

JOURNAL ON RIGHTS OF THE CHILD NATIONAL LAW UNIVERSITY ODISHA

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NATIONAL LAW UNIVERSITY ODISHA CENTRE FOR CHILD RIGHTS

ABOUT THE CENTRE

Centre for Child Rights (CCR) began its journey on 12 April 2015 with an aim to improve access to justice for children through various purposive activities targeted to ensure protection of the rights of the children in various areas like child labour, gender justice, children's education, child trafficking, etc. CCR has undertaken a number of programmes for the research and documentation on the juvenile justice system in Odisha, capacity building of different stakeholders of the child protection structures and for the introduction of clinical legal education on child rights and juvenile justice in the NLUO curriculum.

NLU Odisha has entered into a partnership with United Nations Children Fund (UNICEF, Odisha) for a period of three years for a project on "*Effective Implementation of Children's Laws in Odisha*" to conduct research on the functioning of the JJBs/CWCs in the State of Odisha with the objective to secure a better understanding of the operational aspects of the juvenile justice mechanisms. It has also joined hands with ICSSR and the Government of Odisha to undertake research and documentation initiatives for different institutions established under the Juvenile Justice Act. Besides, it is also offering technical support to the Labour Department, Government of Odisha in the implementation of State plan of action for elimination of child labour in Odisha.

VISION

To ensure justice to the children and promote effective implementation of children's laws and governance in the State of Odisha, the centre will

endeavor to create child-friendly mechanisms through the promotion of child rights practices.

MISSION

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

Senior Programme Coordinator: Mr S. Kannayiram

Senior Research Associate: Mr Pramoda Kishore Acharya

MESSAGE FROM THE VICE CHANCELLOR

NURTURING AND PROMOTING “TENDER JUSTICE”

The fifth volume of the Journal on the Rights of the Child has seen some commendable contributions on some very relevant issues of contemporary child rights discourse. These include discussion *inter alia* on violence against children, child sexual abuse, juvenile diversion, migration of children and transgender children.

The children are the most vulnerable victims of many circumstances and they are portrayed as “children in conflict with law” or “children in need of care and protection”. There are several invisible stories of children who were deprived of their life, liberty, dignity, freedom and innocence. The narratives on violence against children reveal the most disturbing trauma experienced by children. It is manifested in different forms such as physical violence, sexual violence, psychosocial abuse and social exploitation. The recent revelations of sexual abuse in State run shelter homes in *Muzaffarpur, Bihar* and *Deoria in Uttar Pradesh* points out the harrowing experiences of children across India.

The *Freddy Peats* case in Goa in 1990s created shocking waves and demonstrated the vacuum and gaps in the law in the area of child sexual abuse. The situation continued till the *Nirbhaya* case which prompted the Government of India to set up *Justice J.S. Verma Commission* that eventually resulted in passing of the first comprehensive law on Prevention of Child Sexual Offences Act in 2012.

New innovative court rooms have been set up under the POCSO Act to facilitate the victims to testify before the court without fear or intimidation. In these courts, the victim and accused will be in two different rooms and

will be able to see each other only through closed circuit TV. These are measures to instill confidence in the victims and to prevent revictimisation.

Juvenile diversion is a viable alternative to the formal juvenile court proceedings. It is a form of interventional strategy which aims at reformation, rehabilitation, resocialisation and reintegration of the child back into the society. The courts in India are exploring more avenues in the area of juvenile diversion strategies through restorative justice programmes, community services, skill-building programmes, family treatment amongst others.

The child migration is the recent phenomenon happening in India and across the globe for varying reasons including an escape from the persecution at home, migration for work, to avoid zones of exploitation, etc. Such migrant children are even more vulnerable in terms of sexual abuse, exploitation or slipping into delinquency.

Transgender children and intersex children are the other categories of the most marginalised children that deserve priority and attention. As observed in *Arunkumar v. The Inspector General of Registration and others* (2019 Madras High Court), "Beyond the man-woman binary, there are as many as 58 gender variants. Of course, we use the expression 'transgender' as an umbrella term. They must be given their time and space to find their true gender identity."

Children are voiceless and they need an informed and enlightened voice to bring these issues into main stream public debate. Justice to Children's approach is to ensure that the children are better served and protected by the justice system at various levels which is strongly advocated by the Supreme Court of India from *Sheela Barse* to *Sampurna Behura*. We need to develop a new jurisprudence of "Tender Justice", nurturing and promoting justice to children.

I wish this journal will make an attempt to develop and contribute as a significant source and platform for research sharing in the area of child rights in India. I appreciate the collective efforts made by the Editor-in-Chief, the

faculty, student editorial teams and Centre for Child Rights (CCR) team in bringing out the fifth volume of the Journal on the Rights of the Child.

EDITORIAL NOTE

Prof. (Dr.) Srikrishna Deva Rao,

Hon'ble Vice-Chancellor,
National Law University Odisha

It is an honour for me to introduce before our various readers the fifth volume of the UNICEF Journal on the Rights of the Child of the National Law University Odisha. As the part of its research endeavor, Centre for Child Rights (CCR) National Law University Odisha brings out its annual flagship publication in the form of the Journal on the Rights of the Child.

Our previous issues have been on a variety of issues concerning child including matters like child labour, juvenile delinquency, child sexual abuse, etc. Considering changing contours of child law and its ever-widening scope the present issue has taken up a broad-based approach and is on the theme of "Law, Policy and Practices of Child Rights in India".

The present volume of the Journal on the Rights of the Child brings before our readers total of eight research articles and a case comment. These research articles deliberate on subjects ranging *inter alia* from child soldiers, juvenile justice, transgender children, child migrants to family law matters like parentage, adoption and child custody.

The opening article is by Prof. (Dr) Nuzhat Parveen Khan on "A Critical Evaluation of Child Soldiers in South Asian Countries under International Humanitarian Law and Human Rights". The paper analyses an urgent requirement to curb the practice of employing child soldiers. It argues that from both global and State-level initiatives, a child must not be recruited as combatant into the armed forces in any State and non-State actors. Moreover, First Optional Protocol was enacted by the United Nations to end this activity, yet only a few reforms have taken place in reducing the activity of both State and non-State actors due to the lack of enforcement by the States. The paper also emphasises the State's paramount objective in a constitutional democracy to protect children from any kind of such hostility.

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“A critique of Jammu Kashmir Juvenile Justice Act” by Manali Maheshwari and Ajay Kumar Meena highlights that Jammu and Kashmir Juvenile Justice Act has got many loopholes and inadequacies because of which the main objective of the act—reintegration of the child with society and community cannot be fulfilled. International Juvenile Justice Standards which have got so many provisions regarding the welfare of the child are not fulfilled and implemented. The armed forces and J&K Police have failed in protecting the best interests of the child. This paper proposes a “reformatory approach” which Jammu and Kashmir Juvenile Justice Act should follow and implement.

Konina Mondal and Anwasha Panigrahi in their paper “Children Beyond Gender – Relocating the Rights and Status of Transgender Children in the Context of Juvenile Justice System of India” points out that transgender children are the minority within minorities, who are a group most vulnerable, are not being ensured justice enough. It argued in favour of inclusion of transgender children in the JJ Act, as children in need of care and protection, it aims to explore the vulnerabilities, status, rights and restoration of such children.

Nidhisha Garg’s “Improving the prospects of adoption under the Juvenile Justice Act, 2015” argues in favour of strengthening adoption laws in India. The State has the responsibility of the children especially that of abandoned, surrendered and orphaned children, but the State also has its limitations, economic, logistical and emotional. The State cannot provide a family-like atmosphere. That can only be provided by a set of loving parents. One of the solutions to improve the sorry state of such children is to put them up for adoption. This research work deals with a critical analysis of adoption laws in India and recommends certain suggestions to strengthen the same.

Advika M. and R. Nandhitha’s “Institutional Child Sexual Abuse: The Injustice that Thrives on Secrecy, Silence and Shame” delve into the settings of institutional abuse and provide cases and instances of where it has occurred. It provides a succinct and brief history of child sexual abuse legislation in India. Methods and approaches to alleviate the agony of victims of child abuse are also examined, along with suggestions as to

the implementation of legislations or programmes that address this long-neglected issue. Paper recommends a two-fold strategy for the rehabilitation of victims.

In the paper titled “International Parental Child Abduction: A Critical Overview of the Indian Approach compared to International Standards” by Divya Meenakshi R. deals with the international child abduction. Paper attempts to critically analyse the current statutory provisions and judicial pronouncements in connection with intercontinental or international parental child abduction. It also endeavours to scrutinise and weigh out the advantages and drawbacks of the draft of the proposed legislation that is to be applied in such scenarios, incorporating and critiquing the suggestions of the Law Commission, pertaining to India’s position in this matter.

Sushree Saswati Mishra and Seemon Snigdha Jena’s “Juvenile Diversion” strives to highlight the need for recognition of the concept of “Juvenile Diversion” in the context of all the transitions undergone by Indian juvenile justice system over the years to provide for the reformation of juvenile delinquents. It argues for pre-adjudication diversion as a better option to tackle social stigmatisation and risk of recidivism by focusing on providing individualised treatment and encourages community participation in helping the child to unlearn delinquent behaviour and eliminate the negative impact of institutionalisation.

Upasana Acharya in her paper on “Migration: Children, Leaving and Living in Turmoil” highlights how children have migrated since decades to escape conflict and persecution at home; to leave behind destitution and follow the path of a possibly brighter future. This review provides for a relevant framework to protect young migrants and outlines the limitations of the established policies. It suggests for the betterment in the status of protection of the child irrespective of their legal status. The paper also reviews multi-level risk factors pertinent to sexual abuse/exploitation of children along the process of migration, while acknowledging and critiquing the inter-State policies that govern the present rights of the child.

The case commentary by Prashant Singh and Meghna Sharma discusses the rights of intersex children as decided by Madras High Court in the case of *Arunkumar v. The Inspector-General of Registration & others*. This judgment of the Madras High Court is considered a momentous judgment for rights of intersex children in India as it recognises their consent rights and the right to bodily integrity and prohibits sex-selective surgeries on intersex children in the State of Tamil Nadu.

Dr. Owais Hasan Khan
Editor-in-Chief

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A CRITICAL EVALUATION OF CHILD SOLDIERS IN SOUTH ASIAN COUNTRIES UNDER INTERNATIONAL HUMANITARIAN LAW AND HUMAN RIGHTS

—Nuzhat Parveen Khan*

ABSTRACT

The recruitment of child soldiers in India is widely practiced in different ways. On one hand government denies any recruitment of child soldiers in State military services, at the same time, it contains different legislations under which children under 18 years of age can be recruited in State military services that is directly contrary to the First Optional Protocol upon Involvement of Children in Armed Conflict to the Child Rights Convention to which India is a member and signatory State. As a result of which many children across the country are being denied of some basic human rights guaranteed by the Constitution such as Right to Life, Education, Personal Liberty, Dignity and several other rights. Therefore, the paper will analyse upon an urgent requirement to curb the practice of this menace and that too from both global and State level initiatives, a child must not be recruited as combatant into the armed forces in any State and non-State actors. Moreover, First Optional Protocol was enacted by the United Nations to end this activity, yet only a few reforms have taken place in reducing activity of both State and non-State actors due to the lack of enforcement by the States. Hence, the paper will also emphasis, that the State's paramount objective in constitutional democracy is to protect children from any kind of such hostility, the Government of India has a duty imposed by the Constitution of the country to adopt certain measures in order to ensure that children's development rights are protected. Further, provisions which clearly contravene the regulations mentioned in the First Optional Protocol must be withdrawn from the legal system, inhumane child recruitment policy into State military services must be abolished within a short span of time. Also, the paper emphasis that for all those recruited into the State and non-State actor's armed forces, the mission of re-establishing them back in society should be the State's aim for a better future for the country's children.

* Professor and Ex-Head and Dean, Faculty of Law, Jamia Milia Islamia, New Delhi.

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Keywords: International Humanitarian Law, Child Soldiers, Armed Conflict, South Asia, Salwa Judum, Militancy

1. INTRODUCTION

The armed conflict impacts thousands of children in India, directly and indirectly, few times for the State and few times in opposing the government by the militants. The recruitment of child soldiers in India is practiced into different ways, on one hand government denies any recruitment of this kind in State military services, at the same time, it contains different legislations under which children under 18 years of age can be recruited in State military services that is directly contrary to the First Optional Protocol (hereinafter referred as FOP) upon the Involvement of Children in Armed Conflict to the Child Rights Convention (hereinafter referred as CRC) to which India is a member and a signatory State. As a result of which many children across the country are being denied of some basic human rights guaranteed by the Indian Constitution such as Right to Life, Education, Personal Liberty, Dignity and several other rights.

Less wages, compliant, undemanding, dependency are some factors that make children prone to being captured via warlords and forced to battle with deadly weapons in the field. Child soldiers are the latest form of modern-day slavery and are the worst of a kind, it tends to be a short-term local problem, but gradually this has huge adverse impacts and long-term global consequences. Therefore, an urgent requirement to curb the practice of this menace and that too from both global and State level initiatives, a child must not be recruited as combatant into the armed forces in any State and non-State actors. Moreover, FOP was enacted by the United Nations to end this activity, yet only a few reforms have taken place in reducing activity of both State and non-State actors due to the lack of enforcement by the States.

2. FIRST OPTIONAL PROTOCOL TO THE CONVENTION ON THE RIGHTS OF THE CHILD AND CHILD SOLDIERS

Child soldiers is a worldwide problem and efforts have been made on a global scale upon the prevention of recruitment of child soldiers, with the most important being the reducing minimum age to 18 years as soldiers and also the United Nations Children Fund defines child soldiers as "any child (boy or girl) under 18 years of age, who is part of any kind of regular

or irregular armed force or armed group in any capacity.” Age limit of 18 year is set by the FOP on the Involvement of Children in Armed Conflict in the year 2002, earlier 15 years used to be the minimum for recruitment in armed forces set by the Geneva Convention of 1949 and by Additional Protocols of 1977.

Even then it is estimated that about 300,000 child soldiers are still serving in the world’s armed forces and 40 per cent of them are girl child soldier. Although there are more under aged soldiers in Asian and African countries but also European Countries and America are contributing towards these inhumane issues. According to the Child Rights Convention, recruiting a girl and boy under 18 years of age is illegal, but still few exceptions prevail that circumvent the effect of the Additional Protocol of 1977, because a child can still join the armed services willingly or upon parents’ permission, the State provides arms training to children over the age of 18.¹ These exceptions of voluntary employment in the armed services on the one hand and limitation at the same time in the FOP tends to the creation of dual standards and can lead to confusion, some additional regulation has been introduced by the UN General Assembly with the intention of limiting the under aged soldiers in recruitment and has also been accepted by States, but still it is being ignored and not enforced very efficiently and in an efficient manner.

3. FIRST OPTIONAL PROTOCOL ON THE INVOLVEMENT OF CHILDREN IN ARMED CONFLICT TO CRC AND ITS IMPLEMENTATION BY STATE ARMED FORCES

Article 1 of the FOP on the Involvement of Children in Armed Conflict clearly states that member in the armed services of a State who have not reached 18 years of age should not participate in direct hostilities and India’s States in response to it:

The minimum age for recruitment of prospective officers into the Armed Forces of India (Army, Air Force and Navy) is 16½ years. However, after enrolment, the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict recruits undergoes training. They are sent to the operational areas only after attaining 18 years of age. The minimum age for recruitment to Central Paramilitary Forces (CPF) is 18 years. Both the Ministry of Home Affairs (MHA) and

1. UNGA Convention on the Rights of the Child (adopted on 20-11-1989) UNTS 1577.

the Ministry of Defence have stated that no soldier below 18 years of age is deployed.

As guaranteed by the Constitution of India, provisions of Fundamental Rights are sufficient measures acting as safeguards for the prevention of State from forcing its citizens into joining the Armed Services.²

Further, the position in India is that when a child reaches 18 years of age only then he will be sent as combatant to the battle field but not prior to the 18 years of age. The person may be a troop of the armed services, but in overt conflicts would not confront in any case. Whereas situation in real scenario is quite different and instances of States violating their own norms and acting in contravention of the Optional Protocol norms has been seen. It being in the State list under Indian Constitution falling under "law and order" list, State Governments authorises to employ child as soldiers and send them into battle field and at the same time they have been brazen in breaching the provisions of Child Rights Convention, here are some of the examples as:

Salwa Judum ("Peace March" or "Purification Hunt" in Gondi language) was a militia mobilised and deployed to counter Naxalite violence in the region as part of anti-insurgency operations in Chhattisgarh, India and there have been numerous reports of minors being employed as a member in the armed services. A survey conducted by Documentation and Advocacy Forum (FFDA) found that the Salwa Judum in the southern district of Dantewada used more than 12,000 minors and the Government of Chhattisgarh had "officially recruited 4200 Special Police Officers (SPOs) and many of them being easily identifiable as minors".³

State initiated Salwa Judum campaigns in 2005 to combat Maoist insurgency. Among Salwa Judum leaders, special police officers were recruited to the defence forces in the villages and were trained with weapons in the State military forces and police force, claiming that children under the age of 18 were recruited as SPOs. A Human Rights Organisation visited Dantewada district in Chhattisgarh in March 2006 and witnessed that children, including nine girls between the age of 14 and 16, were employed as SPOs, the children told that they had been given training on use of deadly weapons and they were used as informants. Later, Central Government

2. *Ibid.*

3. Ueli Zemp and Subash Mohapatra, "Child Soldiers in Chhattisgarh: Issues, Challenges and FFDA's Response" (otherindia.org, 29-7-2007) <http://www.otherindia.org/dev/images/stories/feda_child.pdf> accessed on 10-10-2019.

issued orders for prohibition on recruitment of children as SPOs, but when NCW members visited Dantewada district in December 2006, they again witnessed that children and tribal girls were still employed as SPOs into Salwa Judum camps and used as soldiers in camps against Maoists.⁴

The Supreme Court of India in 2011 decided recruitment of SPOs as “illegal and unconstitutional” in *Nandini Sundar v. State of Chhattisgarh*⁵ and ordered the Union Government to adopt measures and urgent action to put an end to the recruitment of SPOs in the Salwa Judum camps and also in similar groups as well. Following the judgment into the said case, State Governments began to appoint the SPOs without tutorials and training in the regular police, recruitments has been made without any verification report and age has been mentioned as 18 years, in certain cases school certificate has not been demanded and thereby defending their appointments under Tribal Welfare Scheme.

However, under Articles 2 and 3 of the FOP under Children’s Involvement in Armed Conflict, the Article 2 deals with the minimum age for compulsory and coercive participation in the armed forces, which must be 18. In response to which India states that: “There is no forced and coerced recruitment into the Armed Forces of India. Hence, Article 2 of the FOP does not apply to India”.

Article 3 of the FOP on the Involvement of Children in Armed Conflict provides that 18 years as the minimum age for voluntary recruitment in the national forces. In response to the declaration of the Government of India “Recruitment is upon voluntary basis into the Armed Forces in India and any person who has not attained age of 18 years or above inducted overtly into the Armed Forces, therefore, does not take overt part in hostile activities. Persons between the age of 18-42 years are only eligible to apply and the recruitment of the troops is done through open recruitment rallies.”

This statement by the Indian Government is made without ascertaining the State Governments’ practices. A child under the age of 18 may be recruited as per MP police legislation as “boy orderlies”, Section 60 of the regulation states:

4. Child Soldiers International, “Child Soldiers Global Report 2008 – India” (20-5-2008) <https://www.justice.gov/sites/default/files/eoir/legacy/2014/07/14/child_soldiers_2008_Global_Report.pdf> accessed on 10-10-2019.

5. *Nandini Sundar v. State of Chhattisgarh*, (2011) 7 SCC 547.

Boy-orderlies – A certain number of appointments as constables may be given by Superintendents to boys under the ages of 18. They are known as 'boy-orderlies', and receive half the pay of an ordinary constable. In making these appointments preference should always be given to sons or relatives of police officers, or of men who have rendered good service to government. As soon as a boy-orderly satisfies the conditions laid down in Regulation 53, he should be given a preferential claim to appointment in the first vacancy that occurs.

In regulation of it, the Government of Chhattisgarh has legislation to employ "balrakshaks" into the Department of State Police. In June 2011, the State of Chhattisgarh's Home Department declared that 300 (three hundred) balrakshaks were recruited in the Department of Police in the State. They also claimed that balrakshaks were primarily working in the police departments on the compassionate grounds such as parent's death, because of reasons such as maoists/terror attacks, sickness or any other related grounds. After completing their school, the balrakshaks report on the duty only for a period of three days a week and are given only light work such as moving files on the tables and other similar small official work. Nonetheless, ground situation is still that the children are denied of three days of schooling and are compelled for Armed Services that are contrary to the spirit of the FOP to which India is a member and a signatory State. States claim their own reasons; that they have inherited their legal framework from the parent State, i.e. Madhya Pradesh, they also claim that they do not have any such regulations of their own.

There is yet no place for excuse when a child's future is at risk, the government has a foremost obligation to safeguard the rights of its citizens and secure the vulnerable from being the victim of the violators of such rights.

4. FIRST OPTIONAL PROTOCOL ON THE INVOLVEMENT OF CHILDREN IN ARMED CONFLICT AND ARMED OPPOSITION GROUP

Article 4 of the FOP on the Involvement of Children in Armed Conflict deals directly with the issue of child soldiers employed and accepted in the armed military opposing groups or military forces of non-State actors. It states that:

"Armed groups that are distinct from the armed forces of a State should not, under any circumstances, recruit or use in hostilities

persons under the age of 18 years”, and also “State Parties shall take all feasible measures to prevent such recruitment and use, including the adoption of legal measures necessary to prohibit and criminalise such practices”.

There are Naxalites and Maoists in India acting as opposing parties with arms and ammunitions, whereas in reply to Article, the Government of India declared that there is no such armed opposition party in India. Further, Indian Government also claimed that although there are no such conflicting activities in the country and also led an inference upon statutory security towards the children for prevention from participating in such conflicts and providing them with care and protective measures.⁶

The actual scenario in ground situation is something different, on one hand the government denies the existence of such opposing group and conflicting activities in the country and at the same time it bans 35 organisations in year 2012 under UAPA (Unlawful Activities Act) as “terror groups”.⁷

Increased recruitment of children by Maoists has been recorded since 2005. It has been confirmed from sources in Communist Party of India (CPI) (Maoist) and that in Police Department of Andhra Pradesh that children from 14 to 15 years of age were employed into armed services in the State of Andhra Pradesh. On the other hand, Maoists claimed having their own children wing and the division of children, known as the Bal Mandal, was not used in direct hostile activities, but only as messengers and informers. They admitted that military training was provided to prepare them for any situation.⁸

Maoists were also reported to have increased recruitment of under 18's in Chhattisgarh and Jharkhand. Some kids were allegedly taken out of school without the permission of their parents.⁹ Nearly all those under the age of 18 who were recruited by Maoists were confirmed as an alphabetic and

6. Raman Dixit, “Naxalite Movement in India: The State’s Response”(2010) 4(2) Journal of Defense Studies <https://idsa.in/jds/4_2_2010_NaxaliteMovementinIndia_rdixit> accessed on 12-10-2019.

7. Banned Organizations, Ministry of Home Affairs GOI <http://www.mha.nic.in/uniquepage.asp?Id_Pk=292> accessed on 12-10-2019.

8. Anuj Chopra, “Maoist Rebels Spread Across Rural India” (*The Christian Science Monitor*, 22-8-2006) <<https://www.csmonitor.com/2006/0822/p06s01-wosc.html>> accessed on 12-10-2019.

9. Joyce William John, “Children at War in Insurgency Zone” (*The Times of India*, 29-5-2007) <<https://timesofindia.-indiatimes.com/india/Children-at-war-in-insurgency-zone/articleshow/2081272.cms>> accessed on 12-10-2019.

tribal. Also, evidences were found which established that armed groups were involved in recruitment of children below the age of 18 years in Jammu and Kashmir and Pakistan-administered Kashmir.

The Jammu and Kashmir police claimed that around 200 children have been missing in the State since 2004, claiming that most of them were children of poor and illiterate families recruited by militants, although this has not been verified independently.¹⁰

The Indian Army reported to have nine armed children captured in August 2004. The army reported that a few of those came from Pakistan side and were also provided with training by armed groups operating from Pakistan, including the "Jaish-e-Mohammed", "Harkat-ul-Mujahideen" and the "Hizbul Mujahideen".¹¹ Failure by States in order to promote the basic necessities of growth and development in the society as academic and job opportunities for youth often leads to armed groups recruiting them.

It was said that children from age of 10 and above were used for courier and transfer of messages by armed groups and provided them with basic training for the use of arms. Recruitment of children by armed groups puts them at the security forces increased risk. Two major incidents occurred during 2005 and 2006 in which the State forces deployed for security openly fired upon children. Rashtriya Rifles soldiers waiting to ambush insurgents in Bangergund in Kupwara district reported to have fatally shot three boys and one was critically injured in the incident on the night of 23 July 2005. Rashtriya Rifles said that when confronted, the boys had been acting in a suspicious manner and failed to stop. On 22 February 2006, children while playing cricket were shot by the soldiers in Doodipora, Handwara and claimed to kill several militants which lead to killing four boys, including an 8-year-old.¹²

There has been less evidence to prove the fact that children are involved in armed conflicts in north-eastern regions, but this cannot be denied to the extent that there are no activities of such kind in those areas.

10. Human Rights Watch (HRW), "Everyone Lives in Fear": Patterns of Impunity in Jammu and Kashmir (hrw.org September 2006) <<https://www.hrw.org/report/2006/09/11/everyone-lives-fear/patterns-impunity-jammu-and-kashmir>> accessed on 13-10-2019.

11. "Army Grappling with 'Child Warriors' in J&K" (*The Hindustan Times*, 1-8-2004) <<http://www.jammu-kashmir.com/archives/archives2004/kashmir20040801d.html>> accessed on 13-10-2019.

12. *Ibid* (n 4).

The report also stated that in the north eastern region other armed forces were also operating, including the NSCN (which faction was not stated), the People's Liberation Army and United Liberation Front in Manipur were recruiting children openly. The said report also stated that youngest boys were put nearest to the enemy as "the most fearless".¹³

The fact remains that India's Government cannot protect the country's children via the impact recruitment done by the armed forces only merely by denying existence of any insurgency, vulnerability of children belonging to poor and marginalised sections of a country has always been the strongest factor working in favour of the warlords indulged in areas affected by such insurgency.

Article 6 of the FOP on Children's Involvement in Armed Conflict deals with the disarmament, demobilisation and reintegration of these children, Article 6 states:

States Parties shall take all feasible measures to ensure that persons within their jurisdiction recruited or used in hostilities contrary to the present Protocol are demobilised or otherwise released from service. States Parties shall, when necessary, accord to such persons all appropriate assistance for their physical and psychological recovery and their social reintegration.

While the law is binding on India's Government, there is not yet any government compensation plan or rehabilitation policy for these child soldiers. Also, people working in these areas reported less effective policies to reintegrate insurgents into the mainstream at the State level.

5. POSITION IN PAKISTAN

The military of Pakistan plays a significant role in the country's political activities and also has led several successful coups by the military. The issue of Jammu and Kashmir has been an ongoing dispute between India and Pakistan since independence of both the counties, where in order to achieve independence and attainment in Pakistan military several groups have been fighting against security forces of India.

Pakistan became a signatory to the Optional Protocol in the year 2001 but the same was ratified by the country after a major delay of 15 year, i.e.

13. *Ibid* (n 4).

2016 which clearly indicate the exploitation of the children and abuse of the international law by the State.

Article 39 of Pakistan Constitution 1973 states that: "The State shall enable people from all parts of Pakistan to participate in the Armed Forces of Pakistan."¹⁴

As per the United Nations Geneva Convention of 1997 which is Pakistan's Permanent Mission, the legal age of enlistment for soldiers from 16 to 25 and for officer's ranges from 17 to 22. Air Force criteria for the recruitment depicts fighter pilots from the age of 16 are admitted for training.¹⁵ The representative of the Pakistan's Government said during the Asia-Pacific Conference upon the recruitment of children as soldiers in armed forces in Kathmandu in May 2000 that while Pakistan armed forces recruited children under the age of 18 years, it had sufficient measures to ensure that those soldiers did not participate in overt conflicts.¹⁶

At the FOP rounds, the delegation for Pakistan argued for 16 years as the minimum age for the recruitment criteria on voluntary basis and 17 years for participation in hostile activities, but ultimately did not impede consensus.¹⁷

The statement in the negotiation for the age of 17 year for involvement in hostilities construes the adverse policies of the State towards the child education and development. The highlighting point is that the country stands to negotiate this issue and the actual outcome of the recruitment in the armed forces, which is well in the hands of the government, depicts the horrific scenario towards this sensitive issue.

6. POSITION IN BANGLADESH

There is no such legislation which forces the citizens of the country for compulsory recruitment into the armed services of the country. Also, there

14. Constitution of the Islamic Republic of Pakistan, 1973, Art. 39.

15. Pakistan Air Force, "Eligibility Criteria Permanent Commission Courses" <<http://www.joinpaf.gov.pk/-induction/offelig.html>> accessed on 18-10-2019.

16. CRC briefing for the CRC Pre-Session, "Coalition to Stop the Use of Child Soldiers" 03/02/03-07/02/03 (signed 26/09/01 not ratified) <<https://resourcecentre.savethechildren.net/node/2243/pdf/2243.pdf>> accessed on 20-10-2019.

17. UN Commission on Human Rights, Report on Working Group on a Draft Optional Protocol to the Convention on the Rights of the Child on Involvement of Children in Armed Conflicts on its Third Session (18-4- 1997, E/CN.4/RES/1997/78) <<https://www.refworld.org/docid/3b00f2568.html>> accessed on 20-10-2019.

is no provision with regard to age for the employment and deployment of soldiers, but as per each armed force of the country, 16 and 17 years of age is the minimum requirement for employment into the Air Force and Navy respectively.¹⁸ Bangladesh's Paramilitary Services, including the Ansars and the Bangladesh Rifles states the minimum age for recruitment as 18 years of age.¹⁹ The Government of Bangladesh states that scope for a person below the age of 18 years in direct combat conflicts is not at all possible into the armed forces, paramilitary forces or internal security services of the country, as those employed below such age had to undergo for training period (whereas in case of the training for the army the government states it to be a period of nine months only).²⁰

United Nations Committee on the Rights of the Child expressed concern over allegedly large number of children below the age of 18 years who were employed into armed services and the difficulty in assessing the actual age of recruits.²¹ Recruitment details provided by the Bangladesh Army indicated necessity for certificates of educational qualification, a citizenship certificate and a parental consent certificate, whereas birth certificate is not mandatory.²² The rate of birth registration was registered as 10 per cent (was 7 per cent in 2003). Concerns were expressed by the Committee with regard to the absence of compulsory parental consent except for Air Force recruits and the lack of measures to ensure true voluntary and well-informed recruitment of under 18.

Madrasas (religious school of Islam) can make under aged children more prone to recruitment by militant of the Islamist groups. The Committee on the Rights of the Child also expressed its concern over the training given

18. Bangladesh Air Force, Recruitment of BAF Officer Cadets <https://www.baf.mil.bd/?page_id=974> accessed on 18-10-2019.

19. Bangladesh Army: BMA Regular Commission (Long Course) Age Limits" <<https://www.army.mil.-bd/Officer>> accessed on 18-10-2019.

20. UNCRC, Consideration of Reports Submitted by States Parties under Article 12(1) of the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography Initial Report of Bangladesh to the UN Committee on the Rights of the Child on Implementation of the Optional Protocol' (3-12-2005, UN Doc. CRC/C/OPAC/BGD/1) <<https://www.ecoi.net/en/document/1263559.html>> accessed on 18-10-2019.

21. UNCRC, Consideration of Report Submitted by Bangladesh on Implementation of the Optional Protocol, Concluding Observations (March 2006 UN Doc. CRC/C/OPAC/BGD/CO/1) <https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRC/C/OPAC/BGD/CO/1&Lang=En> accessed on 18-10-2019.

22. "Bangladesh Army: Soldier 'When to apply'" <<https://www.army.mil.bd/Soldier>> accessed on 18-10-2019.

by the unauthorised and unregulated madrasas to the children.²³ The NGOs stated the recruitment of children as soldiers as very common, although no concrete evidence was available to support the fact. Several teachers in the private unregistered madrasas were suspected in the Khulna and Rajshahi districts of supplying underage activists to the JMB (Jamaat-ul-Mujahideen Bangladesh), which was involved in August 2005 serial bombings. Children between the age of 12-15 were also reported to be working for the JMJB (Jagrata Muslim Janata Bangladesh), not only as couriers, but also to transport, plant and detonate bombs.²⁴

This recruitment of child soldiers in the name of voluntary services is way of exploitation being done by the State. On one hand they claim that the law of the country does not impose any forced recruitments into the armed forces whereas on the other hand recruitment is being done in the name of voluntary services and consent being taken from parents.

