

CHILD RIGHTS - LACK OF LEGAL LITERACY, ROLE OF THE GOVERNMENT AND JUDICIAL INTERVENTION: AN INDIAN OVERVIEW

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Abstract:- This paper is about child rights in Indian context though global view has also been taken care of in the backdrop of absence of legal literacy and lackluster role of the State, at times, interventions made by the Supreme Court of India quite often by giving directions to the States in different cases at different points of time have also been discussed. This paper also discusses Constitutional provisions relating to children, various enactments concerning rights of children, minimum age of criminal responsibility, competence of a child as a witness, children in the juvenile justice system, children in conflict with the law, claim of juvenility, children in need of care and protection, protection of children from domestic violence, important judicial responses to child sexual abuse and exploitation. Besides this, various Indian Policies and plans for its Children, in particular, National Policy for Children, 2013, have also been discussed.

Keywords:- Lackluster, Constitutional, Competence, Juvenile

Introduction

Hon'ble Supreme Court of India speaking through Justice B.L. Hansaria in **M.C.Mehta Vs. State of T.N. and others**² at the start of the judgment wrote about the child as under:- "I am the child, All the world waits for my coming. All the earth watches with interest to see what I shall become. Civilization hangs in the balance. For what I am, the world of tomorrow will be. I am the child. You hold in your hand my destiny. You determine, largely, whether I shall succeed or fail, Give me, I pray you, these things that make for happiness. Train me, I beg you, that I may be a blessing to the world."

The aforesaid appeal lies at the back of the saying that "child is the father of man". To enable fathering of a valiant and vibrant man, the child must be groomed well in the formative years of his life. He must receive education, acquire knowledge or man and materials and blossom in such an atmosphere that on reaching age, he is found to be a man with a mission, a man who matters so far as the society is concerned."

In this judgment interpreting the

provisions of Child Labour [Prohibition and Regulation] Act, 1986 as also Articles 39[e], 39[f], 41 and 47 of the Constitution of India, Hon'ble Apex Court had issued certain directions to the State Governments regarding fulfilment of legislative intent behind this enactment. Out of the 10 directions issued to the concerned States, few were the most important and thus, are appended below:-

"(3) The employment to be given as per our direction could be dovetailed to other assured employment. On this being done, it is apparent that our direction would not require generation of much additional employment.

(4) The employment so given could as well be the industry where the child is employed a public undertaking and would be manual in nature in as much as the child in question must be engaged in doing manual work. The understanding chosen for employment shall be one which is nearest to the place of residence of the family.

(5) In those cases where alternative employment would not be made available as aforesaid, the parent/guardian of the concerned child would be paid the income which would be

□ Judge, Punjab and Haryana High Court, Chandigarh¹

earned on the corpus, which would be a sum of Rs.25,000/- for each child, every month. The employment given or payment made would cease to be operative if the child would not be sent by the parent/guardian for education.

(6) On discontinuation of the employment of the child, his education would be assured in suitable institution with a view to make it a better citizen. It may be pointed out that Article 45 mandates compulsory education for all children until they complete the age of 14 year; it is also required to be free. It would be the duty of the Inspectors to see that this call of the Constitution is carried out.”

The position of children was further echoed in **Rosy Jacob Vs. Jacob A. Chakramakkal**³, where the Hon`ble Apex Court observed as under:- “The children are not mere chattels: nor are they mere playthings for their parents. Absolute right of parents over the destinies and the lives of their children has, in the modern changed social conditions, yielded to the considerations of their welfare as human beings so that they may grow up in a normal balanced manner to be useful members of the society C.” A little later, Hon`ble Supreme Court of India spoke about the health, dignity and educational needs of the children in **Bandhua Mukti Morcha Vs. Union of India**⁴ in the following terms: “This right to live with human dignity enshrined in Article 21 derives its life breath from the Directive Principles of State Policy and particularly clauses (e) and (f) of Article 39 and Articles 41 and 42 and at the least, therefore, it must include protection of the health and strength of workers, men and women, and of the tender age of children against abuse, opportunities and facilities for children to develop in a healthy manner and in conditions of freedom and dignity, educational facilities, just and humane conditions of work and maternity relief. These are the minimum requirements which must exist in order to enable a person to live with human dignity C.”

In **Bandhua Mukti Morcha Vs. Union of India**⁵, Hon`ble Apex Court spoke thus:

“4. The child of today cannot develop to be a responsible and productive member of tomorrow's society unless an environment which is conducive to his social and physical health is assured to him. Every nation, developed or developing, links its future with the status of the child. C Neglecting the children means loss to the society as a whole. If children are deprived of their childhood — socially, economically, physically and mentally — the nation gets deprived of the potential human resources for social progress, economic empowerment and peace and order, the social stability and good citizenry. The Founding Fathers of the Constitution, therefore, have emphasised the importance of the role of the child and the need of its best development.”

If we go a little back in point of time, we find that law, policy and practice of child welfare has undergone a significant change over the years. Before 1839, there was the concept of authority and control. It was an established common law doctrine that the father had absolute rights over his children. After this, the welfare principle was reflected in the dominant ideology of the family. Children were recipients of welfare measures. It was only during the twentieth century that the concept of children's rights emerged. It advanced further in the 21st Century. This shift in focus from the 'welfare' and 'needs' to the 'rights' and 'development', approach is significant. Earlier, the child was considered only a beneficiary or a recipient of services. Today, the child is a 'participant and partner' in his own development and decisions that affect his life. The 'rights approach' is primarily concerned with the issues of social justice, non-discrimination, equality and empowerment.

