



# Role Of The Indian Judiciary In Protecting Child Rights

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## ABSTRACT

Children are the most auspicious gift of the god. They are the ones who bring joy to the lives of the parents and family. They are considered pure souls who are not caught in society's double standards. But today, we can see the violations of the rights of every person and children are also no longer left. In this world, children are the most vulnerable creatures who can be exploited easily. In a country like India which experienced bloodshed during the partition at that time, along with the females, children were the target of attack and exploitation. As we moved on from the horror experiences of partition the exploitation of children became more common because of many factors such as illiteracy, poverty, easy trafficking etc. Later on, in the 80s and 90s when the thoughts and ideas related to the protection of child rights began to establish themselves, the Indian system also began to realize the importance of child rights this was because of many conventions signed by the Indian government as well as the active role played by the judiciary of India in giving value to child rights. The rights of children are classified into four broad parameters which are the right to survival right to protection, the right to freedom of opinion and the right to education. These rights are considered broad and umbrella rights because of the interpretation of these rights many legislations were passed by the parliament and many judgements related to the protection of the rights of children were pronounced by the Indian courts. The Indian Judiciary from time to time has played an active role when required to protect the rights of children either through, Public interest litigations or taking suo-motu cognizance whenever required.

KEY WORDS- CHILD, JUDICIARY, PROTECTION, RIGHTS, LAW.

## INTRODUCTION

Kofi A. Annan, Secretary-General of the United Nations (2000). observed that: "*There is no trust more sacred than the one the world holds on the children.' There is no duty more important than ensuring that their rights are respected, that their welfare is protected, that their lives are free from fear and want and that they grow up in peace*"<sup>1</sup>

Children are considered as one of the beautiful creations of the god. They are considered the nation's biggest asset as they are the ones who help in nation-building. India is considered to have the largest population of children in the world, on and around there are 431,053,833 children are there in India<sup>2</sup>. These creatures are the most sensitive section of society and can be moulded in any way or can be exploited. So, it becomes necessary to protect their rights and give them a healthy environment for their growth and development. The lawmakers of our country have provided the nation with many legislations which aim to protect the children of the nation, even our constitution makers were aware of how crucial are the children for nation-building so they enshrined several rights fundamental rights, fundamental duties and directive principles of state policies in the Indian Constitution to protect the rights of the children and to give them the path for their development. The Indian judiciary has also not remained silent on this. The Indian judicial system which is considered one of the best judicial systems for the protection of the rights of human beings has also played a magnificent role in the protection of rights of children. It has interpreted the provisions of the constitution or the law in such a manner that it provides the most benefit to the children. From time to time various judgments or judicial activism have worked in favour of the protection of the rights of children. Even the Indian judiciary did not stop functioning in the favour of the children during the harsh times of covid-19.

## WHO IS A CHILD?

To understand the concept of child rights it is imperative to understand what the term child means. The universal definition to understand what the term child means, *a person who is below the age of 18 years is considered to be a child*. Various laws in India have given definitions of "child" such as the Child and Adolescent Labour (Prohibition and Regulation) Act 1986 defines a child as – "*child" a person who has not completed his fourteenth year of age or such age as may be specified in the Right of Children to Free and Compulsory Education Act, 2009 (35 of 2009), whichever is more*"<sup>3</sup>. Similarly, the Prohibition of Child Marriage Act, 2006 defines the child as "*a person who, if a male, has not completed twenty-one years of age, and if a female, has not completed eighteen years of age*"<sup>4</sup>.

<sup>1</sup> Megan Mitchell, Children's Rights In A Changing World, Australian Human Rights Commission, (Oct. 27.2023,11:30AM), <https://humanrights.gov.au/about/news/speeches/childrens-rights-changing-world>

<sup>2</sup> UNICEF, <https://data.unicef.org/how-many/how-many-children-under-18-are-there-in-india/>, (last visited Oct,29,2023)

<sup>3</sup> THE CHILD AND ADOLESCENT LABOUR (PROHIBITION AND REGULATION), ACT § 2(ii), NO.61, ACTS OF PARLIAMENT (1986).

