

JUDICIAL DEVELOPMENTS IN INDIA TOWARDS SECURING THE RIGHTS OF CHILD

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ABSTRACT

Children are the main strength and resource for the future generation of any country. The United Nations Convention on the Rights of Child, 1989 defines a 'child' as every human being who is below the age of eighteen years. However the Convention provides that the age for attaining majority can be fixed at a lower age by the particular domestic law which applies to the child.¹ Every child, like any adult, must be entitled to fundamental rights without distinction or discrimination on any basis. The rights and privileges afforded to children under the plethora of laws in place would be useless if they were not followed. The Indian judiciary plays a critical role in the protection of children and has issued numerous landmark decisions in this region. This paper focuses on the development that has been made with respect to prohibiting harassments and all sorts of ill-treatment shown to children from a very young age. Moreover there are still certain elements missing when trying to combat all illegal activities happening to children when tried to sort out with the prevailing statues. The problem arises with the system that has to control things efficiently, but in the Indian scenario things go out of control just because nobody tends to utilize these plethora of rules and laws accurately prior to the happening of unfortunate events.

AN INTRODUCTION TO CHILD RIGHTS

The notion of child rights is one that was observed by the international community as a fundamental notion that was initially canned. The Mary Ellen case, which occurred in New York City in 1874, exemplifies the plight of children in previous generations. Animal rights

were recognized and embraced by society well before child rights were, so a 6-year-old child who was tortured, bound to bed, and fed only bread and water had to turn to animal rights for justice and freedom. However, as a result of this case, Americans began to notice a gap in the laws protecting children, and the New York Society for the Prevention of Cruelty to Children was established in 1874.

There are specific rights rather than entire group of rights, which although at the first sight shall appear to be exercised by both children and adults, are not. Every child must be entitled to the fundamental rights without distinction or discrimination on any ground like any adult person. According to the Commission for Protection of Child Rights Act, 2005, under Section 2(b), Child Rights is defined so as to include Children's Rights adopted in the UNCRC and ratified by India. As per this, Children's Rights included right to name, nationality, protection from torture and maltreatment, special rules governing the circumstances and the conditions under which children may be deprived of their liberty or separated from their parents.

The Constitution of India has reckoned certain provisions which are specifically meant for the protection of children such as the Articles 15(3), 24, 39(e), 39(f) and 45. The right to free and compulsory education for all children in the 6-14 year age group,ⁱⁱ right to be protected from hazardous employment till age of 14,ⁱⁱⁱ protection from abuse and from being forced to enter occupations not suitable to their age as well as strength,^{iv} right to early childhood care and education till the age of six years^v and right to opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and guaranteed protection of childhood and youth against mistreatment and against moral and material desertion^{vi} are such specific protections for children guaranteed under the constitution which are in addition to any protection that can be extended to a child in par with any adult. In pursuance of such constitutional directives various child welfare and protection legislations have been enacted such as the Right to Education Act, Juvenile Justice Act, POCSO Act, etc.

One more sniping example is the case of *Bachpan Bachao Andolan v. Union of India*^{vii}, in which the Supreme Court considered a PIL filed before it which brought to the forefront that the children were being trafficked from Nepal or taken from their homes, exploited as child labourers in circuses, and subjected to mental, physical, and sexual abuse. The court in its final

judgment answered to the prayers in positive and ordered that the employment of children in circuses be prohibited. Court required the government to conduct raids on all circuses to liberate the children and to examine into child rights violations committed in such areas. The released children were to be kept in the Care and Protective Homes until they are 18. However the court also provided that if the parents of such children are willing to take them back into safe custody then they may be returned to their parents after due verification.

CHILD PROSTITUTION

Child prostitution is a major global concern, but it has received insufficient attention in India, owing to a general lack of sensitivity to the issue. It's a long-standing problem that destroys children of their childhood, civil rights, and dignity. The sexual abuse of a child for monetary or in-kind remuneration is known as child prostitution. It is typically, but not always, arranged by an intermediary (parent, family members, procurer, etc.). The majority of child prostitution is between the ages of 11 and 18. These children are typically from dysfunctional families and are enticed by older gentlemen who offer them food and shelter.

Article 34 (b) of UNCRC requires the member states to take appropriate measures to prevent “*exploitative use of children in prostitution or other unlawful sexual practices*”. Under the Indian Constitution, Article 23 deals with prohibition of trafficking in human beings, forced labour and all forms of exploitation. This was meant at placing an end to all systems of trafficking in the human beings including prostitution and beggary. Under the Indian Penal Code, Section 366A makes procurement of a minor girl from one part of place to another is punishable and section 366B, which makes importation of a girl below the age of 21 years are punishable. These sections try to prevent prostitutions by strict penal action. Section 372 and 373 makes selling and buying of minor girls for the purpose of prostitution, a crime for which even 10 years of imprisonment and fine can be awarded.

