
INTERNATIONAL JOURNAL OF ADVANCED LEGAL RESEARCH

RIGHT OF CHILDREN: NATIONAL SCENARIO

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"Few human rights abuses are so widely condemned, yet so widely practiced. Let us make child labour a priority. Because a child in danger is a child that cannot wait."

-Kofi Annan, Former UN Secretary

The situation of Human Rights in India is a complex one, as a result of the country's large size and tremendous diversity, its status as a developing country and a sovereign, secular, democratic republic, and its history as a former colonial territory. The Constitution of India provides for Fundamental rights, which include freedom of religion. Clauses also provide for Freedom of Speech, as well as separation of executive and judiciary and freedom of movement within the country and abroad. It is often held, particularly by Indian human rights groups and activists, that members of the Dalit or Untouchable caste have suffered and continue to suffer substantial discrimination. Although human rights problems do exist in India, the country is generally not regarded as a human rights concern, unlike other countries in South Asia.

Fundamental Rights

Fundamental Rights is a charter³ of rights contained in the Constitution of India. It guarantees civil liberties such that all Indians can lead their lives in peace and harmony as citizens of India. These include individual rights common to most liberal democracies, such as equality before law, freedom of speech and expression, freedom of association and peaceful assembly, freedom to practice religion, and the right to constitutional remedies for the protection of civil rights by means of writs such as habeas corpus. Violations of these rights result in punishments as prescribed in the Indian Penal Code,

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subject to discretion of the judiciary. The Fundamental Rights are defined as basic human freedoms which every Indian citizen has the right to enjoy for a proper and harmonious development of personality. These rights universally apply to all citizens, irrespective of race, place of birth, religion, caste, creed, colour or sex. They are enforceable by the courts, subject to certain restrictions. The Rights have their origins in many sources, including England's Bill of Rights, the United States Bill of Rights and France's Declaration of the Rights of Man.

Rights mean those freedoms which are essential for personal good as well as the good of the community. The rights guaranteed under the Constitution of India are fundamental as they have been incorporated into the "fundamental Law of the land" and are enforceable in a court of law. However, this does not mean that they are absolute or that they are immune from Constitutional amendment. Fundamental rights for Indians have also been aimed at overturning the inequalities of pre-independence social practices. Specifically, they have also been used to abolish untouchability and hence prohibit discrimination on the grounds of religion, race, caste, sex, or place of birth. They also forbid trafficking of human beings and forced labour. They also protect cultural and educational rights of ethnic and religious minorities by allowing them to preserve their languages and also establish and administer their own education institutions.

Directive Principles of State Policy in India

An important feature of the Indian constitution⁴ is the Directive Principles of State Policy. Although the Directive Principles are asserted to be "fundamental in the governance of the country," they are not legally enforceable. Instead, they are guidelines for creating a social order characterized by social, economic, and political justice, liberty, equality, and fraternity as enunciated in the constitution's preamble.

The Forty-second Amendment, which came into force in January 1977, attempted to raise the status of the Directive Principles by stating that no law implementing any of the Directive Principles could be declared unconstitutional on the grounds that it violated any of the Fundamental Rights. The amendment simultaneously stated that laws

⁴Tyayal ,B.B. &Jacob.A(2005), Indian History, World Developments and Civics pg.A-23

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prohibiting "antinational activities" or the formation of "antinational associations" could not be invalidated because they infringed on any of the Fundamental Rights. It added a new section to the constitution on "Fundamental Duties" that enjoined citizens "to promote harmony and the spirit of common brotherhood among all the people of India, transcending religious, linguistic and regional or sectional diversities." However, the amendment reflected a new emphasis in governing circles on order and discipline to counteract what some leaders had come to perceive as the excessively freewheeling style of Indian democracy. After the March 1977 general election ended the control of the Congress (Congress (R) from 1969) over the executive and legislature for the first time since independence in 1947, the new Janata-dominated Parliament passed the Forty-third Amendment (1977) and Forty-fourth Amendment (1978). These amendments revoked the Forty-second Amendment's provision that Directive Principles take precedence over Fundamental Rights and also curbed Parliament's power to legislate against "antinational activities."