The rights perspective is embodied in the United Nations Convention on the Rights of the Child (CRC), 1989, which is a landmark in the international human rights legislation. India ratified this Convention and is bound to make laws in conformity with the same. The rights-based approach includes children as rights-holders and the States as primary duty-bearers.

Though globally, 21st Century witnessed important policy and legislative initiatives as well as significant verdicts of the Court, nearer home, we found the blossoming of the provisions of the Constitution concerning child rights and more children friendly outlook of the Courts and in particular of the Supreme Court of India.

CONSTITUTIONAL PROVISIONS RELATING TO CHILDREN

Children are precious assets of a country. They are meek and tender and thus, are unable to espouse their own cause. Though, mandate from the Constitution of India *ipso facto* was not enough to bring cheers to the Indian children but the Indian Supreme Court putting life into such provisions made those vibrant and functional for the benefit of the little ones. It would be appropriate to take stock of the constitutional provisions as well. These are :

ARTICLE 24. Prohibition of employment of children in factories, etc. - No child below the age of fourteen years shall be employed to work in any factory or mine or engaged in any other hazardous employment.

ARTICLE 39(e). that the health and strength of workers, men and women, and the tender age of children are not abused and that citizens are not forced by economic necessity to enter avocations unsuited to their age or strength;

ARTICLE 39(f). that children are given 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.

ARTICLE 41. Right to work, to education and to public assistance in certain case. - The State shall, within the limits of its economic capacity and development, make effective provision for securing the right to work, to education and to public assistance in cases of unemployment, old age, sickness and disablement, and in other cases of undeserved want.

ARTICLE 45. 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.

ARTICLE 47. Duty of the State to raise the level of nutrition and the standard of living and to improve public health. - The State shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties and, in particular, the State shall endeavour to bring about prohibition of the consumption except for medicinal purposes of intoxicating drinks and of drugs which are injurious to health.

In addition to these provisions, following provisions of the Indian Constitution also are beneficial for the children:-

ARTICLE 14. The State shall not deny to any persons equality before the law or the equal protection of the laws within the territory of India.

ARTICLE 15 (3) Nothing in this Article shall prevent the State from making any special provision for women and children.

ARTICLE 21. No person shall be deprived of his life or personal liberty except according to procedure established by law.

ARTICLE 21A. The State shall provide free and compulsory education to all children of the age of six to fourteen years in such a manner as the State may, by law, determine.

ARTICLE 23. (1) Traffic in human beings and *beggar* and other similar forms of forced labour are prohibited and any contravention of this provision shall be an offence punishable in accordance with law.

ARTICLE 29(2) No citizen shall be denied admission into any educational institution maintained by the State or receiving aid out of State funds on grounds only of religion, race, caste, language or any of them.

ARTICLE 51A(k) who is a parent or guardian to provide opportunities for education to his child or, as the case may be, ward between

the age of six and fourteen years.

Judicial activism has been displayed in several court decisions, in public interest litigations by civil society groups relating to children in institutions, adoption, child labour, child marriage, child prostitution, and the educational and health rights of children.⁶

It was after a long campaign and struggle that the 86th Constitutional Amendment to make the right to education a fundamental right was so made in 2002. Article 21A provides for free and compulsory education to all children in the age group of 6 to 14 years. The manner of education has to be determined by enacting a law.

The expression 'education' must be given a broader meaning with regard to Article 21A of the Constitution of India as also the Directive Principles of the State policy. The State is under a Constitutional mandate to provide educational institutions at all levels, which must function to the best advantage of the citizens. Articles 39(e) and 39(f) direct that the State policies be directed towards securing children because of their tender age. The long awaited Right of Children to Free and Compulsory Education Act, 2009 (RTE Act) received the Presidential assent on 26 August 2009.⁷

SOME OF THE SHORTCOMINGS IN THE ACT ARE⁸:

a) RTE 2009 Act is an instrument that legalizes the existing multi-layered education system, which depends on the economic capacity of the parents. It legalizes the current four operating systems—government schools, aided private schools, the special category schools, and non-aided private schools.

b) The provisions relating to recognition of schools under the Act raise concerns about the children studying in unrecognized schools.

c) The Act is silent on child labour. In fact, the Right to Education Act must be used to eliminate child labour. Issues of children with special needs and the availability of trained teachers for such children are also missing in the Act.

d) The sixty-seven year old Constitutional promise of free and compulsory education for all children between the ages of 6 to 14 years has been snatched away. The Right to Early Childhood Care and Education of children below the age of 6 years has been denied. The RTE Act should have covered the entire school education system for children aged 0-18 years. The exclusion of groups of children is a violation of human rights. The Constitutional Right of Early Childhood Care and Education must be restored and the requisite provisions for its quality delivery must be made. The directive principle in the Constitution relates to early childhood care and education and also states that it is the fundamental duty of parents to send their children to school. It would have been more effective if early childhood care and education had been guaranteed as a fundamental right rather than as a directive principle.

e) Certain important norms and standards need to be included like distance of school from the child's residence, teaching aids, computers, equipment in laboratories, promotion of teachers, etc. These issues must be made justiciable.