The special legislation in this behalf is the Immoral Traffic Prevention Act, 1956. Under the Act, a child is a person who has not completed 16 years of age.^{viii} And minor is a person who

has completed 16 years of age but below 18 years.^{ix} The Act imposes aggravated punishment if the offence involves a child or a minor.

The landmark case to be mentioned in this regard is that of *Vishal Jeet v. Union of India and others*,^x in which a public interest litigation was filed seeking a CBI investigation against those police officers under whose jurisdiction Red Light areas were flourishing and to take necessary action including the action to bring the children of the prostitutes and other children found begging in streets as well as the girls pushed into 'flesh trade' to protective homes and then to rehabilitate them. Though the Supreme Court declined to order a CBI investigation, claiming that it would be ineffective, it did note in its decision that many impoverished children and girls in their adolescence are dragged to the 'Flesh Market' and forcefully forced into the flesh trade. The Court determined that this can only be suppressed and eradicated if law enforcement agencies take swift and strict disciplinary action against all offenders, including pimps, brokers, and brothel keepers. The Court issued a number of directives to governments, including establishing Advisory Committees to make recommendations for measures to be taken to eliminate the evil of child prostitution and implementing various social welfare programs for the care, safety, recovery, advancement, and recovery of children and girls who are survivors of prostitution.

In *Gaurav Jain v. Union of India and others*,^{xi} Separate schools with vocational training programs and hostels for children of prostitutes were the topic of discussion. However, the Supreme Court ruled that such segregation would be detrimental to the girls. It is said that prostitutes do not want children, and that when children are born to them, it is usually against their wishes to raise them. However, after such children are born to them, it is in the best interests of such children and society it should be for such children to be separated from their mothers and encouraged to mingle with others and integrate into society.

In the case of *Public at Large v. State of Maharashtra and others*,^{xii} the court had issued certain directives to state governments in relation to minor girls who had been rescued from the sex trade in certain Maharashtra districts. Some of the pertinent directions-

The rescued girls should not be exposed to HIV testing, and if they have already been tested, their identities and results should not be revealed. All evacuated children should be referred to

a physical test to assess their age, and they should be given adequate medical care if they are sick. If the saved person is an adult girl who does not want to stay in the foster home, she must be able to leave on her own terms. If any other state governments are willing to make plans for the girls' arrival, the Chairman of the State Juvenile Justice Board will issue the requisite orders to move the girls to the other states that are willing to accept them.

CHILD PORNOGRAPHY

The sexual abuse of children is described as child pornography. The POCSO Act of 2012 is the most important piece of legislation in our country for dealing with this threat. The law aimed at preventing child sexual exploitation also includes guidelines for the crime of child pornography. The crime of using a child for sexual purposes is addressed in Chapter III of the POCSO Act.^{xiii} Section 14 provides for the punishment for the offence as an imprisonment which may extend up to five years and fine on first conviction and up to seven years on second or subsequent conviction. Section 15 punishes the offence of storage of pornographic material in any form which includes a child.

In addition to the POCSO Act, the Information Technology Act of 2000, as amended in 2008, punishes child pornography directly. It is illegal to print or distribute content involving children in sexually suggestive acts. It also makes it illegal to browse, collect, distribute, or create any sexually explicit content featuring children. The Act stipulates that a first conviction is punishable by five years in prison and a fine of up to five lakh rupees, while a second conviction is punishable by seven years in prison and a fine of up to ten lakh rupees. The Act creates a non-bailable and cognizable offense.

One judgment to site here is that of *Kamlesh vaswani v. Union of India and others*,^{xiv} The Women Lawyers Association submitted an action with the Supreme Court, asking the court to order the respondents to block all pornography websites, including child pornography, forums, and links, as well as to prohibit the uploading of such material and to take other steps to remove child pornography. However, the decision has not yet been made, and the case has received widespread criticism about the liberties of a person who watches porn in his own home.

CHILD SEXUAL ABUSE

The need for a law on child sexual abuse was brought to the attention of the Supreme Court in the case of *Sakshi v. Union of India and Others*.^{xv} The petitioner called the court's attention to the country's alarming rise in sexual abuse against women and children. The Court gave some important guidance in determining the writ petition, including that during a trial of child sexual exploitation or rape, a screen or other such provisions must be made so that the victim or witnesses do not see the accused's body or face. Insofar as they relate specifically to the incident, the questions placed in cross-examination on behalf of the accused should be given in writing to the Presiding Officer of the Court, who can put them to the victim or witnesses in a straightforward and non-embarrassing manner.