The Directive Principles of State Policy (DPSP) are contained in part IV, articles 36 to 50 of the Indian Constitution. Many of the provisions correspond to the provisions of the ICESCR. For instance, article 43 provides that the state shall endeavour to secure, by suitable legislation or economic organization or in any other way, to all workers, agricultural, industrial or otherwise, work, a living wage, conditions of work ensuring a decent standard of life and full enjoyment of leisure and social and cultural opportunities, and in particular the state shall endeavour to promote cottage industries on an individual or cooperative basis in rural areas.

It was said by several members in the Constituent Assembly that the directive principles are superfluous or mere guidelines or pious principles or instructions. They have no binding force on the State. In his speech Dr. Ambedkar answered, "The directive principles are like instruments of instructions which were issued to the Governor in General and Governors of colonies and to those of India by the British Government under the 1935 Act under the Draft Constitution. It is proposed to issue such instructions to the president and governors. The text of these instruments of the instructions shall be found in scheduled IV to the Constitution of India. What are called directive principles is that they are instructions to the Legislature and the Executive. Such a thing is, to my mind, to

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be welcomed. Wherever there is grant or power in general terms for peace, order and good government that it is necessary that it should be accompanied by the instructions regulating its exercise.” It was never intended by Dr. Ambedkar that the Directive Principles had no legal force but had moral effect while educating members of the Government and the legislature, nor can it be said that the answer referred to necessarily implied with the Directive Principles had no legal force.

Causes of Poverty: There are definitely a number of causes that might lead to poverty. These causes are usually looked at from various points of view. Looking at an Economists point of view, it so turns out that, low per capita income, unemployment could be the primary reasons for poverty. From a social perspective, lack of healthy habits, unclean habits, health hazards, absence of family planning schemes could lead to poverty.

Whatever the reasons are, the net result ultimately is that it affects society as a whole and in a strict sense, it is not a question of an individual's survival, but is one of society's healthy existences.

Unplanned population is one main reason for poverty. Education, according to some, could lead to alleviation of this problem. But unless the " more- hands- to- feed- a- mouth" situation is evacuated, there will still exist the demon called poverty. Education, coupled with a little positive attitude and a peaceful environment could do wonders to not only to alleviate, but even to eradicate it.

Social and cultural practices regarding girl child, foeticide, child marriage

The Supreme Court of India, in Writ Petition (Criminal) No. 81 of 2006, has requested the Law Commission to assist it with certain issues relating to child marriage. The Supreme Court in its order dated 27.3.2006 has also noted that different laws specify different ages while defining a child and there are various contradictions between these legislations.

The Writ Petition, which has been filed by the Delhi State Commission for Women and the National Commission for Women, points out that while the word, “child” is defined as any person below the age of 18 years in the Indian Majority Act and

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The Juvenile Justice (Care and Protection) Act, 2000, it was 18 years for girls and 21 years for boys in the Child Marriage Restraint Act, 1929 (hereafter CMRA). The Hindu Marriage Act also prescribes the same minimum age for a marriage. The Writ Petition further states that though the Indian Penal Code contains no definition of the word “child”, the age of consent for the girl for sexual intercourse is 16 years under Section 375 IPC while in married couples the age of consent is presumed to be 15 years. According to the Petitioner the Shariat allows marriage at the age of 15 years. The Petition further lists as a grievance the following:-

HMA does not authorize the court to declare a marriage void on the ground that either of the parties is underage. The Indian Penal Code exempts a husband from the charge of rape if his wife is not under 15 years of age. The Petition sees this as a direct contradiction to the Child Marriage Restraint Act of 1929, under which no child marriage is allowed. However, the Petition notices that child marriages are not invalid under the Child Marriage Restraint Act, 1929. The Petition therefore recommends that there should be a uniform definition of child in all legislations for the sake of uniformity and for the sake of protecting children against child abuse. It argues that the legal minimum age for marriage is 18 years under a number of ratified international agreements and the laws of many countries. It argues that all marriages under the age of 18 years should be void.

