

THE INSIGNIFICANT RIGHTS: A FALLACY UPTURNED

AUTHOR – BHASKAR MISHRA & DR.ROHIT KUMAR SHUKLA, STUDENT & ASST. PROFESSOR AT AMITY UNIVERSITY, LUCKNOW UTTAR PRADESH

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INTRODUCTION

Child rights¹, like human rights, come from the idea that all people have fundamental rights that they are born with, and these rights are inalienable and inviolable. They cannot be taken away because of a person's gender, age, religion, race, ethnicity or other factors. It is recognized that special protection must be given to children to ensure full, happy, and healthy development without fear of harm or exploitation.

Everyone has a role to play in protecting children. Parents, schools, communities, police, courts, medical professionals, voluntary organizations, child welfare groups, district child protection units and other means are responsible for creating an ecosystem that will protect children and help them live their childhood without fear.

Child sexual abuse is on the rise worldwide. The Soaring rates of juvenile delinquency are faced by World and India is in top five countries. However, criminal law in India is not enough to address such an important and serious issue in many respects. The Law Commission in its 172nd Commission Report¹⁷¹³ reviewed law after *Sakshi v. U.O.I.*¹⁷¹⁴ The case was reviewed by law with a sexual offense. The commission had appealed for several amendments to the law to be implemented in the matter. The IPC was amended several times by the 2013 Criminal Law Amendment Bill after the Nirbhaya case.

There are 430 million children in India,¹⁷¹⁵ including one in five children under the age of 18 in the world. They have been facing big challenges since their birthday. Malnutrition, illiteracy, kidnapping, forced labor, drugs, sexual abuse, pornography, etc. are not

common among children in India. Researchers are particularly concerned about the issue of child sexual abuse in India.¹⁷¹⁶ Child sexual abuse usually involves health or psychological abuse with the child, who is usually confident and optimistic about the child.

A person uses a child for sexual arousal or sexual gratification. According to a national study by the Ministry of Women and Child Development,¹⁷¹⁷ 'sexual abuse' is defined as taking a child to her private parts or bringing a child into private areas and taking nude photos. However, this statement does not reveal the real reality as most of the cases have not been reported due to stigma in our society. A study conducted by UNICEF after the Delhi gang of 2012 found that one child was involved in three cases of rape, and these incidents were increasing at an alarming rate.¹⁷¹⁸ About 7200 children, including infants, are raped every year, which is a matter of great concern.

Until 2012, single sexual offenses against children recognized by law were covered by three sections of the Indian Penal Code (IPC): Rape (unauthorized sexual intercourse -

¹⁷¹⁶ United Nations Children's Fund, "The Situation of Children in India – a profile," May 2011

¹⁷¹⁷ Ministry of Women and Child Development, Government of India, "National Study on Child Abuse: India 2007," 2007

¹⁷¹⁸ UNICEF, "UN in India condemns the gang rape of a student in New Delhi," December 31, 2012

¹⁷¹³ <http://www.lawcommissionofindia.nic.in/rapelaws.htm>

¹⁷¹⁴ *Sakshi v UOI*, AIR 2004 SC 3566

¹⁷¹⁵ The Planning Commission, Government of India's 12th Report.

Section 376), violation of modesty (Section 354) and unnatural acts "unnatural sexual intercourse with any male or female animal" (anal sex, homosexuality) 377). Consequently, aggressive sexual abuse, harassment, and exploitation are not explicitly recognized as a crime and therefore not reported (assuming they are reported). The growing activity on child protection issues in the media and public discourse may be due to the enactment of the Protection of Children from Sexual Offences (POCSO) Act by the Government of India. The law covers child sexual abuse, sexual harassment and obscenity (under the age of 18) and obliges special courts to expedite investigations into these crimes.