The victim of child abuse or rape, while giving testimony in the Court, should be allowed sufficient breaks as and when required. The trial should be held in camera as such camera trial would enable the victim of crime to be comfortable and answer the questions with greater ease and thereby improve the quality of evidence of a prosecutrix because there she would not be hesitant to depose frankly as she may be in an open court, under the gaze of the public and as far as possible, trial of such cases may be conducted by lady Judges wherever available so that the prosecutrix can make a statement with greater ease and assist the Court to properly discharge their duties, without allowing the truth to be sacrificed at the altar of rigid technicalities.

In *Delhi Commission for Women v. Delhi Police*,^{xvi} some procedures were issued by the Court to police, hospitals/ doctors, Child Welfare Committees, Sessions Court, Magistrate Courts, Prosecutors and other concerned authorities to be followed with regard child sexual abuses and incest. The various guidelines from Children's points of view are as follows:

- In cases of incest and child in need of care and protection, the Child Welfare Committee shall ascertain the nature of support she is getting from her family and initiate steps for ensuring best interest of the child.

- In appropriate situations, the Child Welfare Committee will ensure that the victim receives recovery services. In the event of a lengthy stay, the victim should be provided with educational and vocational training to allow her to support herself after she has left the foster home.
- Before issuing any order restoring custody of a child to the family, the Child Welfare Committee must perform an investigation to determine the victim's suitability for reunification with his or her family. The Child Welfare Committee can only change the child's custody after consulting with the stakeholders.

In the case of *Court on Its Own Motion v State and another*^{xvii}, the Court laid down vast and detailed guidelines to be followed by police; medical examination of child victim; recording of statement of child victim; and to the trial courts while dealing with cases of child sexual abuse.

In the High Court's Directions to the Police it can be seen that on a complaint of a cognizable offence involving a child victim being made, concerned police officer shall record the complaint promptly and accurately. The investigation is referred to an officer not below the rank of Sub-Inspector, preferably a lady officer, sensitized by imparting appropriate training to deal with child victims of sexual crime. The statement of the victim shall be recorded verbatim and the officer recording the statement of the child victim should not be in police uniform. Then the statement of the child victim shall be recorded at the residence of the victim or at any other place where the victim can make a statement freely without fear. The parents of the child or any other person in whom the child reposes trust and confidence will be allowed to remain present. The Investigating Officer to ensure that at no point should the child victim come in contact with the accused. The child victim shall not be kept in the police station overnight on any pretext. The Investigating Officer recording the statement of the child victim shall ensure that the victim is made comfortable before proceeding to record the statement and that the statement carries accurate narration of the incident covering all relevant aspects of the case. If found necessary, he may take the assistance of a psychiatrist. The Investigating Officer shall ensure that the child victim is medically examined at the earliest preferably within twenty four hours at the nearest government hospital or hospital recognized by the government. The

Investigating Officer shall ensure that the investigating team visits the site of the crime at the earliest to secure and collect all incriminating evidence available.

In the Directions regarding Medical Examination of Child Victim it can be analysed that, in case of a girl child victim the medical examination shall be conducted preferably by a female doctor. In so far as it may be practical, psychiatrist help is made available to the child victim before medical examination. The report should be prepared expeditiously and signed by the doctor conducting the examination and a copy of medical report be provided to the parents/guardian of the child victim. The parents/guardian/person in whom child have trust should be allowed to be present during the medical examination. Emergency medical treatment wherever necessary should be provided to the child victim.

In the Directions regarding Recording of Statement of Child Victim before Magistrate the procedure goes like first, the statement of the child victim shall be recorded promptly and at the earliest by the concerned Magistrate and any adjournment shall be avoided and in case the same is unavoidable, reasons to be recorded in writing. In the event of the child victim being in the hospital, the concerned Magistrate shall record the statement of the victim in the hospital. To create a child friendly environment rooms shall be provided within the Court areas where the statement of the child victim can be recorded. The child victim shall not be separated from his/her parents/guardians nor taken out from his/her environment unless the parents/guardian is reported to be abusive or the Magistrate thinks it appropriate in the interest of justice. Wherever possible, the investigation officer shall ensure that the statement of the child victim is also video recorded. No Court shall detain a child in an institution meant for adults.