7. POSITION IN SRI LANKA

The military recruitment was on a voluntary basis and regulated by the "Soldiers Enlistment Regulations of 1955". Recruitments were done as either "recruits" or "directly enlisted soldiers", from the age of 18 years. Whosoever qualified for the recruitment was required to submit the birth certificate as an authentic proof of age.²⁵

The National Cadet Corps were available children under 16 of age, as per the "Mobilization and Supplementary Forces Act, 1985". This provided students with "pre-military" and "civil training" but it was not possible to call cadets for active service and they were not members of the armed services.

In November 2006 a UN special advisor on children and armed conflict "found strong and credible evidence that certain elements of the government security forces are supporting and sometimes participating in

23. *Ibid* (n 20).

24. Coalition to Stop the Use of Child Soldiers, Child Recruitment in South Asian Conflicts: Bangladesh (April 2007) <www.child-soldiers.org> accessed on 18-10-2019.

25. UN Committee on the Rights of the Child (UNCRC), Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict: List of Issues Related to the Consideration of the Initial Report of Japan [2-3-2010 (CRC/C/OPAC/JPN/)],

the abductions and forced recruitment of children by the Karuna faction”²⁶ President Rajapakse along with other high ranking officials have stated repeatedly that the Government of Sri Lanka would investigate State’s involvement allegations and keep any members of the security forces found to have violated the law accountable. Human Rights Watch asked the Government of Sri Lanka on a regular basis for the outcomes of the inquiries and challenged the seriousness of the government’s commitment to an inquiry in August 2007.²⁷

Around 1,500 recruits served in LTTE, more than 300 of whom were still under 18 years of age in the mid of 2007. Whereas, average age of recruitment in the period 2002-2007 rose from 14 to 16 years of age and about one third of the LTTE’s recruits were girls.²⁸

The seriousness of the government towards the health, education and development could be ascertained from the above-mentioned statements. The children are the future assets of any country who in near future would contribute to the development of the nation and its people. Government of any country must look for the future development and make the contribution obligatory on its part for the same.

8. CONCLUSION

The State’s primary objective in constitutional democracy is to protect children from any kind of hostility and the Constitution of India inflict an obligatory duty on Indian Government to initiate precise measures and policies in order to make sure that all children’s development rights are safeguarded. Therefore, with target of being a member and a signatory State to FOP on the Involvement of Children in Armed Conflict in the CRC, the Government of India has an obligation to protect a child who has not attained the specified age from being abused by armed forces, State and non-State actors. Legislations that directly contravene the provisions of the FOP must be withdrawn from the State legislations. Inhumane forced and voluntary recruitment in State military services must be removed on

26. Statement Allan Rock, UN Special Advisor on Children and Armed Conflict (Colombo, 13-11-2006) <<https://childrenandarmedconflict.un.org/2006/11/13nov06/>> accessed on 18-10-2019.

27. HRW Sri Lanka Return to War: Human Rights under Siege (August 2007) <<https://www.hrw.org/-reports/2007/srilanka0807/>> accessed on 18-10-2019.

28. UN Security Council, Report of the Secretary-General on Children and Armed Conflict in Sri Lanka, (21-12-2007 S/2007/758) <<https://www.securitycouncilreport.org/undocuments/document/CACS2007758.-php>> accessed on 18-10-2019.

A CRITIQUE ON JAMMU AND KASHMIR JUVENILE JUSTICE ACT

—Manali Maheshwari* & Ajay Kumar Meena**

ABSTRACT

*Children in conflict with the law are one of the most affected segments of the society whose rights have been violated by the armed conflicts which are happening across the world. Many forms of violence have been witnessed by these children like sexual abuse, arbitrary detention, torture, etc. The impacts of these forms of violence are loss of childhood, education, health and safe environment. Further the State is not able to fulfill the responsibilities of safeguarding the children which comes through the principle of *parens patriae*. Jammu and Kashmir Juvenile Justice Act has got many loopholes and inadequacies because of which the main objective of the act—reintegration of the child with society and community, cannot be fulfilled. International Juvenile Justice Standards which have got so many provisions regarding the welfare of the child are not fulfilled and implemented by the State Parties. State Parties are not fulfilling their international commitments and domestic laws and because of which children who are considered as most vulnerable section are becoming aggressive and violent. The armed forces and J&K Police have failed in protecting the best interests of the child. This paper proposes a “reformatory approach” which Jammu and Kashmir Juvenile Justice Act should follow and implement.*

Keywords: Juvenile Justice Act, Children in Conflict with Law, Illegal Detention, International Juvenile Justice Standards, Education and Mental health.

1. INTRODUCTION

The valley of Kashmir has been consistently witnessing armed conflict and violence which can be termed as the oldest unsettled conflict. There has been a large number of human rights violations against the people of Jammu

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and Kashmir by the security forces in which children and women have been the most affected groups. As per JKCCS report, 80 per cent of the women and children are affected amongst the 90 per cent of the civilian population of the world which are direct victims of such conflicts.¹ The armed forces have violated child rights by using pellet guns to frighten the protestors and have caused serious and fatal injuries to the civilians including young children.² The other serious crimes perpetrated against children are sexual violence, torture, illegal detention and enforced disappearances. As per the Convention on the Rights of the Child,³ anyone who is below 18 years of age is defined as children. The international juvenile justice standards and child specific laws provide that children living in conflict-torn regions need extra care, protection and assistance for the overall development of health and mind. But instead, children are one of the most affected groups as they have been both direct and indirect targets of State violence.⁴ The impact of militarisation during nineties was exponentially increased and was in the form of extra-judicial killings, illegal arrests and detention, sexual exploitation and use of excessive force. All the violence which was perpetrated against the children traumatised them and led to psychological and mental disorders. The main reasons due to which psyche of the children are affected are loss of parents, close relatives and basic livelihood.⁵ This also leads to change in societal behavior and loss of education. Education is one of the resources which is used to develop the mind of the child and it is impacted by occupation of schools by armed forces.⁶ The proximate presence of armed forces created a sense of insecurity and fear amongst the children and because of which dropout rates increased to an extent.

This paper seeks to critique the J&K Juvenile Justice Act, 2013⁷ as the important provisions laid down for the welfare of the juveniles are not

1. Jammu Kashmir Coalition of Civil Society (JKCCS) - Terrorized: Impact of Violence on the Children of Jammu and Kashmir (30-11-2018).
2. M. Mohsin Alam Bhat & Suroor Mander, "Purgatory in Kashmir: Violation of Juvenile Justice in the Indian Jammu and Kashmir" (Yoda Press, 2018) <<https://ssrn.com/abstract=3367308>> accessed on 6-11-2019.
3. UN General Assembly, Convention on the Rights of the Child, 20-11-1989, United Nations, Treaty Series, Vol. 1577, p. 3.
4. *Ibid* (n 2) 3.
5. Asima Hassan & Aneesa Shafi, "Impact of Conflict Situation on Mental Health in Srinagar, Kashmir"(2013) 10 BJS 103 <<http://www.bangladeshsociology.org/BEJS%2010.1Asima%20Hassan.pdf>> accessed on 6-11-2019.
6. Samir Ahmad, "Impact of Militarization on Education in Kashmir" (12-11-2013) <<http://blogs.cuit.columbia.edu/peace/2013/11/12/impact-of-militarization-on-education-in-kashmir/>> accessed on 2-11-2019.
7. Jammu and Kashmir Juvenile Justice (Care and Protection of Children) Act, 2013.

implemented. It also states that first, the international Juvenile Justice Standards, Constitutional Principles and specific laws are not followed properly; second, to show that the mental health and education of the juveniles are most affected due to the impact of violence on children.

This paper is an in-depth analysis of forms of violence like illegal detentions, sexual exploitation and use of pellet firing shotgun which are perpetrated by armed forces. Further, the impact of such forms of violence on children are stated and described in detail.

2. INTERNATIONAL JUVENILE JUSTICE STANDARDS SPECIFIC LAWS RELATED TO CHILDREN

2.1 Standard Minimum Rules for the Administration of Juvenile Justice

The Beijing Rules are standard rules which are made for the protection, safeguard and welfare of juveniles in conflict with law, to protect Fundamental Rights and remedies of children and as a directive to States which shall be applied and followed for the preservation of child rights. These rules shall be followed impartially while handling any juvenile offender and no discrimination is to be done on the basis of race, sex, caste, etc.⁸ The main objective behind enacting these rules is that juveniles shall be treated in proportion to the circumstances of the offender and offence. The “principle of proportionality⁹” shall be kept in mind and while dealing with juveniles the individual circumstances of the offender shall also be given importance. There remains a clear demarcation between juvenile and adult. Juveniles shall be treated differently from adult.¹⁰ Basic procedural and institutional safeguards such as right to silence, presumption of innocence, right to presence of parent or guardian, establishment of juvenile justice homes and juvenile justice courts shall be recognised and guaranteed to all the offenders.¹¹ The privacy of juvenile offenders shall be respected and no harm shall be done to their image.¹² The Beijing Rules provides that detention pending trial shall be avoided and alternative measures like close

8. UNGA Standard Minimum Rules for the Administration of Juvenile Justice (“The Beijing Rules”) Resolution adopted by the General Assembly, 29-11-1985, A/RES/40/33.

9. *Ibid.*

10. *Ibid.*

11. *Ibid.*

12. *Ibid.*

supervision, etc. shall be used.¹³ Detention pending trial shall be used as a last resort and vulnerable juvenile offenders shall not be kept with adult detainees.¹⁴ These types of special standard rules are made to safeguard the interests of the child and to save the childhood of the children. Stone pelters and protestors expressing political opinions are illegally detained and kept in jails with adults. No guidelines of Juvenile Justice Act are followed and this is how child rights are violated. This is why protection provided by Beijing Rules is more essential for the protection of children in Kashmir where children are constantly living in fear and facing armed violence.

2.2 United Nations Convention on the Rights of the Child, 1989

The UNCRC is a human rights treaty signed in 1989 which provides for minimum rights of the children and works to promote and safeguard social, political, economic and cultural rights of the children.¹⁵ Its main objective is to provide children with necessary care, protection and assistance so that they can fully take up their responsibilities in the community. The child rights are protected by this significant development in international law by adopting UNCRC. This treaty recognises child as a vulnerable human being and hence has incorporated child friendly mechanisms which shall be followed by State Parties while dealing with them. It provides that State Parties shall protect children and no forms of exploitation shall be done on the basis of race, language, sex, status, belief, etc.¹⁶ The Convention recognises that child has a right to freely express their opinions and no sort of discrimination shall be done. The treaty provides that appropriate legislative and administrative measures shall be taken into account by State Parties for the protection and preservation of the child from physical or mental violence, torture, sexual abuse and ill-treatment.¹⁷ As per Article 12, children shall be provided with an opportunity of being heard in any judicial or administrative proceeding in which he is tried and has a right to participate in the process of own development as well as nation's development.¹⁸ Children have a right to free and compulsory education so

13. *Ibid*, Part II.

14. *Ibid*.

15. Farhana Latief, "Children in Kashmir and Access to Justice: Normal Law in Abnormal Situations, A Law Reform Study of Children in Conflict" (TISS, 2014) <https://www.academia.edu/10452395/-Children_in_Kashmir_and_Access_To_Justice> accessed on 1-11-2019.

16. UNCRC 1989, Art. 2.

17. UNCRC 1989, Art. 19.

18. UNCRC 1989, Art. 12.

that child's personality, mental and physical ability gets developed.¹⁹ As per Article 38, State Parties must protect and take care of children who are affected by the armed conflict.²⁰ This Convention is an important document which provides for the development of children and their protection which is very necessary in the situations like Kashmir where children are exposed to harsh realities of armed conflict. Children of Kashmir need extra care, protection and since they are the most vulnerable segment witnessing and experiencing the traumatised life.

2.3 Jammu and Kashmir Juvenile Justice Act, 2013

Juvenile Justice Act is enacted to incorporate such provisions which protect and safeguard the interests of the child by catering to their needs required for growth and development.²¹ As children are the most vulnerable segment of the society, they have to be treated differently from adults and main focus remains upon reintegration and re-socialisation of the children and not upon criminalisation and incarceration.²² This law also provides various child friendly mechanisms which can help in the adjudication and disposition of the matters by taking into account the best interests of the child.²³ The State of Jammu and Kashmir enacted its separate Juvenile Justice Act in 1997 which was a copy of the JJ Act of India, 1986. Afterwards, in the year 2013 another J&K JJ Act was passed which was same as the JJ Act passed in India in the year 2000. This act provided for establishment for observation homes, juvenile justice board for adjudication of the matters and separate procedures for dealing with juveniles shall be institutionalised.²⁴ But there is no implementation of International Juvenile Justice Standards and constitutional principles apart from the enactment of J&K JJ Act, 2013. This act contains certain limitations like Article 37(b) of UNCRC which provides that no child shall be arbitrarily and illegally detained,²⁵ Article 37(a) which states that no torture or inhuman treatment shall be done with children²⁶ but both these provisions were not enacted in J&K JJ Act.

19. UNCRC 1989, Art. 28.

20. UNCRC 1989, Art. 38.

21. JJ Act, 2013

22. Mander (n 2) at 10.

23. Rayan Naqash, "Jammu and Kashmir Finally Moves to Enforce Juvenile Justice Laws—But it won't be Easy" (Scroll.in 11-3-2018) <<https://scroll.in/article/870723/jammu-and-kashmir-finally-moves-to-enforce-juvenile-justice-laws-but-it-wont-be-easy>> accessed on 5-11-2019.

24. Latief (n 15) 26.

25. UNCRC 1989, Art. 37(b).

26. UNCRC 1989, Art. 37(a).

3. IMPACT OF ARMED CONFLICT ON CHILD RIGHTS

3.1 Use of Pellet Firing Shotgun

Pellet firing guns which are generally used to curtail democratic rights of the protestors have devastating and fatal consequences on both adults and children.²⁷ It is considered as one of the dangerous weapons when it is used by the law enforcement agencies to deter and restrict civilian population. Many serious killings and injuries have been perpetrated which has ultimately caused serious human rights violations. As per J&K State Human Rights Commission, 1726 people including children were injured by metal pellets during the year 2016.²⁸ Young children who are often caught up doing protests and stone pelting have been impacted a lot by this “crowd control” method. School going boys and girls have lost their childhood and education as they have lost vision because of which they are not able to read, write and study properly.²⁹ They have also lost support of their livelihood because of loss of their parents or close relatives’ eyesight which means that their parents cannot earn anymore and it shifts the burden of family on the children. These pellet guns have lifetime consequences on children’s mind which causes their mental condition to deteriorate ultimately leading to psychological and physiological damage. These so called “non-lethal” weapons have also impacted wellbeing and access to healthcare facilities.

3.2 Illegal Detention

Illegal detention is used by Jammu and Kashmir authorities to use the power arbitrarily by arresting and imprisoning children for an indefinite period of time without following the special provisions which are provided in Jammu and Kashmir Juvenile Justice Act, 2013.³⁰ As per Section 4(1) of the J&K JJ Act, specialised institutions like Juvenile Justice Boards shall be set up

27. Sarojini Nadimpally, “Use of Pellet Guns has Caused a Public Health Crisis in Kashmir” (The Wire 29-3-2017) <<https://thewire.in/health/pellet-guns-kashmir-public-health>> accessed on 3-11-2019.

28. Office of the United Nations High Commissioner for Human Rights, Report on the Situation of Human Rights in Kashmir: Developments in the Indian State of Jammu and Kashmir from June 2016 to April 2018, and General Human Rights Concerns in Azad Jammu and Kashmir and Gilgit-Baltistan (13-6-2018) 21.

29. Amnesty International, “Losing Sight in Kashmir: The Impact of Pellet-Firing Shotguns”(2018) <<https://amnesty.org.in/losing-sight-kashmir-impact-pellet-firing-shotguns/>> accessed on 5-11-2019.

30. Amnesty International, India: A “Lawless Law”: Detentions under the Jammu and Kashmir Public Safety Act (Report) (21-3-2011) ASA 20/001/2011.

for adjudicating the cases of children in conflict with law.³¹ The authorities apply false and arbitrary charges by not taking into account the real age of detained child and hence violating their rights. The State has also violated international Conventions with respect to child rights and constitutional principles. One of the draconian and repressive law which is arbitrarily used is Jammu and Kashmir Public Safety Act, 1978 which authorises the authorities to detain the individuals for undefined acts which are “prejudicial to the security of the State” and for other acts which are “prejudicial to the maintenance of public order”.³² As per Amnesty 2011 report, it is stated that child rights were violated by arbitrarily detaining children without adhering to the international commitments.³³ Proper institutions, laws and procedures should be established to deal with the juveniles as per the Convention on the Rights of the Child. As per international law, anyone who is below 18 years of age would be considered as child and certain juvenile justice standards like “Beijing Rules” have to be followed while dealing with them. The detention of children is strictly prohibited by both JJ Act, 2013 and UN Standard Minimum Rules but it can be used as a last resort in some special circumstances. These rules mentioned that child detainees should not be kept with adults and proper procedure should be followed without violating life and liberty of children. As a result, Section 8 of Public Safety Act was amended in 2012 and it provided that no person under 18 years of age can be detained. Pursuant to this amendment, Jammu and Kashmir Juvenile Justice Act, 2013 came into picture which provided for establishment of Juvenile Justice Boards, Juvenile Courts and Observation Homes for the protection and preservation of juveniles. After all in these steps and initiatives taken for the protection of children by the government, there were violations of child rights by illegally detaining stone pelters and protestors, not observing the guidelines provided by JJ Act, 2013 and by ill treatment and torture done with the children which ultimately affects the psychological health and social behavior of the child.

3.3 Sexual Violence

Sexual violence during armed conflict is often treated as one of the grave and heinous violations against the children and it is reported that globally 35 per cent of the conflicts involved sexual violence in some form or other.

31. Amnesty International, Tyranny of a “Lawless Law”: Detention without Charge or Trial under the J&K Public Safety Act (12-6-2019). <<https://amnesty.org.in/wp-content/uploads/2019/06/Tyranny-of-A-Lawless-Law.pdf>> accessed on 3-11-2019.

32. Jammu and Kashmir Public Safety Act, 1978.

33. Tyranny of a lawless law (n 31) 16.

Armed forces and militants perpetrate sexual abuse, harassment, assault and rape against the locals and civilians and they are also protected by the impunity which is provided by repressive law Armed Forces Special Power Act. During the year 2018, a petition was filed by Support Group for Justice for Kunan Poshpora providing 143 cases of sexual violence perpetrated by state actors between 1989- 2017 to State Human Rights Commission. One of the most dreadful crime happened with 8 year old girl residing in Kathua district of Jammu was abducted, raped and murdered by police authorities to instill fear amongst the community of the girl. Women and children are affected socially, psychologically and emotionally as they are most vulnerable sections of people. Such types of violence traumatise and create fear in the minds of communities and family members of victims. State Parties are under obligation to protect and preserve children from all types of sexual violence and exploitation by adopting such laws and educational measures provided by the Convention on Rights of the Child, 1989.

3.4 Loss of Education

Education provides children with decision making powers, reasoning powers and helps in the development of mind by providing knowledge.³⁴ Jammu and Kashmir being the highest militarised zone in the world directly impacts children's unimpeded access to education as schools and other educational institutions came under the occupation of security personnel. Children are the most vulnerable segment and the impact of armed conflict at this initial and essential phase of life violates their free and safe access to education. Children are victims of economic or sexual exploitation, harassment and continuous observation because of the presence of security forces in the close proximity of schools and other educational institutions.³⁵ Children's security and rights are violated and they are being mentally and psychologically affected by the large-scale occupation of armed forces near schools. As per the 2006 report by Public Commission on Human Rights, it was found that total 46 schools were directly under the control of security forces which shows the schools and other educational institutions were actively used as military base camps and interrogation centers.³⁶ Parents are hesitant to send their children to school in situations of continued conflict and as a result the dropout rates of

34. Stuart Maslen, "Relevance of the Convention on the Rights of the Child to Children in Armed Conflict" (1996) 6 *Transnational Law & Contemporary Problems* 332.

35. Report on the Situation of Human Rights in Kashmir (n 30) 33.

36. Jammu Kashmir Coalition of Civil Society (n 1) 22.

school going children shoot up.³⁷ Children are continuous victims of abuse, harassment and abduction and with this fear in mind they are not allowed to continue their education. This has also led to increase in lower student enrollment and teacher recruitment.³⁸ The consequences of occupation of schools by armed forces and the establishment of military base camps near educational institutions are large in number. Schools were reported to be closed for almost four months in 2016 because of the ongoing protests and this led to interruption in education and non-completion of the curriculum on time.³⁹ Approximately 30 schools were burnt and partially destroyed by security forces in Jammu and Kashmir in 2016 as per United Nations report on Children and Armed Conflict which shows that the large-scale militarisation has affected the education system of Kashmir and which has led to lack of development in that region. As per JKCCS report, more than 185 students were killed between 2003-2017 and among them 136 students were killed by J&K Police and armed forces which shows that there is a rapid rise in the incidents of violence against students. These types of violent incidents like killings, harassment, etc., establish that children are not given special protection and also they are not treated as adults.

3.5 Mental and Psychosocial Disorders

As defined by WHO, health is defined as complete mental, physical and social wellbeing of a person and not just free from any illness.⁴⁰ One of the important components of health is mental health which refers to psychological wellbeing and a state of balance between the individual and surrounding world. Good mental health leads to peace, happiness and satisfaction in life. The consequences of violence and conflict impact children in a very drastic way. It can lead to psychological stress and post-traumatic stress disorder.⁴¹ The impact can be felt directly when children go through illegal detentions, sexual exploitation, torture, rape, etc. The psyche of the growing mind is also affected when children go through the loss of their family members, disruption of schools and colleges and loss of surroundings and communities developed around them. It was found that mental health of the children is mostly affected by the trauma which was caused and experienced due to the killing of the close relatives of the

37. *Ibid.*

38. Carolyn Hamilton and Tabatha Abu El-Haj, "Armed Conflict: The Protection of Children under International Law" (1997) 5 International Journal on Child Rights 1.

39. Report on the situation of Human Rights in Kashmir (n 30) 34.

40. Shafi (n 5) 102.

41. Maslen (n 34) 332.

children (49 per cent) and when the relatives are detained and tortured (15 per cent).⁴²

Armed conflict also affects the physical, emotional and mental development of child in various ways. The traumatic events witnessed by children make them prone to increased anxiety, depression and instill a sense of fear of being separated from their families.⁴³ The concentration and determination level of a child gets reduced and they develop violent and aggressive behavior which is hampering their childhood. The emotional repercussions of sudden death of loved ones and violence inflicted on family members are detrimental to healthy childhood.

It was found that around 80,000 people have visited mental health experts and amongst them three-fourth of people have been diagnosed with psychological and mental disorders during the year 2005-2006 and this was found in the survey of State Mental Health Society.

Loss of education, exposure to sexual violence, parental loss and frequent displacement leads to mental, social and emotional disorder which traumatises children and affects their thinking. Children are not able to address these problems because of lack of cognitive abilities and this impacts their social behavior and actions. These traumatised experiences make them more introvert regarding the internal conflicts which are still not resolved and this leads to disturbed mental state of a child. It has been found that children who are born in war-torn areas have gone through acts of violence and hence they are mentally tough but it is very difficult for a child who has not gone through war like conditions to cope up with the situations when they are exposed to war.

4. IMPACT OF STRUCK DOWN OF ARTICLE 370 ON RIGHTS OF CHILDREN

The situation of children of Kashmir has been continuously deteriorating as serious and grave child rights violations have taken place. All the international juvenile justice standards and specific provisions safeguarding the rights of children are not duly considered and implemented in the situations of the armed conflict. Jammu and Kashmir Juvenile Justice Act, 2013 which is enacted to protect and promote the best interests of the

42. Nuzhat Firdous, "Kashmir Conflict: Alarming Mental Health Consequences" (2015) 3 IJIP 7.

43. *Ibid.*

children who are in conflict with law is not functioning properly.⁴⁴ The main objective of the law is to reintegrate and rehabilitate the children who have suffered violence but both armed forces and J&K police have failed to fulfill their responsibilities. These children shall be dealt sensitively with proper care and assistance by helping them to reform and socialise with their community and society. As per a fact-finding report called Kashmir Caged, it was found that children were illegally and arbitrarily picked and detained by the security forces to create a sense of fear in the minds of civilian population.⁴⁵ Stone pelters and young protestors were also detained and tortured and the guidelines provided by J&K Juvenile Justice Act are not fulfilled as child detainees are kept with adult prisoners. As per the laws and conventions, children shall be treated differently from adults as their vulnerable behavior is susceptible to the aggressive behavior and violence. The detained juveniles may be killed in the custody of the security forces or enforced disappearances may happen against them. Some forms of violence like sexual abuse, harassment and molestation still happens with young school going girls and women. Parents do not permit their children to attend schools and colleges because of the fear and insecurity which ultimately lead to increase in dropout rate of school. Schools and other educational institutions have been tremendously affected. This has led to closing of institutions which ultimately impacted education of children and this can be a reason for slowing down of the process of development of child. Further, a petition was filed in September 2019 by two renowned child rights activists on the condition and plight of the children who were illegally detained and asked for the report of J&K Juvenile Justice Committee on this issue. A report was filed by Juvenile Justice Committee of J&K High Court in October 2019 which mentions that juveniles were detained but 25 of them were released and 21 were kept in observation homes.⁴⁶ This shows that Section 18 of J&K Juvenile Justice Act was not followed which provides that no proceeding or order can be passed against juveniles.⁴⁷

44. Latief (n 15) at 26.

45. Jean Drèze, Kavita Krishnan, Maimoona Mollah and Vimal Bhai, "Kashmir Caged: A Fact Finding Report" (Indian Cultural Forum 14-8-2019) <<https://indianculturalforum.in/2019/08/14/kashmir-caged-a-fact-finding-report/>> accessed on 6-11-2019.

46. Juvenile Justice Committee of Jammu and Kashmir High Court, "Report on illegal Detention of Children in Kashmir" 42 (24-9-2019) <<https://cjp.org.in/wp-content/uploads/2019/10/JJC-Report-on-Illegal-Detention-of-Children-in-Kashmir.pdf>> accessed on 6-11-2019.

47. JJ Act, 2013, S. 18.

The violations against children are perpetrating at an alarming rate which causes mental and emotional disorder to the child so, the government should look into the trauma and plight of the children and help them rehabilitate. Also, strict actions should be taken against the armed forces if they continue to commit violence against the children.

5. RECOMMENDATIONS

1. All the international juvenile justice standards, constitutional principles and specific laws related to children should be stressed and implemented.
2. Juvenile in conflict with law should be treated differently from adult detainees.
3. Armed forces and security personnel shall be punished as per the procedures laid down if they violate the rights of the children.
4. Education, which is one of the greatest asset and resource of the child shall be given importance in the conflict situations so that it can help in the process of development of the child.
5. Armed forces shall not set up their camps proximate to the schools and educational institutions as it makes the child insecure and frightened.
6. The main focus of the government shall be on reintegration and rehabilitation of the child in conflict with law.
7. Illegal detention of the children shall not take place as it impacts the psyche of the child. Child goes through mental and psychological disorder due to continued trauma and fear so they should be protected with due care and assistance.

6. CONCLUSION

This paper sought to establish that the current legislation which is enacted for the protection of the juveniles that is Jammu and Kashmir Juvenile Justice Act, 2013 is not implemented and followed properly by the authorities and government. There are a number of loopholes in the current framework which should be amended as per the best interests of the child. All the international juvenile justice standards like Beijing Rules, UNCRC, etc., should be implemented in all the domestic laws of the children as India

is a signatory to them. This paper provides that a child should be given due care and assistance in the situations of the armed conflict as his/her mind is very susceptible to the violent behavior and violence which impacts mind in both emotional and physical way. The impact of violence on education should be the most important thing on which government should work upon. Children are considered as future pillars of the society so their overall development like health, education should be given utmost importance. The author has also proposed certain amount of recommendations which are very important for safeguarding the rights of the children.

"Children are an integral part of our society," said the Minister for Social Justice and Empowerment, Krishna Pal Gargi while addressing the Transgender Panchayat on 3 August 2019. Despite being recognized as an "integral" part of our society, transgenders are one of the most vulnerable and marginalized groups in our society. They are often subjected to discrimination, violence, and social exclusion. The government has a duty to protect their rights and ensure their well-being. The Jammu and Kashmir Juvenile Justice Act, 2019, is a landmark legislation that aims to provide a legal framework for the protection and welfare of children in the state. It covers various aspects of child rights, including their right to education, health, and a safe environment. The Act also addresses the issue of child labor and child marriage, which are prevalent in the state. The government has a responsibility to ensure that the Act is implemented effectively and that the rights of children are protected. This paper provides a critique of the Act and offers recommendations for its improvement. It highlights the strengths and weaknesses of the Act and suggests ways in which it can be made more effective. The author also discusses the importance of child rights and the role of the government in protecting them. The paper concludes by emphasizing the need for a comprehensive approach to child rights protection and the importance of involving all stakeholders in the process.

CHILDREN BEYOND GENDER – RELOCATING THE RIGHTS AND STATUS OF TRANSGENDER CHILDREN IN THE CONTEXT OF JUVENILE JUSTICE SYSTEM OF INDIA

—Konina Mandal & Anwesha Panigrahi*

ABSTRACT

Six long years have passed since the Supreme Court of India decided on the issue of persons falling outside the traditional male/female gender binary. Its landmark decision, National Legal Services Authority v. Union of India¹ not only recognised transgender as a “third gender” category, but at length discussed the complex concepts of gender and identity. Welcomed as progressive and empowering, the half-hearted follow up of the NALSA judgment can lead us to conclude that the transgender community is vulnerable even today. The plight of the transgender adult percolates also to the transgender youth, an even more vulnerable and largely invisible category within the transgender community. Of the total number of 4.9 lakh transgenders identified by the census, 55,000 are children between the age group of 0-6 years.² As a nation that is concerned about its children, India has a plethora of child friendly legislations. One of the foremost legislations which concern children is the Juvenile Justice Care and Protection of Children Act, 2015. Covering children who are in conflict with the law as well as children who need care and protection, the JJ Act has a very wide ambit. The Transgender Bill which was recently passed by the Lok Sabha also does not show sufficiency in its provisions regarding transgender children. Therefore, the minority within minorities, who are a group most vulnerable are not being ensured justice enough. Rehabilitation of transgender children, who had no families to begin with or who have lost support of their families is what this paper yearns for. It cannot be denied that such children

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1. *National Legal Services Authority v. Union of India*, (2014) 5 SCC 438 : AIR 2014 SC 1863.
2. Rema Nagarajan, “First Count of Transgender in Census: 4.9 lakh” *The Times of India* (TNN, 1-5-2014).

need a non-binary and gender-expansive environment to grow in. Arguing in favour of inclusion of transgender children in the JJ Act, as children in need of care and protection, it aims to explore the vulnerabilities, status, rights and restoration of such children.

Keywords: Transgender, Juvenile Justice, Children, Gender, Rights.

1. INTRODUCTION

“Transgenders are an *abhinn ang* (integral part) of our society,” said the Minister for Social Justice and Empowerment, Krishan Pal Gurjar while introducing the Transgenders Rights Bill, on 5 August 2019.³ Despite being recognised as an “integral” part of our society, transgenders are one of the most persecuted communities not just in India, but all over the world. Systematic marginalisation, denial of equal rights and discrimination prevail in their lives from the moment they are born owing to the generally perceived violation of conventional gender expectations.⁴

The traditional definition of transgender as an umbrella term that includes people who do not identify with the sex assigned to them at birth as their gender identity,⁵ very much applies to even children. They might face the same mismatch between how they were categorised at birth and their emerging gendered sense of self.⁶ Such transgender children are paid little attention and are largely invisible. Much like themselves, their rights are also left unnoticed and uncared for.

India is a signatory to a number of international human rights treaties and boasts of a Constitution that encompasses and ensures a wide range of Fundamental Rights to all its citizens - young and old. Various child-friendly legislations in India also oblige to the said rights. However, the rights of transgender children are barely touched upon under the ambit of

3. Anish Gawande, “Transgender Citizens: The Other ‘Integral Part of India’ that may have been Shortchanged by its Parliament” (Quartz India, 7-8-2019) <<https://qz.com/india/1682971/indias-lok-sabha-passes-transgenders-bill-without-serious-debate/>> accessed on 20-10-2019.