CHILD SEXUAL ABUSE IN INDIA

To protect the rights of all children is unanimous and believes that the future of any nation is incomplete without protecting the rights of children. The future of any country lies in children, so everyone should protect the rights of children. Right to food, life, health, education and dignity are prominent among these rights. The need of laws for combating child sexual abuse lies in the very fact, if children are protected the future of nation is protected. It is pertinent to note that, the effects of child sexual abuse on the psychology of child is ever-lasting and it tends to lower the confidence in the child and scars him or her for life and if such generation is future face of a country then it would have negative effect on the country's development as a whole be it economic, social and at global level.

In the context of India, several schemes and provisions were enacted to protect the rights of children. In which ICDS and ICPS are prominent. Along with this, the dignity of children has been protected under the Juvenile Justice Act 2015 and POCSO.

Constitution of India

The Constitution of India gives a major place to the status and protection of children.

Constitution makers have been fully aware to protect the rights of children. This awareness is reflected in many provisions of the Constitution. Article 15, which was created to prevent discrimination, has given prominence to protection of children. Article 14, 15, 15 (3), 19 (1), 21, 21 (A), 23, 24, 39 for rights of equality, right to life, right to personal liberty and rights against exploitation were provided.

Principles of Child Centric Policies and Laws:

The National Commission for Protection of Child Rights was formed to formulate and follow policies on protecting the rights of children and fulfilling their basic needs. Five essential management principles are emphasized prominently in child policies. This includes decentralization, flexibility, and the process of institutional structure, coverage and providing services by creating a policy guide according to the needs of children. Gram Panchayat have been enabled for this. Institutional structure has been created at the state, district, block and village level to protect the right to health, nutrition, education and freedom of children. Even measures to simplify the process of providing justice to children have been considered. For this, special codes have been created at the state level to develop codes centered on children in jurisprudence, trained cadres on child rights and their dignity, privacy and security.

National Policies and Legislations Addressing Child Rights:

The Fundamental Rights and Directive Principles of the Indian Constitution provide the framework for child rights. Policies and Legislation have been formulated at the national level for the rights of children against child trafficking, child marriage, child labor, education and sexual offenses. Several constitutional provisions and national policies have been framed to implement the commitment to child rights.

As part of the country's child protection

policies, India has enacted laws on child sexual abuse. The Child Protection v. Child Protection Bill was passed by Parliament on 22 May 2011 as a law relating to child sexual abuse.¹⁷¹⁹ The rules laid down by the government under this Act were also announced in November 2012 and the law is ready to come into force. POCSO Act, most sexual offenses were under IPC 1860, but this does not apply to all types of sexual offenses against children and its general law. It does not distinguish between adult and child victims.

Researcher has extensively reviewed the available literature on the research topic and has done extensive and in depth study of the relevant laws in this regard along with the reports of survey conducted in this behalf by governmental and non-governmental organizations.

As per study conducted by MWCD in 2007, 53.22% of child in India are victims of sexual abuse. (The Hindu, 14 July 2010)¹⁷²⁰

In **Sarath Chandra Pottala V. Union of India**,¹⁷²¹ the constitutional validity of POCSO was challenged by the petitioner, that the special court has power to determine the age of the accused. However if there is a dispute, the special court has no power to determine the same.

According to the WHO, Child Sexual Abuse is such a forceful act which is executed on child without the consent of the child since the children are unable to give informed consent for such acts. It violates the law as well the social norms of society.¹⁷²²

A study conducted by RAHI in 1997 revealed that 76% of the victims were sexually abused when they were child, among whom 71% were abused by their relatives or near and dear

ones.¹⁷²³

According to the ANCPA in 1997, they were cases reported of child abuse, sexual abuse, physical abuse and neglect.¹⁷²⁴

Sexual abuse of children is a burning problem in India and emphasizes on the situation which is aided by the absence of effective legislation and the silence of the victims. There are variety of sexual offences in child abuse such as sexual assault, sexual exploitation and sexual grooming. The effects of CSA and its preventive measures are also researched by the researcher.¹⁷²⁵