Legislative intentment of Indian democracy for the protection and welfare of the children is so strong and well pronounced that there are other statutes which take care of the well being of the children. These are as under :-

1. The Guardian and Wards Act, 1890.
This Act deals with the qualifications, appointment & removal of guardians of children by the courts & is applicable to all children irrespective of their religion.
2. The Child Marriage Restraint Act, 1929.
This Act as amended in 1979 restrains the solemnization of child marriages by laying down the minimum age for both boys & girls. This law is applicable to all communities irrespective of their religion.
3. The Orphanages and Other Charitable Homes (Supervision And Control) Act, 1960.
This Act provides for the supervision and

- control of orphanages and homes for children.
4. Apprentices Act, 1961.
This Act lays down qualifications for persons above fourteen years of age to undergo apprenticeship training in any designated trade.
 5. The Child Labour (Prohibition and Regulation) Act, 1986.
This Act prohibits the engagement of children in certain employment & regulates the conditions of work of children in certain other employment.
 6. The Infant Milk Substitutes, Feeding Bottles and Infant Foods (Regulation of Production, Supply and Distribution) Act, 1992.
 7. The Pre-Natal Diagnostic Technique (Regulation and Prevention of Misuse) Act, 1994.
 8. Juvenile Justice (Care and Protection of Children) Act, 2000.
 9. The Protection of Women from Domestic Violence Act, 2005
 10. Right of Children to Free and Compulsory Education Act, 2009
 11. The Protection of Children from Sexual Offences Act, 2012. 9
 12. The Criminal Law [Amendment] Act, 2013

WHO IS A CHILD?

Definition of a 'child' under the Indian Laws is not uniform so far as their age is concerned. Who is a child and when the childhood ends, are though innocuous simple questions, but have varied and complex meaning.

According to Article 1 of the United Nations Convention on the Rights of the Child, 1989, "a child means every human being below the age of 18 years unless, under the law applicable to the child, majority is attained earlier". The Article thus grants the discretion to individual countries to determine by law whether childhood should cease at the age of 12, 14, or 16 years, or whatever age they find appropriate.

The word 'child' in Indian laws has been

used in various legislations as a term denoting relationship; as a term indicating capacity; and as a term of special protection. Underlying these alternative specifications are very different concepts about the child. For purposes of criminal responsibility, the age limit is 7 and 12 years under the Indian Penal Code, 1860. For purposes of protection against kidnapping, abduction and related offences, the age limit has been fixed at 16 years in the case of boys and 18 years in the case of girls. However, the Indian Penal Code, while defining rape, in Section 375, exempts a person from the charge of rape if he has forcible sexual intercourse with his wife, who is above 15 years of age. Provisions with regard to rape and punishment for varied forms of this offence have been amended and made strict providing for minimum sentence.

Under the Immoral Traffic (Prevention) Act, 1986, a child means a person who has not completed 16 years of age and a minor means a person who has completed 16 years of age but not completed 18 years. Under the Child Labour Prohibition and Regulation Act, 1986, a child means a person who has not completed his fourteenth year of age. An area of concern is that no minimum age has been specified for child labour.

For purposes of special treatment under the Juvenile Justice (Care and Protection of Children) Act, 2000, the age limit is 18 years for both boys and girls. The Protection of Women from Domestic Violence Act, 2005 defines a child as any person below the age of 18 years and includes any adopted step or foster child. Under the Plantation Labour Act, 1951, a child means a person who has not completed his fourteenth year of age, while an adolescent means a person who has completed his fourteenth year of age but has not completed his eighteenth year of age.

Under the Indian Majority Act 1875, every person domiciled in India shall attain the age of majority on his completing the age of 18 years and not before that. The Indian Majority Act, 1875, was enacted in order to bring about uniformity in the applicability of laws to persons

of different religions. Unless a particular personal law specifies otherwise, every person domiciled in India is deemed to have attained majority upon completion of 18 years of age. However, in the case of a minor for whose person or property, or both, a guardian is to be, or has been appointed or declared by any court of law then the age is 18 years and in case of every minor the superintendence of whose property has been assumed by the Court of Wards, before the minor has attained that age of majority, it will be 21 years and not 18 years.

Section 4(a) of the Hindu Minority and Guardianship Act (HMGA), 1956 defines a 'minor' as a person who has not completed the age of 18 years. The age of majority for the purposes of appointment of guardian of a person or property of minors, according to the Dissolution of Muslim Marriages Act, 1939, is also the completion of 18 years.

The Law Commission of India did attempt in its 84th report to bring up the age of consent in rape to 18 years in tune with other enactments and to make it consistent with the refined and modern notions regarding the concern and compassion which society should bestow on its younger members. But that was not accepted, with the result that the age of consent in an offence of rape continues to be 16 years even today. Raising the age of consent for sexual intercourse to 18 years to make it consistent with the stipulations in the subsequent enactments appears to be the unavoidable imperative before the system.

The Hindu Marriage Act, 1955, states that a female has to be 18 years of age before she can legally marry. Similarly, under the Christian and Parsi marriage laws, the age of marriage is 18 years. Under the Muslim Personal law, the age of marriage for both boys and girls is the age of attainment of puberty.