4. Arnold H. Grossman and Anthony R. D’Augelli, “Transgender Youth: Invisible or Vulnerable”, *Journal of Homosexuality* [2006] 51:1, 111-128, 113.

5. UNICEF, “Eliminating Discrimination Against Children and Parents Based on Sexual Orientation and/or Gender Identity” (Position Paper No. 9, 2014) 2.

6. Elijah C. Nealy, *Transgender Children and Youth: Cultivating Pride and Joy with Families in Transition* (1st edn., W.W. Norton, 2017) 12.

these legislations. This paper begins with an attempt to discern the rights of transgender children under various international human rights instruments, their status under the Indian Constitution and Juvenile Justice Act, ending with arguments favouring the inclusion of transgender children under the purview of the JJ act, as children in need of care and protection and recommendations to ameliorate their position in the system.

Although, the paper transits many legislative instruments and precedents, the scope of it is limited to the Juvenile Justice Care and Protection of Children Act, 2015 (hereinafter, JJCP, 2015) which acts as the primary guide when matters related to “children in need of care and protection” arise.

2. LOCATING THE RIGHTS OF THE TRANSGENDER CHILD GLOBALLY

Transgender rights arise from human rights.⁷ Universal, inalienable and indivisible, human rights such as the right to life, non-discrimination, equality, speech and expression, security, privacy, etc., are distinctly provided in multiple human rights treaties and legislations around the world. Guaranteed to people who fall under the category of cisgender,⁸ the very same rights also apply to transgender people. Starting from the International Bill of Rights⁹ to the Convention against Torture,¹⁰ rights of the transgender are enshrined in various international covenants. One of the most apposite international covenants, the Yogyakarta Principles, hailed as a “milestone for lesbian, gay, bisexual and transgender communities”, lays down global standards for sexual rights and gender equality. It strongly recognises that gender identity and sexual orientation are inherent to every individual and must not be rationales behind abuse and prejudice.¹¹

7. Tia Powell, Sofia Shapiro and Ed Stein, “Transgender Rights as Human Rights” [2016] *AMA Journal of Ethics* 18 1126-1131, 1127.

8. The Oxford English Dictionary defines Cisgender as a person whose sense of personal identity corresponds to the sex and gender assigned to him or her at birth.

9. UNGA Universal Declaration of Human Rights (adopted 10-12-1948) 217-A (III) Arts. 2, 3, 5, 7, 9, 12, 19 and 20; International Covenant on Civil and Political Rights (adopted 16-12-1966, entered into force 23-3-1976) (1976) 999 UNTS 171 Arts. 2, 6, 7, 9, 17, 19(2), 21, 22(1), 26; UNGA, International Covenant on Economic, Social and Cultural Rights (adopted 16-12-1966) UNTS 993 Art. 2.

10. UNGA Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10-12-1984) UNTS 1465 Arts. 1(1) and 2(1).

11. ICJ, “Yogyakarta Principles: Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity”, March 2007.

The most contested right with respect to the LGBTQI communities and specifically the transgender community, is the legal right to gender recognition. Every person, whether an adult or child has the right to choose their gender. This right to choose one's gender, which flows from a recognition of fluidity, will have value only when coupled with the consequent reliance on formal legal acceptance that authorises them to identify with their personal choice.¹² Unfortunately, the self-determination of gender identity has not been acknowledged by most countries in the world. While some countries like Malta, Ireland, Denmark have recognised the right to choose gender identity individually,¹³ other countries like Chile and Lithuania are hesitant in bringing changes into their letters of law.¹⁴ There is, globally, a lack of legislations which recognise the rights of gender variant people, especially children.

Individuals correspondent to the above said rights, whether cisgender or transgender, include children. In the context of children, the most authoritative international instrument laying down their rights is the UN Convention on the Rights of the Child (hereinafter UNCRC), one of the most widely ratified international instruments. Currently it has 196 States obligated towards it, including India. The Committee on the Rights of the Child, which monitors the implementation of the UNCRC, recognises four cross-cutting norms also known as the "general principles" which have been given special status. The right to non-discrimination (Article 2), best interest of the child (Article 3), right to life, survival and development (Article 6) and right to be heard (Article 12) are fundamental not only as rights themselves, but also as interpretative guides to realising all the other rights enshrined in the Convention.¹⁵ The importance of these four basic rights cannot be overemphasised. This is however, not to say that other rights in the Convention are not of equal importance. No right is more important than the other. Transgender children come within the purview of the CRC. However, amidst those, protection from discrimination¹⁶; right

12. Ana-Maria Bucataru, "Using the Convention on the Rights of the Child to Project the Rights of Transgender Children and Adolescents: The Context of Education and Transition" (2016) QMHR 3(1), 71.

13. Aron Macarow, "These Eleven Countries are Way Ahead of the US on Trans Issues" 9-2-2015 <<https://archive.attn.com/stories/868/transgender-passport-status>> accessed on 20-10-2019.

14. Bucataru (n 12) 73.

15. UNICEF, "What is the UNCRC?" (UNICEF UK) <<https://www.unicef.org.uk/what-we-do/un-convention-child-rights/>> accessed on 20-10-2019.

16. UNGA Convention on the Rights of the Child (adopted on 20-11-1989) UNTS .

to be protected from all forms of violence¹⁷; the right to the best possible health care¹⁸ and the right to a broad-based curriculum which helps develop life skills, talents and abilities, including the ability to make well-balanced decisions and develop a healthy lifestyle¹⁹ are particularly important.²⁰

3. INDIAN POSITION ON THE TRANSGENDER COMMUNITY: JUDICIAL PRONOUNCEMENT TO LEGISLATION

Five years ago, Justices Radhakrishnan and Sikri of the Supreme Court of India, in their landmark pronouncement *National Legal Services Authority v. Union of India*,²¹ acknowledged that “seldom, our society realises or cares to realise the trauma, agony and pain which the members of transgender community (hereinafter TC) undergo”.²² That discrimination and abuse is rampant towards this community on account of “moral failure” of society to accept individuals with gender variant identities has been noted by the Supreme Court at the very outset of the judgment. The main issue this case presented before the Supreme Court was the issue of legal recognition and declaration of the gender identity of the transgender community necessitated by the fact that non-recognition of such identity violates their Right to Equality (Article 14) and Right to Life (Article 21) under the Constitution of India.

To ameliorate the status of the transgender community within the society, the Supreme Court relied on various international agreements, legislations and policies of countries from Germany to Argentina, to come to the conclusion that the Indian Constitution needs to be interpreted in a way that legal recognition of gender of a transgender person is included. The Court identified several provisions of the Constitution which were applicable to the TC. By interpreting “any person” under Article 14 of the Constitution to encompass within its ambit transgender persons, the Court rightly extended equality before law and equal protection to the TC which was earlier denied due to non-recognition. Bestowing this equality meant

17. UNCRC 1989, Art. 19.

18. UNCRC 1989, Art. 24.

19. UNCRC 1989, Art. 29.

20. Children’s Rights Alliance for England, *Children Speak Out on Transgender Issues* (July 2015) London <http://www.crae.org.uk/media/118087/CRAE-BULLETIN_TRANS_FINAL.pdf> accessed on 21-10-2019.

21. *National Legal Services Authority v. Union of India*, (2014) 5 SCC 438 : AIR 2014 SC 1863.

22. *Ibid*, 1.

uniform enjoyment of the freedoms and rights advanced by the law.²³ Further, Article 15 which prohibits discrimination against any citizen on various grounds including sex, Article 16 which prohibits discrimination relating to employment opportunities and Article 19 which ensures freedom of speech and expression, expression here meaning the ability to express ones self-perceived gender have been found by the Supreme Court to apply to the TC. Lastly, the all-encompassing ambit of Article 21²⁴ was once again invoked to include legal recognition of gender identity as a “part of the right to dignity and freedom” guaranteed by the Indian Constitution as “gender constitutes the core of one’s sense of being as well as an integral part of a person’s identity.” This way the Supreme Court, upheld the rule of law, broadened the scope of constitutional rights and ensured justice to the marginalised transgender community by not only recognising them as a “Third Gender” but ensuring that their Fundamental Rights are safeguarded. The Court however acknowledged that the heavy reliance on international Conventions was necessary as there exists no legislation in India which deals with the rights of the transgender community. The judgment also laid down some important directions to the Central and State Governments which were required to take several steps to enhance the problems faced by the community by incorporating the recognition of “third gender” in all documents, giving them the status of “socially and educationally backward class citizens” for reservation purposes in educational institutions and public employment and framing social welfare schemes for the community. The Court’s progressive outlook in comparison to the *Suresh Kumar Kaushal* Bench’s decision to recriminalise homosexuality was indeed a revitalising move. Here it is important to mention that even before the NALSA judgment, in 2013, the Ministry of Social Justice and Empowerment, acknowledging the plight of the transgender community had called for the formation of an Expert Committee to “study the problems of the transgender community and suggest suitable measures to address them.”²⁵ The report came up with many solutions and recommendations – from gender sensitisation to inclusion of “transgender” in definition of “child” in the Juvenile Justice Act. However, despite the Court’s reliance on the report and directions that the report should be read in conjunction

23. Manasi Bhushan, Analysis on Transgender Persons (Protection of Rights) Bill, 2016 (India Law Journal) <<https://www.indialawjournal.org/analysis-on-transgender-persons.php>> accessed on 21-10-2019.

24. Constitution of India, 1950.

25. Ministry of Social Justice and Empowerment, Report of the Expert Committee on Issues Relating to Transgender Persons 27-10-2014 1 <<http://socialjustice.nic.in/writereaddata/UploadFile/Binder2.pdf>> accessed on 20-10-2019.

with the judgment passed by it for implementation purposes, nowhere did the “transgender child” find any further mention in the NALSA judgment. Perhaps a mention of transgender children by the honourable Supreme Court would highlight their invisibility.

One year into the landmark judgment, an evaluation of the implementation of the judgment manifested that efforts undertaken by the Central and State Governments have been lukewarm since the inception of the Court’s directions. Even though the UGC made some positive strides²⁶ in making special arrangements for transgender students in the education arena, the inclusion seemed superficial without addressing some of the real challenges faced by them, like bullying for instance.²⁷ Violence perpetrated on the community also did not cease with several instances of brutal torture and humiliation being reported.²⁸

After two failed attempts to pass a legislation on transgender rights, one in 2014 and another in 2016, even today, five years later, the introduction of the Transgender Persons (Protection of Rights) Bill, 2019 is flawed. Lack of clarity on self-perceived identity effectively curtailing recognition of gender in tune with the NALSA judgment,²⁹ inconsistent penal provisions that put transgender persons at greater risk of sexual assault³⁰ and the mention of “rehabilitation centres” for transgender children are a few provisions which denote the Bill’s regressive nature. However, having shed light on some of the flaws, it is important to appreciate that it has taken into account and mentioned, for the first time, transgender children in Section 12.³¹ Even the

26. “Ensure Transgenders Feel at Home, UGC to Universities”, *The Times of India* (TNN, 15-2-2015) <http://timesofindia.indiatimes.com/articleshow/46248552.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst> accessed on 20-10-2019.

27. Danish Sheikh, “Transgender Rights: One Year of NALSA” *The Daily O* (18-4-2015) <<https://www.dailyo.in/politics/transgender-rights-bill-nalsa-tiruchi-siva-section-377/story/1/3236.html>> accessed on 20-10-2019.

28. Danish Sheikh and Sanhita Ambast, “How India’s Law Fails LGBT People” (Asia and the Pacific Policy Society, 26-4-2016) <<https://www.policyforum.net/indias-law-fails-lgbt-people/>> accessed on 20-10-2019.

29. PRS Legislative, Issues for Consideration: The Transgender Persons (Protection of Rights) Bill, 2019 <<https://www.prsindia.org/node/842865/chapters-at-a-glance>> accessed on 20-10-2019.

30. Staff Reporter, “DCW: Transgender Bill Encourages Sexual Assault on Transgender” *The Pioneer* (New Delhi 27-7-2019) <<https://www.dailypioneer.com/2019/state-editions/dcw--transgender-bill-encourages-sexual-assault-on-transgenders.html>> accessed on 20-10-2019.

31. The section states that no child shall be separated from parents or immediate family on the ground of being a transgender, except on an order of a competent court, in the

2016 Draft National Plan of Action for Children missed out transgender children in it despite having mentioned children with disabilities and those affected with natural calamities.³² Therefore, the fact that the Bill even mentions “child” is significant.

4. MINORITY WITHIN MINORITIES: VULNERABILITIES OF THE TRANSGENDER CHILD

As mentioned above, the transgender community is already a minority community all over the world. For children, who are anyway a vulnerable lot, displaying gender a typical behaviour can further increase their vulnerability.³³ Confronted with myriad challenges, the vulnerability of such children is mainly related to health – physical and mental, safety, violence upon disclosure or knowledge of transgender status and alienation from parents and community.³⁴ Acceptance of their own identity as transgender can be psychologically pressurising given their fragile age and this pressure coupled with feelings of shame, guilt and worthlessness can lead to more drastic psychological problems in children. These feelings get exacerbated as the child grows up often leading to depression, poor self-esteem and suicidal thoughts.³⁵ Children who identify themselves as transgender begin to affirm their gender by social transitioning, which usually includes changes in gender signifiers. This process, although fully reversible physically can be damaging, owing to emotional resentments on one hand and social stigma on the other.³⁶ For instance, making a transgender youth use bathrooms corresponding their sex at birth subjects them to the feelings of isolation, harassment and assault.³⁷ The possibility of facing rejection from peers, school, community and even family is always very high. Parochial attitudes that prevail in society more often than not translate into non-acceptance of every individual as equal. Isolation at school and home, marginalisation in education and health care, abandonment by family and

interest of such child.

32. Ministry of Women and Child Development, “National Plan of Action for Children, 2016 Putting the Last Child First Draft” (11-3-2016) F.No.17-112012-CW-I <https://wcd.nic.in/sites/default/files/National%20Plan%20of%20Action_0.pdf> accessed on 20-10-2019.

33. H. Grossman and R. D’Augelli (n 4) 115.

34. *Ibid*, 115.

35. Bucataru (n 12) 80.

36. Erin Archer Kelser, Responding to Transgender Youth with Dignity and Respect (July 2019) Health Progress 41-47, 45, <<https://www.chausa.org/publications/health-progress/article/july-august-2019/responding-to-trans-gender-youth-with-dignity-and-respect>> accessed on 25-10-2019.

37. *Ibid*, 43.

community, bullying, intimidation and sexual violence largely stem from a blatant disregard for the rights of such children.³⁸ Therefore, it is imperative for us to be aware of the rights of transgender children in order to better protect them from discrimination and abuse.

In India, their vulnerability can be inferred from the number of transgender children found missing in the year 2017.³⁹ A survey conducted by a non-profit organisation concluded that around 40 per cent of the transgender population are faced with sexual abuse from a tender age. This abuse continues even when they are adults.⁴⁰ The effect of such abuse on a transgender child, owing to their peculiar struggles, can only be more and in no case less than any other child.

5. TRANSGENDER CHILDREN AND THE JUVENILE JUSTICE ACT

The Juvenile Justice Care and Protection of Children Act, 2015, is one of the foremost legislations on children that govern the juvenile justice system of our country. The scope of this act extends to “children in conflict with law”⁴¹ meaning those children who have been alleged or found to have committed an offence and not being 18 years of age on the date of commission of such offence as well as “children in need of care and protection”⁴² meaning vulnerable children who require care and protection.

Recalling the MSJE Expert Committee Report and its suggestion of including “transgender” in the definition of “child” in the Juvenile Justice Act is undoubtedly a very necessary move. By including boy, girl and transgender or other as categories, would further expand the scope of the Act. Section 2(14) which defines “Children in need of care and protection” extends the benefit of care and protection to a wide array of vulnerable children. The section includes within its fold, abandoned children without ostensible means of subsistence, children found working in contravention of labour laws or begging, children residing with persons who might inflict injury or exploit or abuse the child, disabled children, children with unfit

38. UNICEF (n 15) 4.

39. Ministry of Home Affairs, “Crime in India 2017 Statistics” National Crime Records Bureau. <<http://ncrb.gov.in/StatPublications/CII/CII2016/pdfs/NEWPDFs/Crime%20in%20India%20-%202016%20-Complete%20PDF%20291117.pdf>> accessed on 26-10-2019.

40. Puja Chagoiwala, “India: No Country for Transgender Women” *This Week in Asia* (8-7-2018) <<https://www.scmp.com/week-asia/society/article/2154077/india-no-country-transgender-women>> accessed on 20-10-2019.

41. Juvenile Justice (Care and Protection of Children) Act, 2015, (JJCPA, 2015) S. 2(13).

42. JJCPA, 2015, S. 2(14).

or incapacitated parents, missing or runaway children, etc. Covering as many as 12 categories of children, it would be even more beneficial for transgender children to be formally recognised as a “child in need of care and protection”. This move would enable the Child Welfare Committee to be instrumental in truly implementing some of the directions, if not all in favour of the transgender child.

The Child Welfare Committee, a five-member quasi-judicial body conferred with the powers of a Judicial Magistrate First Class plays a very significant role in the restoration and rehabilitation of vulnerable children.⁴³ The CWC has the power to restore and rehabilitate children either through institutionalisation or through the family and community. Therefore, bringing transgender children under the ambit of children in need of care and protection empowers and widens the jurisdiction of the CWC to ensure proper protection of such children.

Reflecting on an extract from the NALSA judgment,⁴⁴ where a transgender person Siddharth Narain admits not only had he identified as a woman from a tender age, at the age of 16 the non-acceptance and physical abuse perpetrated on him by his family also made him realise that he would be most comfortable as a part of the transgender community. Clearly, even before attaining majority, he was vulnerable. His anecdote therefore ended with him running away from home and living with the transgender community.

With the current status of law which does not provide much for transgender children, a scenario like this raises some pertinent questions. Like Siddharth, harassed and abused transgender children might by choice want to be a part of the larger TG community to feel more accepted, some might want to stay with their families despite non-acceptance, some might even be confused and conflicted as to where to go and some might even be at risk of facing potential abuse. Therefore, if the CWC was to be involved, how would its involvement help such transgender children? Even though these are potential challenges that might face the CWC, the involvement of the body can at least provide some direction and protection to such children. For example, in cases of such children who seek acceptance in the family, the CWC can play a role in counselling children as well as the parents and sensitise them on gender related issues. Similarly, in case of a transgender

43. JJCPC, 2015, S. 29.

44. *National Legal Services Authority v. Union of India*, (2014) 5 SCC 438 : AIR 2014 SC 1863.

child who may be at risk of facing imminent danger or for the purposes of immediate help it can temporarily place the child in a child care institution. Evidently, collaboration of the CWC in cases involving transgender children can immensely benefit the restoration and rehabilitation of such children.

6. RECOMMENDATIONS

The glaring exclusion of victims belonging to the transgender community in the annual crime statistics published by the National Crime Records Bureau in 2016 has been recently taken care of by the latest Crime in India 2017 statistics. Despite the unwarranted delay in publication, it is worth mentioning that for the first time, transgender victims have been represented in the form of data as under “Missing Persons” and “Victims of Murder”. It is even more worth mentioning and appreciating that transgender children have been brought into light. However, it may be suggested that they should figure under more crime heads other than just remaining a population designated as missing persons and victims of murder.

While the current statistics mention only “girl child victims” of offences against children, a gender sensitive representation of “male” and “transgender” children would be desirable. Inclusion of transgender children under the specific chapter of “Crimes against Children” would not only increase the visibility of crimes perpetrated against them but also shed light on the consequent number of victims which emerge from those crimes. Therefore, drawing inspiration from NGOs which survey specific data pertaining to transgender children, the NCRB in its next publication should include more detailed information on them.

The importance of information is being stressed on to enlarge visibility and perception of the transgender child-victim population. It is only by way of learning more about this population that effective measures to ensure their needs can be fulfilled.⁴⁵ Education that sensitises⁴⁶ the general public as well as various juvenile justice professionals in their “in-service training programmes”⁴⁷ regarding the transgender child and community as a whole, can be immensely beneficial for their harmonious existence in society. Similar sensitisation through education should also trickle down to the transgender youth especially. Awareness regarding the gender constructs

45. Bucataru (n 12) 81.

46. Jay Harcourt, *Current Issues in Lesbian, Gay, Bisexual and Transgender Health*, (6th edn., Routledge 2014) 126.

47. *Ibid*, 126.

prevailing in society and how they enhance vulnerabilities among the transgender community should be prioritised.

Bringing the transgender youth under the bracket of Child in Need of Care and Protection with a focus on their specific needs is necessary to further rehabilitation of these children who already suffer rejection from their families. Actively involving the CWC as proposed above, can empower the Committee to take appropriate decisions to aid the rehabilitation and restoration of such children. Therefore, it is suggested that along with a revision in the Transgender Rights Bill which needs to address in more detail the plight of transgender children, an expeditious inclusion of transgender children in the Juvenile Justice Act, 2015 is the need of the hour.

7. CONCLUSION

The “best interest of the child” principle governs child rights legislations around the world. Protection of children is the paramount responsibility of the State and the current juvenile justice mechanism devised by it, is commendable on a lot of counts. However, it would indeed be in the best interest of vulnerable transgender children if they are given more recognition and protection by the existing juvenile justice machinery. Extending such protection will ensure justice to these children who are struggling to guard their right to dignity at such a tender age.

IMPROVING THE PROSPECTS OF ADOPTION UNDER THE JUVENILE JUSTICE ACT, 2015

—Nidhisha Garg*

ABSTRACT

In the case of Gaurav Jain v. Union of India¹ it was enunciated that “children of the world are innocent, vulnerable and dependent. Their childhood should mature as they broaden their perspectives and gain new experience. Excluding good foundation of life for them is a crime against humanity. The children cannot wait till tomorrow, they grow every day and along with them grows their sense of awareness about the surroundings. Tomorrow is no answer, the goal of their present care, protection and rehabilitation is the need of the hour.”

Children who grow up in homes are lucky enough to have the security of all these. But about a staggering one lakh children in India still sleep on streets. These are the cases of abandoned children, orphaned children, births through unwanted pregnancies, births as a result of rape of minor girls, surrendered children, etc. The State has the responsibility of these children, but the State also has its limitations, economic, logistical and emotional. The State cannot provide a family like atmosphere. That can only be provided by a set of loving parents. One of the solutions to improve the sorry state of such children is to put them up for adoption. But, as it was observed, quite disturbingly, by the author, the prospects of adoption in India are not very high. This research work deals with a critical analysis of adoption laws in India and hence aims to recommend certain suggestions, which if incorporated would improve the scenario of the same.

Keywords: Adoption, Foster Care, Juvenile Justice, Surrogacy, Foetus Adoption, Milestone Development

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1. *Gaurav Jain v. Union of India*, (1997) 8 SCC 114 : AIR 1997 SC 3021.

1. INTRODUCTION

Section 2(2) of the Juvenile Justice (Care and Protection of Children) Act, 2015 (hereinafter referred to as the JJ Act) defines adoption as, “adoption means the process through which the adopted child is permanently separated from his biological parents and becomes the lawful child of his adoptive parents with all the rights, privileges and responsibilities that are attached to a biological child.”

There has been observed a steady decline in the adoption rates in our country from 2010 onwards. According to the 2011 census, India has 50 lakh childless couples and 50,000 adoptable children. A first look at the figures projects a positive picture that the supply being much less than the demand, all the adoptable children should ideally get a loving home. But the reality presents otherwise. Only 3788 children were adopted in the financial year 2017, including both, in country as well as inter-country adoption. The following table clearly indicates the declining status of adoption rates in India over the last couple of years:²

Year	In-country Adoption	Inter-country Adoption
2010	5693	628
2011 (January'11 to March'12)	5964	629
2012-2013 (April'12 to March'13)	4694	308
2013-2014 (April'13 to March'14)	3924	430
2014-2015 (April'14 to March'15)	3988	374
2015-2016 (April'15 to March'16)	3011	666
2016-2017 (April'16 to March'17)	3210	578
2017-2018 (April'17 to March'18)	3276	651
2018-2019 (April'18 to March'19)	3374	653

As is evident from the face of the above presented data, the adoption rates in India are neither consistently increasing nor promising. This is what bothers the author and is hereby identified as the problem of this research work.

The author anticipates an inter-play of various factors like procedural delays, social and emotional barriers, logistical and financial barriers

2. Ministry of Women & Child Development Government of India, Central Adoption Resource Authority “Adoption Statistics” (2010-2019) <http://www.cara.nic.in/resource/adoption_Statistics.html> accessed on 1-10-2019.

among others, a combination of which result in the adoption rates in India being so low. The succeeding section takes into consideration each of these factors in detail, followed by certain recommendations so as to cure the fallibilities in the provisions as well as in the procedure and finally followed by the concluding section.

2. FACTORS RESPONSIBLE FOR LOW ADOPTION RATES

2.1 Adoption by Single Men

As per Rule 5(2)(c) of the 2017 guidelines for adoption issued by the Ministry of Women and Child Development by way of notification in the official gazette dated 4 January 2017, single men are prohibited from adopting a girl child. The guidelines are silent as to whether this prohibition extends to divorcees and widowers also or just unmarried men.

This provision, the author feels, is outdated and square and must be repealed if adoption prospects are to be improved. The Hindu Adoption and Maintenance Act, 1956 (hereinafter referred to as HAMA) does not speak of any such prohibition, adoption being free for all “persons” to whom the said act applies barring of course, the kinds of relationships which the law doesn’t recognise in the first place, like people in live-in relationships and those who engage in unnatural sexual intercourse; which act is also a criminal offence under Section 377 of the Indian Penal Code, 1860. So long as the Indian penal provisions do not decriminalise homosexuality, the author does not even suggest that they be allowed to adopt as that would amount to arguing for adoption rights of criminals. The matter whether homosexuality should be decriminalised or not is a separate matter altogether and something that the author does not intend to dwell upon in this paper.

But as far as adoption by single men is concerned, the law seems to have moved back in time, by allowing it in a 1956 enactment (HAMA) but prohibiting it in a 2015 enactment (JJ Act). Even after several amendments to the HAMA, this provision stands as it was originally enacted. Therefore, as of today, even in 2018, the HAMA still uses the term “person” and not “only single females”. It was only in 2016, that Maneka Gandhi, then Minister for Women and Child Development brought about massive changes and introduced the new regulations for adoption that this prohibition on single men was inserted. Yet the HAMA stands unamended.

Section 57(4) of the JJ Act provides that single men cannot adopt a girl child. Section 56(3) of the JJ Act explicitly states that nothing in this act shall apply to the HAMA, 1956. Therefore, by applying the rule of construction *expresso unius est exclusio alterius*, which means that expression of one implies exclusion of another, it can be concluded that single men to whom HAMA applies may adopt a girl child.³

In Section 57(3) of the JJ Act, the phrase, “single or divorced” has been used and not “single and divorced” which means the legislature considers single and divorced people to be belonging to two different categories. Also, it uses “person” and no single or divorced “females”, thus implying that it applies to both men and women.

Any person, irrespective of his religion, gender and caste may apply for the guardianship of either the person or property or both of a minor to the satisfaction of the court. There is no prohibition whatsoever, on single men from being declared as guardians of a minor female, either in the Hindu Minority and Guardianship Act, 1956 (hereinafter referred to as HMGA) or in the Guardianship and Wards Act, 1890 (hereinafter referred to as GWA).

The foster care provision (Section 44 of the JJ Act) read along with the Model Guidelines for Foster Care 2016, provides only that the child should be placed in a family or family-like atmosphere. The guidelines are silent as to what constitutes family-like atmosphere, the term not being defined even in the definition clause.

In light of the construction of the above statutes, the conclusions which can be arrived at can be summarised as under:

- i. There is no restriction whatsoever under any of the above-named statutes on adoption of a boy child by single men.
- ii. Single men, to whom the HAMA applies, may adopt a girl child, the JJ Act not being applicable to them.
- iii. Divorced men and widowers may adopt a girl child, even under the JJ Act, the category of single and divorced men being considered separate by the legislature.
- iv. Single unmarried men who wish to adopt under the provisions of the JJ Act are prevented from adopting a girl child.

3. Hindu Adoptions and Maintenance Act, 1956, S. 2.

- v. Single men may be appointed as guardian of a girl child under both, the HMGA and GWA.
- vi. Single men may be the foster parent of a girl child under Section 44 of the JJ Act.

In regard to the conclusions drawn above, the author would like to put forth some of her personal views:

- a. Probably the drafting of Section 57(3) of the JJ Act was done by the legislature in light of the increasing number of sexual crimes against women. The issue which would have concerned the legislature is that if single men were to be given rights of adopting a girl child, it would open the doors for trafficking of and sexual crimes against those girls. This is a genuine concern given the history of sexual crimes against women the world over, in general and in India in particular. But then there have also been many times when a crime is reported of a girl being raped by someone in her own family, say by her uncle or in some extreme cases, by her very own father also. People who commit such crimes are not fathers, brothers or uncles when they do it, they are just criminals, possessing criminal tendencies and who have in some way lost their rationale and lack any amount of emotional quotient. Such activities can easily be checked by regular and stringent Post Placement Reports (hereinafter referred to as PPRs) but the mere existence of crimes of such nature is no reason for imposing a blanket ban on all single men from adopting a girl child. The author believes that there are many genuine, single men who are willing to give a child a loving and caring environment to grow up in. Before a child is finally given in adoption, there are Home Study Reports (hereinafter referred to as HSR) conducted by the social workers of the adoption agency, which require the social worker to visit the residence of the Prospective Adoptive Parents (hereinafter referred to as PAPs), to examine the environment, to talk to the people in the neighbourhood regarding the general conduct of PAPs and if there is anything fishy about the adopter's intentions, it can be sensed on a close and critical examination during the HSR or pre-adoption counselling and interactive sessions with the PAPs. Also, if the girl is being subjected to any cruelty by the adoptive father, it can be disclosed in the follow up reports or the PPRs which are conducted at an interval of every six months for two years after the adoption.

This means that for every adoption there are a total four follow up reports conducted over a period of two years.

- b. Maybe the members of the legislature drafted this provision with the belief that a single man is not capable of being sensitive towards certain requirements of a girl child, which probably, only a woman can understand, for example, being able to explain to the girl about menstruation when she attains adolescence, etc., but if that were to be the case, the prohibition should also be extended to widowers and divorcees. Just because a man, at one point of time in his life, had a wife doesn't automatically transform him to become sensitive towards such issues. Also, there may be a situation in a man's life where destiny itself may put him in a situation where he has to bring up a daughter alone, for example, cases in which a widower has a daughter or divorced men who have been given the custody of their daughters. Moreover, a person who willingly opts for adoption of girl child can safely be assumed to be sensitive about these issues because had that not been the case, the man would never have willingly come forward to adopt a girl child. A man who, by his free consent wishes to adopt a girl child will, for all practical purposes, be aware of the responsibilities that come along with being a father to a daughter.

2.2 Sorry State of Children in Shelter Homes:

The abandoned, surrendered, or orphaned children who live in Specialised Adoption Agencies of the State where the highest number of adoptions takes place every year, that is, Maharashtra (with 66 per cent adoption rate) is not very impressive. These are not even special needs children, all are normal, healthy children in the age group of 0 to 36 months. It is said that a child's brain is most receptive during the first five years of life and most kids who get adopted belong to the age group of 2 to 5 years. The cases of adoption below and above that are rare. If during this time, the kids are not exposed to proper care and attention they are bound to lag behind in their milestone development. Provided below is a table of milestone tracking for May-June 2019 of all children in the age group 0-36 months in a specialised adoption agency in Mumbai.⁴ (The names of the children have been changed for confidential reasons).

4. The above data was collected by the author during her internship at Bal Anand, World Children Welfare Trust India, Sai Kripa, Ghatla Village, Chembur, Mumbai, 400 071, the said SAA.