According to Save the Children, 2009, the research has found that children placed under institutional care are prone to physical, emotional and sexual abuse and neglect.¹⁷²⁶

According to the report released by the, MWCD, GOI in 2007, 56% of children in institutional care were subjected to physical abuse and 47% reported sexual abuse. The JJA lays down minimum standards on infrastructure and quality of care for each child care institution, but often these are not adhered to. Many issues such as overcrowding, lack of hygiene and dysfunctional infrastructure are widespread.¹⁷²⁷

As per the Newspaper report of Indian Express, Ahmadabad on 26-11-2004, The NHRC, has took note of newspaper photograph of a handcuffed child and has directed Bihar police to explain the reason of doing so. It is a violation of the guidelines of the Supreme Court. This boy of 12 years had been apprehended for demanding extortion money in Bihar. However the police are violating the direction of Supreme Court in handcuffing him.¹⁷²⁸

¹⁷¹⁹ Parliament passes bill to protect children from sexual abuse". NDTV. May 22, 2012

¹⁷²⁰ Study of MWCD (2007) The Hindu, 14 July 2010

¹⁷²¹ Sarath Chandra Pottala Vs. Union of India; criminal writ petition no. 2/2014 April 2014

¹⁷²² Report on Child abuses: WHO (1996)

¹⁷²³ Study by RAHI (1997)

¹⁷²⁴ ANCPA 1997

¹⁷²⁵ Smt. M.P.Chandrika, "Child Sexual Abuse Versus the Protection of children from Sexual offences Bill, 2010" which is published in Law Profile, in Vol 2, issue 7, July 2011

¹⁷²⁶ Report of Save the Children, 2009

¹⁷²⁷ MWCD, GOI 2007

¹⁷²⁸ Indian Express, Ahmadabad on 26-11-2004

The International Centre for missing and exploited children (ICMEC) took a review of the child pornographic laws in the year 2010 in 187 countries. It came out that 93 countries have no laws on pornography. Out of remaining 94 countries 36 countries do not criminalize the possession of pornographic material regardless of their intent to distribute.¹⁷²⁹

The report of CRY indicates that there are thousands of children go missing every year. According to the report millions of children are forced into sex trade. The report revealed a number of children forced into commercial sex. 40% of total children are found to be involved in commercial sex and most of them are found in metro cities like Mumbai, Delhi, Chennai, Kolkata, and Bangalore. 71% of these children are illiterate.¹⁷³⁰

According to the National Crime Records Bureau, 2012 Chhattisgarh has topped with 107 cases of incestuous rape. In 2004, the cases have reached to 505, in 2005 it was the highest 750, in 2006 431 cases reported, in 2007 it was 405, in 2008 there were 309 cases reported, in 2009 it was 404 cases reported, in 2010 it was the second lowest that is 288 cases were reported and the lowest reported case that is 267 in 2011.¹⁷³¹

Apart from above mentioned literature, researcher has also reviewed several Legislations enacted by Parliament in relation to protection of children and their rights:

Objectives and Scope of Work

The major objectives of the present research study are:

1. To trace the historical evolution of the problem.
2. To examine the factors responsible for Child Abuse.
3. To peep into various aspects of 'Child

Abuse' and determine its repercussions on the society as a whole.