The absence of a comprehensive and common definition of the term 'child' is a predicament; it creates confusion and a dilemma. Although one would like to have a uniform age limit legally prescribed for the status of

childhood that may perhaps not be possible. Nevertheless, some rationalization is possible or some norms can be laid down, as some of the age limits in the laws appear to be arbitrary while some are based only on socio-cultural perceptions. If 'the best interest of the child' interpretation was to be adopted, one could perhaps err on the side of a higher age limit for protective care and a lower age limit in respect of civil and cultural matters. The question of review of the definition of the 'child', in the light of Article 1 of the Convention on the Rights of the Child, has been referred to the Law Commission of India to be considered by the Commission while undertaking a comprehensive review of the Code of Criminal Procedure, the Indian Evidence Act, and the Indian Penal Code¹⁰. Pursuant to this Report, some amendments have already been made and have become effective with effect from 3.2.2013.

2.1 THE MINIMUM AGE OF CRIMINAL RESPONSIBILITY

The legal definition of a child also affects how the courts deal with the offenders. The age is very significant here, as a person who is a minor or a child cannot be tried and convicted in the same manner as an adult as at the time of commission of the offence, the child was not capable of understanding the consequences of his actions and had no mensrea and was a doli incapax-that is, not understanding the right from the wrong.

Article 40 (3) (a) of the CRC requires State Parties to promote the establishment of a minimum age below which children shall be presumed not to have the capacity to infringe the penal law¹¹. A child below the age of 7 years cannot be considered a child in conflict with law. Nothing is an offence done by children between 7 and 12 years of age who have not attained sufficient maturity of understanding to judge the nature and consequences of their conduct on that occasion¹². If there is a legislation dealing with the criminal liability of minors, the benefit of this legislation must be accorded to an accused who is

a minor, and such accused should not be tried under the ordinary law for adults. Children have to be dealt with under the juvenile justice system and not the adult criminal justice system. Children can not be punished for more than three years. Gang rape of Nirbhaya, a girl in Delhi, who later died because of the injuries sustained in the incident, has raked up the discussion and amendment in law to lower the age as also punishment for some of the offences is in the offing. Major role played in this case was by the juvenile accused.

2.2 COMPETENCE OF A CHILD WITNESS

A child can also be a witness. The Courts have held that a child witness, if found competent and reliable to depose to the facts, and then such evidence even could be the basis of conviction¹³. In other words, even in the absence of oath, the evidence of a child witness can be considered under Section 118 of the Evidence Act, provided that such witness is able to understand the answers. Therefore, the evidence of a child witness and his credibility would depend upon the circumstances of each case.

The only precaution that the Court should bear in mind while assessing the evidence of a child witness is that the witness must be a reliable one and his demeanour must be like any other competent witness so that there is no likelihood of the child being tutored. Further, Section 118 of the Indian Evidence Act, envisages that all persons shall be competent to testify, unless the Court considers that they are prevented from understanding the questions put to them or from giving rational answers to these questions, because of tender years, extreme old age, disease - whether of mind, or any other cause of the same kind. However, a child of tender age can be allowed to testify if the child has the intellectual capacity to understand questions and give rational answers.

3. CHILDREN IN THE JUVENILE JUSTICE SYSTEM

Children come into contact with the juvenile justice system as offenders or as victims. The Juvenile Justice (Care and Protection of

Children) Act, 2000 and amended in 2006, deals with two categories of children—'juvenile in conflict with the law' and 'child in need of care and protection'. 'Juvenile in conflict' with the law means a person who is alleged to have committed an offence under the law of the country and who is below 18 years of age on the date when the offence was committed.¹⁴ Its objective is to provide for proper care, protection and treatment by catering to their development needs, and by adopting a child-friendly¹⁵ approach in the matters and in the best interest of children and for their ultimate rehabilitation.

The Juvenile Justice (Care and Protection of Children) Act (JJA), 2000, is a legislation that conforms to the CRC and the United Nations Minimum Standards for Administration of Justice to Children (Beijing Rules). The CRC has laid down the basic principles of decision-making to promote the best interests of children, and all decisions relating to children need to be guided by this consideration. The Beijing Rules direct that institutions should be used only as a last resort and only after community measures are not available for children. As the JJA, 2000 was specifically made to implement India's obligations under these and other international instruments, it is incumbent upon the authorities implementing this legislation to ensure the protection and promotion of the principles embodied in the JJA, 2000.

The Act also provides that no report in any newspaper, magazine, news-sheet or visual media of any inquiry regarding a juvenile in conflict with the law or a child in need of care and protection under this Act shall disclose the name and address of the school or any other particulars calculated to lead to the identification of the juvenile or child, nor shall any picture of any such juvenile or child be published. The authority holding the inquiry may permit such disclosure, in exceptional cases, if in its opinion such disclosure is in the interest of the juvenile or the child.¹⁶ In spite of these specific provisions, many well-known publications even today, reveal the identity of the child.