Sr. No.	Name of the Child	Age	Date of Tracking	Per cent of milestone development	Below/above Avg.	Therapy kind needed
1.	Durga	36 Months	12/06/17	66.67 per cent	Below Avg.	Cognitive
2	Anamika	36 Months	12/06/17	50 per cent	Below Avg.	Speech and social
3	Aarti	24 Months	20/05/17		Below Avg.	Cognitive and Speech
4	Suraj	18 Months	18/06/17	70.50 per cent	Age Appr.	N. A.
5	Priya	24 Months	18/06/17	59 per cent	Below Avg.	Speech
6	Sahil	36 Months	18/06/17	62.50 per cent	Below Avg.	Cognitive
7	Ajinkya	18 Months	23/05/17	68.75 per cent	Below Avg.	Cognitive and Speech
8	Soumya	18 Months	23/05/17	81.25 per cent	Above Avg.	N. A.
9	Leticia	18 Months	23/05/17	78.57 per cent	Below Avg.	Cognitive
10	Anwar	12 Months	23/05/17	82.30 per cent	Below Avg.	N. A.
11	Vishnu	12 Months	23/05/17	75 per cent	Below Avg.	N. A.
12	Pragat	36 Months	20/05/17	66 per cent	Below Avg.	Social
13	Shiva	24 Months	20/05/17	49 per cent	Below Avg.	Occupation
14	Vaswati	36 Months	12/06/17	61 per cent	Below Avg.	Cognitive
15	Chetan	6 Months	12/06/17	87.50 per cent	Above Avg.	N. A.

When calculated, the average percentage of milestone development in these children amounts to 66.29 per cent, which is a very disturbing figure, considering this data is of a stage when the maximum development of a child takes place. This is not to say that these children do not have the potential. Every child is born with equal capabilities and if that potential is tapped by an appropriate environment which is conducive to learning and development, every child can be an achiever in some way or the other. All households would naturally want to adopt kids with a good track record of milestone development. A kid which is undernourished or lacks in the development of his cognitive skills, would require more attention by the adopting family and since at the time of adoption, the PAPs are given a brief history of the milestone development along with the medical history of all the kids present in the agency, it is quite natural for a child with a higher percentage of development to get chosen over those with a lower percentage. Therefore, if the adoption agencies take it up on a priority basis to make their children more progressive when it comes to physical and intellectual development so that every child is at par with every other child of the agency at least when it comes to this matter, then more children than are being adopted now, will be taken in adoption by families which would be more than pleased to welcome them in their lives. This argument can be coupled with the argument that small infants be put up for adoption as soon as possible. Later the stage at which a child is adopted later will be his development as per regular standards.

2.3 Lack of Substantive Legislation on Surrogacy

There is no conclusive legislation on surrogacy in India. The number of births through surrogacy in the country in the last three years is approximately 2000. Commercial surrogacy has been legal in India since 2002; India has been a favourite country for those wanting a surrogate child. The cheap availability of the service enables an overuse of the practice with commissioning parents arriving from various other countries as well. In 2002, the Indian Council of Medical Research (hereinafter referred to as the ICMR) laid out guidelines for surrogacy, which made the practice legal, but did not give it legislative backing. This led to a booming surrogacy industry which had lax laws and no enforcements. A study conducted in July 2012, backed by the UN, put the surrogacy business at more than \$400 million with more than 3000 fertility clinics all over the country. However, the necessity of legal protection was enforced through the case of *Baby*

*Manji Yamada v. Union of India.*⁵ A Japanese couple commissioned a surrogate mother in India, but they ended in a divorce. The single male parent wasn't granted custody of the child and the mother refused to accept it. Japan gave the child humanitarian visa and allowed the grandmother to take the child on behalf of her son, given his genetic relation with the baby. During the case, however, the Supreme Court recognised that the parent of a surrogate child may be a male and recognised surrogacy as a positive practice.⁶

A draft bill called the Surrogacy (Regulation) Bill, 2016, which has been passed by the Union Cabinet, is pending before the houses of legislature. The bill intends to put a total ban on commercial surrogacy in India and plans to allow only altruistic surrogacy.

A draft ART (Assisted Reproductive Technology) Bill was formulated in 2010 but was never passed as a law. The Bill lays down further conditions and procedures for surrogacy and notes that there are no regulations as to how many times a birth mother may be allowed to reproduce. The Bill also enabled single parents, male or female, to have a child through surrogacy. Here, the women have to prove they were infertile and couldn't give birth while the men have no such condition. A research undertaken by Centre for Social Research (CSR) points out that the bill does not protect the rights of a surrogate mother. The Bill also did not allow single foreign nationals and homosexual couples to be commissioning parents. It defines "couple" as "two persons living together and having a sexual relationship that is legal in India."

There are clear differences between the ART Bill and the Surrogacy bill, in that, the former recognises and legalises commercial surrogacy, the latter puts a blanket ban on it. The former does not recognise adoption by live-in couples, homosexual couples, etc. but the latter is silent on altruistic surrogacy by such people. It is therefore clear that both cannot be passed and be in operation at the same time, since that would amount a serious conflict of laws. As of now, neither of the two become law and the guidelines issued by the ICMR are the only thing available to regulate surrogacy. Until either of the above two is passed, these are probably going to have the force of law and the laxity in laws will continue.

5. *Baby Manji Yamada v. Union of India*, (2008) 13 SCC 518.

6. Tarishi Verma, "What are the Surrogacy Laws in India: Here is Everything You Need to Know" *The Indian Express*, (Mumbai, 6-3-2017) 13.

Since there is no conclusive legislation on surrogacy laws in India, two possibilities may follow:

- i. People may take advantage of lack of strict and detailed legislation on surrogacy and therefore choose surrogacy over adoption.
- ii. Due to uncertainties in the legal position in regard to surrogacy, more people may resort to adoption, owing to certainty and predictability in its provisions and also because the concept of adoption being much older than the concept of surrogacy, people and the society in general being more receptive of adoption more than surrogacy.

The aim of this paper is to harness the potential of the second possibility. Adoption is a practice which was recognised even in ancient personal laws, much before the technology for surrogacy could even be developed. This makes adoption a custom of higher authority than surrogacy and therefore minds of majority of the people are more open to the concept than to that of surrogacy. This lack of conclusive legislation on surrogacy can be made use of to tap the full potential of adoption in India, whose evidence will be nothing else but a rise in adoption rates.

2.4 Financial and Other Miscellaneous Limitations

Adoption may also prove to be an expensive affair. Although the 2017 Regulations do not provide for any threshold limit on the income of the PAPs but, the procedure itself may turn out to be expensive. The Child Corpus Amount is 40,000 Rupees, the Home Study Report costs Rs 6000 and each of the four bi-annual Post Placement Reports costs Rs 2000; amounting to Rs 8000 rupees and the grand total amounting to Rupees 54,000. This may not be an amount payable by many. It is left to the discretion of the social worker conducting the Home Study Report to judge whether the couple is financially capable of bringing up a child. This makes the process subjective and uncertain. Instead, the author suggests that the Ministry for Women and Child development only set a threshold income that the PAPs need to satisfy before they can be selected as prospective adopters; which amount must be decided after a thoughtful consideration of all factors regulating the paying capacity of an average middle class household in India.

Apart from this, there are very stringent provisions with respect to PAPs, like their medical condition, how often their work requires them to travel, a suitable neighbourhood, reaction of the other family members towards the idea of the couple bringing an adopted child into the family. Although these may be relevant in securing the best interests of the child, but strict adherence to them may reduce the prospects of several children getting a loving home. Even children who are biologically born tend to live in families where parents travel as a part of their work and they grow up to be confident, talented individuals. Children grow up in slums with a very disturbing neighbourhood. Sometimes extended members may not be happy with the birth of a girl child to the couple and may carry a hostile attitude towards her. Due to the reasons beyond human control, there are cases where kids lose their parent to medical illnesses. Therefore, these factors may exist even for a child born biologically in a household. By including these factors and striving to achieve strict compliance to all of them may just add on to the restrictions already mentioned above and by this, it seems to the author that the legislature is aiming for a utopian situation, which unfortunately does not exist in the practical world. Therefore, it is suggested that some leniency may be allowed during the examination of presence of these factors in the PAPs. A home is definitely better than the conditions under which a child lives in an orphanage or foster care home, as is clearly evident from the milestone development data available above, that too, of an agency that is regarded as one of the best when it comes to taking of children.

3. PROSPECTIVE SOLUTIONS FOR IMPROVING THE CURRENT STATE OF AFFAIRS

3.1 Adoption of Small Infants

The process of declaring a child legally free for adoption takes at least three to four months and therefore even if the process is started on the day the child is born, the baby cannot be put up for adoption until a minimum of three months from its birth. Most childless couples would love to adopt as young a child as possible so that they can start building their bond from a very young age. Many a time PAPs withdraw from the process of adoption because the kids they are offered are aged five or above. People might have reasons to drop the idea of adoption if the kids available for the process are aged above five and rightfully so. It is said that 90 per cent of a child's brain is developed by the age of five. Any person would like his/her child

to grow up with the values that he/she had himself instilled in it. But if the child which becomes their son or daughter already has its values and belief systems developed, the parents would find it difficult to relate to their own kid, which might not turn out to be a very healthy relation for a family. Also, adjustment in a completely new atmosphere would be slightly tougher for an older kid than it would be for an infant. Be it language related problems, food related issues, company related issues or lifestyle related concerns, all of these would be more of a problem for a bigger kid than they would for an infant and therefore, it is submitted in the humble opinion of the author, that the doors of adoption of infants must not be closed for both, parents as well as children. In such a scenario, putting up small infants for adoption will see a huge boost in the number of annual adoptions.

In response to the above-stated point, there are counter-arguments sure to be raised, ones relating to proper assurance of the nature of parents and the atmosphere of the household, etc. These can be ensured by stricter but faster HSRs and by inserting strict penal provisions for any wrongful action on the part of the parents, if, disclosed at a later stage.

3.2 Adoption of Foetus

Parallel to and in continuation of the above-stated argument, runs this argument of allowing unborn babies that is, foetuses to be put up for adoption, with the free consent of course, of the biological mother or parents.

India still doesn't allow for adoption of unborn foetuses. It is, at the minimum, only three months after the child is born, that it can be declared legally free for adoption. Though there is no provision in any of the laws in India which expressly prohibits the adoption of foetuses but, on the other hand, there is also not a single provision which provides for the same. All laws related to the subject are completely silent on the subject of adoption of foetuses. Also, there are clear provisions which state that any child who has not been declared legally free for adoption by a proper court order (which itself is passed only after reasonable enquiry as to tracing his roots and family have been completed), no child can be put up for adoption. A necessary implication of this provision is that under no circumstance, can a foetus be adopted, because logically speaking, a court order cannot be passed for an unborn (for the simple reason that a foetus has no legal recognition as a person), thus closing all doors for its adoption.

Cases of rape and sexual harassment are not very uncommon in India. More often than not, these result in pregnancies and with the Medical Termination of Pregnancy Act, 1971 (hereinafter referred to as the MTP Act) which permits for abortion to be done only within the first 20 weeks of the gestation period and in some cases of extreme rarity, allows for abortion to be done until 26 weeks when sanctioned by a licensed obstetrician. In a recent judgment with the Bench comprising of the then Chief Justice J.S. Khehar and Justice D.Y. Chandrachud, a 10-year-old girl was denied a petition to abort her child, which pregnancy was the result of rape by her uncle. The foetus was already 32 weeks, and the MTP Act imports a ban on abortion at such an advanced stage. Though there runs a feminist argument parallel to this according to which, the woman should have full right over her body and she should be given the sole power to decide whether to continue with the pregnancy or not, there is also the aspect of danger to the health of the woman and the foetus which cannot be completely ignored. Abortion at an advanced stage may be fatal to the woman. Also, the moral aspect comes into the picture as at an advanced stage, i.e. after the second trimester, all the parts of the body are fully developed and the shape of the foetus can very evidently be identified as that of a human. Terminating the pregnancy implies, homicide, wherein it is said the foetus experiences pain if aborted, which is different from abortion at an early stage where whose existence is being terminated is just a primitive mass of cells, without any sensory function and which cannot be identified as a "person" as yet.

Justice Chandrachud has himself expressed regret on various occasions as the small girl had to be forced to deliver the child, even though at the age of 10, her pelvic bones didn't have the amount of strength which is usually required for delivery. This meant the delivery would have been very painful for the kid. The parents have now asked the doctors to put the infant up for adoption but had this option been available to them at a prior stage the debate to increase the time-limit for abortion would have, in a way be settled, considering the fact that pregnant women who have become so either due to an unplanned pregnancy or as a result of rape may put up their foetus for adoption. This way people wanting and waiting to bring in a life into theirs can also be satisfied and the woman also doesn't have to go through the opprobrium of giving birth to child which she doesn't want to raise.

3.3 Counseling to Overcome Social Stigma

A lot of people refrain from adoption because of the social stigma that is attached to it in our country. In a country that has the history of female foeticides and female infanticides and where the girl child is considered a burden, there are plenty of examples of people adopting for the purpose of a male child. Even the courts have encouraged it. In the case of *Ram Prasad Seth v. State of U.P.*,⁷ the Supreme Court while disallowing a Hindu male to commit bigamy for the purpose of a son held that, "For the purpose of lighting the funeral pyre, the person may adopt a *dattak* son or an adopted son."

But it is not always necessary that the laws speak the language of majority of population. Even though the legislature may have enacted detailed provisions for adoption, but if the mental barrier of the people with respect to adoption is not changed, no amount of amelioration in the provisions can make adoption lucrative for a greater number of people. For that to happen, the social stigma that persists among the people, must first be erased; that can only be done in an effective manner by widespread awareness programs. In furtherance of this, the author suggests that the government should take proactive steps for creating more awareness among the people. These can include pro-bone advertisements in both, print as well as digital form to reach as wide an audience as possible. An even better step would be to include it in the syllabus of higher secondary students, because education is the best way of ensuring the instillation of a belief in the next, if not in the present generation of the population. A student with a curious mind may, for once, not believe what his parents say but may definitely believe, with conviction, what is written in a textbook of his. Therefore, awareness programs in schools for children of appropriate age, awareness programs in general on radio, television and newspaper would have a direct impact in increasing the adoption prospects in India.

3.4 Allowing Adoption to Parents with three Biological Children

People who already have a biological child are prevented from adopting a child of same gender as per Section 11 of HAMA, 1956 which provides the conditions for a valid adoption. There is no such provision under the CARA regulations. The legal position seems to have moved in a backward

7. *Ram Prasad Seth v. State of U.P.*, 1960 SCC OnLine All 128 : AIR 1961 All 334.

direction, as before 2015, even couples with children of same sex were allowed and there was no limit on adoption by people who already had three biological children, irrespective of marital status, this meant that even singles were allowed to adopt. This was before the 2006 amendment, but we seem to have moved backward since then. Section 41(6)(b) as it stood after the Amendment Act, 2006, read as follows, “The Court may allow a child to be given in adoption, (a) to a person irrespective of marital status or; (b) to parents to adopt a child of same sex irrespective of the number of living biological sons or daughters; or (c) to childless couples.”⁸

The Orissa High Court, in the case of *Subhadra Mahatab Seva Sadan v. State of Orissa*⁹ held, “Law is well settled that it is the substance and not the form which is to be looked into by a court of law while deciding any lies and appropriate relief to which a party may be entitled should not be withheld on the technical ground that the nomenclature of an application has been made wrongly.”

Therefore, a conjoint reading of Section 41(5) of the JJ Act and Rules 25(m) and Rule 33(3)(b) of the CARA guidelines makes it crystal clear that when an abandoned child is offered for adoption, the Child Welfare Committee (hereinafter referred to as CWC), which is a quasi-judicial authority has to declare the child legally free for adoption, where after the competent court has to pass necessary orders under Section 41 of the said act allowing a child to be given in adoption. It is, therefore, seen that it is only the Child Welfare Committee under the JJ Act, who is authorised to declare a child legally free for adoption and law does not provide for any other agency, be it the State Council for Child Welfare or any other body, to have any say in regard to adoption. The learned District Judge in course of hearing the matters called for a report from the Orissa State Council for Child Welfare, who reported that the petitioner no. 2 is not eligible to adopt two girl children under Section 11¹⁰ of the HAMA, 1956. The petitioners wanted to

8. *Andrew Mendez v. State of Kerala*, 2008 SCC OnLine Ker 54 : (2008) 1 KLJ 647.

9. *Mahatab Subhadra Seva Sadan v. State of Orissa*, 2012 SCC OnLine Ori 291.

10. The provision of S. 11 requiring age difference between adoptive mother and adoptive son to be at least 21 years is mandatory in nature and the word “must” cannot be read as “may”. This breach is fatal to adoption; *Hanmant Laxman Salunke v. Shrirang Narayn Kanse*, 2005 SCC OnLine Bom 1480 : AIR 2006 Bom 123.

(i) The defendant’s father only wanted that he should be reared up by Sankar and Sasi after the mother’s death and there had been no formal ceremony of adoption nor were Sankar and Sasi unfit to have children of their own, thereby negating the

adopt two girl children and although they had applied under Section 9(4)(b) of HAMA, the court looked into substance and not form and held that the bar will not apply and adoption of siblings together is in compliance with both, the Laxmi Kant Pandey case as well as CARA guidelines and hence the agency had erred while dismissing the petition as barred by HAMA, Act. Therefore, the court has also, in the best interests of the child, shown an inclination to rely on the JJ act instead of HAMA. To resolve this, the author suggests an amendment to the HAMA to remove the bar of Sections 9 and 11.

People with three or more biological children are prohibited from becoming foster parents, the only exception being the case of special needs. The author understands that the intention of the legislators behind such drafting is the concern that not many couples voluntarily take up adoption of special needs. But the author feels that this clause is faulty to the extent that a special needs child needs more care, protection and attention than a normal child does. Also, there are medical expenses of medicines and treatment that accompany the bringing up of a special needs child. Considering the fact that India is a country that doesn't rank very high when it comes to GDP per capita income, bringing up four children with one of them being differently abled or mentally or physically challenged may be an even more daunting task. This may actually work adverse to the best interests of the special needs child.

In today's times when generally the maximum number of children that a couple produces is two, if a couple, already having three biological children, itself comes forward seeking adoption, they can be driven by nothing but altruistic motives. It becomes evident from such an action, that they are truly, genuinely interested in adoption, that they possess the appropriate financial and infrastructural facilities to support the fourth child, because

adoption; *Urmila Devi v. Hemanta Kumar Mohanta*, 1993 SCC OnLine Ori 30 : AIR 1993 Ori 213.

- (ii) The age of the plaintiff was 30 years and that of the adoptive mother 48 years six months, thereby contravening the provisions of S. 11(iv) as the difference between the plaintiff and mother was only 19 years and not 21 years. See also *Nemichand Shantilal Patni v. Basantabai*, 1994 SCC OnLine Bom 29 : AIR 1994 Bom 235.
- (ii) There was no evidence in hand that the plaintiff was actually given and taken in adoption by the parents or guardians of the plaintiff as required under S. 11.
- (iii) Adoption was held not to have taken place. See also *Nemichand Shantilal Patni v. Basantabai*, 1994 SCC OnLine Bom 29 : AIR 1994 Bom 235.

had that not been the case, they wouldn't have come forward for adoption in the first place. Therefore, anybody should be kept outside the purview of adoption but them. Having said that, inclusion of such families, (who although will be very less in number) in the scope and ambit of adoption will definitely have some if not a very big impact in showing a positive graph on the growth of adoption rates.

3.5 Creating Foster Care More Lucrative

Foster Care, as stated in argument 8 above, is the placing of a child in a family like atmosphere. Creating foster care more lucrative will definitely increase the numbers of adoption. In cases of Indian adoption, there is an option for the child to remain in temporary foster care to see if the child can adjust in the home or not. In cases of older children, (ones above five years) the consent of the child is also taken for the same.

Rule 10(1)(i) of the 2016 Foster Care Guidelines provides that aliens (people who are not Indian citizens are not eligible for foster care). People who are not citizens may want to opt for foster care but if they are kept out of the ambit of foster care, it will never be possible. Rule 10(1)(i) of the 2016 Foster Care Guidelines clearly provides that only Indian citizens are eligible for being prospective foster care parents. This might be unjust to both, children, who might get the opportunity of living in a loveable atmosphere and to potential couples who would like to take up the foster care of children but are unable to because of the legal bar. The author understands that the legislature might have thought it reasonable on its part to impose this bar because aliens may or may not live in the country for a prolonged period, thus leaving the future of those children bleak. But this assumption can be easily rebutted by the following arguments:

a. Foster care is not equivalent to adoption, in that foster care kids don't have a right of inheritance in the property of the foster family, nor does the foster family have an obligation for the rest of the lifetime of the child, thus not making it a prolonged responsibility. The guidelines itself provide for two types of foster care:¹¹

i. Short term foster care - foster care not exceeding one year

11. Model Guidelines for Foster Care, 2016, R. 4.1.1.

ii. Foster care for prolonged periods - foster care exceeding one year.

The adherence to the foster care of the child by the family can be ensured by a contract of foster care for one year, the breach of which can be penalised by specific performance, thus preventing the family from leaving the child stranded alone before the end of one year and preventing them from leaving the country before fulfilling all the responsibilities of a foster family.

- b. Even Indian families who are appointed as foster families do not have an obligation to take care of the child till eternity. Even foster care for prolonged periods can, by periodic extension be extended only till the child attains 18 years of age,¹² that also only if the family voluntarily asks for an extension and if the compatibility between the child and the foster family is found satisfactory.

The Foster Care Guidelines, 2016 are completely silent as to what happens when the period of foster care ends. It starts with defining certain terms and moves on to certain provisions which are applicable during the period of foster care, regarding the privileges, rights, duties and obligations of the foster family, the foster kids and the agency which facilitated the process of agency. There is absolutely no provision whatsoever, neither in the above-mentioned guidelines nor in the Hindu Adoption and Maintenance Act, 1955 with respect to the rights of the child and obligations of the foster family. When asked about this loophole, an agency in Mumbai answered that in most cases, the term for foster care is six months and in that time the compatibility between the child and the family develops so much that the family is almost always willing to adopt the child and indeed go on to adopt the child. In cases, where either the child was unable to cope up with foster care family or where the family was (which happens very rarely, in reality it's usually the first possibility), the child comes back to the agency and awaits adoption by another family. If analysed carefully, there is a glaring *faux pas* on the part of the legislature. Infants and toddlers aged till about 4-5 years are emotionally immature to actually be able to decide if they find the foster family compatible or not and therefore even the guidelines do not provide for their choice to be taken into consideration. The children above five years, who are given the option of choosing whether they want to continue living with that family either in the capacity of a foster child

12. Guidelines 2016, R. 4.1.2.

or that of an adopted child, when refuse to go back to the family due to adjustment problems have to come back to the agency and since by now they are already about 5-6 years of age, even prospective adoptive parents refrain from taking them in adoption and they are ultimately left to grow in the agency until they turn 18 and this in turn brings an end to all the possibilities of that child getting a home.

- c. One of the primary reasons why people opt for foster is also because they want to try their hand at rearing a kid and probably then go for producing their own kid. If 35 years is set as the threshold age, then a lot of prospective foster care households will be left out of the purview. In most cases, when a child lives with a family, the bond which grows between the family and child is such that most people go on to adopt their foster child. If that be the case, this possibility should not be nipped in the bud. Like the threshold age for parents for adoption is 25 years, the same should be applied for foster care also. 15 per cent of India's population is between 25 to 35.¹³ If such a large proportion of the population is kept outside the purview of foster care, it will clearly have a negative impact on foster care and hence, eventually on adoption also. Therefore, the author suggests that they be not neglected and instead be included so that foster care and adoption rates thereafter can witness a boost.
- d. Nothing comes for free. The State wants every child to have a safe, protective and caring atmosphere and there are potential youth who can provide just the same. India being the country with the largest youth population, it is better we tap the potential of this youth to increase the welfare of children.

While there are many dedicated people willing to open their homes and hearts to children in distress, it cannot be denied that financial gain is among a number of significant incentives leading some to become foster parents.

Rule 2.1.9(A)(iii) of the 2016 guidelines for Foster Care provide for possibility of financial support only if there is dire necessity, that is, it is

13. Census of India, 2011 Populations (Ch. 2) <<http://www.censusindia.gov.in/vitalstatistics/srsreport-9chap%2020-%202011.pdf>> accessed on 18-10-2019.

discretionary and not mandatory.¹⁴ The author suggests that it be made a general rule instead of it being made an exception.

As the number of licensed foster homes has dropped to a low of 100,000 for the nation's estimated 500,000 foster care children and so has the quality of foster care homes unquestionably diminished over the years.

Judy Sheindlin, supervising judge for the Manhattan Family Court, describes the foster parent typically found today in the New York City foster care system, "The typical foster parent I see is a single woman who has several biological children of her own. She is supported by welfare or social security disability. She is a high school dropout whose own kids are marginally functioning. She does not have the ability to help them with their schoolwork and she has little hope for a brighter economic or social future."¹⁵

A 1989 study conducted by the Child Welfare League of America found many foster parents in California to be similarly qualified. In reviewing a hand guide for foster parents, the League suggested adding photographs, drawings and graphics as, "While some foster families may be college trained, many foster parents may be illiterate or have poorly developed reading skills. The aim should be toward the average foster parents' reading level. Eligible foster parents can earn \$22,000 a year; plus, medical benefits for caring for a developmentally disabled child through the program. In some cases, a family taking an additional such child may be paid a total of \$35,000 a year. One Detroit foster parent had just applied for public assistance when her sister suggested the Life Program. Seeing it as a chance to avoid dependency on the welfare program, she ended up adopting her first foster child. She admits she was drawn to the program by the money. Hers is counted as a successful story. She ended up adopting her first foster child. But how might the natural mother have fared had she had the benefit of an even a fraction of this income to stay at home to care for her own child?"¹⁶

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14. In case the financial support is requested and if there is no other alternative, then only in such cases can the District Child Protection Unit initiate the procedures for the same and seeks permission from the CWC for the final order.
 15. Judy Sheindlin, *Don't Pee on My Leg and Tell Me It's Raining: America's Toughest Family Court Judge Speaks Out*, (HarperCollins, 1996) 109-110.
 16. Child Welfare League of America, *The Foster Family Care Services System of the Children's Services Bureau of the County of San Diego Department of Social Services*, (San Diego, California, July 1989) 43-44.

The intention behind the above discussion was to present a picture as to how financial incentives for foster care may draw many people towards foster care and through foster, to adoption. India, unfortunately, as of now does not provide for any kind of reimbursement or financial aid to foster care parents for the expenses they may incur during rearing of the child for the said period. Our country is not one with one of the highest rankings when it comes to per capita income, thereby making us a relatively poor country. In such a scenario, financial incentives can prove to be huge incentive in drawing people for both, foster care and adoption.

4. CONCLUSION

The above-mentioned facts and figures indicate, beyond all reasonable doubts to the fact that adoption laws in India do need various amendments including the passing of central umbrella amending and codifying legislation which repeals all existing provisions and provides for a one stop shop for all provisions relating to adoption, foster care and after care which should be applicable to all citizens of India irrespective of their religion. This would make all the existing conflicts in laws redundant. There is also a dire need to fasten the process of adoption so that best interests of the child are not compromised with. Certain financial and age bars need to be removed so that a larger section of population is made eligible for adoption. The doors of adoption should be opened for single males.

In light of the arguments presented above, supported by the courts' stand and that of other authorities, the author believes it is high time the legislature incorporates the amendments so recommended in the legislations pertaining to adoption in India and also calls for the Law Commission of India to come up with a report as that would be more conclusive and persuasive than the author's personal views.

It is very clear from the picture presented above that the life of children who are not adopted by anybody can be really very disheartening. No member of the society with even a pinch of compassion in his mind would want this to happen to a child under any circumstances. Similarly, author also wishes for every child of this country a loving home that can mould him into a confident personality because no citizen of this country should feel inferior to others or feel that he has been disadvantaged with respect to others for the lack of a home and family. If the children, who are the future citizens, are nurtured to become confident and healthy adults, there can be

stopping this country from progressing in all fields. It is in this respect that this research work was conducted by the author and the arguments were presented in the first section itself to improve the prospects of adoption in India.

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[The following text is extremely faint and largely illegible. It appears to be the abstract and the beginning of the main body of the paper. Key words like 'ABSTRACT', 'The purpose of this paper', and 'The paper will also recommend' are faintly visible.]

INSTITUTIONAL CHILD SEXUAL ABUSE: THE INJUSTICE THAT THRIVES ON SECRECY, SILENCE AND SHAME

—Advika M. & R. Nandhitha*

ABSTRACT

Institutional child sexual abuse lives in a world of its own - a world of vulnerability and exclusion, where the excruciating pain felt by the victims is often ignored or neglected. There are a shockingly large number of ways it can manifest, in a multitude of places-right from juvenile homes to schools and nursery homes. Surprisingly, there are no efficacious legislations or functional policies that specifically target this topic.

The paper will delve into the settings of institutional abuse and provide cases and instances where it has occurred. It will also provide a succinct and brief history of child sexual abuse legislations in India. Methods and approaches to alleviate the agony of victims of child abuse will be examined, along with the suggestions as to the implementation of legislations or programmes that address this long-neglected issue. The paper will also recommend a two-fold strategy for the rehabilitation of victims.

It is high time we remove our blinders and address the issue first-hand by acknowledging the deplorable injustices faced by the world's most valuable resource and best hope for the future, our children.

Keywords: Child Sexual Abuse, Institutional Abuse, Rehabilitation Strategy, POCSO, Juvenile Homes, Orphanages, Schools, Juvenile Justice Act.

1. INTRODUCTION

"Safety and securities don't just happen; they are the result of collective consensus and public investment. We owe our children,

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the most vulnerable citizens in our society, a life free of violence and fear.”

—Nelson Mandela

India is home to 440 million children, more than the entire population of USA, Canada and Mexico put together. In 2007, India carried out one of the world's most extensive and sophisticated reports on child abuse, which carried a sample size of 13 States and over 12,000 children.¹ The study provided shocking findings- 53.22 per cent of children faced sexual abuse, with the highest percentage of sexual abuse among both boys and girls in Andhra Pradesh, Assam, Bihar and Delhi. The study also reported that most of the children did not report the matter to anyone.²

2. INSTITUTIONAL CHILD SEXUAL ABUSE

Not all cases of sexual abuse happen in homes. There are many cases of institutional child abuse all around the world. The settings of these cases are orphanages, mental institutions, places of worship, *Ashrams*, refugee camps, juvenile homes, circuses and even seemingly innocuous places like schools and day-care centers. The abusers here are strangers or horrifically, people who are known to the child and abuse their positions of power and authority to take advantage of the young ones entrusted to their care. These include custodians and supervisors such as teachers, priests, doctors, caretakers and other workers.

We are no stranger to these cases, seeing that mainstream media covers atrocious cases of abuse frequently. The most terrifying thing here is that most cases of institutional abuse do not come to light due to many reasons.

One of the most common reasons is that children may be groomed; a dynamic where the abuser takes a non-threatening approach by gaining the child's trust and slowly but surely begin to break down their defenses. There is a high incidence of these cases where the abuser is in a caregiver role (teachers, coaches, priests/godmen and others). Here, the abuser easily gains access to the victim and can easily keep them silent by manipulating them into believing that their "relationship" needs to be kept a secret. These offences range right from voyeurism to peno-vaginal rape or sodomy.

1. "Statistics" (Friends of Salaam Baalak Trust) <<https://www.friendsofsbt.org/statistics>> accessed on 25-10-2019.
2. Ministry of Women and Child Development, Government of India, Study on Child Abuse: India 2007 (Kirti Publishers, 2007) <<https://resourcecentre.savethechildren.net/library/study-child-abuse-india-2007>> accessed on 25-10-2019.

Sexual abuse in juvenile homes, orphanages and other such institutions are rarely disclosed, as in these cases, the abusers are ironically the very people with whom the care of the children is entrusted- the staff or other people in positions of power- such as principals, officers and others. Sometimes, the staff conspires to engage in commercial abuse, by allowing strangers to have "contact" with the children for monetary reimbursement. Therefore, it should be no surprise that many children run away from these institutions. Around 47 million runaway and homeless adolescents are approximated to be on the streets of India.³ These children would rather live on the street with no security and no idea as to where to get their next meal, rather than remain in the custody of the loathsome monsters they call their caretakers.

There is still a shameful air that exists around cases of child sexual abuse. India is a conservative and traditionalist country. This stigma and blaming of survivors does nothing but augment the pain and suffering of the children and their families. Therefore, it is no surprise that most cases of sexual abuse go unreported.

3. LEGISLATIVE FRAMEWORK

3.1 The Constitution

Children's rights find their basis in the Constitution. According to Article 15(3), children are protected under the doctrine of protective discrimination. The State is empowered to make and enforce any special legislation or policies in order to protect them. Article 21(A) assures free and compulsory education for all children between the age of 6 to 14 years. Article 23 prohibits trafficking of human beings along with other similar forms of forced labour. As per Article 24, no child below the age of 14 years can be employed to work in any factory/mine, nor can they be engaged in any other hazardous employment. The Directive Principles of State Policy under Article 39 requires the State to direct policy towards securing Article 39(E).