It further prays that the Union of India should be directed to amend the laws relating to age of marriage and minimum age of giving sexual consent so that both are in conformity with each other. The petition prays for deletion of the explanation under Section 375 IPC under which marital rape is not considered rape unless the wife is less than 15 years of age.

Amongst the reasons given for declaring marriages⁵ under the age of 18 years voids is the reason that child marriage is usually forced marriage and no full and informed consent can be given by a person under 18 years. Child marriage is also stated to be akin to child abuse and for many girls is the beginning of frequent and unprotected sexual activity which can have serious health consequences like anemia, maternal mortality, infant mortality, and result in certain diseases like HIV/AIDS. The Petition

⁵Section 375 IPC

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points out that young girls are more prone to domestic violence and have limited social networks. The rights of young⁶ girls like the right to education and the right to an all-round development are violated by child marriage.

It is pertinent to point out that after the Writ Petition was filed the Child Marriage Restraint Act, 1929 has been revamped and the Prohibition of Child Marriage Act, 2006 has been enacted. It is a well-known fact that child marriage has a specific gender dimension and the adverse effects of child marriage have a greater impact on a girl child. We need to examine whether the new Act addresses all the concerns relating to child abuse, health, and human rights which are inevitable consequences of child marriage.

The Scope, Causes and Consequences of Child Marriages

Child marriages continue to be a fairly widespread social evil in India. In a study carried out between the years 1998 to 1999 on women aged 15-19 it was found that 33.8% were currently married or in a union.

The phenomenon of child marriage can be attributed to a variety of reasons. The chief amongst these reasons is poverty and culture, tradition and values based on patriarchal norms. These norms do not take into account that “child marriage is a violation of human rights, compromising the development of girls and often resulting in early pregnancy and social isolation, with little education and poor vocational training reinforcing the gendered nature of poverty.

Young married girls are a unique, though often invisible, group. Required to perform heavy amounts of domestic work, under pressure to demonstrate fertility, and responsible for raising children while still children themselves, married girls and child mothers face constrained decision making and reduced life choices. Boys are also affected by child marriage but the issue impacts girls in far larger numbers and with more intensity. Where a girl lives with a man and takes on the role of caregiver for him, the assumption is often that she has become an adult woman, even if she has not yet reached the age of 18.”

⁶Section 5 and 11 HM Act

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The marriage of a minor girl often takes place because of the poverty and indebtedness of her family. Dowry becomes an additional reason, which weighs even more heavily on poorer families. The general demand for younger brides also creates an incentive for these families to marry the girl child as early as possible to avoid high dowry payments for older girls. The girl in our patriarchal set up is believed to be *parkithepan* (somebody's property) and a burden. These beliefs lead parents to marry the girl child. In doing so, they are of course relieving themselves of the 'burden' of looking after the child.

The girls are considered to be a liability as they are not seen as individuals who can contribute productively to the family. Unfortunately, the patriarchal mindset is so strong that the girl has no say in decision making. Texts like Manu Smirti which state that the father or the brother, who has not married his daughter or the sister who has attained puberty will go to are sometimes quoted to justify child marriage. Child marriages are also an easy way out for parents who want their daughters to obey and accept their choice of a husband for them.

There is also a belief that child marriage is a protection for the girls against unwanted masculine attention or promiscuity. In a society which puts a high premium on the patriarchal values of virginity and chastity of girls, girls are married off as soon as possible.

Furthermore, securing the girl economically and socially for the future has been put forth as a reason for early marriage. The institution of marriage in communities or societies can be used to serve or strengthen economic and social ties between different families and even communities. Also, a young girl may be offered to a family in order to improve the financial and social standing of the girl's family. Other reasons that have been listed for the high prevalence of child marriages in India are lack of education and knowledge, shortcomings in the law, and the lack of will and action on part of the administration. As stated above, child marriage is a grave violation of the rights of the child depriving her of opportunities and facilities to develop in a healthy manner to obtain education and to lead a life of freedom and dignity. It deprives the young girl of capabilities, opportunities and decision-making powers and stands in the way of her social and personal development.