ACCORDING TO THE JUVENILE JUSTICE ACT 2000, A 'CHILD IN NEED OF CARE AND PROTECTION' MEANS A CHILD:

- who is found begging or is a street child or a working child;
 - who is found without any home or settled place or abode and apparently without any means of subsistence;
 - who resides with a person (he may or may not be a guardian of the child) and such person:
 - who has threatened to kill or injure the child and there is a reasonable likelihood of the threat being carried out;
 - who has killed, abused or neglected some other child or children and there is a reasonable likelihood of the child in question being killed, abused or neglected by that person;
 - who is mentally or physically challenged or ill children or children suffering from terminal diseases or incurable diseases having no one to support or look after them;
 - who has a parent or guardian and such parent or guardian is unfit or incapacitated to exercise control over the child;
 - who does not have either parent and no one is willing to take care of him/her or whose parents have abandoned or surrendered him/her or who is a missing and run-away child whose parents cannot be found after reasonable inquiry;
 - who is being or is likely to be grossly abused, tortured or exploited for the purpose of sexual abuse or illegal acts;
 - who is found vulnerable and is likely to be inducted into drug abuse or trafficking
 - who is being or is likely to be abused for unconscionable gains; or
 - who is a victim of any armed conflict, civil commotion or natural calamity.
- In this Act, 'juvenile' or 'child' means a

person who has not completed the eighteenth year of age, mainly to bring juvenile legislation in conformity with the CRC. Both boys and girls below the age of 18 years enjoy the protection of juvenile legislation.

3.1 CHILDREN IN CONFLICT WITH THE LAW

The definition of 'juvenile in conflict with the law' was amended in 2006 and it is clear today that this term means a juvenile who is alleged to have committed an offence and has not completed the eighteenth year of age as on the date of commission of such an offence. The occurrence of violent juvenile crimes is a global phenomenon. Juvenile crimes are also increasing at an alarming rate in India. Today, newspapers are full of news of murder, rape, and kidnapping committed by teenagers. The National Crime Research Bureau (NCRB) claims that 83.7 per cent of the crimes committed by juveniles in 2006 came under the Indian Penal Code. While Maharashtra reported the highest number of IPC crimes among juveniles in 2006, Madhya Pradesh registered the highest number of crimes such as murder, rape, kidnapping and abduction. The news of teenagers being used to smuggle marijuana also makes regular headlines in the dailies¹⁷.

The legal definition of a child also affects the manner in which the courts deal with offenders. A person who is a minor or a child cannot be convicted in the same manner as an adult. If a juvenile is accused of an offence under the provisions of the Narcotics Drugs and Psychotropic Substances Act (NDPS), or Prevention of Terrorism Act (POTA), he is certainly entitled to the necessary benefits under the special enactment, namely the Juvenile Justice Act. While different high courts have taken different positions on the applicability of JJA 2000 to cases where the accused is a child, the Supreme Court has clearly held that JJA, 2000 will apply to children alleged to have committed offences under those special penal legislations

also.¹⁸

3.2 CLAIM OF JUVENILITY

Whenever a claim that a person is a juvenile or below 18 years is raised before any court or a court is of the opinion that an accused person produced before it was a juvenile on the date of commission of the offence, the court shall make an inquiry, take such evidence as may be necessary (but not evidence of age on an affidavit) to determine the age of such person, and then the court shall record a finding as to whether the person is a juvenile or a child or not, stating his age as near to the actual as may be. If the court finds that the person was below 18 years on the date when the offence was committed, the court must send the juvenile to the Juvenile Justice Board, as only the latter can pass any order in such a case.

An important provision is that a claim of juvenility or that the accused was a juvenile may be raised before any court and it shall be recognized at any stage even after disposal of the case¹⁹.

In India, there are millions of children, especially in the villages, who do not have birth certificates. It has been observed that in many instances, if the police take a child into custody, and find him/her to be well-built, s/he is considered as an 'adult' and denied the beneficial provisions of the Juvenile Justice system. A mention must be made of a 'Baba Room' in one of the well-known prisons, wherein children whose age had not been confirmed or could not be confirmed were huddled up waiting for their age verification. Age determination of the children in conflict with the law is a very complex issue. The largest number of cases that come before the High Courts and the Supreme Court under this legislation and its predecessors pertain to the determination of age. In the absence of a birth certificate, a child may easily be excluded from the operation of the JJA and denied its care and protection.

In the case of **Ramdeo Chauhan**,²⁰ the Supreme Court refused to determine the age of

the accused on the basis of entries in the school register or medical evidence, both of which indicated him to be a child on the date of the offence, and confirmed the death penalty for the offence of murder even though one judge expressed a doubt as to whether the boy was a child on the date of commission of offence. The governor later commuted his sentence to life imprisonment on the recommendation of the National Human Rights Commission.

There have also been some recent judgments on this issue. The Supreme Court has held that as regards the point of proof of age, the school-leaving certificate is the best evidence and that as far as the medical certificate is concerned, the same is based on an estimate and the possibility of error cannot be ruled out. However, the date of birth in the Secondary School Certificate is not to be taken to be correct unless corroborated by the parents of the child who have got the same entries made.

3.3 CHILDREN IN NEED OF CARE AND PROTECTION

The children in need of care and protection include vulnerable children like street children; orphaned, abandoned, abused and destitute children; working children; child labourer trafficked children; mentally ill children; children affected or infected by HIV/Aids; and children who are victims of conflict and disaster situations. These children have committed no offence but they are victims of their circumstances or situations. Some other categories of children who need special assistance are migrants, those affected by armed conflict, and victims of natural calamities like floods or cyclones. These are children in especially difficult circumstances and need to be protected from all kinds of abuse, neglect and exploitation. The Act has expanded the definition of the child in need of care and protection very significantly.