3.2 The Indian Penal Code, 1860

The State has an obligation to set up government run services as well as pragmatic policies to protect minors. The critical issue was first tackled

3. Vaishali Raval, Pratiksha Raval and Stacey Raj, "Damned if they Flee, Doomed if they Don't: Narratives of Runaway Adolescent Females from Rural India" (2010) 25(8) *Journal of Family Violence* 755.

in 2012, with the enactment of the Protection of Children from Sexual Offences Act, more commonly known as the POCSO Act. Before this, there was no specific act to deal with the cases of child sexual abuse. The only specific piece of child abuse legislation was the Goa Children's Act, 2003. All cases of abuse were prosecuted on the basis of the Indian Penal Code, namely:

- IPC 375- *Rape*
- IPC 354- *Outraging the modesty of a woman*
- IPC 377- *Unnatural offences*
- IPC 511- *Attempt to commit offence punishable with life imprisonment*

This was neither efficacious nor beneficial to the victims due to the considerable amount of loopholes present, the most glaring one being that these provisions weren't exactly tailor-made for children's needs. IPC 375 only provided for "traditional" peno-vaginal intercourse and therefore, did not protect young boys and other forms of penetration. IPC 354 does not give a statutory definition of "modesty". In addition to this, it carried a weak penalty and was a compoundable offence.⁴ Once again, it did not provide for male victims. In the eyes of law, "modesty" of a male did not exist. IPC 377, although providing for male victims did not define "unnatural offences". There were no provisions present for repeat offenders. Another flaw was that there was no uniformity in the age of a "child", as different legislations gave different ages. Finally, the law also criminalised consensual sex between two minors which unsurprisingly led to a lot of misuse.

3.3 The Protection of Children from Sexual Offences (POCSO) Act, 2012

These loopholes were recognised and addressed in the Protection of Children from Sexual Offences (POCSO) Act, 2012. It was enacted to provide a strong framework that punished child sexual abuse, child pornography and other related offences, while safeguarding the interests of the child at every step of the way. The legislation made the judicial process child friendly, in order to minimise trauma and shield children from the injustices that happened to them. Some features of the act include:

4. Under S. 320 of IPC, Compoundable Offences are those offences where, the complainant (one who has filed the case i.e. the victim), enter into a compromise and agrees to have the charges dropped against the accused.

- A “child” has been defined as a person under 18 years of age.
- The act is gender neutral.⁵ This is an important distinction from earlier provisions which did not address the growing number of cases where there was a male victim.
- Section 2(14) of the Juvenile Justice (Care and Protection of Children) Act, 2015 defines a sexually abused child as “child in need of care and protection”.
- It recognises different forms of sexual abuses which includes: (i) penetrative sexual assault, (ii) aggravated penetrative sexual assault, (iii) sexual assault, (iv) aggravated sexual assault, (v) sexual harassment, (vi) using the child for pornographic purposes, and (vii) trafficking of children for sexual purposes.
- The above offences are classified as “aggravated”, when the child who is abused is mentally ill or the person who abused the child occupies the position of trust or authority with regards to the child. This is the only part of the act that addresses institutional child abuse.
- It provides for special courts that conduct in-camera proceedings and without revealing the identity of the child, in order to ensure anonymity.
- To ensure speedy trial, the Act stipulates that the evidence of the child has to be recorded within a period of 30 days. Also, the Special Court has to ensure that the trial is completed within one year of reporting the case.
- The Act also provides for the mandatory reporting of sexual offences.
- The National Commission for the Protection of Child Rights (NCPCR) and State Commissions for the Protection of Child Rights (SCPCRs) have been formed to ensure the implementation and maintenance of this act.

3.4 Challenges and Drawbacks of POCSO Act, 2012

In spite of careful considerations and recommendations being incorporated for the framing of this legislation, there are some drawbacks and discrepancies that surround this act.

5. *Eera v. State (NCT of Delhi)*, (2017) 15 SCC 133 : 2017 SCC Online SC 787.

- *Age*: The POCSO act mandates that for a girl under the age of 18 seeking abortion, the service provider should register a complaint of sexual assault with the police. However, the Medical Termination of Pregnancy Act does not mandate the reporting of the identity of the person who is abused. This makes the service providers hesitant to provide abortion services to children under 18.
- *Consent*: The POCSO act doesn't give a clear indication with respect to the need for taking consent from abused children with regards to the medical examination.
- *Medical Examination*: Under Section 2 of the act, if a female child is abused, then the medical examination should be carried by a female doctor. Whereas in cases of emergencies, the available medical officer has to provide medical care as stated under Section 166-A of IPC. This leads to a conflict of legal positions when the female doctor is not available.
- *Consensual Sexual Act*: Sexual intimacy between two consenting adolescents is considered illegal under the POCSO act, because the act considers sexual act with or between children below 18 years to be deemed as illegal irrespective of whether consent is given or not.
- *Reporting*: Even after bringing such legislation, the cases are not usually reported. Institutional sexual abuse cases are very difficult to coax out of children and rarely reported, due to the helpless situation of the children. They are constantly under fear and are manipulated to believe that such an act is caused because of their own blunders. They are vulnerable because of the authority that these institutional caretakers have on them.

3.5 Protection of Children from Sexual Offences (Amendment) Bill, 2019

Even after the formulation of such an act, the country has witnessed many cases of child sexual abuses over the years. To make the provisions more stringent, the Parliament on 1 August 2019 passed the Protection of Children from Sexual Offences (Amendment) Bill, 2019.

This new amendment did away with the discrepancies in the Criminal Law Amendment, 2013, which proposed death penalty for rape of minor girls less than 12 years but not minor boys. The new amendment is gender neutral, whereby the punishment for aggravated sexual assault is

a minimum of 20 years and the maximum punishment of death penalty, irrespective of the gender of the child. The punishment for penetrative sexual assault for a child below 16 years has been increased from 10 years to 20 years of imprisonment, plus a fine. For the offence of using of child for pornographic purposes, the punishment has been increased from a maximum of five years to a minimum imprisonment of five years. The Bill has defined child pornography as “any form of visual representation of sexually explicit content involving a child in any form of videography, photography or any form of digital media”.

Even after such rigorous punishments have been framed, these torturous incidents continue to happen and many children become victims of institutional sexual abuse. Let us take a more detailed look at institutional child abuse and the settings in which it takes place.

4. ORPHANAGES

The word “orphanage”, meaning a home for children with no parents is misleading. The children in institutions who are actual orphans make up only a small proportion. Most children in orphanages are children whose parents have little to no means to support them. These parents abandon their children, sometimes even on the side of the road. This appalling situation is a direct result of the nexus between poverty, illiteracy and overpopulation. Single parents also entrust their children to these institutions- often these are young girls who are conceived after rape or teenage mothers attempting to conceal any signs of premarital pregnancies.

4.1 Chennai Eternal Word Trust Orphanage Case:⁶

In August 2018, an unauthorised orphanage run by Eternal Word Trust in Tirumullaivoyal in Chennai, had around 48 children between 3 to 15 years were living in the orphanage and some of them attended nearby schools. When a legal awareness camp was conducted at the nearby government school where some of the children were studying, a couple of the girl children approached the magistrate and described the trauma and tribulations they faced at the hands of the caretakers of the orphanage, which led to the arrest of the owners.

6. “Four Held for Child Sexual Abuse at Unauthorised Orphanage”, *The Hindu* (Chennai, 25-8-2018) <<https://www.thehindu.com/news/cities/chennai/four-held-for-child-sexual-abuse-at-unauthorised-orphanage/article24775552.ece>> accessed on 25-10-2019.

4.2 Goa's Freddie Peats Case:⁷

The Freddie Peats case is one of India's most reprehensive and appalling cases. A foreigner named Freddie Peats ran an orphanage called "Gurukul Orphamily" in Colva, Goa, where he routinely subjected the young boys in the home to sexually perverse abuse. He also received monetary remuneration for trading the children to other foreigners. He would also take sexually explicit photos of the boys and inject them with steroids.

This case was a horrifying instance of child sex tourism. It showed the deeply embedded systems and circles of child prostitution that could essentially remain hidden in plain sight and could get away with anything. The heart wrenching accounts of the boys caught national attention and even today, the day Freddie Peats was arrested is celebrated in Goa as Anti-Child Prostitution day.

5. ORGANISATIONS OF FAITH

Organisations of faith such as Ashrams and churches are not safe from sexual abuse. These places, a safe haven for most people, are a petrifying reminder of abuse for some. Religion is one of the most vital parts of many peoples' lives. Churches, mosques, temples and Ashrams are places that people go to in order to feel closer to their faith. It is alarming that children are abused by the very people we turn to for hope.

It is impossible not to think of the Catholic Church abuse cases that caught the world's attention, with movies, documentaries and books being made about it. From 2001 to 2010, there were an overwhelming amount of sex abuse cases involving about 3,000 priests, many of which dated back 50 years. The church had a history of concealing most of these cases, until the *Boston Globe* published a bold and undaunted investigation about these cases. From the 21 February to 24 February 2019, Pope Francis and the presidents of all the episcopal conferences of the world held a four-day summit meeting to discuss the prevention of sexual abuse by Catholic Church clergy in Vatican City.⁸

7. *State of Goa v. Freddy Albert Peats*, (1992) Sessions Case No 24 of 1992.

8. Joshua J. McElwee, "Francis Summons World's Bishop Presidents to Rome for Meeting on Clergy Abuse" (*National Catholic Reporter*, 12-9-2018) <<https://www.ncronline.org/news/accountability/francis-summons-worlds-bishop-presidents-rome-meeting-clergy-abuse>> accessed on 24-10-2019.

5.1 Thrissur Priest Rape Case:

In April 2014, a 10-year-old girl confided in her parents a shocking incident – the vicar of the church the family attended would routinely touch her inappropriately and had raped her recently.⁹ *Raju Kokkan*, 40, vicar of the St. Paul's (Roman Catholic) Church would often summon the girl to his chambers under the pretext of giving her clothes to try on. He would then watch her while she undressed and capture explicit images of her in his mobile phone, and then rape her. This happened on a number of occasions. The vicar was promptly arrested.

5.2 Jodhpur Asaram Bapu Case:

Asaram Bapu is a self-proclaimed godman who came into the limelight in the early 1970s. In August 2013, a 16-year-old girl accused him of raping her under the pretext of exercising her from evil spirits. This created a huge controversy which launched an investigation into Asaram Bapu's Jodhpur ashram.

What the world did not know was that such "exorcisms" were routine among the godman and his female devotees and were called "*samarpan*". The girls' parents, who were also incidentally devotees of him, registered FIR with the police. Asaram vehemently protested the allegations claiming the defense of impotency, which he subsequently failed after passing the Potency Test. Medical examination of the girl confirmed sexual assault and he was booked under the IPC as well as the POCSO Act. The family of the girl received death threats from the disciples of the ashram. Asaram received support from the ruling party and the local MLAs.

Finally respite arrived to the family in April 2018 in the form of a court order pronouncing Asaram guilty of the rape charges and he was given life imprisonment.¹⁰

9. Shaju Philip, "Police Register Rape Case Against Catholic Priest in Kerala", *The Indian Express* (Thiruvananthapuram, 25-4-2014) <<https://indianexpress.com/article/india/india-others/police-register-rape-case-against-catholic-priest-in-kerala/>> accessed on 23 -10-2019.

10. "Asaram Rape Case Verdict: Godman Sentenced to Life Imprisonment till Death", *The Economic Times* (25-4-2018) <<https://economictimes.indiatimes.com/news/politics-and-nation/asaram-verdict-today-security-beefed-up-in-3-states-media-entry-banned/articleshow/63903700.cms>> accessed on 24-10-2019.

6. JUVENILE HOMES

Juvenile homes or youth detention centers are prisons for minors where they are either placed or detained for a period of time while awaiting trial or placement in long-term care programme. There are two types of children addressed as juveniles, one is "children in need of care and protection", for instance, children picked up from the streets or factories, under Section 2(14) of the Juvenile Justice Act. The other category is "child in conflict with law" who are children below 18 years of age committing crimes, under Section 2(13) of Juvenile Justice Act. Juvenile correction homes are developed by the State to reform, protect and reinstate the child back into the society after he or she completes 18 years of age. The children undergo reintegration, through a series of holistic approaches which aim to shape the child as a better citizen in the society by engaging them in activities like cooking, cleaning, basic education and moral values.

However, the stark reality is that the children who are sheltered in these homes are made to live in inhumane conditions and are deprived of the proper environment needed for them to become responsible adults.

A report was framed by the *Asian Centre for Human Rights (ACHR)*, which listed that out of 39 cases reported, 11 cases belonged to child sexual abuses in government-run juvenile justice homes, which includes observation homes, children homes, shelter homes and the remaining 28 of them were privately run/NGO based juvenile homes. The places where the children are supposed to feel safe and secure have turned out to be places of perversion and degeneracy.

It would not even be a slight exaggeration to say that juvenile homes have become a breeding ground for perpetual sexual offenders, pedophiles, who take advantage of the helpless and vulnerable situations of the juveniles. The mental state of juveniles in these homes is usually troubled because of traumatic family incidents, insecurity, abandonment issues, poverty and other socio-psychological factors. Thus, the predators are usually the caretakers, wardens and security staff, who usually prey upon these juveniles by misusing the authority and trust that is invested in them by feeding on the child's weak mental and physical state. Such type of offences are increasing due to inefficient inspection committees, lack of registration, non-functional Child Welfare Committees and non-separation of inmates based on their age, sex or offences. Some of the cases that were reported are illustrated below:

6.1 Muzaffarpur Shelter Home Case:¹¹

In August 2018, the Tata Institute of Social Sciences was conducting a social audit of shelter homes and juvenile girl homes across the State of Bihar. They had managed to expose the sexual offences against girl children in a State Government funded stay-home called "*Seva Sankalp Evam Vikas Samiti*." A total of 34 girls out of 42, all aged between 7-14 years were drugged, raped and sexually abused regularly by the owner, Brajesh Thakur and other caretakers in the home. When the girls became pregnant after sexual abuse, they were forced to undergo abortions. The owner and the other caretakers were booked under the POCSO Act, and the Court directed the CBI to look into this matter.

6.2 Apna Ghar Case:¹²

Three girls managed to escape their shelter home called "*Apna Ghar*" in Rohtak, which immediately led to the unfolding of the sexual abuses that was undergone by more than 120 inmates inside the facility. The *National Commission of Protection of Child Services* had conducted a raid and had arrested the main accused who happened to be a woman called Jaswanti Devi and others including her son-in-law, the drivers and counsellors who had come to give treatment to the children.

7. SCHOOLS

Educational institutions play an important role in a child's life. When they spend most of their time in school with their teachers, away from their parents, it naturally becomes their second home. The trust entrusted by parents in the teachers to take care of their children is misused in many instances. It is in schools and crèches that children come to learn about the outside world and behavioural traits are developed in the very same classroom environments.

By subjecting children to unwanted sexual advances, it may affect the child's growth mentally, physically and psychologically, thereby creating a

11. Rohit Kumar Singh, "Bihar Shelter Rape Case: How Brajesh Thakur Built His Evil Empire", *India Today* (Muzaffarpur, 1-8-2018) <<https://www.indiatoday.in/mail-today/story/bihar-muzaffarpur-shelter-rape-case-how-brajesh-thakur-built-evil-empire-1302233-2018-08-01>> accessed on 25-10-2019.
12. "How the Apna Ghar Sexual Abuse Case Unfolded", *Hindustan Times* (Chandigarh, 27-4-2019) <<https://www.hindustantimes.com/india-news/all-about-rohtak-s-apna-ghar-sexual-abuse-case-the-horror-tales-and-how-it-unfolded/story-M7ubCPrcH7H3S77N64RxUJ.html>> accessed on 23-10-2019.

scar in their lives that can never be erased completely. Teachers, caretakers and attendees are often people with whom the child comes into close contact every day and will ultimately learn to trust and obey whatever they say. Hence, it makes it easier for institutional predators to take advantage of their helpless situations and trick them into not revealing whatever happened to them through the use of fear, coercion and manipulation.

Such abuse can be traced back to one of the oldest cases that would be familiar to every person in the legal field, *R. v. Williams*,¹³ where a music teacher manipulated the mind of a teenage girl, into believing that oral sex will help her to improve her vocal cords and then sexually abused her. Thus, predators can easily victimise the vulnerable child.

1. On 14 August 2019, a case was reported that a 5-year old girl child, studying in a private school in South Delhi was sexually abused by the sweeper in her school repeatedly. The accused had taken the child into isolated places and abused her for a couple of days. The accused was booked under rape and charged under the POCSO Act, 2012. The CCTV footages show that the man had accompanied the child to the washroom repeatedly.¹⁴
2. A hearing-impaired student belonging to a school in Uttar Pradesh had reported that she was molested by the school's principal along with another teacher. The victim revealed that along with her, six other children were also subjected to this inhumane treatment. The victim narrated that the principal would touch her inappropriately in the pretext of giving chocolates and showed them obscene pictures. The accused persons are booked under the POCSO Act, 2012, for sexual abuse of minor girls.¹⁵

8. REFUGEE CAMPS

A refugee is defined as a person who flees their country of origin because they fear persecution on the basis of race, religion, nationality, political opinion,

13. *R. v. Williams*, (1987) 3 All ER 411.

14. Shiv Sunny and Kainat Sarfaraz, "Sweeper Caught for Raping 5-Yr-Old in Delhi School May be Serial Offender: Cops", *Hindustan Times* (New Delhi, 14-8-2019) <<https://www.hindustantimes.com/india-news/sweeper-rapes-5-yr-old-girl-in-south-delhi-school/story-uPiKU5O1HxQXdjdCejD60M.html>> accessed on 23-10-2019.

15. "Here are Five Cases of Child Molestation in Indian Schools", *India Today* (New Delhi, 4-8-2014) <<https://www.indiatoday.in/education-today/news/story/top-10-cases-of-school-molestation-in-india-202738-2014-08-04>> accessed on 22-10-2019.

or membership in a particular social group, or due to natural disasters like earthquakes, tsunamis, or armed conflicts. There are a multitude of reports of sexual violence against refugee women. This is primarily due to the lack of awareness and educational programmes, caregiver policies, harmful norms and societal practices and most importantly, a lack of empathy in the host nation.

In a survey of 1,000 Palestinian refugee girls in Jordan, 78.5 per cent reported male harassment and 64.6 per cent reported harassment on their way from and to school.¹⁶ According to the United Nations,¹⁷ 258 million people have become refugees in order to flee violence; almost half of these people are women and girls. During the perilous journey, girls are put in a number of dangerous situations. Women have reportedly starved themselves and avoided using basic amenities like toilets, so that they don't have to use the same bathrooms as men and according to one report, a woman was reportedly abused for asking extra food for her children. Out of these victims, only a small fraction asks for help.

There are many deplorable accounts from refugee girls alleging sexual mutilation, forced marriage and gang rapes.

9. MITIGATING FACTORS

Even though multiple legislations have been passed to mitigate this gruesome situation, the scenario has not changed much. The abuse is, in strong likelihood not even reported, due to fear and lack of awareness among children, as well as adults. The problem of institutional child abuse is increasing and needs meticulous, well thought out, preventive and proactive measures to ensure that such traumatic and inhumane acts come to a grinding halt.

The measures that are to be taken to mitigate this problem at hand can be dealt in a two-fold approach. The first one will aim at preventing institutional child abuse at grass root levels. The second one is targeted towards helping abused children to come out of their trauma and prevent

16. Outreach and Curriculum Program in Jordan Succeeds in Reducing Violence Against Refugee Girls (The Evaluation Fund-Reducing Violence against Children) <<https://theevaluationfund.org/projects/preventing-violence-against-girls-in-palestinian-refugees-camps/>> accessed on 22-10-2019.

17. United Nations Department of Economic and Social Affairs, "The World's Women 2015: Trends and Statistics" <<https://unstats.un.org/unsd/gender/InNews.html>> accessed on 22-10-2019.

re-victimisation. Even though scars can never be erased completely, steps can be taken to heal them and help them to lead a normal life.

10. STEPS TO BE TAKEN TO PREVENT INSTITUTIONAL ABUSE

10.1 First Step: Prevention Strategy

1. *Regular Inspection:* Institutional homes are not regularly visited and inspected by the Inspection Committees under Section 54 of the Juvenile Justice Act.¹⁸ Inspection Committees come under the Integrated Child Protection Scheme which mandates that the juvenile homes must be inspected every three months. Apart from this, surprise inspections and surveillance must be conducted, preferably by independent bodies like NGOs. This effort should be made more functional so that the caretakers in the juvenile homes are aware of their roles and responsibilities. Psychological evaluation of both the child and caretakers should be made separately and the same has to be reported systematically.
2. *Registration:* The JJ Act mandates that all juvenile homes including orphanages, shelter homes and correction homes be registered. Many privately owned juvenile homes are not even registered and this makes it easy for them to continue any illegal activity unhindered. The unregistered ones don't come into the system at all, thereby moving away from the purview of the State authorities. These places become the breeding zones for juvenile sex tourism, illegal adoption and child sex trafficking.

18. Under S. 54 states, Inspection of institutions registered under this Act.— (1) The State Government shall appoint Inspection Committees for the State and district, as the case may be, for all institutions registered or recognised to be fit under this Act for such period and for such purposes, as may be prescribed. (2) Such Inspection Committees shall mandatorily conduct visits to all facilities housing children in the area allocated, at least once in three months in a team of not less than three members, of whom at least one shall be a woman and one shall be a medical officer, and submit reports of the findings of such visits within a week of their visit, to the District Child Protection Units or State Government, as the case may be, for further action. (3) On the submission of the report by the Inspection Committee within a week of the inspection, appropriate action shall be taken within a month by the District Child Protection Unit or the State Government and a compliance report shall be submitted to the State Government.

3. *Segregation*: Even though Section 47(4) of the Juvenile Justice Act¹⁹ gives guidelines regarding segregation of juveniles based on their age group, offences and gender, such action is not even implemented properly. There should be separate facilities for girls and boys, as well as segregation with respect to age group (like children below 12 years, 13-15 years and 16 years and above). This ensures that senior inmates cannot have contact with juveniles and thereby avoiding vulnerability in the first place.
4. *Awareness*: NGOS, child welfare workers, doctors and law students must visit schools, juvenile homes, shelter homes to educate children about the concept of “*Good Touch and Bad Touch*”, as children in institutional setups have a lack of parental figures to educate them in their lives. This education will ensure that the predators cannot manipulate them or gaslight them. Student awareness groups should be created because they can connect easily with children and the youth population.
5. *Family and Social Policy*: Out of the children who end up in juvenile homes, many of them are abandoned. Many parents are manipulated into believing that they are leaving their child with institutions who will take good care of their children. Good family support schemes and child welfare schemes have to be given by the government so that parents need not send their children to institutions. Provision of monetary benefits, free child healthcare, employment opportunities must be created, so that parents can help raise their children in a safe and secure environment.
6. *Selection*: The caretakers, wardens, workers should be carefully selected based on their previous employment records (for example, whether they have previously been reported for misconduct in character, along with criminal records and family backgrounds). The employees should be checked against the NDSO, the National Database on Sexual Offenders, a registry launched in 2018. A psychological evaluation must be made mandatory. No form of recommendations should be allowed to employ a person. An inspecting officer should be fixed for a particular home and he/she

19. Under S. 47(4), every child alleged to be in conflict with law who is not placed under the charge of parent or guardian and is sent to an observation home shall be segregated according to the child's age and gender, after giving due consideration to physical and mental status of the child and degree of the offence committed.

should keep track of the employees. The employees should be rotated so that they don't get comfortable in the same place. An appropriate probation period must be observed and in the case of any misconduct, there has to be an investigation. Information regarding workers with character misconduct should be circulated across all juvenile homes and Child Welfare Committees throughout the country.

10.2 Second Step: Preventing Revictimisation

Wounds heal and fade away but scars do not. Victims of child abuse face physical, mental and emotional trauma. Childhood is the part of life that shapes the entire future of a person. A sense of fear, shame and guilt perpetuates their mind every time they remember their experience and will remain with them forever. It is impossible to make their trauma disappear, but certain steps can be taken to alleviate it and reduce chances of re-victimisation.

1. *Privacy*: For the best interests of the child, all matters related to the incident should be kept private. Any disclosure of information regarding the witnesses, the details of the incident and the child's identity, should be strictly prohibited. First of all, if any information is disclosed, it will endanger the child's safety. Secondly, it may cause the children to create a stronger wall between themselves and the society. Thirdly, the societal stigma directed towards the child will increase chances of secondary re-victimisation.
2. *Effective Assistance*: Assistance and help in any manner should be extended to the child. Right from judicial support services, financial, health, social and psychological, assistance has to be given. Counselling sessions should be conducted regularly and the progress of the child has to be monitored systematically. Regular psychological evaluations may be conducted to screen for suicidal tendencies. Health services with respect to the pregnancy of the victim have to be handled with utmost care and caution. The child should be informed about the effects of abortion and should be taken care of properly since it might affect their future wellbeing.

No child is emotionally or psychologically equipped to deal with sexual abuse, neither long term nor short term. The short-term effects include regression, such as enuresis/bedwetting or thumb sucking, loss of appetite or sleep, unwillingness to participate in social activities and poor performance in academics. Channelising pain into productive activities like sports, arts

and education can not only relieve themselves from trauma but will also help them feel confident and will bring them a sense of accomplishment.

3. *Judicial Process*: Child abuse victims face a lot of discomfort during the judicial process. Right from reporting the case until the trial is finished, they have to recollect and relive their trauma many times. The investigation should be handled by professionals in a child-friendly manner. They should in no way feel uncomfortable during the investigation and have to be treated in a respectful and dignified manner. The child's testimony can be recorded once and the court can help the child by exempting them to be present during trial and prevent them from facing their abusers multiple times.
4. *Safety*: The safety of the child should be taken care before and after the judicial process is over. During the judicial process, there is a significant chance that the child will be threatened by the abuser or those associated with him. Authorities should take proper steps to ensure that the child's safety is not compromised. After the trial is over, the child must be relocated to a safe and secure environment. In the new environment, it has to be ensured that the caretakers don't have a previous record of misconduct, so as to prevent the child from re-victimisation from a potential offender. Moreover, the child's previous history may not be revealed so as to not promote him/her as vulnerable and hence rendering them an easy target. The child must also be educated about self defense mechanisms and how to face the situation if they encounter it once again. They must also be made aware of the child helpline number- 1098.

11. CONCLUSION

Effects of sexual abuse in childhood can even continue many years after the abuse has occurred. The victim does not become a completely functional adult and experiences struggle in many aspects of life. Therefore, sexually abused children can never grow into a self-actualised version of what they can be and will not be able to make meaningful contributions to society.

Of course, the ideal solution would be to wholly eradicate poverty, illiteracy and other social evils. But this hypothetical solution will remain nothing but a dream for many years to come. The State must take it upon itself to create a new set of policies that give more importance to the implementation. Sexual abuse, especially in institutions, cannot be combated easily. This situation requires work at the grassroots level. The discrepancies in present

legislations must be removed. The main focus of causing a child to cope with trauma lies in the post-offence measures that are taken by the authorities. The final step of the rehabilitation is reserved for the society. Voluntary organisations can be set up so as to share warmth, love, and affection to the children who are constantly deprived of it in their lives.

The strategy that has been outlined earlier is a concrete and sure way of ensuring that child sexual abuse is curbed at the grassroots level. The second step provides a strategy to prevent re-victimisation and steps to be taken in order to care for existing victims.

Children are the bricks with which a community is built and trauma like this makes them weak and unable to cope with the simplest of things, rendering the very foundation of a society weak. As John F. Kennedy said, "*Children are the world's most valuable resource and its best hope for the future.*"²⁰

20. "Re: United States Committee for UNICEF 25-7-1963", President's Outgoing Executive Correspondence Series, White House Central Chronological File, Presidential Papers, Papers of John F. Kennedy <<https://libquotes.com/john-f-kennedy/quote/lbv2e3r>> accessed on 23-10-2019.

INTERNATIONAL PARENTAL CHILD ABDUCTION: A CRITICAL OVERVIEW OF THE INDIAN APPROACH COMPARED TO INTERNATIONAL STANDARDS

—Divya Meenakshi R.*

ABSTRACT

The rise in migration of people across countries and the compulsion of families having to move as a result of better opportunities available to the family members has led to various forms of confusion in the arena of family law and the custody of a child in this respect happens to be one such issue. The Hague Convention on the Civil Aspects of International Child Abduction came about as a solution to this problem as it has been an important measure for solving the uncertainties that existed in relation to the jurisdiction of courts in such cases. It highlights the manner in which a transboundary issue of child abduction in violation of one's rights of custody, shall be governed and the need for the same. However, the rationale behind India's lack of effort towards becoming a party to this Convention still remains unclear. Domestic laws for regulation of such abductions also lack clarity. In light of this problem, this paper attempts to critically analyse the current statutory provisions and judicial pronouncements in connection with intercontinental or international parental child abduction. It also endeavors to scrutinise and weigh out the advantages and drawbacks of the draft of the proposed legislation that is to be applied in such scenarios, incorporating and critiquing the suggestions of the Law Commission, pertaining to India's position in this matter.

Keywords: Custody, Abduction, Child, Parent, Return.

1. INTRODUCTION

With globalisation and growth of open-minded cultural accommodation and acknowledgement, there have been consequential issues in relation to

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the jurisdiction of courts, and the statutes that must apply when there is a petition for divorce or judicial separation in a marriage of a couple where each spouse belongs to a different country. In such scenarios, the custody of the child in such marriages came under skepticism, as there were no proper means or laid down guidelines for settling the issue.¹

The court orders concerning custody could not be properly implemented in another country's jurisdiction, on account of the differences identifiable in the two countries' laws governing family matters that cover guardianship, custody, maintenance, divorce, succession and such other areas that are often directly derived from religious principles. The parents' differential contentions on custody of the child may also arise from their religious beliefs and customs. This gave rise to the issue of international abduction of children by the parents as a result of the perplexing issues that arise in the governance of these marriages' disputes. Such abduction is said to have taken place when a parent happens to take away the child past the boundaries of one country, away from the child's habitual residence, so as to breach his or her spouse's rights of custody of the child.²

When the custody of a child is in dispute, between a separated couple, one of the parents may successfully manage to relocate the child to a different country altogether, resulting in the other parent pursuing legal remedies in a jurisdiction that may not have the power to judicially enforce an order passed by it in such an issue. There are distinct discrepancies in the laws of various countries as well, for dealing with international parental child abduction. So this also leads to prolonged litigation and delay in the delivery of decisions, due to the problems that exist in the application of domestic laws across the country's border.³

2. NATURE OF ISSUE

A Hindu family of three from India had been residing in the US in order to pursue their careers and livelihood there. The wife, who happened to visit her homeland had decided to live in India itself after that, with their

1. Lora Cordin, "The Hague Convention on the Civil Aspects of International Child Abduction as Applied to Non-Signatory Nations: Getting to Square One" [1997] *Houston Journal of International Law* 141.
2. Noah L. Browne, "Relevance and Fairness: Protecting the Rights of Domestic-Violence Victims and Left Behind Fathers under the Hague Convention on International Child Abduction" (2011) 60(5) *Duke Law Journal* 1193, 1194.
3. Antoinette Sedillo Lopez, "International Law—U.S./Mexico Cross-Border Child Abduction—The Need for Cooperation" (1999) 29 *New Mexico Law Review* 289.

child and rejected her husband's requests to return to the US again. Due to this, her husband managed to acquire an order from a court in the US for the custody of his child, as his rights were subject to the jurisdiction of that country. He also filed a petition in the appropriate court in India, seeking enforcement of this order. The wife objected this and refused to cohabit with the husband, claiming that there was marital discord between them and contended that the foreign Court's order must not be effectuated. The court in India was faced with the question of deciding which parent should have custody of the child, while considering the best interest of the child, under the given circumstances in a case. After taking a close look into the facts of the case, the Indian Court passed an order that was not in consonance with the decision of the foreign Court, as the mother was held to be in a better position to have the rights of custody of the child. This case highlighted the obvious need for a law in this regard in India, as the issue of such child abduction was governed under the influence of foreign decisions, orders, rules, the circumstances and facts alone, due to the absence of a formal legislation that lays down the procedures and mandates to be followed when such problems arise.⁴

This paper aspires to furnish the need for mending the tattered and disintegrated position of this issue in the legal arena of India, due to the absence of specific provisions or other forms of formally enforceable rules. The Hague Convention on the Civil Aspects of International Child Abduction is the first of its kind that protects the rights of children in a problem of parental abduction. It is pertinent to note that it does not merely emphasise upon the return-centric aspect. It incorporates the protection of the individual rights of the child as well. This paper also discusses the pros and cons of the draft of the Civil Aspects of International Child Abduction Bill, 2016 and its reformed version the Protection of Children (Inter-Country Removal and Retention) Bill, 2016 which falls in line with the articles of the Convention.

3. HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION

This Convention was a remarkable venture in history, in order to avert any unwarranted shifting of a child by one of his or her parents and proper homecoming of the child to the customary place of living or residence. It provides that this Convention shall be applied in any situation in which

4. *P.K. Srikumar v. Harshitha Gopinathan*, 2015 SCC OnLine Mad 10343 : (2015) 6 Mad LJ 300.

there happens to be a “breach of rights of custody”, not just when an order is passed in a foreign jurisdiction. It recognises that this problem can arise even before there is actual legal separation of the couple, wherein one spouse may want to move away from the marital residence. This one-sided act of relocating a child is condemned by this Convention. It functions as an instrument which ensures that the lifestyle of the child is restored to however it was before he or she was taken away to another country. It also aims to help the child recover from the psychological and mental trauma. It holds the perception that the habitual residence of the child and the forums in that jurisdiction are in a better position to pass orders on issues of parental abduction, rather than any other designated institutions in the foreign country. It seeks to establish precision and clarity in this manner.⁵

The text indicates that the Convention applies with an assumption that in any instance of parental abduction, the child is supposedly removed from the location that he or she would have perceived as “home”, to an unfamiliar place. On this note, it apprehends that the judicial institutions in the child’s accustomed dwelling place is to deal with legal processes involved in one of the parents obtaining custody of the child.⁶ The logic behind the child’s habitual place of living having the power and jurisdiction to address the issue has its origination in the comprehension that the parties had consented that the forum courts that receive such petitions would not really judge the merits of the matter in question. They shall be concerned only with whether the child has been wrongfully removed through a process of abduction. The Convention also gives a power to the Courts of the country to which the child is abducted to, for ordering that the child must be sent back to the country that he or she was originally in. It also visualises that such orders from judicial institutions must be properly communicated in the international level, so as to reduce the incidence of these abductions.⁷

It is pertinent to note that such a seizure of the child might be justified in certain situations that are recognised as exceptional ones. For example, Article 13 suggests that the child’s return to his or her own home may be disallowed if there happens to be a dangerous risk of the child being subject

5. Hague Convention on the Civil Aspects of International Child Abduction (adopted 25-10-1980, entered into force 1-12-1983).
6. Rebecca K. McKelvey, “An Overview of the International Parental Child Abduction Provisions of the Hague Convention” (2010) 7(1) Ankara Law Review 67, 71.
7. The International Child Abduction Database (INCADAT) database is a repository of material, including a case law search, related to the Convention < <http://www.incadat.com/index.cfm?act=text.text&ng=1>>.

to physical or mental harm, or otherwise, if the child is bound to face unnecessarily difficult situations.⁸ The courts analyse these situations and consider it before giving their decision. This telescopes into the approach where the rights and best interests of the child and courts have been applying these standards.⁹ This gives scope for governmental actions and courts are to analyse concerns in the area of public policy and the domestic laws that are directly related to these.¹⁰

4. ESSENCE OF THE APPROACH

The Convention managed to shift the type of approach towards the issue from focusing on the child's best interest to return centric one. The former gave space for the parent who has removed the child to adopt a forum for jurisdiction at his or her own comfort, without considering the perils faced by the other parent.¹¹ The latter approach has hence managed to place emphasis on the child's right to livelihood, in contrast to the child being perceived as property in a discourse for custody between the parents. This is explained in the Explanatory Report to the Convention.¹²

Though this has elements of social considerations and welfare, while trying to identify the juridical logic and background of this principle, the Report has indicated that some judicial institutions have made certain orders on the basis of that country's legal backing, imposing the effects of same on individuals of some other nationality, by utilising the child's best interest postulate, which must not be encouraged.¹³ The dispositive details of the Convention does not have any direct text providing for securing the best

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8. Linda Silberman, "The Hague Child Abduction Convention Turns Twenty: Gender Politics and Other Issues" (2001) 33(1) *New York University Journal of International Law and Politics* 221.
 9. *Felix Blondin v. Marthe Dubois*, 283 F 3d 153, 298 (2nd Cir., 2001); Marisa Leto, "Whose Best Interest? International Child Abduction under the Hague Convention" (2002) 3(1) *Chicago Journal of International Law* 247, 249.
 10. Carol S. Bruch, "Religious Law, Secular Practices, and Children's Human Rights in Child Abduction Cases under the Hague Child Abduction Convention" (2000) 33(1) *New York University Journal of International Law and Politics* 49, 54.
 11. Barbara E. Lubin, "International Parental Child Abduction: Conceptualizing New Remedies through Application of the Hague Convention" (2005) 4 *Wash. U. Global Stud. L. Rev.* 415.
 12. Elisa Prez-Vera, "Explanatory Report on the 1980 Hague Child Abduction Convention".
 13. Guide to Good Practice under The Hague Convention of 25-10-1980 on the Civil Aspects of International Child Abduction – Trans frontier Contact Concerning Children, General Principles and Guide to Good Practice (The Hague Conference on Private International Law, 2008).

interests of the child alone, to the extent of the suitability of the situation for the Convention to apply and for securing its object, i.e., return of the child. The aims of the Convention as portrayed, which address the deterrent and remedial facets of international parental child abduction, are in consonance with a particular idea of what the child's best interest must be.¹⁴

But while considering the exceptions that may justify the child being removed by one parent from the accustomed dwelling, the Convention allows forum courts to arrive at a conclusion in the matter of affirming the presence of these exceptions, which includes a "child's best interest" challenge to a petition for return. This postulate is subject to many interpretations but makes sure that the court thoroughly analyses of what decision will result in the welfare of the child, however it may interfere with the affair of homecoming.¹⁵ Article 13 hence encompasses the lack of objectivity of this postulate. For example, the return of the child may be accompanied by a threat of the child being a victim of physical pain or mental harm, placing the child in discordial circumstances. However, in such instances the postulate is incorporated in the decision-making process of the court.¹⁶

It is pertinent to note that India is a signatory to the United Nations Convention on the Rights of the Child (UNCRC), which promotes decision making in matters of violation of child rights in accordance with postulate of child's best interest.¹⁷ The UNCRC also propagates the incorporation of the best interests' approach in custody disputes, but countries that follow

14. *Ibid.*

15. Art. 13 of the Convention allows the forum court hearing the return application to make a "best interests of the child" examination if the return application is challenged on the basis of the grave risk exception to return.

16. Carol S. Bruch, "The Hague Child Abduction Convention: Past Accomplishments, Future Challenges" (1999) 1 *European Journal of Law Reform* 97.

17. The Convention on the Rights of the Child, opened for signature 20-11-1989, 1577 UNTS 3 (entered into force on 2-9-1990) Art. 3 (CRC). This article provides that: "1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration. 2. States parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures. 3. States parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision".

laws covered by religion are marked by dubiety in application of this.¹⁸ This premise of the child being in the safest position when his or her interests are acknowledged and fortified in the habitual residence may not be completely logical in all situations. It is applicable only to the extent of forum courts being able to deal with the issue in a considerate manner.¹⁹ Also, there could be clashes between the religious predicaments and the assumptions of the UNCRC. Also, when custody is granted in accordance with the child's best interest, the standard of its incorporation may vary, according to the judge who may hear the case.²⁰

The underlying precept that return of the child to his or her habitual place of dwelling is directly connected to the welfare of the child²¹ holds good only until the judicature of that place interpret the issue accordingly and when it is the most easily accessible, i.e. *forum conveniens* for delivering an order in the dispute. The return of the child at the earliest and ensuring that he or she continues to live in the original place of residence may not be in consonance with his or her right to development. This is an important concern and criticism of this postulate.²²

The issues in analysing as to what decision would aptly serve the interest of the child is intensified in petitions for return to courts in countries that are not a party to the Hague Convention and India is amongst these countries. Secularism being one of the basic tenets of the Indian Constitution and religion being in a position to influence legal mechanisms and legislations with respect to custody of a child, the fact that India is not a signatory to the Hague Convention has had a negative effect on petitions for return of an abducted child. The requisite magnitude of clarity is not present, coupled

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18. Peter McEleavy, "The European Court of Human Rights and the Hague Child Abduction Convention: Prioritising Return or Reflection?" (2015) 62(3) *Netherlands International Law Review* 365.
 19. Eran Stoegeer, "International Child Abduction and Children's Rights: Two Means to the Same End" (2011) 32(3) *Michigan Journal of International Law* 511, 526.
 20. Wibo van Rossum, "The Clash of Legal Cultures over the Best Interests of the Child Principle in Cases of International Parental Child Abduction" (2010) 6 *Utrecht L. Rev.* 33.
 21. The Preamble to the Convention states: "The States signatory to the present Convention, firmly convinced that the interests of children are of paramount importance in matters relating to their custody, desiring to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence, as well as to secure protection for rights of access...".
 22. Rhona Schuz, "The Hague Child Abduction Convention and Children's Rights" (2002) 12(2) *Transnational Law and Contemporary Problems* 393, 439.

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with the difficulty of implementing foreign court orders and enforcing an Indian decree in another country.²³

5. THE INDIAN LAW REGARDING CUSTODY OF CHILDREN

If a child is abducted from a country which is not a signatory to the Convention, the national laws of the country from which he or she was taken away, will apply. Domestic legislations do try to apply the child's best interest approach in these issues, but it is subject to interpretation.²⁴ Moreover, foreign legal systems and laws framed by international authorities may be accompanied by a sense of apprehension. This results in much difficulty to the parent whose right of custody is violated. Such a parent does have the option of making a plea to the government, it is seen that there aren't many instances to show that this process will be efficient in ensuring the return of the child. It is seen that governmental authorities often do not obligingly aid in conferring details or any other form of supervision in obtaining the child from the other country, back to his or her habitual residence.²⁵

India's position of not being a party²⁶ to the Convention has been pointed out by the judiciary indicating the need to accede to it.²⁷ In most instances, parental child abduction has often been viewed as a child custody dispute and the personal law of the country itself is applied, except a few exceptional ones.²⁸ A significant number of abducted children are often brought to India by the parent, compared to other places, according to the statistics secured by the US Government. A report put together in 2016 showed that about 99 applications for return of custody were unresolved in India and 24 of these had come up in 2015.²⁹

23. Stellina Jolly, "International Parental Child Abduction: An Explorative Analysis of Legal Standards and Judicial Interpretation in India" (2017) 31 Int'l JL Pol. & Fam. 20.

24. John Paone, "The Hague Convention and International Child Abduction: A Brief Review" (2003) 4 NJ Law 18.

25. Lora Cordin, "The Hague Convention on the Civil Aspects of International Child Abduction as Applied to Non-Signatory Nations: Getting to Square One" (1997) 20(1) Houston Journal of International Law 141, 156-7.

26. Foreign & Commonwealth Office, UK, India – Child Abduction (20-3-2019) <https://www.gov.uk/-government/uploads/system/uploads/attachment_data/file/368267/child_abduction_india.pdf>.

27. *Seema Kapoor v. Deepak Kapoor*, 2016 SCC Online P&H 1225.

28. *V. Ravi Chandran (2) v. Union of India*, (2010) 1 SCC 174; *Arathi Bandi v. Bandi Jagadrakshaka Rao*, (2013) 15 SCC 790.

29. Bureau of Consular Affairs, US Department of State, Annual Report on International Parental Child Abduction (IPCA) <<https://travel.state.gov/content/travel/en/>>

6. RELATED LEGISLATIONS

The word "custody" has not been defined in any law relating to the institution of family in India. "Guardian" as a person taking care of a minor or his or her property or both, has been defined in the Guardians and Wards Act, 1890.³⁰ It is applicable to people of all religions and is procedural in nature. Amongst Hindus, the legal regime operating for custody of a child is connected to guardianship, which indicates a set of rights that a person carries in favour of a minor, for his wellbeing.³¹ The Hindu Minority and Guardianship Act of 1946 provides for the father of the child as the natural guardian, the mother being the second in line, an exception to this rule being in cases where the child's age is less than five years.³² This rule must be interpreted in such a manner that the mother shall be the guardian in the absence of the father, even if it's during the course of his lifetime.³³

Though two the above-mentioned legislations have varied approaches with respect to the inculcation of the child's best interest principle. While the Guardians and Wards Act places more importance on the authority of the parent, while the Hindu Minority and Guardianship Act upholds the welfare principle. This gives way for discrepancies, as the law views Hindus in a sufficiently different manner compared to those of other religions.³⁴ The Code of Civil Procedure, 1908 discuss the enforcement of orders given by the courts of other countries, through Sections 13 and 14.³⁵ The rule of *res judicata* applies to such judgments provided that "1. A foreign judgment must be conclusive. 2. Such a judgment must be made by a court competent according to the law of the State which has constituted it and must have directly adjudicated upon the 'matter' which is pleaded as *res judicata*. The parties must have submitted to its jurisdiction or been present or represented at the proceedings in the foreign court. 3. A foreign judgment must have been given on the merits of the case."³⁶ It is important that a

International-Parental-Child-Abduction/for-providers/legal-reports-and-data/
reported-cases.html> accessed on 4-11-2019.

30. Guardians and Wards Act, 1890, S. 4(2).

31. Sonali Abhang, "Guardianship and Custody Laws in India — Suggested Reforms from Global Angle" (2015) 20(7) IOSR Journal of Humanities and Social Sciences 39, 41.

32. Hindu Minority and Guardianship Act, 1956, S. 6(a).

33. *Githa Hariharan v. RBI*, (1999) 2 SCC 228.

34. Guardians and Wards Act, 1890 S. 17 emphasises custody issues to be decided by a combined reading of the law to which the minor is a subject with the primacy of the welfare of the minor.

35. Code of Civil Procedure, 1908, S. 13.

36. Anil Chawla, "Legal Status of Foreign Decree of Divorce for Hindu Couple Married in India", India Legal Help <<http://www.indialegalhelp.com/files/foreigndivorce.pdf>>

competent Court must hear the issue and the parties admit themselves to its jurisdiction, in a matrimonial dispute.³⁷ A judgment that does not properly avail importance to international or Indian law, where there is scope for its application, is not to be accepted as one accorded with finality.³⁸

7. VIEW OF THE JUDICIARY

Though the enacted legislations have been applied in custody disputes with respect to minors who had to reside outside the country, the intellectual logic behind the decisions rendered have been in consonance with the consideration of the best interest of the child and his or her homecoming, from a foreign country, is largely dependent on the circumstances of a particular case and it cannot rely on any formalistic foundations. There have been no visibly intricate patterns to develop jurisprudence in this matter, though Indian Courts have referred to the obiter dictum in judgments delivered in other countries, for preserving the rights of the child. The Supreme Court has gone to the extent of exercising its summary jurisdiction for the purpose of sending children back to their habitual place of dwelling. The conceptual principles of "most intimate contact" and the "closest concern" were arrived at by the Court for guiding custody matters.³⁹ However, it has also been held that law of the country where the child is abducted to shall apply in a custody dispute, in the Court of that country.⁴⁰

In the case of *Sarita Sharma v. Sushil Sharma*⁴¹ the husband obtained a court order from a foreign country for sole custody of the child. Violating the wife's right to visit, he removed the children to India, seeking enforcement of the foreign court's orders. However, the order for the divorce and custody were passed after the wife had come to India. But the court upheld the rights of the child over this discrepancy in enforcement of such an order. In transnational disputes for custody, it laid down that the following principles must be taken into consideration:

accessed on 2-11-2019.

37. *Y. Narasimha Rao v. Y. Venkata Lakshmi*, (1991) 3 SCC 451.

38. *International Woolen Mills v. Standard Wool (UK) Ltd.*, (2001) 5 SCC 265.

39. *Surinder Kaur Sandhu v. Harbax Singh Sandhu*, (1984) 3 SCC 698 : AIR 1984 SC 1224.

40. *Dhanwanti Joshi v. Madhav Unde*, (1998) 1 SCC 112.

41. *Sarita Sharma v. Sushil Sharma*, (2000) 3 SCC 14.

1. Principles of conflict of laws indicate that the court that has the most intimate contact with the issues arising in the case should exercise jurisdiction.
2. Welfare of the minor prevails over the legislative provisions in Section 6 of the Hindu Minority and Guardianship Act.
3. The domestic court will consider the welfare of the child as of paramount importance and the order of a foreign court is only a factor to be taken into consideration.

It also took into account, the Court's ratio in *McKee v. McKee*,⁴² where it was put forth that in countries that are not party to the Convention, disputes must be decided upon the merits of the case. On this line, the Supreme Court has ordered the return of the child to the other country, so that the dispute can be dealt in the foreign courts, as this move guaranteed the welfare of the child.⁴³

In the case of *Ruchi Majoo v. Sanjeev Majoo*⁴⁴ the Supreme Court took the view that the phrase "ordinarily resident" must be construed on a factual basis. It was also held that by application of the doctrine of *parens patriae* courts must take an objective stand when it comes to deciphering the welfare of minors and the reasoning behind an order given by a foreign court must not be adhered to without examining its intricacies. It must be a factor to be considered while delivering the final decree.

Hence the determination of the best interest of the child can also indicate that foreign court would be in a recommendable position to look into the dispute. However, this order need not be taken as a conclusive one by the other country involved in the matter. The principle of comity of courts is not colored with finality. The "first strike principle" must also be acknowledged, so that the decision of the foreign court is not disrespected.⁴⁵

Recently, the court emphasised on the power of judicial institutions to assign custody of the child to the parent that lives in a foreign country, if it finds that such a decision will benefit the child.⁴⁶ Shared custody as an idea was ordered in the case of *Eugenia Archetti Abdullah v. State of*

42. *McKee v. McKee*, 1951 AC 352.

43. *Shilpa Aggarwal v. Aviral Mittal*, (2010) 1 SCC 591.

44. *Ruchi Majoo v. Sanjeev Majoo*, (2011) 6 SCC 479.

45. *Surya Vadanam v. State of T.N.*, (2015) 5 SCC 450 : AIR 2015 SC 2243.

46. *Leeladhar Kachroo v. Umang Bhat Kachroo*, 2005 SCC OnLine Del 694 : (2005) 121 DLT 218.

*Kerala*⁴⁷ along with visitation rights. However due to the lack of legislative recognition for the concept of shared custody in India, the courts are often used to considering the orders given in courts of other countries for shared residence, keeping in mind that the well-being of the child is of supreme importance.⁴⁸

8. OVERVIEW OF THE HAGUE CONVENTION

Emphasis on retaining and restoring the status quo of the child (this being his or her habitual residence) is essential for justice to prevail, as this could prove to be fair to the child and the parent, while it sees to it that the parent who has abducted the child does not obtain an unreasonable benefit from this unfair action. This has been inculcated in the Explanatory Report to the Convention.⁴⁹ It can be observed that that a parent who purposely removes the child attempts to alter the jurisdictional factor in a custody dispute.⁵⁰ This was to be remedied by way of setting the seal on prompt return of the child. So, the Convention is primarily concerned with determining which forum would be appropriate to hear the case, as embodied through the provisions of Articles 16 and 19 of its text. It can also be seen that the place that the child is accustomed to will have the proper cultural and moral environment for the growth and development, due to his or her familiarity with those surroundings.⁵¹ These are the logical reasons behind the emphasis placed upon return of the child to the habitual residence, which is subject to exceptions.

It is upon the abducting parent to prove the existence of custody rights in his or her part and lack of violation of such rights of the other parent.⁵² The provisions under Article 13 entail that a removal by one parent may be

47. *Eugenia Archetti Abdullah v. State of Kerala*, 2004 SCC OnLine Ker 474 : (2005) 1 HLR 34.

48. Anil Malhotra and Ranjit Malhotra, "India, Inter-Country Parental Child Removal and the Law" (30-9-2008) <<http://www.reunite.org/edit/files/articles/2008%20FSL%20Contribution.pdf>> accessed on 29-10-2019.

49. Danielle Bozin-Odhiambo, "Re-Examining Habitual Residence as the Sole Connecting Factor in Hague Convention Child Abduction Cases" (2012) 3(1) Family Law Review 4, 5.

50. Allison Maxim, "International Parental Child Abduction: Essential Principles of the Hague Convention" (2012) 69(4) Bench and Bar of Minnesota 19.

51. Caroline Nicholson, "The Hague Convention on the Civil Aspects of International Child Abduction — Pill or Placebo" (1999) 32(2) The Comparative and International Law Journal of Southern Africa 235.

52. Susan Mackie, "Procedural Problems in the Adjudication of International Parental Child Abduction Cases" (1996) 10 Temp. Int'l & Comp LJ 445.

Protection of Children (Inter-Country Removal and Retention) Bill, upon further recommendation by the LCI. It provides for designation of a central authority that must handle the issues of removal of children, by overseeing the proceedings in the Courts.⁶⁵ It provides that:

- The affected parent in a contracting nation can approach the authority for taking steps for return of the child.⁶⁶
- It embodies the essence of Article 13 of the Hague Convention.⁶⁷
- If the child is aged appropriately, then his or her opinion can also be taken into account.⁶⁸
- Specific authorities can be appointed for collecting details about the habitual residence and the removal.⁶⁹
- A decree for return of the child can be accompanied by an order for the abducting parent to pay the cost of the child's return to the habitual residence.⁷⁰
- Upon request, the High Court can pass an interim order for the benefit of the child.⁷¹
- These provisions will ensure the welfare of the child and aid in smooth handling of issues in the family, which is necessary for healthy mentality of the child.⁷²

11. CONCLUSION

International parental abduction of children violates a child's right to development. While it is true that the need for prompt return of the abducted child can be subject to controversy, it is vital for India to accede to the said Convention and enacting a legislation in respect of the same so that the issue of international parental child abduction can be taken note of and addressed in an efficacious manner. It must incorporate aspects of relocation and ill

65. Law Commission of India, the Protection of Children (Inter-Country Removal and Retention) Bill, (No. 263, 2016).

66. *Ibid*, S. 8(1).

67. *Ibid*, S. 17.

68. *Ibid*, S. 17(2).

69. *Ibid*, S. 20(2).

70. *Ibid.*, S. 21.

71. *Ibid.*, Ch. 5.

72. *Sumedha Nagpal v. State of Delhi*, 2000 SCC OnLine Del 14.

treatment of the child in her home country.⁷³ The formulation of Article 13 of the Convention adopted in Japan is noteworthy in this respect. The judiciary, while interpreting such cases, must scrutinise all the external factors surrounding the issue, such as the drawbacks involved if the child were to return to the habitual residence.⁷⁴

If India becomes a party to that Convention, then international principles as well as the postulate of protection of the child's best interest will prevail. This can be perceived in consonance with the existing law on custody rights. The reasons for wrongful removal must also be incorporated, for the protection of the right to health, education and livelihood guaranteed to children in India. These are a part of the Fundamental Rights under Part III of the Constitution and hence it is the duty of the State to ensure that these are not violated and if breached, must be remedied.⁷⁵ Children are the torch bearers of a nation and it is important to guarantee a safe environment for their growth and development, which must be backed by law.

73. US House Committee on Foreign Affairs, Hope Deferred: Securing Enforcement of the Goldman Act to Return Abducted American Children (14-7-2016) <<http://docs.house.gov/meetings/FA/FA16/20160714/105221/HHRG-114-FAi6-Wstate-AbbiR20160714.pdf>> accessed on 29-10-2019.

74. Act for Implementation of Convention on the Civil Aspects of International Child Abduction (the Implementation Act) 2013 (Japan) Art. 38(1)(4); Colin P. A. Jones, "Towards an 'Asian' Child Abduction Treaty? Some Observations on Singapore and Japan Joining the Hague Convention" (Working Paper No. 31, Asian Law Institute, 2013) 25.

75. Constitution of India, 1950, Arts. 21, 23, 24.

JUVENILE DIVERSION

—Sushree Saswati Mishra & Seemon Snigdha Jena*

ABSTRACT

This research paper strives to highlight the need for recognition of the concept of "Juvenile Diversion" in the context of all the transitions undergone by Indian juvenile justice system over the years to provide for the reformation of juvenile delinquents. The enactment of Juvenile Justice Act, 2000 is a milestone in itself as it laid emphasis on reformation and reintegration of the child in conflict with law back into the society which was symbolic of the fact that society had come to understand that the psychology and the ability of a child to make informed decisions is completely different from that of an adult and therefore it would be unreasonable to place the child and an adult on the same pedestal. With procedural loopholes in the system coming to the forefront in the recent times, pre-adjudication diversion is a better option to tackle social stigmatisation and risk of recidivism by focusing on providing individualised treatment and encourages community participation in helping the child to unlearn delinquent behavior and eliminate the negative impact of institutionalisation.

The diverse programs are tailored to suit the specific needs of a juvenile delinquent by taking into account the socio-economic variables. Diversion is not a process which seeks to undermine the constitutional rights of a child rather it seeks to avoid unnecessary imposition of social control over the child and assist him in realising his innate potential and accommodating to the established societal norms.

Keywords: Pre-adjudication Diversion, Social Stigmatisation, Recidivism, Individualised Treatment, Community Participation.

1. INTRODUCTION

The development of a comprehensive juvenile justice system in India owes a lot to Babington Macaulay who is responsible behind formulation of the

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Indian Penal Code of 1860, which has stood the test of time and is still revered to as a progressive piece of legislation of its time; and which included provisions¹ for protection of children from being held criminally liable owing to their lack of maturity to comprehend the nature and ramifications of their actions, which started the trend of differential treatment being meted out to juvenile offenders by placing them on a different footing than the adult criminals. Further, when India ratified the Convention on the Rights of Child (CRC)² in the year 1992 it ensured the strengthening of children-oriented legislations in India whose major contribution was that it provided for a uniform age of maturity for both boys and girls which is legally recognised in many other countries.

Juvenile justice system in India has a dual role of looking after the “Children in need of care and protection”³ and working towards the reintegration of a “child in conflict with law”⁴ into the society by subjecting the child to the critical supervision and reformatory training provided in correctional homes⁵ which are provided statutory recognition but is afforded the status of last resort after all other options of reforming the juvenile are extinguished.⁶

In the last few years, following the Nirbhaya rape case⁷ the morality of the entire nation took precedence over legal logic leading to the amendment in Juvenile Justice Act creating a separate category for the juveniles aged 16-18 years who have accused of or found to have committed heinous crimes.⁸

Of the diverse holistic principles recognised for ensuring all round development and creation of a conducive enabling environment which would help the child develop a unique identity and ensure his/her welfare,⁹ one of the most interesting principles is the “Principle of Diversion” which if given the required attention would lead to low risk of a child becoming

1. Indian Penal Code, 1860, Ss. 82, 83.

2. UNHRC, Convention on the Rights of the Child, <<https://www.ohchr.org/en/professional-interest/pages/crc.-aspx>> (accessed on 11-9-2019).

3. The Juvenile Justice (Care and Protection of Children) Act, 2015, S. 2(14).

4. *Ibid*, S. 2(13).

5. *Ibid*, S. 2(14).

6. *Ibid*, S. 18(1)(g).

7. *State v. Ram Singh*, 2014 SCC OnLine Del 1138.

8. *Ibid* (n 3), S. 15(1).

9. *Ibid* (n 3), S. 3.

a hardened criminal by subjecting him to an alternative more constructive system rather than subjecting him to the formalistic court procedures.¹⁰

2. THEORETICAL FOUNDATIONS

The reason for evolvement of a different jurisprudence and system altogether for dealing with juvenile delinquents was realisation of the fact that the psychology of children is altogether different than that of an adult individual who is mature enough to weigh the pros and cons of his conduct and make informed decisions. One of the theoretical bases of this concept is labelling theory which believes that deviance is not a behavioral trait rather it is the product of the interaction between the offender the reaction of the general mass towards the crime.¹¹ No person is a born criminal. The social stigma involved in being subjected to the justice delivery process often leads to the first time offender inclining towards the deviant subculture as the social institutions label him as unfit of being a part of the mainstream society and the society at large is unforgiving of his actions making it difficult for him to once again adjust and be a respected member of the community.

The age factor has always been in the eye of the storm, which juvenile system has become in India. Angst and hatred aside towards those involved in heinous crime, the legal fraternity has questioned the lowering of the age of juvenile with respect to heinous offences.¹² Boys and girls since a very young age are taught to behave in a certain way. Our behavior is gendered. If the entire socialisation process ceases to be gender-biased the natural experiences of children can teach them about inequalities persistent in the society. In India, the mental capacities got recognition way back in 1860.¹³ The basis of fixing the age of juveniles at 18 years is of the Convention on the Rights of Child.¹⁴ The age of understanding at 18 years was decided upon after much deliberations taking into account scientific data and not only the physical and mental growth of a child but his maturity must also be assessed while holding the child criminally responsible. The Committee on Rights of Child strongly recommends that State Parties who set a minimum

10. *Ibid* (n 3), S. 3(14).

11. "The Labelling Theory of Crime" <<https://revisesociology.com/2016/08/20/labelling-theory-crime-deviance/>> accessed on 27-9-2019.

12. *Ibid* (n 8).

13. *Ibid* (n 1).

14. Convention on the Rights of Child, Art. 1 (adopted on 20-11-1989) 1577 UNTS 3.

age of criminal responsibility that does not allow, by way of exception, the use of a lower age.¹⁵

Broinslaw Kasper Malinowski, a famed anthropologist understood the basis of deviance during his study of the Trobriand Islands. He was privy to an unfortunate incident in which he attended the funeral of a young boy who committed suicide when he was subjected to public ridicule and outrage for having broken the rules of exogamy with his partner in crime being the maternal cousin (daughter of his mother's cousin). Malinowski discovered that if such incidents are kept discreet then public opinion is less harsh but if such affair is disclosed and a scandal is stirred up then public ostracism is inevitable amongst the population in Trobriand Islands.¹⁶

This makes it evident that societal treatment of deviants of the fixed societal norms is one of the driving forces behind recidivism which is a constant irrespective of cultural differences in different communities.

Critics of the institutionalisation of children in conflict with law believe that interaction with children of different age groups and different levels of maturity in the correctional homes would do more harm than good for a child which is based on the differential association theory which is still appreciated because of strong empirical research which is premised around the notion that criminal behavior is learned in communication with other people mostly in intimate groups- includes learning of techniques to commit crime which can range from simple tricks known to all the members in the society to highly specialised skills and a specific direction is given to the motives and attitudes to conform with the societal norms or divert away from these rules.¹⁷ A study conducted assessing the inmates of Ghana Borstal Institute on the basis of number of days in a week they used to visit their friends, the number of times in a day such visitations took place and the length of time for which these visits lasted all of which

15. General Comment No. 24 (201), replacing General Comment No. 10 (2007), Children's Rights in Juvenile Justice (CRC/C/GC/24) 35 <<https://www.ohchr.org/Documents/HRBodies/CRC/GC24/GeneralComment24.pdf>> accessed on 12-1-2019.

16. Karl Thompson, "The Labelling Theory of Crime", <<https://www.google.com/amp/s/revisesociology.com/-2016/08/20/labelling-theory-crime-deviance/amp/>> accessed on 12-9-2019.

17. Ross L. Matseuda, "Crime and Delinquency: The Current State of Differential Association Theory", Vol. 34 (Sage Publications, July 1988).

revealed that multiple visitations to delinquent (friends and other peers) increases the process of acquiring delinquent skills.¹⁸

3. JUVENILE DIVERSION

Juvenile Diversion advocates for pre-adjudication treatment to be rendered to a juvenile delinquent in order to prevent association with the criminal legal system. Pre-trial diversion is a formal procedure which is authorised by legislation, court rule or by informal prosecutorial consent, whereby persons accused of certain criminal offenses and who fulfill certain pre-established criteria have their prosecution set aside and are placed in a community-rehabilitation program.¹⁹

The Federal Office of Juvenile Delinquency and Prevention (OJJDP) has recommended six main components of juvenile diversion.²⁰ Pre-adjudication diversion can take place at any point starting from the moment when the juvenile delinquent comes into contact with the formal system (i.e. interaction with the police) till the time he is produced before the appropriate authority for adjudication but it has to be prior to the sentencing.

As per the existing system in India, it is feasible to give pre-adjudication diversion responsibility to the existing authorities- special juvenile police unit²¹ or the designated child welfare police officers who are entrusted with the task of producing the child before the Juvenile Justice Board (JJB) after the child is apprehended.²²

Juvenile diversion programs can be effective for a wide range of youth like first-time offenders and those who have committed petty offences like theft of property of negligible or less value, snatching, addiction to drugs, underage drinking, offences affecting public tranquility like rioting, affray which can be resolved without subjecting the child in conflict with law without subjecting the child to the rigors of court system. Diversion programs are carefully planned out taking into consideration criteria like age, kind of offence, social and economic status, place of residence,

18. Thomas Antwi Bosiakoh and Paul K. Andoh, "Differential Association Theory and Juvenile Delinquency in Ghana's Capital City - Accra: The Case of Ghana Borstal Institute" <<http://www.academicjournals.org/ijsa>> accessed on 12-9-2019.