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V. The Child Marriage Restraint Act, 1929

Legislative History, Judgments, and various Recommendations for Amendments on Child Marriage and Age of Child: The Child marriage Restraint Act was the result of sustained pressure by social reform groups and individuals who felt deeply about the adverse consequences of child marriage. The minimum age of marriage was upwardly revised on several occasions due to social pressure and increased from 10 years to 16 years. In 1940 the age of consent for married and unmarried girls was 15 years though the minimum age of marriage became 16 years.

The CMRA (Child Marriage Restraint Act) law, however, remained ineffective for a variety of reasons. In a study by UNICEF in 2001 it was found that the number of prosecutions did not exceed 89 in any one year. According to the National Crime Bureau Records 2005, 122 incidences were reported in the country under the Child Marriage Restraint Act in 2005, compared to the 93 cases that were reported in 2004. These statistics are obviously not an accurate reflection of the number of cases of child marriage which are occurring in the country. Most cases of child marriage are not being reported and/or being ignored by the police and government authorities. Even from the reported 122 cases, only 45 resulted in conviction. With regard to the question of validity of marriages performed in violation of the age requirement prescribed by the Child Marriage (Restraint) Act, the judiciary has taken a well settled stand. Starting from the earliest case that came up in 1885 to a recent judgment of 2006, the pronouncements of various High Courts and the Supreme Court have approved the validity of such marriages. A recent judgment of the Delhi High Court reiterated that marriages solemnized in contravention of age prescribed under Section 5(iii) of the Hindu Marriage Act, 1955 are neither void nor voidable. The court held that the judgment was based on public policy and the Legislature was conscious of the fact that if marriages, performed in contravention of the age restriction, are made void or voidable, it could lead to serious consequences and exploitation of women. The view that child marriages were valid was upheld in many other judgements like *Durga Bai v. Kedarmal Sharma*, *Shankerappa v. Sushilabai*, *Smt. Lila Gupta v. Laxmi Narain*, *Rabindra Prasad v. Sita Dass*, *William Rebello v. Angelo Vaz*, *Neetu Singh v. State & others*,¹²⁰ and *Ravi Kumar v. The State & Anr.*

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Under the old CMRA (Child Marriage Restraint Act) there were very few convictions⁷. It has been said that “the courts have been reluctant to find adults guilty under the Act. It has been held, for instance, that a guest escorting the bride and reminding others to raise a customary chorus cannot be punished under the Act. Negotiation and preparation for the marriage is also not punishable. Section 5 of the Act, which makes the person who conducts, directs, or performs the marriage liable, has been very narrowly⁸ construed by the court. It has also been held by the courts that for a person to be punished under the Act it must be proved that the marriage has been duly performed in accordance with all the religious rites applicable⁹ to the form of marriage. This kind of reasoning¹⁰ allows an accused party to raise the plea that the marriage has not been performed according to applicable ceremonies. Though there have been some positive judgments under the Act saying that deterrent punishment should be awarded¹¹, courts have given extremely light punishments and let off the accused with small fines. Under the old CMRA (Child Marriage Restraint Act) a police officer had no powers to arrest without a warrant or an order of the Magistrate.

CONCLUSION

After a deep study of our cherished goal and the in-depth study of the foregoing chapters, the rightly reflect, that children are the blooming flowers of garden of the society - "The protection of the child and its welfare under Indian Constitution". After discussing all the aspects of child and their rights and protection, arrived at our final or concluding chapter. From all the foregoing discussions easily understand how far the children have been protected under the Indian Constitution. The study, however, disclosed that children in India and elsewhere in the world, have not been given proper attention, in order to satisfy other people's selfish ends. They have been exploited more or less in all periods of time, though varied in their nature and dimension, depending on the existing socio-economic structure of society.

⁷AIR 1986 Pat 128

⁸AIR 1996 Bom 204

⁹1980 (Vol. VI) HLR 166

¹⁰1999 (1) Vol. 39 HLR 466

¹¹1978 SCC (3) 258

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The child formed part of the labour necessary for the reproduction of the system and value of labour taken as a part of the child socialization for reproduction of the labour power. The study of child labour in historical perspective discloses to us that the child labour was prevalent even in ancient India. The slave's offender age was owned for doing low and ignoble work. Moreover, children of slaves were born as slaves, lived as slaves, and died also as slaves unless the master was pleased to manumit him. It is a well-established fact that child labour in ancient India existed in the form of child slaves.