3.4 PROTECTION OF CHILDREN FROM DOMESTIC VIOLENCE

The Protection of Women from Domestic Violence Act, 2005 covers all children below the

age of 18 years and even includes any adopted step- or foster child. Domestic Violence has been defined as any act that:

- harms or injures or endangers the health, safety, life, limb or well-being, whether mental or physical, of the child or tends to do so and includes causing physical abuse, sexual abuse, verbal and emotional abuse and economic abuse;
- harasses, harms, injures or endangers the child with a view to coerce her or any other person related to her to meet any unlawful demand for any dowry or other property or valuable security; or
- has the effect of threatening the child or any person related to her by any conduct. An Order of Protection of children from domestic violence can be obtained under this Act.

3.5 SOME IMPORTANT JUDICIAL RESPONSES TO CHILD SEXUAL ABUSE AND EXPLOITATION

As regards child prostitution in the light of *devadasi* and *jogin* practices, the Supreme Court asked the state governments to set up advisory committees to make suggestions for the eradication of child prostitution and to evolve schemes for the rehabilitation of the victim girls and children²¹. The Delhi High Court initiated several proactive steps by summoning NGOs and government officers for ensuring effective rescue, rehabilitation and re-integration. Emphasis was laid on the accountability of officers, empowerment of the survivors and preventing prospects of re-trafficking.²² **The Bombay High Court has held that²³:**

- Medical examination of rescued girls to determine their age and to check if they are suffering from any medical ailment;
- Counselling and aftercare to be ensured;
- Children rescued from brothels to be treated as “children in need of care and protection” under the Juvenile Justice (Care and Protection of Children) Act, 2000; and,

- The lawyer representing the accused not be allowed to represent the victims.

It has now been well established that all judicial proceedings relating to victims of sexual abuse must be conducted in an 'in-camera' trial²⁴. The Delhi High Court allowed the evidence of victims of trafficking who had been rehabilitated in their home states to be recorded through video conferencing, in consonance with the judgment of the Supreme Court in **State of Maharashtra v. Dr. Praful Desai**²⁵. This is the first instance of a court allowing evidence to be recorded through video conferencing in a case of trafficking.

In the leading case of **Sakshi v. Union of India**²⁶ the court gave the following directions for holding the trial of child sex abuse or rape:

- 1) A screen or some such arrangements may be made where the victim or witnesses (who may be equally vulnerable like the victim) do not see the body or face of the accused.
- 2) The questions put in cross-examination on behalf of the accused, in so far as they relate directly to the incident should be given in writing to the Presiding Officer of the Court who may put them to the victim or witnesses in a language which is clear and is not embarrassing.
- 3) The victim of child abuse or rape, while giving testimony in court, should be allowed sufficient breaks as and when required.

INDIAN GOVERNMENT AND POLICY PLANNING FOR ITS CHILDREN

Government of India had consistently been endeavouring of mental, physical and social upliftment of children and to take them on the road to development taking care of their health and education. Issues of child abuse and crime, sexual abuse and exploitation, protection of children from domestic violence, child trafficking and prostitution had also been engaging serious attention of the governments and those have been making serious efforts for reforming of its laws relating to child protection.

Remedial measures against economic exploitation of children had also been engaging attention of the Government.

The following are some of the important policy documents of the Government regarding children :-

National Policy for Children, 1974;
National Policy on Education, 1986;
National Policy on Child Labour, 1987;
National Health Policy, 2002;
National Charter for Children, 2003;
National Guidelines on Infant and Young Child Feeding 2004;
National Plan of Action for Children, 2005;
Child Protection in the Eleventh Five Year Plan [2007-2012];

Recently, the National Policy for Children, 2013 was announced. In its introduction, it was observed as under:-

“1.1. India is home to the largest child population in the world. The Constitution of India guarantees Fundamental Rights to all children in the country and empowers the State to make special provisions for children. The Directive Principles of State Policy specifically guide the State in securing the tender age of children from abuse and ensuring that children are given opportunities and facilities to develop in a healthy manner in conditions of freedom and dignity.

The State is responsible for ensuring that childhood is protected from exploitation and moral and material abandonment.”

Following guiding principles were evolved for survival, health and nutrition as also for education and development in addition to protection and participation of children in all major activities:

- (i) every child has universal, inalienable and indivisible human rights;
- (ii) the rights of children are interrelated and interdependent, and each one of them is equally important and fundamental to the well-being and dignity of the child;
- (iii) every child has the right to life, survival, development, education, protection and participation;

- (iv) right to life, survival and development goes beyond the physical existence of the child and also encompasses the right to identity and nationality;
- (v) mental, emotional, cognitive, social and cultural development of the child is to be addressed in totality;
- (vi) all children have equal rights and no child shall be discriminated against on grounds of religion, race, caste, sex, place of birth, class, language, and disability, social, economic or any other status ;
- (vii) the best interest of the child is a primary concern in all decisions and actions affecting the child, whether taken by legislative bodies, courts of law, administrative authorities, public, private, social, religious or cultural institutions;
- (viii) family or family environment is most conducive for the all-round development of children and they are not to be separated from their parents, except where such separation is necessary in their best interest;
- (ix) every child has the right to a dignified life, free from exploitation;
- (x) safety and security of all children is integral to their well-being and children are to be protected from all forms of harm, abuse, neglect, violence, maltreatment and exploitation in all settings including care institutions, schools, hospitals, crèches, families and communities
- (xi) children are capable of forming views and must be provided a conducive environment and the opportunity to express their views in any way they are able to communicate, in matters affecting them;
- (xii) children's views, especially those of girls, children from disadvantaged groups and marginalised communities, are to be heard in all matters affecting them, in particular judicial and administrative proceedings and interactions, and their

views given due consideration in accordance with their age, maturity and evolving capacities.