19. "Pretrial Diversion from the Criminal Process" (1974) 83 Yale LJ 827, 827, <<https://digitalcommons.law-yale.edu/ylj/vol83/iss4/6>> accessed on 12-9-2019.

20. S'Lee Arthur Hinshaw II, "Juvenile Diversion: An Alternative to Juvenile Court" <<https://scholarship.law-missouri.edu/jdr/vol1993/iss2/3>> accessed on 12-9-2019.

21. *Ibid* (n 3), S. 2(55).

22. *Ibid* (n 3), Ss. 3 and 10(1).

educational background, behavioral patterns, habits of the juvenile, analysis of the causes which propelled the juvenile to the commit the crime as well as an assessment of risk factors so as to ensure that the desired outcome is achieved.

The nature and goal of the different strategies employed depends on the point of intervention and the kind of service a program seeks to provide like programs based on the popular Risk- Need-Responsibility Model²³ which concentrates on the risk of re-offending, criminogenic needs and the ability of the offender to be able to harness his abilities for constructive purposes.

The diversion can take place in specialised institutions (ex-teen courts, mental health courts) or in a much more informal setup (ex-community).

The different types of diversion programs can be broadly categorised into informal and formal programs. Informal programs mostly emphasise on warning the juvenile delinquent of the dire consequences he would face if he does not mend his ways or resorts back to anti-social behavior and allows the involvement of parents in the process of correction.

Formal programs occur after a juvenile is arrested and involves a justice element and a service element ranging from surveillance to participating in an intervention program.²⁴

In India, children's amenability for reforms and anti-coercive methods was first recognised in Reformatory Schools Act, 1897.²⁵ There are, indeed, instances in which children between the age group of 16 to 18 may have developed criminal propensities, which makes it difficult to reintegrate them back into the mainstream society but such examples are not of huge propensities so as to promote a change in the thinking process as it is always better to try and reform the child in conflict with law than allow him to develop into a hardened criminal. The early reformers did not agree with the adult criminal procedures and penalties being imposed on children who were guilty of offenses and were against putting of children behind bars with hardened criminals. They were of the opinion that the society's role is not restricted to finding out whether the child is "guilty or innocent" but goes much beyond that to find out how the child went on to become this and what best can be done in the interest of the child and in the interest of the State so as to save the child from a downward spiraling path.²⁶ American

25. Reformatory Schools Act, 1897, S. 8(1).

26. *Salil Bali v. Union of India*, (2013) 7 SCC 705, 63.

Juvenile Justice System underwent a major reconstruction after the famous judgment delivered in the case of *Gault, In re*²⁷.

The Supreme Court of America held that the US Constitution is applicable to the children and stated that children subject to juvenile court proceedings are entitled to notice of charges against them,²⁸ to cross examine the victim/complainant,²⁹ to assistance of legal counsel³⁰ and to the protection against self-incrimination.³¹

Pretrial diversion is a multi-purpose concept as it prevents stigmatisation and labelling which generally leads to recidivism, avoids needless stringent social control in case of petty offences and the juvenile delinquents can be rehabilitated without having to go through the rigorous procedures of the juvenile justice system, reduces juvenile justice system costs and reduces the burden on juvenile courts. It helps the child in conflict with law to undergo reformation while maintaining his ties with the family and community which in turn helps him in acquiring significant behavioral changes and in a way also reduces the prospects of recidivism, individual needs are catered to as each juvenile delinquent is subjected to specific programs which is suitable to his situation, enables collaboration of all the stakeholders involved in the matter and emphasises on restorative justice (the juvenile offenders are made to understand and accept their obligations).

4. TYPES OF PROGRAMS

1. Community Service - The first community service order was made by the Nottingham Crown Court in the year 1973 with respect to a cannabis supplier.³¹ Since then it has evolved into a positive sanction which has the potential to reduce the rates of incarceration. Community service makes the juveniles feel that they are also a part of the community and helps them awaken to their skills/talents which they were not previously aware of or they did not have adequate opportunity to showcase their potential. All community services whether voluntary or mandated allows its participants to have opportunities to develop critical thinking and problem-solving skills, gain understanding about how to go about making constructive

27. *Gault, In re*, 1967 SCC Online US SC 106 : 18 L Ed 2d 527 : 387 US 1 (1967).

28. *Ibid*, (26).

29. *Ibid*, (57).

30. *Ibid*, (41).

31. *Ibid*, (55).

changes, from meaningful relationships without compromising a sense of individual self-worth.³²

Clark County, in Washington has started an initiative which is referred to as the “restorative community service” which includes making the offenders get involved in such activities which would enable them to feel the sense of accountability for what they have done and try to make things right with the victims and community by providing their work services.³³

In the case of *Kent v. United States*, the Supreme Court gave the hint of a change in the mindset which prevailed while dealing with juveniles stating that the child receives the worse of both worlds neither does he gets the protections reserved only for adult criminals nor does he receives the care and protection meant for children.³⁴ The profiles of juveniles engaged in community programs vividly illustrates a wide variety of family and environmental risk factors like poor parent-child relationship, lack of affection, sexual abuse, violence, etc.³⁵

2. Juvenile Probation - In San Francisco, there is a provision of sending the juvenile delinquent home but he has to remain under the supervision of an authorised probation officer who would regularly communicate with the child.

Another interesting feature which has been incorporated in the Juvenile Justice system of San Francisco is that they arrange for a Juvenile Advisory Council (JAC) Probation Orientation which is conducted by those youngsters who have successfully completed their probation program.³⁶

In July 2017, the National Council of Juvenile and Family Court Judges (NCJFCJ) adopted a resolution to develop juvenile justice probation services and recognises that a developmental approach is needed to recognise a youth’s incomplete brain development and their heightened sensitivity to rewards and psychosocial immaturity.³⁷

3. Youth Aid Panels - These panels consist of members of the community who look into the matter of the juvenile delinquent’s lack of conformity with the norms of the society and try to bridge the gap between the delinquent and the concerned social control mechanisms. This program helps the juveniles who have successfully completed the program learn personal

37. “Juvenile Probation Needs to Join 21st Century with Developmental Approach” <<https://www.jjic.org/2018/05/07/juvenile-probation-needs-to-join-21st-century-with-developmental-approach>> accessed on 28-10-2019.

responsibility and saves substantial costs as it sidesteps the Juvenile Court proceedings.

It is very true in today's time that being an adolescent is not easy as the range of emotions an adolescent experiences or wants to, varies across a broad range of spectrum and many a times a child does not know how to handle his psychological changes as he does not fully comprehend this. Knowing that the people in the community are there to assist him, a juvenile offender would start feeling that he too is one amongst us all and would come to accept his obligations and undergo realisation and the underlying principle of this initiative is that a criminal is a product of the society as criminality is nothing but a response to the society's drawbacks. The initiative taken by Montgomery County (Pennsylvania) in establishing a Youth Aid Panel emphasises the need of community participation in encouraging behavioral modification in youths. It has incorporated into its terms for accepting a juvenile into the program conditions like doing community service, writing apology letters and participating in victim interaction sessions, thus acting as an alternative to the court.³⁸

4. Juvenile Mental Health Courts - There is an increasing awareness now that many of the juvenile offenders have serious mental health issues which needs prompt and strategic redressal. Juvenile mental health courts are a step forward in this direction as they try to identify the psychological, educational and social needs of the individual. Youth offender suffering from mental issues need to reside in a setting which is not in the least bit restrictive and the treatment should be so structured so as to cater to an individual's needs and must be culturally appropriate taking into consideration factors like gender, age, sexual orientations, family background, religion, ethnicity, personal preferences, etc.³⁹

Many juvenile offenders suffering from untreated mental health issues find it hard to cope with the traditional juvenile justice setup as it is just the opposite of what they need the most as many a times we do not realise that the child is undergoing through a mental trauma because we are rushed in our approach to mete out the punishment rather than caring to understand the offender's psyche. In legal setups we hardly do appreciate inter-disciplinary interventions so as to expand our knowledge base. The society is always dynamic so is crime which is ever changing and the

38. Youth Aid Panel Program, "Montgomery County Pennsylvania" <<https://www.montcopa.org/164/Youth-Aid-Panel>> accessed on 28-10-2019.

39. *Ibid.* (n 22).

reasons behind doing crime is more myriad than we can think of and goes beyond motive-means-opportunity.

5. INCLUSION OF DIVERSION IN INDIAN JUVENILE JUSTICE SYSTEM

There has been a marked improvement in the juvenile justice system in the recent times with the most important development being the constitution of Juvenile Justice Boards⁴⁰ and establishment of special correctional homes⁴¹ which allow for custodial reformation. The issue which we need to ponder about is the procedural shortcomings in the functioning of juvenile justice boards- whether it caters to the individual needs of each juvenile delinquent and whether it focuses on the psychological aspect (the mentality and behavioral analysis of the juvenile) prior to sentencing. Maturity of a child has always been the bone of contention in the juvenile system more so now considering the current atmosphere prevailing all over the world where technological boom has led to a tectonic shift in the pace at which a child's mind used to evolve.

There is lack of scrutiny with respect to the kind of treatment meted out or activities the juvenile delinquents are made to indulge in the correctional homes. The time period for which juveniles are kept in such institutions raises the doubt whether such limited time is sufficient enough to understand an individual's mannerisms and the circumstances or perception which led him to commit such crime and help him undergo a radical change in his outlook and attitude. Juvenile diversion would ensure the active involvement of all the stakeholders (especially the community), something which is lacking in India and is needed as the community is not always forgiving and is hostile in its approach which makes it difficult for the child to start his life afresh.

Considering that even though we have a satisfactory legislation in place which does provides for variegated alternatives to institutionalisation method we struggle to get rid of the old school ways. We do have enough instances of how wrong can institutionalisation of young perpetrators be which is evident from the Supreme Court's pronouncement in the *Sampurna Behura v. Union of India*⁴² in which the writ petition revealed horrendous conditions in correctional homes for children across the country

40. *Ibid*, (n 3), S. 4(1).

41. *Ibid*.

42. (2011) 9 SCC 801.

illustrating how the spirit of Article 21 of Indian Constitution is down in the dumps. The judgment is highly welcome especially now while India is ushering into a new era with fast track courts and other methodology being adopted when it comes to juvenile justice as there is a paradigm shift in our thought process especially after the Delhi gang rape incident. The question which not only legal academicians and people involved in law filed but everyone needs to ask how far is it justified to further make the whole punishment system rigid when we have had no substantial benefit yield out of it or do we need to approach this problem from a different perspective altogether and as a society try to bring about a change as the judgment does indicates towards it that the involvement of people from the society is indeed necessary so as to make the most important aspect of all this entire system that is to successfully rehabilitate the offender much smoother and less tormenting for the juvenile. Law system is very much in need of collaboration with experts in other related disciplines like-social-psychology, doctors, psychiatrists, behavioral analysts who can help Judges and others involved in the formal setup understand things from a multifaceted perspective.

The role of JJB should be dynamic and proactive enough so that it can in collaboration with social organisations and other correctional authorities (police officers and probation officers) augment resources and channelise the resources to chalk out practical programs which would prevent the child from being put through the rigors of the court system, train concerned personnel in the ways they should deal with a child, monitor the progress of the child and even after successful completion of the reformation process ensure that the child is able to lead his life normally as he did prior to the occurrence of the crime.

In India we follow the due process model in which the criminal justice system is viewed as an obstacle race course and each stage is so designed so as to create hurdles to carry the case from one stage to another as the goal is always to protect the rights of the accused (a person is presumed to be innocent until his guilt is proven beyond reasonable doubt). The values emphasised in this model is reliability (minimising the chances to commit errors) and it criticises the informal and non-adjudicatory fact-finding methods believing that it carries with it a strong likelihood of errors. One of the criticisms of juvenile diversion programs is the due process problems. In order to avoid this problem, it is imperative that diversion should be viewed as not having been created so as to circumvent the constitutional rights of the juvenile. When a youth is subjected to diversion program the juvenile's

acceptance of the program needs to be voluntary and not compromised by coercion, undue influence, fraud or misrepresentation. To start with, the juvenile must not be compelled to admit his guilt so as to be able to enter and participate in the juvenile diversion programs and at any stage of the diversion process, the juvenile must have the right to return back to the formalistic court system for a hearing. The juvenile must be made aware of all his rights and must be able to exercise such rights without being in a disadvantageous position for having opted for the juvenile diversion program in the first place. The juvenile must also be given the right to consult a lawyer of his choice prior to deciding and weighing out all his options so that he can make an informed choice. The juvenile also has the right against self-incrimination.

It is also imperative that the juvenile be informed about the advantages of the diversion program and that he would after successful completion of the program be given the chance of a fresh start with all his records being erased. Confidentiality needs to be maintained at all times during the juvenile diversion program being carried out. Anything which the juvenile confides in to the lawyer, counselor, volunteer, social activist, a member/ members of the community or any other person he comes across during the juvenile diversion program shall not be admissible against the juvenile at a later stage in the court if the juvenile opts for an adjudicatory hearing in the future.

In India, not only do we need the inquisitiveness to try out this alternative but indeed we are in need of proper infrastructure and more budgetary allocation to be made in regard to improve and increase the manpower for an effective juvenile justice system to be operative so that the courts are less burdened (decentralisation of the work load), the legal expenses which indeed in India are high can be cut and moreover the time limit in which such disputes involving juveniles becomes less rather than allowing a case to drag for years in a court.

6. CONCLUSION

The angst of the society after the Nirbhaya rape led the lawmakers to take the extreme step of amending the JJ Act to include the provision of trying juvenile delinquents who are 16 years of age or above as adult criminals for heinous crimes. The issue of administrative failure got overshadowed in all the hype about giving a death sentence to the juvenile involved in the matter which led to less accountability on the part of the authorities whose function it was to ensure proper implementation of juvenile justice.

On the flip side, all of this made us question the working of correctional homes and whether there should be non-institutional dispositional alternatives employed in order to deal with juvenile delinquents. Before the implementation of juvenile diversion programs in the Indian context, the lawmakers have to keep in mind that our criminal justice system is based on the "Due Process" model which upholds the constitutional rights of the accused religiously and in keeping with this they need to ensure such programs are fitted within the well-defined ambits of the Indian Constitution. The concept of juvenile justice system has come to a full circle in the sense that Juvenile Courts were established to divert children from adult criminal justice system and now even efforts are made to completely divert children from the entire court system through juvenile diversion programs. Diversion programs would prove beneficial in reforming youths whose misbehavior does not cross the threshold of amounting to an act involving moral turpitude but whether such programs would have a positive impact on delinquents of 16 years of age or above who are now a separate category altogether is worth giving a thought and working towards. We owe it to the future generation, the youth to provide them with a world in which there are endless opportunities for them to explore and choose their path so that they can make a mark and leave their legacy behind and juvenile diversion is one big step in this direction.

MIGRATION: CHILDREN, LEAVING AND LIVING IN TURMOIL

—Upasana Acharya*

ABSTRACT

Children have migrated since decades in order to escape conflict and persecution at home; to leave behind destitution and follow the path of a possibly brighter future. Today, children being a major part of the population of our country, the rights regarding child migration should be taken into serious consideration. They will likely be increasingly affected in coming decades as a result of globalisation, socioeconomic alterations and climate change. This review provides for a relevant framework to protect young migrants and outlines the limitations of the established policies. It suggests for the betterment in the status of protection of the child irrespective of their legal status. The paper also reviews multi-level risk factors pertinent to sexual abuse/exploitation of children along the process of migration, while acknowledging and critiquing the inter-State policies that govern the present rights of the child. The policies for a migrant child need to operationalise the rights and entitlements envisioned by international human rights law. The regional law should be in consonance with a set standard of fundamental laws at the global level, further taking into consideration the setbacks of the nation, the rights of the child during migration and at all times, needs to be reviewed constantly while seeking increasing benefits for the child.

Keywords: Migration, Child Trafficking, Sexual Exploitation, Rights of Migrants, Education, Child Protection Systems.

1. INTRODUCTION

Thousands of minors are recorded to be engaged in the unorganised sector, at no constant wage rate, working for unreasonable hours, in substandard working atmosphere. Statistically, child migrants (below 19) accounted for

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14 per cent of the total migrant population and 5.9 of the total population including all ages, in 2019 globally. The estimated total internal migration, leads to a staggering 450 million out of which 63 million being children, which is only indicative of sturdy rights for the child.¹

India in the domain of rapid globalisation and an unsteady economy with rising unemployment, the rural sector falls prey to seasonal migration to keep up with the market. The staggering amount of underage kids employed in the unorganised sector raises humanitarian concerns. Usually, children migrate from the rural to urban areas in search of employment opportunities or a stable livelihood. However, not always with such meagre educational qualifications does the youth land an opportunity which would be favourable according to their requirements. In a 2013 study conducted by ILO (International labour organisation), it was observed that 47 per cent of children (between ages 6-14) and 68 per cent of children (between ages 15-17) were working as bonded labours.² The destinations, however of migrating or trafficked children varied considerably, they usually were either the trade sectors or adverse sections with an abundant economy which are unsuitable even for adults to work in.

According to the 2013 census, it was recorded that out of the 63 million child migrants, 30 million were female. While the grounds for migration were stated as either educational or business oriented, a startling 129,183 females between the ages 10-14 had migrated after marriage and the legal age for wedlock in India is 18 years for women. Further, women trafficking poses an integral threat to the nation as the statistics released by the Ministry of Women and Children Development conclude that 19,223 women and children were trafficked with the highest in the state of West Bengal.³ Women/children trafficking for the purpose of sex or forced labour remains the general intent behind overall human trafficking, making it the third largest organised crime globally. Lured by a fulfilling lifestyle impeded by poverty and uneven opportunities in the rural areas, victims fall prey to this staged crime.

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1. UN, Department of Economic and Social Affairs (UN DESA, 2019).
 2. International Labour Organization, Child Migration, Child Trafficking and Child Labour in India. (ILO, 2013).
 3. Finnovation, "Almost 20,000 Women and Children Trafficked in India in 2016" <<https://www.reuters.com/article/us-india-trafficking/almost-20000-women-and-children-trafficked-in-india-in-2016-idUSKBN16G29G>> accessed on 14-05-2020

Child migration makes one vulnerable, even enduring serious threats due to economic drawbacks in one's case. While the right of the child strives to protect them, it is inadequate to the amount of exploitation on the part of the child. Female child being the most vulnerable to exploitation that are often trafficked for the purpose of commercial sex. The destinations of the work sites have an almost 90 per cent lack of access to ICDS (Integrated child development services), 80 per cent of the children migrating have no access to education and additionally 40 per cent are engaged in labour.⁴ Child migration for any of the above purposes and in the given circumstances pose a serious threat to the rights of the child.

2. DIFFERENT SCENARIOS THAT RESULT IN CHILD MIGRATION

Child migration is a resultant outcome of three cases-based scenarios, where – The children migrates along with their parents/guardian, migrating alone or are left behind due to migration. In the first scenario, the child is accompanied by a legal guardian who ought to take care of them and protect their rights. However, the rates of exploitations have only decreased rather than diminishing while being accompanied by a guardian, the 2013 ILO report attested that 53 per cent of the children who migrated with adults, were victims to trafficking. For the child to have proper education at the intended destination, the adult has to make sure that all the arrangements for the same has been made prior to the migration. The failure in the required arrangements will make the child prone to labour or unorganised sector related works. In the second scenario, the child is migrating independently, usually in the case as a student. However, the chances of exploitations are excessive here, as the child is subject to additional vulnerability. These children are deprived of support from their families in an unfamiliar environment and being unaware of their rights makes them even more prone to the vulnerabilities. Usually, these minors are sent off or have chosen to be unaccompanied on their way to work and usually for the purpose of sending remittance back home, while additionally balancing education and work together, inducing an immense amount of unjustified pressure and obligation upon the minor and lastly, when the adults of the family have migrated leaving behind a minor. The minor or a minor along

4. Selim Iltus, "Realities of Life for Children of Seasonal Migrant Workers" (Bernard van Leer Foundation, 2013).

with a person is left behind; usually an older sibling would have an undue burden to take care of themselves and their left behind siblings.⁵

2.1 Status of Illegal Immigrants that are either Detained or Left Behind:

Recently, there was a release of the final citizenship list that rendered a significant amount of people homeless in Assam on the basis of the government's move to detect illegal immigrants who are now excluded from the acquiring citizenship through birth, registration or naturalisation provision. An immigrant is a foreign citizen who has entered the country without a valid passport or travel document or one prescribed for a period of time and that has expired.⁶ Hence, there is no provision to grant legal status or citizenship to the migrants or their children. India does not support the system of permanent citizenship or green cards contrary to that of the United States and it grants only the Indian origins to sustain a livelihood on the permanent basis through the OCI (Overseas citizenship of India) program.⁷ Therefore, there is no evidence that India provides a residency permit or visa to illegal migrants and their children. This poses a grave threat to the legal rights especially of the children who have acquired citizenship by birth in India and are now left behind by their parents who would technically reside in the detention centres. The children left behind would not always necessarily have an adult to accompany them and there might be further vulnerability towards additional exploitation apart from forced labour or trafficking.

Assam is now in the brink of a probable crisis affecting lives of generations to come which would only lead to loss of liberty of a large number of people losing their basic rights. In the midst of a remote area in north-east lie detention camps that would hold over 15 lakhs including a significant number of children. As mandated by the Government of Assam, there are provisions of special treatment targeting women and children and admitting children in nearby schools is one such educational provision. While, a group of National Human Rights Commission who visited the camps stated that the detainees were restrained even from enjoying the basic rights of

5. India Migration Now, "Children on the Move: 63 Million Migrants in India are Children" (Medium, 2019).

6. Citizenship Act, 1955, S. 2(1)(b).

7. Press Release, Government of India, Cabinet, Cabinet Approves Grant of Permanent Residency Status to Foreign Investors (2016).

a convicted prisoner and a few over 900 immigrants were detained in the Assam jails. The government of Assam denies to address the current situation.⁸ Whether a child is accompanied or alone by themselves, who are placed in any detention centre around the globe, the critical categories of legal provisions ensured to children should include, firstly, access to relief during a fair trial, secondly, detention in the most humane conditions possible and lastly, legal representation in their immigration proceedings. The child should in all manner have humanitarian assistance and protection that they require.

3. CHILD TRAFFICKING DUE TO MIGRATION

The number of children migrating has drastically risen at an alarming rate since the past decade and there is enough evidence that a large proportion undergoes sexual or gender based exploitations on their journey. *Child Trafficking*⁹ is one such transgression, that refers to a complex set of interrelated activities that involves migration and exploitation. *Prima facie* the international as well as the internal legislations induce criminalisation to those who perpetrate trafficking. The subsequent concerns involve legal provisions that protect the trafficked and that they are not personalised for such irregular entry.

The UN Convention against Transnational Organised Crime (Palermo Convention) in the 2000,¹⁰ agreed on the definition and the subsequent protocol to protect and prevent trafficking for women and children. The Trafficking Protocol¹¹ defines the act of trafficking as engaging and conveyance of a child for the purpose of abusing, either in or outside the territory. Although the element of coercion sets grounds for arbitrariness here as there would be no valid expression or implication of consent in the case of a minor. Further there is no sexual exploitation mentioned, the

8. Reuters, "Assam NRC: Workers at India's First Detention Camp for Illegal Migrants might End Up There" (India Today, 2019).

9. Bhabha, "Independent Children, Inconsistent Adults: International Child Migration and the Legal Framework", 7.

10. UNGA, United Nations Convention Against Transnational Organized Crime (Palermo Convention, 2000).

11. UNGA, Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, Supplementing the UN Convention Against Transnational Organized Crime (Trafficking Protocol, 2000).

term "forced movement" will cover both sexual and forced labour within its ambit.

There are universally applicable human rights treaties and laws protecting the specific groups of young migrants and victims of child labour. These international treaties should be at par with the regional or the internal laws of the nation. A child migrant is guaranteed rights preserved in three UN agreements, them being implemented and applicable to all irrespective of nationality or status of law in the territory and them being: Firstly, the Universal Declaration of Human Rights (UDHR),¹² secondly, the International Covenant on Economic, Social and Cultural Rights (ICESCR)¹³ and lastly the International Covenant on Civil and Political Rights (ICCPR).¹⁴ The ICCPR accords rights of liberty to move and privilege to choose their residence but only to people who are legally within the territory. The UDHR likewise does not permit "right to migrate." However, preserving the right to movement and residence within the borders of any State and the person's right to leave a country. The ICCPR allows exceptions to this only in the matters concerning security of the nations or public orders.

The Convention on the Rights of the Child (CRC) is the most extensive collection of international legal standards for the protection of the humanitarian rights of children. CRC strengthens the protective impact of human rights for children through a structure that details the obligations to be placed under scrutiny by its supervising treaty body, the Committee on the Rights of the Child. In 2002, the CRC receives power from protocols on the involvement of children in armed conflict and child prostitution and sexual exploitation in any form for commercial sex (Protocol on Sale of Children).¹⁵

3.1 Fundamental Rights of Child Migrants

The Convention on the Rights of the Child (CRC) identifies the four major principles for the protection of the Fundamental Rights of the child.

12. UNGA, *Universal Declaration of Human Rights* (UDHR, 1948).

13. UNGA, *International Covenant on Economic, Social and Cultural Rights* (ICESCR, 1966).

14. UNGA, *International Covenant on Civil and Political Rights* (ICCPR, 1966).

15. CRC Committee, *the Rights of All Children in the Context of International Migration* 13.

Firstly, discrimination against no child. The government has to make sure that within their jurisdiction the rights of every child are ensured, there should be no discrimination in any case of child migrants, child refugees, or any form of gender-based or religion-based discriminations.¹⁶ Exploitation can be subjected to either genders, so there should be equal rights of both male and female child in order to be protected from abuse in any form.

Secondly, the best interest of the child should prevail. The child's interest should inherently be the prime objective behind every action that involves the Fundamental Rights involving the child.¹⁷ The interest should be taken into consideration during the entire process of displacement and possible mistreatments be avoided to the greatest extent. The best interest of child also includes the sexual orientation of the child and there should be no gender-based discrimination regarding the same. The child in the process has all the rights to identify themselves as per their interest without any possible hindrance in the process.

The UN High Commissioner for Refugees (UNHCR) in its 2008 Guidelines, mentioned that there should be limited guidance on how to carry along the principle of best interest, therefore, it is the freedom of the regional government to devise subjective laws that would protect the best interest of the child.¹⁸ The right to acquire any nationality is also an inherent right of the child. The children left behind by parents who could not prove the nationality, inherit the right to choose their own nationality, although according to the citizenship provisions of India, any person born in India will be granted citizenship by birth. However, if the child chooses to stay in the detention camps along with their respective guardians, it is not prohibited. The CRC does not prohibit the detention centres but establishes that it should be the last resort and it should be for the briefest time possible.¹⁹ The children detained there should be separated from adults in order to protect them from any form of exploitation, but if it is for the best interest of the child, he/she may choose to reside with the adult. CRC however, explicitly expressed that children in need of protection are not bound to be kept in the detention centres and rather be encouraged to choose their place of safe residence. The protection board also encourages

16. CRC Committee, General Comment No. 6 (Unaccompanied Children), para 12.

17. *Ibid*, Art. 3(1).

18. UN High Commissioner for Refugees (UNHCR), Guidelines on Determining the Best Interests of the Child (Geneva, May 2008).

19. CRC Committee, General Comment No. 6 (Unaccompanied Children) para 61.

the reunification of family²⁰ after a potential migration ceases or is in process to cease. However, if the child migration has benefitted and the reunification will bring about reasonable risk and potential threats to the Fundamental Rights of the child²¹ the unification of the family should not be the option. Other rights of the child include the right to participation and the right to life and development, as enshrined in the protocols of CRC.

4. SEXUAL VIOLENCE DUE TO MIGRATION

During the process of migration, the child may come across sexual violence, which can be classified into either sexual abuse which includes the forcing of the child into engaging in sexual activities whether aware or unaware and sexual exploitation when someone performs or the child themselves perform sexual activities in exchange for something. Migration always does not necessarily put a child in the domain of exploitation but rather increases the chances of a possible encounter. With migration however there is pressure on the child at times during stages of financial desperation and with the lack of adults the chances of sexual exploitation might see a potential increase. The protection of the sexual rights of the child cannot necessarily be an international program as different countries would need their own respective programs to tackle the subjective issues within their borders, so national government of respective countries should ensure protection to children against sexual exploitation.²² For instance, coordinating at a regional level with the South Asian Association for Regional Cooperation (SAARC) endorsing the Convention on Preventing and Combating Trafficking in Women and Children for Prostitution and the Convention on Regional Arrangements for the Promotion of Child Welfare in South Asia in 2002.²³ The legislations pertain to prevention of child abuse and exploitations while tacking child prostitution and maintaining welfare. There is however a dire need of strengthening laws against sexual violence on a regional level and especially in a country like India with high sexual harassment rates. It would be no surprise if young people are taken advantage of in cases of extreme poverty and children being forced into prostitution. However, implementing a policy would face generic challenges

20. CRC, Arts. 8, 9, 10, 20.

21. Para. 27; see also Gallagher, *The International Law of Migrant Smuggling*, 730–731.

22. Musalo, Frydman, and Ceriani Cernadas, *Childhood and Migration in Central and North America; West, Children on the Move in South-East Asia*.

23. Innocenti Research Centre, *South Asia in Action: Preventing and Responding to Child Trafficking Summary Report* (Florence: UNICEF, 2008).

like the failure of implementation and operationalisation. Regional Conference on Migration (RCM), a forum on child migration that includes representatives from different parts of America, tackle the conventional problem, with the agenda focussing mainly on three issues: migration and development, migration policies and human rights.²⁴ However, human rights of migrants in the region has gained little ground. While, the European Union and the Council of Europe have successfully been able to fund regional-level programs to protect children from trafficking and abuse. End Child Prostitution, Pornography and Trafficking (ECPAT) identifies the development of national plans of action to successfully combat sexual exploitation for a migrating child.²⁵

4.1 Countering Sexual Violence due to Migration Effectively

India, needs to identify the risk prone areas and provide assistance accordingly, while bridging the information gap, some of the organisations are using different methods across a range of technologies in order to reach migrant children with information about the risks they could face. The Childline India Foundation along with the government created a telephone said for the child migrants. The service received over 23 million calls between 2010-2012, 62 per cent of which were from children aged between 11-18 and two-thirds of which were boys.²⁶ Awareness drives away ignorance and the more the people are to be made aware of obligations and responsibilities, the better the outcomes would be. Community based interactions could also help raise awareness. Education establishes a pathway to less anomaly in the coordination of law and with children being aware of their own rights will aid them to approach legal representatives for justice.

Sexual exploitation and abuse of children migrating is a multifaceted issue, and combating the issue would require addressing the proximate cause of the same. In order for the identification of the challenges and successfully

24. Pablo Ceriani Cernadas and Marinka Yossifon, *Children, Migration, and Human Rights in Bilateral and Regional Agreements in Central and North America*.

25. ECPAT International, *Sexual Exploitation of Children in Southeast Asia*; ECPAT International, *The Commercial Sexual Exploitation of Children in Latin America*.

26. M. Temin, M.R. Montgomery, S. Engebretsen, & K.M. Barker, *Girls on the Move: Adolescent Girls and Migration in the Developing World, A Girls Count Report on Adolescent Girls*. Population Council (2013).

preventing it, it would be necessary to highlight the possible ways to counter the problem.

- (i) *Economic Growth and Development*: A crucial way is the government addressing the economic context behind the co-occurrence of migration and sexual exploitation of youth.²⁷ As noted throughout the young aspirants travel to urban areas from rural areas, while 75 per cent of the world's poorest reside in the rural areas, making rural areas way poorer than the urban.²⁸ Investing in government and non-government initiatives to promote economic growth in rural areas will not only benefit youth but the overall economy of the nation. And in return the migration process might come to a subsequent halt where the people from rural areas do not feel the need to travel to urban areas for better job opportunities. Organisations such as the world bank is trying to implement government policies in the rural areas while focusing mostly on women and children for profound improvements in rural areas to counter frequent migration.²⁹
- (ii) *Access to Education*: The co-relation between child migration and child labour is the lack of access of education to the children. Ensuring quality education is fundamental for the termination of any form of violence against the child. While the government has formulated different methods for quality education within the country, however the access to education is still an issue. "Access" here would include, expenses incurred except tuition, destroyed infrastructure or the distance between home and school, all set forth challenges for quality education. Also, women education even though been encouraged still faces criticisms over cultural norms. As culture still serves a significant factor in the way for a quality education, broadening of the mindsets of general public serves an important purpose. Migration for quality education to urban areas is a common occurrence, however access and cultural acceptance of education can cease migration and in return all the possible violations against a child.