LEGAL FRAMEWORK FOR THE PROTECTION OF CHILDREN

Almost one third of the world population comprises children. Therefore, they deserve to be cared and protected to keep up and improve posterity. They are important component of the social structure and the potential future careers of culture. Social justice, therefore, demands justice to children. The need to provide protection to children was first stated in the Geneva Declaration of the rights of child, 1924 and was later recognized under the Universal Declaration of Human Rights, 1948. The great headway had been made in the year 1989 when United Nation adopted international convention on rights of child. The 1989 United Nations Convention on the Rights of the Child assigns substantial responsibilities to states parties in order to protect children from all forms of sexual abuse. As a result, every states should take all necessary national, bilateral, and international steps to combat perversion and persuasion to engage in illicit sexual practises. CRC was ratified by India on December 11, 1992. As a result, it is our government's responsibility to make sure that the rights of children against sexual violence, as defined in the convention, are enshrined in our country's legal structure. In furtherance of this convention several laws are enacted by Parliament which were in addition to already prevalent laws in India in regard to protection of children

Constitution of India

The constitutional provisions are discussed here under:

Preamble:

The Indian Constitution is the longest and largest constitution. Many key provisions for transforming childhood, child raising, and the abolition of the child labour system in India were introduced by the writers of the Indian Constitution. In 1976, the 42nd Constitutional

¹⁷²⁹ ICMEC review of the child pornographic laws in the year 2010

¹⁷³⁰ Report of CRY 2012

¹⁷³¹ Report National Crime Records Bureau, 2012

Amendment added the word 'socialist' to the preamble. It was explained in **D.S. Nakara V. Union of India**¹⁷³², that the main objective of the socialist state of India is to eliminate income inequalities and a decent standard of living for the workers. The Constituent Assembly fully took into consideration the importance of children and made necessary provisions for the education of children and the elimination of the problem of child labor in Indian society.¹⁷³³

Article 14

People of India, including children, must be treated equally in front of the law and afforded equal protection by the law, free of bias and irrationality. This right which is provided in the Indian Constitution protects the rights of children so that their dignity and integrity as a child is not exploited. Children being vulnerable have more chance to be treated unequally in the Indian society.

"The state shall not refuse to any individual within the territory of India equal treatment under the law or equal protection under the law," says Article 14. Thus article 14 uses to expressions "equality before the law" and "equal protection of the law".

"Equality before the law" is somewhat a negative concept implying the absence of any special privilege in favor of individuals and the equal subject of all classes to the ordinary law. "Equal protection of the law" is a more positive concept implying equality of treatment in equal circumstances.¹⁷³⁴ However one dominant idea common to both the expressions is that of equal justice.¹⁷³⁵

Equality before law-

Equality before the law indicates that the law should be equal and equally applied among equals, and that like should be treated equally. The right to sue and sued, to prosecute and be prosecuted for the same kind of action should

be same for all citizens of full age and understanding without distinctions of race, religion, wealth, social status or political influence.

Equal protection of the Laws-

The rule is like that like should be treated alike and not that unlike should be treated alike¹⁷³⁶.

The rule of law imposes a duty upon the state to take special measure to prevent and punish brutality by the police methodology. The rule of law embodied in article 14 is the "basic feature" of the Indian constitution and hence it cannot be destroyed even by an amendment of the constitution under article 368 of the constitution¹⁷³⁷.

The word "any person" in article 14 of the constitution denote that the guarantee of the equal protection of laws is available to any person which includes any company or association or body of individuals. The protection of article 14 extends to both citizen and non citizens and to natural person as well as legal person. The equality before the law is guaranteed to all without regard to race, color or nationality.

Article 15- Special Laws for Children

Article 15 of the Indian Constitution prohibits discrimination. Nowhere in this article precludes the state from creating particular provisions for women and children, as per Article 15(3). It is very clear from Article 15(3) that "special provision" does not mean unequal treatment but it is established for the well being and development of the children in India. By virtue of this Article several enactments have been passed by parliament.

Protection under Article 21

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

Prior to Maneka Gandhi's decision, Article 21 guaranteed the right to life and personal

¹⁷³² 1983 AIR 130, 1983 SCR (2) 165

¹⁷³³ AIR 1983 SC 130

¹⁷³⁴ Dicey---Law of the Constitution, p.49 (10thed.)

¹⁷³⁵ Sheo Shankar v. State of M.P., AIR 1951 Nagpur 53 (

¹⁷³⁶ Dr. V.N. Shukla--- Constitution of India, p.27 (5thed.).