The Government of India has sufficiently shown its commitment for over all development of the children in the following words:-

" 7. Research, Documentation and Capacity Building

7.1 The implementation of this Policy will be supported by a comprehensive and reliable knowledge based on all aspects of the status and condition of children. Establishing such a knowledge base would be enabled through child focused research and documentation, both quantitative as well as qualitative. A continuous process of indicator-based child impact assessment and evaluation will be developed, and assessment and evaluation will be carried out on the situation of children in the country, which will inform policies and programmes for children.

7.2 Professional and technical competence and capability in all aspects of programming, managing, working and caring for children at all levels in all sectors will be ensured through appropriate selection and well planned capacity development initiatives. All duty bearers working with children will be sensitized and oriented on child rights and held accountable for their acts of omission and commission."

Having said so, the Government has also resolved that comprehensive review of the policy will be taken up once in five years in consultation with all the stake holders including children and responsibility of leading the review process has been given to the Ministry of Women and Child Development.

On its part, playing its role in crucial importance, Hon`ble Supreme Court of India in **State of Karnataka and Anr. Vs. Associated Management of [Government Recognised – Unaided– English Medium Primary and Secondary Schools and others**²⁷

2014 [3] SCT 12, striking down order of the Government of Karnataka to the effect that medium of instruction should be mother tongue was *kannada* with effect from the academic year

1994-95 in all Government recognized schools in classes I to IV and schools which could not comply with the condition will be closed down, had held as under:-

- 1) State cannot stipulate as a condition for recognition that the medium of instruction for children studying in classes I to IV in minority schools protected under Articles 29(1) and 30(1) of the Constitution and in private unaided schools enjoining the right to carry on any occupation under Article 19(1)(g) of the Constitution would be the mother tongue of the children as such stipulation.
- 2) Prescription of mother tongue in classes I to IV of primary school cannot compelled by the State as a regulatory measure for maintaining the standards of education.
- 3) A child and on his behalf, his parent or guardian, has the right to choose the medium of instruction at the primary school stage under Article 19(1)(a) and not under Article 21 or Article 21-A of the Constitution.
- 4) A private unaided school which is not a private unaided school which is not a minority school and which does not enjoy the protection of Articles 29(1) and 30(1) of the Constitution can choose a medium of instruction for imparting education to the children in the school.
- 5) Imposition of mother tongue affects the fundamental rights under Articles 19, 29 and 30 of the Constitution; and,
- 6) Govt. recognized schools are inclusive of both government-aided schools and private and unaided schools.

In every field of activity, where welfare and development of the children is involved, the Government of India as also the Judiciary has been vigilant and vibrant, but there have been impediments due to lack of resources.

CONCLUSION

It is imperative to protect the child from all forms of abuse and exploitation and to take all appropriate national, bilateral and multilateral

measures to prevent sexual exploitation of children. Prosecution and conviction rates in cases relating to contravention of the laws pertaining to children are low, pointing out the poor implementation of the law, administrative lapses, lacunae in the laws, and an urgent need for law reform. Policies and legislations for children have, on the whole, suffered from weak implementation, owing to scant attention to issues of child protection, resulting in scarce resources, minimal infrastructure, and inadequate services to address child protection problems.

It is a matter of concern that the prevention, rehabilitation and compensation of

child victims have still to be incorporated in various legislations. The law on child sexual abuse and paedophiles is the need of the hour. India has become a heaven for paedophiles because of its lax laws. Child labour is assuming new forms like those of child artistes, and migrant child labour, and the law must be equipped to deal with them. Enacting a child-friendly legislation to ensure not just compulsory close links between education and the prevalence of child labour demand a convergence of laws on education and child labour. Education also signifies education of equitable quality to every child in India.