The near-universal ratification of the convention on the Rights of the Child has had a catalytic effect, encouraging ratification of other fundamental human rights instruments. Developing special institutions, structures and procedures for children, in State Parties on all continents; prior to 1989, very few countries had taken any steps to ensure visibility with regard to the rights of the child in Government's policies. National Commissions and inter-ministerial committees for children, national plans of action, agenda and strategies for children, child impact assessment. Stale of our Children reports, and "children's Budgets" are currently becoming the rule rather than the exception.

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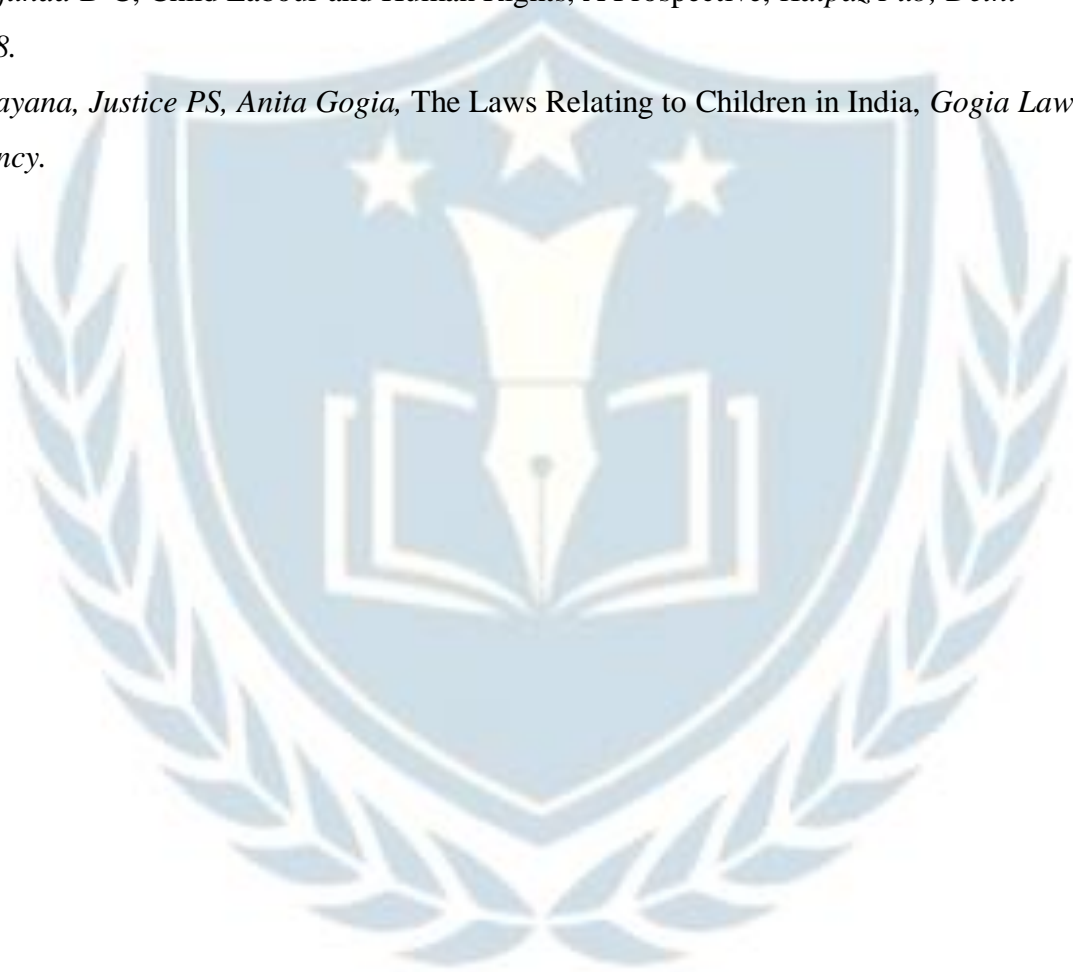
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