<sup>4</sup> THE PROHIBITION OF CHILD MARRIAGE ACT § 2(a), NO.6, ACTS OF PARLIAMENT (2006)

## CHILD RIGHTS AND ITS DEVELOPMENT

Various scholars and jurists have defined the term rights in their ways. The word “right” means what is morally good or fair. Scholars such as Harold Laski, and T.H.Green, define it as-

Harold Laski- Rights are those conditions of social life without which no man can seek, in general, to be himself at his best.<sup>5</sup>

T.H.GREEN- Right is a power claimed and recognised as contributory to the common good.<sup>6</sup>

For a layman to understand the meaning of right is that right means the claim of the citizens which is recognised by the society and which are necessary for the upliftment of an individual.

Similarly, child rights can be defined as the rights which are claimed by the children and are necessary for the upliftment of the children living in a society. The rights can be of various types as per the needs of the children as per the time and condition of society. The Indian law and various conventions of which India is a signatory have given children many rights such as the right to life, right to equality, right to education, right against discrimination, right to protection from trafficking, right to not be employed in hazardous jobs, right to get nutritious food etc. All children have all these rights, no matter who they are, where they live, what language they speak, what their religion is, what they think, what they look like, if they are a boy or girl, if they have a disability, if they are rich or poor, and no matter who their parents or families are or what their parents or families believe or do. No child should be treated unfairly for any reason.

The definition of child rights mentioned in the Commission for Protection of Child Rights Act, 2005 means- *“child rights” includes the children's rights adopted in the United Nations Convention on the Rights of the Child on the 20th November 1989 and ratified by the Government of India on the 11th December 1992*<sup>7</sup>, the article 6 of the convention states that every child has right to life, develop and survival.

The concept of child rights began to develop at the world level after World War 1 ended that time after the adoption of the Geneva Declaration in the year 1924 the concept of child rights emerged and then later on this process continued when the United Nations adopted a declaration of Child Rights in 1959 and so on.

Child rights in India always have been a topic which remained in the social sphere whether in ancient India or modern Indian society. The ancient texts all mention about the protection of human rights. The Vedas, the Upanishads and the Arthashastras bear in them the concepts of equal rights to men, and women, sympathetic concern for women and children and unprejudiced treatment of all human beings in the society. It was only during the twentieth century that the concept of children's rights emerged. In ancient Indian law, particularly in the laws of Manu, the child though located very near to the bottom of a social pyramid was bestowed with the protection of the society. Children were only recipients of welfare measures and the father was considered as the sole guardian of a child. Persistent bias in the nurturing of children in India is indicated in the historical

<sup>5</sup> E-GYANKOSH, <https://egyankosh.ac.in/bitstream/123456789/66934/1/Unit-10.pdf>, (last visited on Oct.29,2023)

<sup>6</sup> JAMES JIA-HAU LIU, ETHICAL POLITICS AND MODERN SOCIETY: T.H.GREEN PRACTICAL PHILOSOPHY AND MODERN CHINA (ROUTLEDGE 2020)

<sup>7</sup> THE COMMISSIONS FOR PROTECTION OF CHILD RIGHTS ACT, 2005 § 2, NO.4 ACTS OF PARLIAMENT (2006)