Reference-

¹ E-mail – parkashsom86@gmail.com

² 1997 AIR 6992

³ (1973) 1 SCC 840

⁴ (1984) 3 SCC 1613

⁵ (1997) 10 SCC 5494

⁶ Some instances of judicial activism relating to children are: *Bhagwan Singh and Ors v. State of M.P.* AIR 2003 SC 1088, *M.C. Mehta v. State of Tamil Nadu and Ors* AIR 1997 SC 699, *Sanjay Suri v. Delhi Administration* AIR 1986 SC 414, *Lakshmikant Pandey v. Union of India* AIR 1984 SC 469; AIR 1986 SC 272; AIR 1992 SC 118, *Gaurav Jain v. Union of India* AIR 1990 SC 292, *People's Union for Democratic Rights (PUDR) v. Union of India* AIR 1982 SC 1473, *Vishal Jeet v. Union of India* AIR 1990 SC 1412, *Dukhtar Jahan v. Mohammed Farroq* AIR 1987 SC 1049, *Sheela Barse v. The Secretary, Children's Aid Society and Ors* AIR 1987 SC 656, *Delhi Domestic Working Women's Forum v. Union of India and Ors* (1995) 1 SCC 14, *Sarita Sharma v. Sunita Sharma* (2000) 3 SCC 14, *Shantisar Builders v. Narayan Khimlal Totane* AIR 1990 SC 630, *Kishen Pattanayak v. State of Orissa* AIR 1989 SC 677, *Unnikrishnan J.P. and Ors v. State of Andhra Pradesh* AIR 1993 SC 2178; *Lakshmi Kant Pandey v. Union of India*, 1984 AIR (SC) 469; *Sheela Barse v. The Secretary, Children Aid Society and others*, 1987 AIR (SC) 656; *Sakshi v. Union of India and others*, 1999 AIR (SCW) 4827; *State of Maharashtra v. Dr. Praful B. Desai and Anr.*, 2003 AIR (SC) 2053; *Central for Enquiry Into Health and Allied Themes (CEHAT) and Ors. V. Union of India and Ors.*, 2003 AIR (SCW) 4698; *St. Theresa's Tender Loving Care Home & Ors. V. State of Andhra Pradesh*, 2005 AIR (SC) 4375; *Ruchi Majoo v. Sanjeev Majoo*, 2011 AIR SC (Civil) 1570; *Ramdeo Chauhan @ Rajnath Chauhan v. Rani Kant Das and Other*, 2011 AIR (SC) 615; *State of Tamil Nadu & Ors. V. K. Shyam Sunder & Ors.*, 2011 AIR (SC) 3470; *Bachpan Bachao Andolan v. Union of India and others*, 2011 AIR (SCW) 5169, *State of Karnataka and Anr. Vs. Associated Management of [Government Recognised – Unaided – English Medium Primary and Secondary Schools and others]* 2014[3] SCT 12.

⁷ Some of the salient features of RTE Act are as follows:

- Every child has a right to free and compulsory admission, attendance and completion of EE (elementary education).
- No child liable to pay any fee/expense preventing her from pursuing and completing EE.
- Compulsion on the state and parental duty to send children to school.
- Not enrolled/dropout children be admitted to age-appropriate class.
- No child shall be failed or expelled up to class 8.
- Bars corporal punishment for mental harassment.
- Qualification for appointment of teachers to be laid down by academic authority authorized by Central Government. Academic responsibilities of teachers laid down.
- Prohibits deployment of teachers for non-education purpose, except for Decennial census, Disaster relief, Elections to Parliament, State Legislatures, and Local Bodies.
- Community participation in schools ensured through School Management Committees (SMC) comprising elected representatives, teachers and parents, members from among parents of children in the school; 50% women, Proportionate

representation to weaker and deprived sections, SMC to plan, manage and monitor schools in collaboration with the local authority.

- All aided schools to provide free education to at least 25% children.
- Special category schools and unaided schools to admit in Class I at least 25% children, belonging to weaker section and disadvantaged group, from the neighbourhood, and provide free and compulsory elementary education.
- No capitation fees, No screening for admission, No school without recognition.
- Curriculum and evaluation procedure laid down by prescribed academic authority should conform to constitutional values, make child free from fear, trauma and anxiety, be child-centred, child-friendly and provide for learning through activities.

There will be no Board examinations till completion of EE.

⁸ “The Legislative and Institutional Framework for Protection of Children in India” by Asha Bajpai, a Professor of Law at Tata Institute of Social Sciences (TISS), Mumbai.

⁹ A World Fit for Child, UNICEF Page 5910

¹⁰ Justice Verma Committee Report on Amendments to Criminal Law 2013. [23.01.2013]

¹¹ Convention on the Rights of the Child, Committee on the rights of the Child 44th session Geneva [15th Jan. to 2nd Feb. 2007]

¹² Section 83 of the Indian Penal Code, 1860.

¹³ Shivasharanappa and others Vs. State of Karnataka 2013 AIR [SC][CRL]1276 and State of U.P. Vs. Ashok Dixit and another 2000[3] SCC 70.

¹⁴ Section 2(L) of The Juvenile Justice (Care and Protection of Children) Act 2000.

¹⁵ The Juvenile Justice (Care and Protection of Children) Bill, 2014

¹⁶ Section 21 of The Juvenile Justice (Care and Protection) Act 2000

¹⁷ The Legislative and Institutional Framework for protection of Children in India – Asha Bajpai [www.unicef.org/India/institutional_and_Legislative_framework_bajpai.pdf]

¹⁸ Madan Singh v. State of Rajasthan, SC DOJ 2.4.05; Raj Singh v. State of Haryana, [2000] 6 SCC 759.

¹⁹ Abuzar Hossain @ Gulam Hossain Vs. State of West Bengal 2013 AIR [SC][Crl.]67.

²⁰ [2001] 5 SCC 714 and 2000 II AD [Cr] SC 801).

²¹ Vishal Jeet v. Union of India, 1990 (3) SCC 318.

²² Court on its own motion v. UOI (Crl. M. No. 862/01) in a PIL: Crl. W. No. 532/92 filed in Delhi HC for implementation of ITPA.

²³ Public at large v. State of Maharashtra: W.P. 112/92.

²⁴ State of Punjab v. Gurmit Singh, 1996 SCC (CR) 316.

²⁵ AIR 2003 SC 2053.

²⁶ 1999 AIR [SCW] 4827 21

²⁷ 2014 [3] SCT 1225