¹⁷³⁷ Indira Nehru Gandhi v. Raj Narain, AIR 1975 SC

liberty to citizens only against the arbitrary action of the executive, and not from legislative action. The state could interfere with the liberty of citizens if it could support its action by a valid law. But after the Maneka Gandhi's decision article 21 now protects the right of liberty and personal liberty of citizens not only from the executive action but from the legislative action also. A person can be deprived of his life and personal liberty if two conditions are complied with, first, there must be a law and secondly, there must be a procedure prescribed by the law, provided that the procedure is just, fair and reasonable.

The right guaranteed in Article 21 is available to 'citizens' as well as 'non-citizens'. Under the umbrella of Article 21 Apex Court by way of Judicial Activism has included several rights mandating protection of children. Few of such rights are discussed here under:

➤ **Right to food for needy children**

In an important judgment in the *PUCL v. Union of India*¹⁷³⁸ case, the Supreme Court ruled that starving people due to inability to buy food have the right to food under Article 21 and therefore the states should be exempted. Available for free, especially if unused and rotting. The court ruled that in such a situation all elderly, vulnerable, disabled, homeless women, homeless men, pregnant and lactating women and homeless children would get food. As a result, the court ordered the states to immediately make available all surplus food stored in buckets through Public Distribution System (PDS) shops to curb hunger and malnutrition.

➤ **Protection against physical attacks enroute school.**

In *Swapan Kumar Saha v. South Point Montessori High School and others*¹⁷³⁹, held that it is the duty of the school administration to ensure that children can get out of school safely. The court concluded that overcrowding

on school buses infringed on school children's right to safely operate school buses under Article 21 of the Constitution. The state was ordered by the court to take corrective action to implement the provisions of the Motor Vehicles Act, 1988 Justice directed school officials to comply with the law.¹⁷⁴⁰

➤ **Right to education was recognized to be implied in right to life:**

In *Mohini Jain v. State of Karnataka*¹⁷⁴¹, The right to life and dignity of a person under Article 21 can only be realized if they are accompanied by the right to education. The Court ruled that the right to education at all levels is a fundamental right within the meaning of Article 21 of the Constitution and it is unlawful to charge a per capita entry fee and reflect peoples' right to education.

In *Unni Krishnan V. State of Andhra Pradesh*¹⁷⁴² states in which the right to education has been proclaimed a basic right of children aged 6 to 14 years by a court of justice. The court disagreed with Mohini Jain's conclusion that children of all ages have the right to education, ruling instead that the right to free education is only available to children under the age of 14, therefore Mohini Jain's lawsuit was dismissed on this basis. The state's liability after the age of 14 is decided by economic performance and progress, according to the court.

Although the SC ruled in the Unni Krishnan case that the right to education is a fundamental right for children aged 6 to 14, the situation has not improved even after that. There was a demand from all sides to make education a fundamental right. As a result, the government enacted the 2002 Constitutional Law (86th Amendment) that would make education a fundamental right.

¹⁷³⁸ 2000 (5) Scale 30

¹⁷³⁹ 2007 2 GLR 10

¹⁷⁴⁰ AIR 2008 (NOC) 236 (Gau).

¹⁷⁴¹ AIR 1992 SC 1858

¹⁷⁴² (1993) 1 SCC 645

Article 21-A Right to free and compulsory education

The Constitution Act of 2002 (86th Amendment) added a new section 21A after Article 21 and made education a fundamental right for all children between 6 and 14 years of age. "All children between the ages of 6 and 14 will receive free and obligatory education in the manner established by the state," it said. Education is widely accepted as a fundamental human right. One of the most important components of a democratic government's success is education. An educated citizen should elect representatives to form the government. Education provides human dignity to the person which contributes to the development of their country. It is the duty of the Constitution's framers, who recognise the value of education, to provide it under Article 45, as one of the State's commands, to all children up to the age of 14 within ten years of incorporation. To provide free and compulsory education to has completed six years. The goal was to end illiteracy in the country.