Finally, the Directions made to Trial Courts while dealing with cases of Child Sexual Abuse asks to create a child friendly atmosphere while conducting its proceedings in respect of a sexually abused child. Proceedings shall be conducted in camera and appropriate measures taken to ensure that the child victim is not confronted with the accused. Wherever possible the Court may resort to the recording of statement through video conferencing. The Committal Court shall commit such cases to the Court of Sessions preferably within fifteen days after the filing of the charge sheet.

CHILD BEGGARS

Child beggars can be seen in almost every district in India. They become victims to many forms of exploitation and abuse. Maiming of child beggars is a harsh reality. Section 76 of the Juvenile Justice (Care and Protection of Children) Act, 2015 provides punishment for a period of 5 years to any person who employs a child for begging. Those who abet begging are also liable for the same punishment. Section 363A of Indian Penal Code (IPC) provides for punishment for a person who kidnaps or maims a minor for purposes of begging. Child beggars falls under the category of Child in need of care and protection under Section 2(14) of the JJ Act of 2015.

In the Delhi High Court decision of *Harsh Mandar and Anr. v. Union of India and Ors*,^{xviii} constitutional validity of all provisions of Bombay Prevention of Begging Act of 1959 except Section 11 was challenged as violating Articles 14, 19, 20, 21 and 22 of Constitution of India. Section 11^{xix} of the act provides penalty for employing or causing persons to beg or using them for the purpose of begging.

Though the case was primarily about determining whether the state should criminalize begging within our country's constitutional framework, which guarantees everybody the right to live in dignity, the case's judgment also includes a discussion of children's rights to live in dignity and to education as recognized by judgments and Article 21 A, as well as a discussion of the children's right to live in dignity and to education as recognized by judgments and Article 21 A. The court held in its decision that clauses of the Act that do not regard beggary as an offence per se are not subject to constitutional review, and that only those provisions that treat beggary/begging as an offence committed by the beggar, or that are ancillary to it, deserve to be struck down on constitutional grounds. And, among other things, the court affirmed the constitutionality of Section 11.

CONCLUSION

The protection of children's rights is not a new area of concern for governments and courts around the world. The only recent fact is the daily emergence of new forms of child abuse, with the most vulnerable being the most vulnerable. Various domestic legislation and international community initiatives have attempted to address the problem for a long time. However, the degree to which these efforts have been successful has sparked a lot of criticism. Furthermore, the most recent statistics on child labour, child sexual exploitation, beggar-forced children, child illiteracy, youth delinquency, child trafficking, malnutrition, female feticide, and anything else that can be done to a helpless child anywhere in the world by any psychic individual, as published by various international organizations such as WHO, UNICEF, and ILO, show that these figures are on the rise. These issues have a variety of solutions, much like every other problem that plagues mankind but whose execution is the greatest nightmare of all time.

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ⁱ The United Nations Convention on the Rights of Child, 1989, Article 1

ⁱⁱ The Constitution of India, 1950, Article 21 A

ⁱⁱⁱ *Supra*, Article 24

^{iv} *Supra*, Article 39 (e)

^v *Supra*, Article 45

^{vi} *Supra*, Article 39 (f)

^{vii} *Bachpan Bachao Andolan v. Union of India*, [2011] INSC 403

^{viii} The Immoral Traffic Prevention Act, 1956, Section 2 (aa)

^{ix} *Supra* Section 2 (cb)

^x *Vishaljeet v. Union of India and other*, AIR 1990 SC 1412

^{xi} *Gaurav Jain v. Union of India and others*, AIR 1997 SC 3021

^{xii} *Public at Large v. State of Maharashtra and others*, Writ Petition No. 112 of 1996.

^{xiii} POCSO Act, 2012, Section 13.

^{xv} *Sakshi v. Union of India and Others*, 2004 Cr LJ. 2881.

^{xvi} *Delhi Commission for Women v. Delhi Police*, W.P. (CRL) 696/2008

^{xvii} *Court on Its Own Motion v State and another*, W.P. (CrL.) No. 930/2007

^{xviii} *Harsh Mandar and Anr. v. Union of India and Ors*, W. P. (C) 19498/2009

^{xix} The Bombay Prevention on Begging Act of 1959, Section 11. Whoever employs or causes, any person to solicit or receive alms, or whoever having the custody, charge or care of a child, connives at or encourages the employment or the causing of a child to solicit, or receive alms or whoever uses another person as an exhibit for the purpose of begging, shall on conviction be punished with imprisonment for a term which may extend to three years but which shall not be less than one year.