27. Martin Godfrey, *Youth Employment Policy in Developing and Transition Countries – Prevention as well as Cure* (Human Development Network, World Bank, 2003).

28. International Labour Office, *Promotion of Rural Employment for Poverty Reduction*, International Labour Conference, 97th Session (Geneva: ILO, 2008).

29. Loretta de Luca, Helene Sahy, Saba Joshi, and Mayra Cortes, *Learning from Catalysts of Rural Transformation* (Geneva: ILO, 2013).

- (iii) *Child Protection Systems*: Lately, there has been an increased awareness regarding community-based child protection systems that oversees the process of displacement of the child. This process would help better implementation of child protection of the laws being with local community groups in coordination with formal systems of care. Child protection systems have been implemented in South Sudan where Save the Children Alliance enabled the development of over 100 community-based child protection networks. The local groups fought for the rights of children within their communities, conducted trainings on the protection of the child, and helped in the identification of vulnerable children that needed help.³⁰
- (iv) *Strengthening Families*: With the existence of broken families it would be tougher for a youth to hold themselves back from another possible opportunity that would look lucrative but would not be much of so. Family restructuring is an important process to manage within the family the rapport that would not facilitate the migration of the child. In other possible case scenarios, it is not impossible that a child is forced to migrate because of violence within the family, with the counselling of the disruptive family potent and unnecessary migrations can be reduced.
- (v) *Preparing the Migrant Youth*: A child is not always interested to migrate and rather it becomes an unnecessary burden for them to migrate. In these times, individual intervention is important when the youth is either forced to migrate and fall into the unorganised sector for sending remittance back home. Children should be made aware and there should be participatory discussions regarding the disadvantages and risks associated with migration. Most of the children migrating are not completely aware of the exploitation they might face in the process. If already set for migrating, a child should be made aware of the possible employment opportunities except for labour and unorganised sector and with possible educational exposure, the youth may even land a job with a fixed salary. Connection with the family again plays an important role in the welfare of the child. The association with the local community and the making of new

30. M. Wessells, *What are we Learning about Protecting Children in the Community? An Inter-agency Review of the Evidence on Community-based Child Protection Mechanisms in Humanitarian and Development Settings* (London: Save the Children, 2009).

acquaintances benefits the child as well. These are all the possible ways to avoid exploitations when a child is displacing.

5. PROTECTION OF THE RIGHTS OF THE CHILDREN BELONGING TO THE SPECIAL POPULATION

A significantly greater amount of protection is needed for the support of particularly vulnerable groups, the children with disability. The people with disability make up to 7-10 per cent of the total population of the world. According to research, people with disability are more likely to be exploited due to severe vulnerability as a migrant. Children with disability need to be added into the special provision programs for the protection of human rights of the disabled children.³¹ And another marginalised community is the LGBTQ community that comprises of population over 2.5 million recorded in India. The LGBTQ community includes lesbian, gay, bisexual, transgender, intersex and queer, often face forced migration because of abuse or persecution from their families, which puts the community at a high risk of possible exploitations which further requires specialised protection for human rights.³²

6. INTER-STATE MIGRATION POLICIES FOR MIGRANTS AND THEIR IMPACT

India's new IMPEX (Inter-State migrant policy index), demonstrates the extent of different States in the protection of rights of the children. IMPEX takes into consideration the aggregate of important factors pertinent to migrant's wellbeing within the State which involves labour market, education, child rights, social benefits, political inclusion, housing, domicile and identity, health and sanitation. The IMPEX assessment discloses prevalent indifference and discrimination towards migrants by State-level policymakers. The average score for policy implementation of the child rights is 32 and States such as Kerala and Maharashtra score 75 and 61 respectively due to their child favourable State policies. The prime reason behind such favourable State policies include child-friendly policies for the child migrants. Kerala's 2016 State policy for child includes the provisions of rescuing and rehabilitating migrant children, they also

31. Aleema Shivji, "Disability in displacement", *Forced Migration Review* 35 (July 2010).

32. *Belong to Youth Services, Lesbian, Gay, Bisexual and Transgender (LGBT) Asylum Seekers and Refugees Project, key principles for working with LGBT Asylum Seekers and Refugees* (Dublin 2013).

provide health and protection facilities. Similarly, Maharashtra's 2014 child policy guarantees the same provisions of rescuing and rehabilitating while protecting the health, education and even discrimination.³³

Right to Education was also protected which IMPEX holds perspective to migrant children. The average score of India being 34 with Kerala, Maharashtra and Gujarat achieving high scores of 66, 49 and 45 respectively. Each of the State has made sure of special provisions that protect the educational rights of the migrant children. Kerala's 2010 Migrant Workers Welfare Scheme and Project Rohini,³⁴ while the latter teaches different languages to the students, the former makes sure there is social security to the migrant children. Maharashtra's Education guarantee card (EGI) tracks the migrant children in the State and tracks the enrollments in the school. Innumerable child migrants live in the country without any immunisation, with a lack of access to child care and quality education and are forced to work at a young age.

IMPEX 2019 Scores: Children's Rights

How have the top 7 destination states in India accounted for the rights of migrant children?

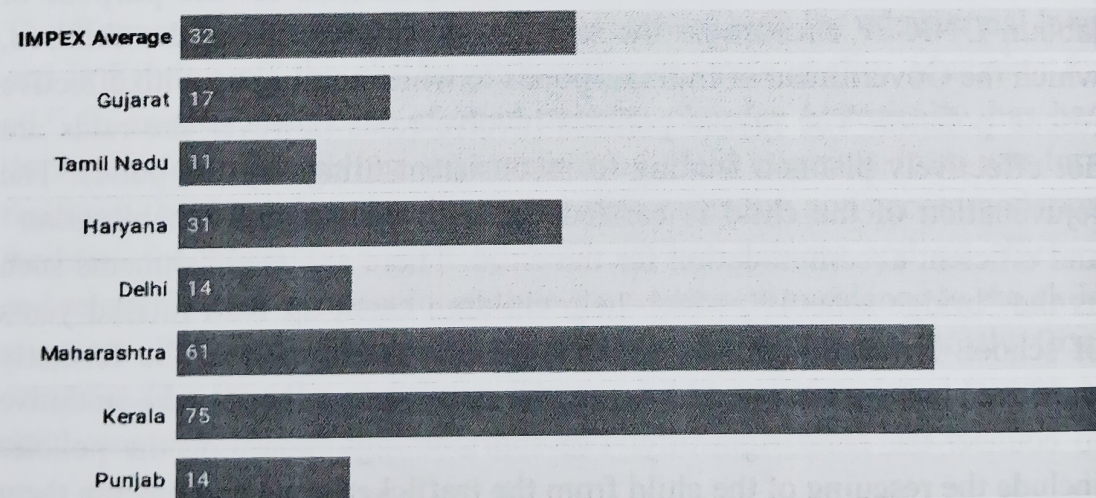


Chart: India Migration Now • Source: IMN IMPEX 2019 • Created with Datawrapper

As stated by the 2011 census, Delhi, Gujarat, Haryana, Kerala, Maharashtra, Punjab and Tamil Nadu have been the most preferred destination States for migrants in India. But the migrants come across various difficulty in these States as their policies being inaccessible to all, the migrants become

33. India Migration Organisation, MN-IMPEX-2019.

34. K.P.M. Basheer, "Kerala's Scheme for Migrants" (*Business Line*, 2018).

completely dependent on although compelling laws for their livelihoods. Migrants have little-to-no State-level assistance and are often become a scapegoat by local law enforcement and politicians for any discrepancies. They are usually paid less and often face discrimination and with widespread discouragement about their quality of life and a yearning to go back home eventually.

7. MIGRATION AND ON THE RESCUE ALONG WITH REJUVENATION OF THE CHILDREN

A significant number of children are migrating from economically backward areas to technologically advanced areas in search of work. In many of these cases, children are trafficked by agents who are bringing them to the employers in the city by extending small advancement to the poverty-stricken parents and giving false assurances of a better future. Government statistically reports that over 126,000 incidences of child trafficking for the intent of labour was registered during the span of 2011-12 in India.³⁵ And with accordance to the National Crime Records Bureau, additionally another 100,000 children go missing in India per year, which researchers believe have been trafficked for the purpose of labour. UNICEF encourages the rescue and reintegration of the children, which the Government of India responds to while coming up with effective rescue policies. The rescue policies involve raids however the raids are not effectively planned leading to inconsistent filings by the police. The rejuvenation of the child is carried out with educational rehabilitation³⁶ and efficient accommodation for the child. There are establishments such as the “bridge schools”, which help children catch up with missed years of school. Even though, the psychological rehabilitation of the formerly trafficked children is not addressed, the government should take initiative to counsel the child rightfully. The shortcomings regarding the policies include the rescuing of the child from the trafficked zone and placing them back into their pre-trafficked areas, it also ignores the post-traumatic stress of trafficking and the prime reasons that furthered them into migrating.

35. United Nations Office on Drugs and Crime (UNODC), *Current Status of Victim Service Providers and Criminal Justice Actors in India on Anti Human Trafficking* (New Delhi, UNODC 2013).

36. Ministry of Labour and Employment, Protocol on Prevention, Rescue, Repatriation and Rehabilitation of Trafficked and Migrant Child Labour, Ch. 4, Convergence Strategy 16.

8. EFFICIENCY OF THE EUROPEAN UNIT INTO PRODUCING DESIRED OUTCOMES

The European Unit laws require for a minimum obligation of protection and care of child rights from all member European nations, though practically the results vary regionally. While there are strong EU laws, the recent surge in the rates of child seeking asylum in the member nations have put the laws to test. One of the finest laws of equal education is evident in the State laws of Germany. Regardless of the legal status of the child, the access to school education is guaranteed to all, indeed with compulsory qualitative education. In most of the schools, transitional classes are run to ease integration into regular classes once children have basic command over German language. The transition classes are aimed to remove cultural barriers, giving a practical overview of the country while providing quality education, but with the increasing rate of migration, it has posed challenges to integration as the cultural difference while taking sensitivity into consideration is not being able to be established, although a higher number of transition classes have been started, these seem to be inadequate. Provided further, migrant children having little-to-no knowledge of the language, therefore the child faces difficulty in grasping up the subject without extra efforts. The German Government, is however consistent with the educational laws and is fighting off the challenges heading towards quality education for all.³⁷ In another such case of good policies, Sweden historically, has had the reputation of receiving unaccompanied child migrants from war-torn countries, having exceptionally appreciable reception and accommodation facilities for migrants, a child-friendly asylum process and an efficient and relatively easy process for granting a permanent residence to the child migrants. Receiving high amounts of asylum applications mostly from countries like Somalia and Syria, Sweden has a well-developed system of child care and protection for all, through the whole asylum process.³⁸

9. RECOMMENDATIONS

The recommendation suggests ways to deliver practicable manners for the improvement of the existing issues regarding protection for migrating

37. Kolja Wohlleben, *Education as Refuge: Systemic Challenges to Refugee and Migrant Education in Hamburg, Germany*, unpublished paper (2016).

38. *European Migration Network, Policies, Practices and Data on Unaccompanied Minors in 2014 – Sweden*, (European Commission, 2014).

children by, preventing dynamics that increase the helplessness to abusive or forced movement.

- Child protection laws for migrating children needs to be combined into the advocacy encompassing the UN Sustainable Development Goals (SDGs), the aspiring set of goals, adopted by the United Nations in the year of 2015 and is functional worldwide and to be applied.³⁹
- Anti-poverty policies, support for employment and the access to proper education needs to be provided in regions where the migration rates are high, needless to mention, all the above-mentioned rights should be applicable to all sections of the society.
- Communication in the form of information campaigns or programs should be used as a tool for educating the possibly migrating segment of the population and the programs should aim in making the population aware about the basic levels of dangers associated with migration.
- The protection of migrating children should be integrated in national policies in order for the safeguarding of all vulnerable children. This can be achieved by collaborating with child right experts or organisations that deal with the rights of children. For instance, a group of child protection specialists from areas of nine Caribbean community and International organisation for migration and UNICEF collaborated to exchange and analysing the drawbacks and further developed the existing policies for the migrating children influenced gravely in the region.⁴⁰

Migration critically affects the child in different phases all through the progression. It is crucial to protect the rights of child even during the ongoing process of migration, as the child is subjected to different vulnerabilities and also, it is necessary to protect the rights at the destination.

39. UN General Assembly, *Transforming our World: the 2030 Agenda for Sustainable Development*, (2015).

40. CARICOM Member States include Antigua and Barbuda, Belize, the Commonwealth of The Bahamas, the Commonwealth of Dominica, Guyana, Jamaica, St. Kitts and Nevis, St. Lucia and Trinidad and Tobago. See IOM, CARICOM, and UNICEF, "A Framework and Recommendations for Action on Children Affected by Migration in the Caribbean" (Geneva: IOM, 2010).

- Monetary initiatives on the basis of funding, for the protection of migrating children and in particular support services through the route of migration backed up by trained staff for the protection, as they should be prepared in cases of emergencies.
- Separated and unaccompanied migrating children have to be allotted with a legal guardian. A search related database with all appointed guardians has to be updated as a centralised system and supported by training. Sweden has an exemplary guardianship system.
- A child protection plan regarding the outcomes of migration has to be implemented in the education sector, with importance to children affected by the process.
- Expanding public understanding and education agendas on accessible resources for security and protection of child migrants, and appropriate immigration strategies and practices. Publicising national guidelines on the rights to access and use basic amenities that has to be free from the fear of deportation and discrimination of the child migrants.

10. CONCLUSION

Migration has been an integral part of the socio-economic structure of India, with a rise in the number of migrants in the past decade, India has seen a rise in the exploitation of children as well. With 20 per cent of child population residing in India, it should be a general obligation for all the citizens to make the place of engagement a safe and protected one. Children migrate due to several different reasons and the laws should be consistent with the Fundamental Rights of the children. As migration has become one of the prime transgressions in India, including seasonal-internal migration, the child rights should be at par with crimes and rising population. This review has explored through all possible violations of the rights of the child and the status of India in the same. The review revolves around the question of how to counter the violations of the exploitation and abuse of the child in the process of migration. Based on the vulnerabilities, efficient State policies of other nations should be taken into consideration and additionally improve the laws of the land, accordingly. The paper discusses in the end the recommendations targeting the vulnerabilities of the migrant children by extending the protection while on the move and at

the destination, furthering suggestions on the prevention of migration as a process inherently. The ways to target the prevention of the process of migration is fundamentally through spreading awareness and strengthening policies as a part of the nation-wide strategies pertinent to the protection of helpless children. Ultimately, only a well-coordinated, widespread response which will effectively target and increase protective environment for young people at risk of violation and trafficking while promoting their healthy growth and development into adulthood, whether or not they migrate.

CASE COMMENT

**ARUNKUMAR v. THE INSPECTOR
GENERAL OF REGISTRATION**

(W.P. (MD) NO. 4125 OF 2019 AND
W.M.P. (MD) NO. 3220 OF 2019)

—Prashant Singh* & Meghna Sharma**

ABSTRACT

Intersex children in India are at constant risk of forced surgical and medical intervention in the form of sex reassignment surgeries. The aim of such surgeries is to align the body of the intersex children as per the normative definition of traditional gender identity, i.e. male and female. Healthcare professionals perform these surgeries without any prior and informed consent of the child. This judgment of the Madras High Court is considered a momentous judgment for rights of intersex children in India as it recognises their consent rights and the right to bodily integrity and prohibits sex selective surgeries on intersex children in the State of Tamil Nadu. It will have far reaching consequences with respect to the future of intersex human rights movement in India. In this case comment, the authors have made an attempt to highlight the need for a nationwide ban on such surgeries. The comment also provides an insight into the current discourse around SOGIESC issues in India and future of law-making with respect to protection of human rights of intersex children.

Keywords: Intersex Children, Sex-Selective Surgeries, Intersex Rights in India, Gender Identity, Right to Bodily Integrity

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1. INTRODUCTION

The judgment in the case of *Arunkumar v. Inspector General of Registration* (hereinafter referred as “the judgment”) was delivered by the Madurai Bench of Madras High Court (hereinafter referred as “the Court”) on 22 April 2019. It is considered to be a momentous judgment for rights of intersex children in India as it recognises their consent rights and the right to bodily integrity. In particular, the judgment declared a prohibition on sex selective surgeries on intersex children in the State of Tamil Nadu. This judgment is likely to far reaching consequences with respect to the future of intersex human rights movement in India.

Complying with the directions of the Court, the state of Tamil Nadu issued a Government Order on 13 August 2019 prohibiting the practice of medically unnecessary sex selective surgeries on intersex infants.¹ The State of Tamil Nadu has become the first State in India to have given normative effect to the demand for stronger legal protection of rights of intersex children in India.² If adopted nationally, India is likely to become the third State in the world, after Malta and Taiwan, to have a legal regime which protects the rights of intersex children.³

With this brief background, it is important to provide the roadmap of discussion in this case comment. At the outset, the comment provides a brief overview of the judgment including the issues and ruling on each of issues. Post the discussion on the judgment, the comment provides a constitutional analysis with regard to the idea of decisional privacy. This analysis is pertinent while discussing consent rights of intersex children.

This case comment has two primary objectives. Firstly, it aims to demystify the discourse around SOGIESC (Sexual Orientation, Gender Identity and Sex Characteristics) rights which is critical to understand the import of this judgment. Secondly, this comment is aimed at looking at the implications of the judgment with respect to the normative future of rights of intersex children in India considering the severe and irreversible consequences of

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1. Health and Family Welfare Department, Government of Tamil Nadu, G.O. (Ms.) No. 355 <https://www.hrw.org/sites/default/files/supporting_resources/tn_order_august_2019.pdf>.
 2. Ramya Kannan, “Why did Tamil Nadu Ban Sex Normalization Surgeries on Intersex Children?” *The Hindu* (Chennai, 8-9-2019) <<https://www.thehindu.com/news/national/tamil-nadu/why-did-tamil-nadu-ban-sex-normalisation-surgeries-on-intersex-children/article29363039.ece>> accessed on 29-10-2019.
 3. *Ibid.*

forced surgical and medical interventions which are performed on intersex children.

2. ISSUES ADDRESSED IN THE JUDGMENT

Arunkumar and Sreeja filed a writ petition before the Madurai bench of the High Court of Madras. The petition primarily sought challenge to the decision of the Registrar and Inspector General of Registration. It prayed for quashing the decision as illegal so as to allow for the registration of marriage between the petitioners.

Broadly, the judgment addresses two issues. Firstly, the Court was asked to examine the validity of the decision of Registrar and Inspector General of Registration who refused to register the marriage of the petitioners. The Court held that the decision was violative of Article 14 of the Constitution of India. The petitioners were discriminated due to sexual orientation and gender identity. Secondly, the Court also examined the validity of forced sex selective operations on intersex children. In this comment, the second issue of the judgment is the focus of analysis.

3. RULING

In order to understand the import of the judgment, it is important to understand what is contained in the term- "Intersex". The term "Intersex" is an umbrella term used to "describe a wide range of natural bodily variations. Intersex people are born with sex characteristics (including genitals, gonads and chromosome patterns) that do not fit typical binary notions of male or female bodies. In some cases, intersex traits are visible at birth while in others, they are not apparent until puberty."⁴

The judgment also discussed the term in the following manner:

Beyond the man-woman binary, there are as many as 58 gender variants. Of course, we use the expression "transgender" as an umbrella term. When a child is born it is usually endowed with male genitalia or female genitalia. But there are children who are born with genitalia that belongs to neither category. They are known as intersex children. They must be given their time and

4. United Nations Free & Equal, for LGBT Equality, Fact Sheet-Intersex, <<https://www.unfe.org/wpcontent/uploads/2018/10/Intersex-English.pdf>> accessed on 29-10-2019.

space to find their true gender identity. But the parents make the infant undergo sex reassignment surgery (SRS).⁵

With respect to the validity of sex reassignment surgeries, the Court began by examining the issues related to consent of the intersex children who are made to undergo such procedures. The Court had the occasion of examining this issue while acknowledging the contribution of Gopi Shankar Madurai-an intersex activist.

Gopi Shankar had written a letter to National Human Rights Commission (NHRC) *to ban the forced sex selective surgeries and medical abuse on intersex babies in India and to recognise Intersex people's Fundamental Rights in India.*⁶ NHRC forwarded the letter to the Ministry of Health.

In its reply, Ministry of Health said the following:

Any kind of invasive medical procedure including sex reassignment surgeries are done only after thorough assessment of the patient, obtaining justification for the procedure planned to be conducted with the help of appropriate diagnostic test and only after taking a written consent of the patient/guardian. Further, medical fraternity is bound to provide medical services to all without any discrimination on any grounds whatsoever.

Justice G.R. Swaminathan has extracted the whole reply in the judgment and characterised it as “*strange reading.*” In particular, the judgment has taken issue with the understanding of the government with respect to consent rights of the children. Relying on a judgment⁷ by Justice K. Chandru, the Court held that “*consent of the parent cannot be considered as the consent of the child.*”⁸

The Court has also extracted relevant portions of report from World Health Organisation titled- “Sexual Health, Human Rights and the Law”. This report has called for a deferment of “intersex genital mutilation (IGM)” till the time intersex person are old enough to provide informed consent. It also highlights the need to recognise consent rights of children. Further, it also recommends that proper training is given to healthcare professionals so that they can provide adequate support to children with intersex traits and their parents. As per the report, it is critical for parents to have complete

5. *Arunkumar v. Inspector General of Registration*, 2019 SCC OnLine Mad 8779.

6. *Ibid.*

7. *S. Amutha v. C. Manivanna Bhupathy*, 2007 SCC OnLine Mad 141 : (2007) 2 CTC 97.

8. *Arunkumar's* (n 5) 17.

information about the consequences of any medical intervention and all the alternatives. To enable discussion about sexual diversity, WHO recommended the following:

“medical and psychological professionals should be educated and trained about physical, biological and sexual diversity and integrity, and that they should properly inform patients and their parents of the consequences of surgical and other medical interventions and provide additional support”.

Further, the judgment recalled the mandate of the judgment in *National Legal Services Authority v. Union of India* in which, the Supreme Court of India declared the following:

“[N]o one shall be forced to undergo medical procedures, including SRS, sterilisation or hormonal therapy, as a requirement for legal recognition of their gender identity.”⁹

As per the scheme of the Constitution, *“the law declared by the Supreme Court shall be binding on all courts within the territory of India.”¹⁰* Recognising the mandate of the above-mentioned ruling of the Supreme Court, the judgment directed the Government of Tamil Nadu to issue a Government Order based on the mandate of the *NALSA* judgment so as to effectively ban unnecessary sex reassignment surgeries on intersex infants. Further, the Court also directed the Health and Family Welfare Department inform the registry of the Madras High Court with regard to the implementation of the directions.

With respect to the stigma and public awareness on this issue, the Court made the following remarkable observation:

Any intersex child is entitled to and must stay within the folds of its family. The running away from the family to the margins and beyond is a fatal journey that must be arrested. Time has come when they are brought back from the margins into the mainstream. This is because even though the transgender community is having its own social institutions, the stories we hear are horrendous. The parents must be encouraged to feel that the birth of an intersex child is not a matter of embarrassment or shame. It lies in the hands

9. *National Legal Services Authority v. Union of India*, (2014) 5 SCC 438 : AIR 2014 SC 1863.

10. The Constitution of India 1950, Art. 141.

*of the Government to launch a sustained awareness campaign in this regard.*¹¹

To comply with the directions of the Court, the Government of Tamil Nadu was given eight weeks to pass a Government Order banning the sex reassignment surgeries.

4. CONSENT RIGHTS OF INTERSEX CHILDREN AND DECISIONAL PRIVACY: CONSTITUTIONAL PERSPECTIVE

While this judgment has been hailed by intersex activists across the world, it is important to understand the normative grounding of the ruling. In this judgment, the Court has acknowledged the fact that intersex children have the right to privacy which includes the right to determine their gender identity. However, the judgment could have characterised the consent rights to be integral to the right of decisional privacy which is guaranteed to all persons including intersex children. A normative articulation of this kind is critical to pave the way for strong enforcement model.

In 2017, the Supreme Court of India in *K.S. Puttaswamy v. Union of India*,¹² declared that right to privacy is a Fundamental Right. However, the unanimous affirmation of right to privacy as a Fundamental Right by the Supreme Court has still left certain questions unanswered. In an era, where the jurisprudence related to decisional privacy has reached an advanced stage, the consent rights of sexual minorities are yet to be discussed in the mainstream. While, the recent "*Puttuswamy*" decision given by the Indian Supreme Court has made an attempt to define the contours of the right to privacy, there's still confusion with regard to the exact normative content of the right to privacy.

Indian Courts have not yet explicitly delineated "decisional privacy". Yet, on multiple instances they have in fact grappled with this notion. Broadly however, under the ambit of the right to privacy, Indian Courts have protected a number of "choices". These include, an individual's choice of profession,¹³ a complainant's dietary choices,¹⁴ a woman's reproductive

11. *Arunkumar's* (n 5) 21.

12. *K.S. Puttaswamy v. Union of India*, (2017) 10 SCC 1.

13. *Anuj Garg v. Hotel Assn. of India*, (2008) 3 SCC 1 : AIR 2008 SC 663.

14. *Hinsa Virodhak Sangh v. Mirzapur Moti Kuresh Jamat*, (2008) 5 SCC 33 : AIR 2008 SC 1892.

choices,¹⁵ a person's autonomy to choose relationships,¹⁶ choice to exercise a right to silence,¹⁷ the petitioner's choice of gender,¹⁸ and a wife's right to not cohabit with her spouse.¹⁹ Therefore, "decisional privacy" in India protects an individual's choices from State interference.

The protection of "decisional privacy" means protecting those choices or decisions that are "private", "personal" or "fundamental". The right to bodily integrity is very much part of decisional privacy and therefore, the exercise of this right should be protected with an iron-clad statute.

Within the Indian privacy model, to understand the range of 'choices' that fall within the ambit of privacy, it is important to refer to the work of Paul Siegel.²⁰ The paper relies on the notion of "self-regarding conduct" i.e. "conduct which affects no one's interests but those of the participants themselves". However, the slight modification it is propose is to re-characterise it as "self-regarding *choice*" or "self-regarding *decisions*". So understood, "decisional privacy" protects those decisions of an individual that affect no interest other than his own. When another interest is engaged, the complainant's right to choose needs to be weighed against it. This reasoning explains the protection afforded to a person's choice of food or profession. As long as that choice does not affect another interest, it will be protected. In so far as it does, his choice will need to be weighed against that other interest. The consent rights of intersex individuals and children needs to be examined in this context.

5. IMPLICATIONS ON DISCOURSE AROUND SOGIESC ISSUES IN INDIA

Even after the *NALSA* judgment, the Indian State is yet to come up with a rights-based legislation for the protection of rights of transgenders persons and intersex persons. In the *NALSA* judgment, the Supreme Court had directed the Union and the State Governments to undertake steps to fulfill the mandate of the judgment. In particular, the judgment declared the

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15. *Suchita Srivastava v. Chandigarh Admn.*, (2009) 9 SCC 1 : AIR 2010 SC 235.
 16. *NAZ Foundation v. Govt. of NCT of Delhi*, 2009 SCC OnLine Del 1762 : 2010 Cri LJ 94.
 17. *Selvi v. State of Karnataka*, (2010) 7 SCC 263 : AIR 2010 SC 1974.
 18. *National Legal Services Authority v. Union of India*, (2014) 5 SCC 438 : AIR 2014 SC 1863.
 19. *T. Sareetha v. T. Venkata Subbaiah*, 1983 SCC OnLine AP 90 : AIR 1983 AP 356.
 20. Paul Siegel, "Privacy: Control Over Stimulus Input, Stimulus Output, and Self-regarding Conduct" (1984) 33 Buffalo Law Review 35, 36.

need for legal gender recognition of transgender persons. The Court also recognised the obligation of the government to address the needs of persons who did not conform to binary notion of gender identity, male or female. The judgment recommended the government to adopt anti-discriminatory and social welfare measures.

With the Transgender Persons (Protection of Rights) Bill, 2019, the Union Government had the opportunity to ensure Fundamental Rights are guaranteed to all persons regardless of their sex characteristics and gender identity. However, the bill has not lived up to the mandate of the normative articulation in the *NALSA* judgment and hence, it suffers from serious flaws. The judgment of Madras High Court articulated the following:

5.1 Fundamental Right to Gender Identity:

The *NALSA* decision had stated that transgender persons have a Fundamental Right to decide their gender identity as either man, woman or third gender. Incidentally, the court also found support for this legal proposition in Hindu traditions and modern neuroscience which validates the argument of internal and external gender mismatch experienced by the transgender population.

5.2 Fundamental Right to Gender Expression:

The Court reiterated *NALSA* in saying that gender expression and presentation are protected under Article 19(1)(a) of the constitution, and the State could not “prohibit, restrict or interfere” with a transgender person’s expression of the same.

5.3 Right to Equality:

The Court also referenced *NALSA* to reiterate that the fundamental right to equality was available to “all persons” and not just men and women. Therefore, the court also found discrimination on the basis of gender identity as unconstitutional and violative of Article 14 of the Constitution.

5.4 Dignity and Privacy:

The Court also found, following *NALSA*, that the gender identity discrimination offends the Fundamental Right to dignity and privacy protected under Article 21 of the Constitution of India.

An articulation of this kind from a court no less than a High Court is expected to have significant impact on the law-making process when it comes to protection of human rights of intersex children.

6. FUTURE OF LEGAL PROTECTION REGIME OF INTERSEX CHILDREN

The view taken by the judgment has been affirmed by the United Nations Committee on Rights of Persons with Disabilities as well. While considering the initial report of India at the 22nd Working Session, the Committee recommended India to “adopt measures to prevent sex assignment or “sex normalising” surgeries, bullying and stigmatisation against intersex children, ensuring their rights to preserve their physical and mental integrity.”²¹

In 2013, the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment called on states to “*repeal any law allowing intrusive and irreversible treatments, including forced genital-normalising surgery, involuntary sterilisation, reparative therapies or conversion therapies, when enforced or administered without the free and informed consent of the person concerned.*”²²

It is hoped that such recommendations would encourage the government to take an active role in the protection of intersex people by legally prohibiting the unnecessary surgical and medical treatment of intersex people without their personal informed consent at the national level.

7. CONCLUSION

This comment has demonstrated that the discourse around SOGIESC issues in India is replete with conceptual disagreements. Due to the paucity of literature and the absence of any guidance from the Supreme Court decisions, the way forward for rights of children with intersex traits is tough. Unfortunately, the current statutory framework still operates under the influence of a heteronormative approach. To make the situation

21 Concluding Observations on the Initial Report of India, Committee on the Rights of Persons with Disabilities, CRPD/C/IND/CO/1 <https://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPPrICAqhKb7yhspCUnZhKljU66fLQJyHlkqMIT3RDaLiqzhH8tVNxhro6S657eVNwuzlzu0xvsQUehREyYEQD%2BldQaLP3IQDpRcmG35KYFtgGyAN%2BaB7cyky7> > accessed on 29-10-2019.

22 Report of the Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, Juan E. Mendez, Human Rights Council (1-2-2013 A/HRC/22/53).

worse, the courts have also abdicated these issues to be worked out by the executive and the legislature. This comment has sought to clarify the case-law and devise a model which is conceptually sustainable and reconcilable with the decided cases. Moreover, this paper made a case for the rights model which is premised on the judgment given by the *Puttaswamy* case.

Going forward, it is hoped that a clearer understanding of these conceptions and the applicable tests will be beneficial for creating a formidable legal protection regime for intersex children at the national level. Even though the judiciary has taken a lead in creating a robust normative framework, the role of executive and the legislature is equally important to ensure better enforcement of the rights. These questions await further exposition.

5.1 Fundamental Right to Gender Identity

In 2017, the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment (SR) visited India to investigate the human rights situation of intersex persons. The SR found that intersex persons in India are subjected to discrimination and violence, and that their rights are violated. The SR also found that the Indian government has failed to take adequate measures to protect the rights of intersex persons.

It is hoped that such recommendations would encourage the government to take an active role in the protection of intersex persons. The SR also found that the Indian government has failed to take adequate measures to protect the rights of intersex persons. The SR also found that the Indian government has failed to take adequate measures to protect the rights of intersex persons.

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