CONCLUSION AND SUGGESTIONS

India is a place of discrepancies. No other country has had such a profound impact on ethnic groupings, mutually unintelligible languages, topography and climate, faiths and cultural practises, and economic growth levels. India has a population of over one billion and over 400 million children. At one time we were all children. This is something that is common to all of us. Many of us have children or are somehow involved in the lives of youngsters. We want our children to be happy, strong, healthy, and successful as they grow up. We want them to be fortunate. They are the next generation of parents, grandparents, caretakers, educators, physicians, cops, magistrates, civic leaders, trustleaders, legislators, and policymakers. It is apparent that violence against children is not a unique occurrence, but rather a complex problem with deep roots. The events and

settings that contributed to the formation of such aggression, as well as encouraged such behaviour through passivity and inaction, are always the source of this genesis. Some youngsters become more violent than others in this environment, and they forgive themselves. How we deal with crimes affecting children will have a direct impact on future families and communities.

The legislative framework and the criminal justice system are the main watchdogs for child sexual abuse. Both groups will only look into child sexual assault after it has occurred. Furthermore, both are more concerned with bringing justice to the victims of child sexual abuse than with preventing it. As a result, it does not concentrate on classification solutions to lessen or eradicate the negative consequences of child sexual abuse. Furthermore, the majority of cases of child sexual abuse have not been adequately reported to criminal justice or child protection groups, and the existing institutional approach to child sexual abuse does not provide adequate justice or protection. The development of new, sophisticated techniques to preventing child sexual abuse is underway. However, while such approaches have great potential to prevent child sexual abuse, they are new and have not yet been fully tested. There is a need to further evaluate and strengthen trends in existential leadership, circles of responsibility and support, including public news targeting victims of child sexual abuse and child sexual abuse.

Protection of Children from Sexual Offences Act, 2012

The POCSO Act aims to protect children at all levels of the legal process and places a premium on the notion of 'best interest of the child.' The Act, which had substantial provisions, was, nevertheless, poorly implemented. As a result, it failed to achieve the goal for which it was enacted in the first place, owing to a lack of awareness. The

provision establishing special courts was also kept in the Act as a quotation. Some district courts were converted into POCSO courts, with special rooms set aside for specific cases. As a result, the number of POCSO and ordinary cases pending increased dramatically. The researcher claims that, unlike other statutes, the significance of this "unique statute" lay in the formulation of special courts for trying crimes under the Act.

This Act was having the socio-legal mandate to curb the brutal exploitations of the Child Sexual Abuses in Indian Subcontinent and also to protect the larger Child Masses from the brutal atrocities and other forms of dangerous acts of Sexual Sabotage being happened to the Child Victims including the different minor Girl Child and the Male Child on the larger scale. The following are some of the guidelines in forms of rules and regulations as being issued by the Hon'ble Supreme Court of India in order to curb the Child Sexual Abuses on the large masses, they are as follows:

- There has to be an effective establishment of the Child Welfare Committee at large by the Courts so that any report if gets filed in context to the Child Sexual Abuse, shall be communicated to the Police Authorities within 24 hours and has to be solved also by the Police Authorities.

- There have been the express rules as mandated by the Hon'ble Supreme Court of India that the police have to record the statement of the Minor Child in the civil clothes or in the casual dresses, so that the Minor Child shall not feel threatened while giving out the statement.

- It is the commitment of these courts to ensure that the minor isn't presented to the blamed while recording his/her announcement, as the personality of the minor remains undisclosed.

- The minor ought not a way to deal with go over his/her revelation in court and that minor can moreover give his/her affirmation

through a video.

- The cases are not delayed and are disposed of inside a year from its date being represented.