculcate in the young minds. True education according to our Late President is the acquisition of enlightened feelings and enlightened powers to understand daily events and the environment, both earthly and planetary.¹⁰ This message written and endorsed by our former President is the core theme of this film that adds to its worth and value.

⁷ Quora.com, 'Is it true that trees can die by simply being cursed' <<https://www.quora.com/Is-it-true-that-trees-can-die-by-simply-being-cursed>, accessed> accessed 15 August 2016

⁸ Robert Fulghum, *All I Really Need to Know I Learned in Kindergarten* (Ivy Books, 1988)

⁹ Dr APJ Abdul Kalam, 'Creating a World Worth Living' (2016) Manorama Year Book 3.3

¹⁰ *ibid*

Awards and Accolades

Taare Zameen Par has many feathers in its cap. The movie went on to win the 55th National Film Award in 2007 for the Best Film on family welfare, Best Lyricist for Sri. Prasoon Joshi and Best Male Playback singer for Sri Shankar Mahadevan.¹¹ This directorial debut of Aamir Khan was later reissued as *Like Stars on Earth* for Disney's international version.¹² It has the distinction of being the sole Indian film which was bought by an international studio, the Walt Disney Company Home Entertainment for distribution in North America, United Kingdom and Australia for seven crores.¹³ The only setback which the movie suffered was despite being India's official entry for the 2009 Academy Awards Best Foreign Film, it failed to progress to the short list. This film stands out for using for the first time the technique of clay animation in a Bollywood film¹⁴.

The movie has to its credit fourteen wins and fifteen nominations namely in 2009, from Apsara Film Producers Guild awards, it won the Apsara Award for the Best Film and Best Director and nominations for the Best Actor to (Darsheel Safary), Best Music Director – the trio Shankar Mahadevan, Ehsaan Noorani and Loy Mendosa for *Rock On*. It got nominated for the Best Film in 2008 by the Bombay International Film Festival. The film awards of 2008 went to Aamir Khan for the Best Film and Director, to Amole Gupte for the Best Story and to Darsheel Safary for Best Actor - Critics. In the same awards Tisca Chopra starring as Ishaan's mother in the movie was nominated for the Best Supporting Actress and Aamir Khan for the Best Supporting Actor. The Screen Weekly Awards in addition to aforementioned categories also awarded Sri. Prasoon Joshi Best Lyricist for the song '*Maa*', Best Child Artist to Darsheel

¹¹ Press Information Bureau <www.pib.nic.in> accessed 10 August 2016.

¹² Wikipedia.org <www.wikipedia.org> accessed 10 August 2016

¹³ Taare Zameen Par <www.taarezameenpar.com> accessed 15 August 2016

¹⁴ Also referred to as 'Claymation' being one of the many forms of stop motion animation (physically manipulating an object so that it appears to move on its own) where each animated piece either character or background is deformable made of a malleable substance usually Plasticine/modeling clay.

Safary, the Most Promising Debut Director and several nominations for Best Screenplay to Amole Gupte, Best Special Effects to Tata Elxsi, Best Male Playback Singer to Shankar Mahadevan and Best Supporting Actor to Vipin Sharma *inter alia*.¹⁵ The commendable role played by Darsheel Safary as Ishaan rightly portraying the expressions and mannerisms of a dyslexic boy is difficult to overlook. Actor Aamir Khan, as the calm and composed teacher has truly been a success with the audience in an equal measure.

CONCLUDING THOUGHTS

Children are like roses, fragrant yet sensitive. Let us cut down a bit on hurry and take time and patience in order that these roses may not wilt before they bloom. Many childhoods today are lost in loneliness, day care centers or under the supervision of *ayahs* due to demands of parent's profession and social engagements. In a concluding remark, the words of our Hon'ble Late President Dr. A.P.J Abdul Kalam may be cited, who himself was also a teacher, that the three most important people in a child's life are father, mother and teacher. *Taare Zameen Par* has exposed the world of differently abled children, who have tender hearts and delicate minds. The movie is an asset as it is oriented towards family welfare, the importance and impact of family and teacher as the primary unit in the upbringing and development of a child and fostering a child on a need based angle. In *Taare Zameen Par* the director has sacrificed romance, action, eye-catching song numbers, and dances to include an issue as important as medical condition of a child and remedial techniques to solve this problem in form of compassion and attention needed by a child to rise up. It has depicted through a song that has pictured innocent, differently abled children as the true stars on earth, their little performances, a truly different world away from the noisy entertainment to provoke our thoughts. The documentary footage about children included at the end, makes the film worthy of a standing ovation.

¹⁵ Imdb.com, 'Taare Zameen Par (2007)' <www.imdb.com> accessed 11 August 2016

**RIGHTS OF THE CHILD TO FREEDOM OF ASSOCIATION IN THE
LIGHT OF LEADING NEPALESE CASE**

TILOTAM POUDEL V MINISTRY OF HOME AFFAIRS ET. AL.

*** Prabhat Chhetri**

Freedom of association is the right to join or leave groups by a person's own choice and for the group to take collective action to pursue the interests of members.¹ Generally, this right is difficult to practice, interpret and enforce, when applied as a right of children. Various international instruments talk extensively on freedom of association of people as a whole; but the UN Convention on the Rights of the Child holds a special position because it guarantees freedom of association to special group of population i.e. children. Article 15 of the UN Convention on the Rights of the Child which is associated with freedom of association reads, “*State Parties recognize the rights of the child to freedom of association...*”²

In this backdrop, a leading Nepalese case *Tilotam Poudel v Ministry of Home Affairs et.al.*³ has well interpreted and explained the concept of Right to Freedom of Association of Children. In this case, the Nepalese Government had denied the registration of an organization that was seeking registration as a Non-Government Organization (NGO), which was established by children, including the plaintiff in the case. The Government reasoned that children were

* The author is a 5th year student, pursuing B.A. LL.B A at Tribhuvan University, Nepal Law Campus; General-Secretary at Law Student Society (LSS), Nepal.

¹ Jeremy McBride, *Freedom of Association, The Essentials of Human Rights* (Hodder Arnold 2005)

² UN Convention on the Rights of the Child, 1989, Art 15

1. States Parties recognize the right of the child to freedom of association and to freedom of peaceful assembly.

2. No restrictions may be placed on the exercise of these rights other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.

³ *Tilotam Poudel v Ministry of Home Affairs et.al.* [2001] NLJ. 423.

incapable to perform functions in the eyes of law and also couldn't bear the liabilities arising out of their position in an organization, if registered, and therefore such organization can't be registered as per law. The plaintiff filed a writ petition against the government's decision, claiming it as their right to register such organization. The Supreme Court of Nepal invalidated the decision of the government and issued a writ of mandamus for the registration of organization upholding the rights of children to form an organization.

This decision is a landmark decision as it has recognized and applied the concept of Rights of the Child to Freedom of Association. The Court opined that merely being a child will not result in deprivation of freedom to form associations which is a fundamental right guaranteed by the Constitution, unless law expressly prohibits it. The Court applied Article 15 of the Convention on the Rights of the Child which provides right of child to freedom of association. In application of Convention on the Rights of the Child, the Court reasoned that Nepal being a party to the Convention the provisions of this Convention shall be given effect in case of inconsistency with domestic law, somehow upholding the superior status of international law.⁴

CONCLUSION

The Right of the children to form an association may be regarded as important and complex, yet a less explored area of child rights. The judgement of Nepalese Supreme Court in the case of *Tilotam Poudel*⁵ is a praiseworthy decision.

First of all, the Court acknowledged the sensitivity of the issue and invalidated the decision of denial of registration of organization merely on the

⁴ The Constitution provision somehow tilts towards dualism the principal provision regarding the status of international treaties has been enshrined in Section 9 of the Nepalese Treaty Act, 1990. Section 9 (1) appears close to the practice of some countries such as Norway and Ethiopia which give superior status to the convention than that of domestic law. However, Section 9(2) appears close to British legal approach, which requires an Act of Parliament for a treaty to be implemented.

⁵ *Tilotam* (n 3).

ground that it was being established by children. Also, the writ of mandamus was issued to register the organization, even though it was established by children. The defendant's argument regarding the incapability of children to perform duties arising out of their position, if registered, was discarded by the Court. Here the Court's verdict focused on children's rights over legal complexity.

As per the decision of the Nepalese Supreme Court, the freedom of association is not only limited to adults but may also be enjoyed by children. It is a fundamental right guaranteed by the Constitution, unless law expressly prohibits it. Hence, the interpretation of right of the children to freedom of association is made in broad sense and in the favor of children's rights.

The Court has also provided a superior status to Convention on the Rights of the Child. The Court gave the verdict relying on Article 15 of the Convention on the Rights of the Child, which has guaranteed freedom of association. It must be noted that, regarding the application of international law, Nepalese law has no uniform practice. However in this case, the Court has applied the Convention directly and provided/affirmed the supremacy of the Convention, which well reflects the status and significance of the convention in Nepalese legal system. The decision can be a good example while applying the Convention on the Rights of the Child in domestic courts – especially while addressing child rights issues.

In a nutshell, children's rights to freedom of association is an important right that children possess. Convention on the Rights of the Child has taken a giant leap to uphold its theme in Article 15. State parties must ensure the recognition and application of the rights of the child to freedom of association. Government should promote such right because it contributes to the social, cognitive, physical, and emotional well-being of children. The case therefore, can be concluded as an important case law in defining and applying the concept and also could be an important reference for the future claims regarding the freedom of association of children.

CENTRE FOR CHILD RIGHTS

Centre for Child Rights was established in the year 2015 by the National Law University Odisha, Cuttack to pioneer teaching, research, training and advocacy in the field of child rights. The centre envisions providing integrated support to different layers of institutional governance in local, state and national level for the protection of child rights. The centre aims to do so by creating framework of research support and logistical back-up to the statutory processes concerning protection of children and by providing complementary support to different stakeholders involved in the child rights paradigm. In its present engagement and with the generous support of UNICEF, the Centre strives to support and strengthen child protection structures by leveraging knowledge change and policy reforms to make juvenile justice system more accountable, efficient and effective for protecting and promoting child rights.

Published by: The Registrar, National Law University Odisha, Cuttack
Kathajodi Campus, Sec - 13, CDA, Cuttack 753015, Odisha (India)
E-Mail: registrar@nluo.ac.in, Contact No. +91-671-2338018, 2338011
Website - www.nluo.ac.in