records. Numerous factors including the age of the child, gender of the child, caste and kinship led to the biased behaviour against children in India<sup>8</sup>. The condition of child rights mostly deteriorated during the British rule as the nation suffered many losses such as economic as well as human loss in several famines. Due to this plight of the nation, the children in every corner of India were deprived of their rights. These ailing conditions of their rights were rectified by the social reformists of that time such as Raja Ram Mohan Roy, Mahatma Gandhi Lal Bahadur Shastri etc. In the year 1949 UNICEF began its work in India and took slow steps at a time it started improving the dire straits of children of the nation, in the last years of the 20<sup>th</sup> century it established itself well in India and functioned well in removing hurdles which were coming and violating the rights of children. Because of the functioning of UNICEF in India, in the later years of the 20<sup>th</sup> century, India ratified and became a signatory to many treaties for the protection of child rights. The year 2000 saw major developments in the field of Child rights these are - To comply with the provisions of UNCRC, the Juvenile Justice Act 1986 was amended and reenacted as the Juvenile Justice (Care and Protection of Children) Act in 2000, The Government of India appointed an Expert Committee under the chairmanship of Justice V R Krishna Iyer for drafting the National Commission for Children Bill 2000, The Supreme Court of India banned corporal punishment for children on December 1, 2000. Later on, in the years 2007 India adopted- the Prohibition of Child Marriages Act, 2006 (PCMA), which came into effect on 1st November 2007, 2010- The Right of Children to Free and Compulsory Education (RTE) Act, 2009, came into force with effect from 1st April 2010, 2011- Guidelines governing the adoption of Children in India were formulated in 2011 and in 2012 the Indian government enacted the POCSO ACT, 2012. From time to time various amendments in Legislation such as in the Indian Penal CODE, 1860 and in the Code of Criminal Procedure, 1973 have been made related to the protection of child rights and friendly procedure towards children if required in any situation.

## ROLE OF THE INDIAN JUDICIARY IN PROTECTING THE CHILD RIGHTS

*“The hallmark of culture and advance of civilization consists in the fulfilment of our obligation to the young generation by opening up all opportunities for every child to unfold its personality and rise to its full stature, physical, mental, moral and spiritual. It is the birthright of every child that cries for justice from the world as a whole.”*

V.R. Krishna Iyer J<sup>9</sup>

<sup>8</sup> Preeti Rana Prof. A. Laxminath Prof. S.P. Singh, *EVOLUTION OF CHILD RIGHTS IN INDIA*, 3 International Journal of Education, Modern Management, Applied Science & Social Science, 228, 228-231 (2021), <https://www.inspirajournals.com/uploads/Issues/1394505837.pdf>

<sup>9</sup> Justice V.R. Krishna Iyer, “Jurisprudence of Juvenile Justice: A Preambular Perspective,” Souvenir of the International Conference on Shaping the Future of Law, organised by the Indian Law Institute, New Delhi on 21-25 March, 1994



Before discussing the role of the judiciary in protecting the rights of children. It becomes necessary to focus on a legal maxim i.e. “*ubi jus ibi remedium*” The concept behind this is that every right when it is breached must be provided with a right to a remedy. The role of the judiciary begins when the rights of an individual are breached. The Indian judiciary is always known for its steps taken to protect the rights of the people. Related to child rights the Indian judiciary has shown its judicial activism many times. For the protection of child rights judiciary has pronounced various judgments related to the protection of children from sexual offences, protection under the penal code, protection through the Indian constitution, protection in the process of adoption etc. The various judgments of the Hon’ble Supreme Court and High Courts are discussed below.

A. Protection of Children from Sexual Offences- The most prone victims of sexual offences are the children as they are not aware of such acts which are committed against them. To protect children from such heinous crimes the government has enacted the POCSO Act, 2012 and the judiciary has interpreted the to its utmost to provide justice to the children and provide them with their right to live with dignity. There are various landmark cases related to this and one of those is- *Tuka Ram and Another V. State of Maharashtra*<sup>10</sup>

This case, which is popularly known as the ‘Mathura Rape Case’, shook the criminal justice system of India to a certain extent. A girl named Mathura was raped in the police station. When the case reached the court the accused were acquitted from the charges by the trial court and then convicted by the high court and later on finally acquitted by the Supreme Court on the ground of lack of evidence. This case led the amendments in our criminal laws which are as follows-

Firstly, Section 375 IPC was amended whereby consent obtained by putting the victim in fear of death or hurt was regarded as rape, which was earlier not available.

Secondly, Section 114-A of the Evidence Act, 1872 was amended whereby the court shall presume that the victim of sexual abuse had not given her consent i.e. the burden to prove that the victim had given consent will be upon the defence once the victim denies that she had not consented to the intercourse.

Thirdly, Sections 327(2) and 327(3) were newly added to the Criminal Procedure Code, 1973. Section 327(2) made it compulsory for the trial court to conduct the trial of rape cases in-camera proceedings. Whereas, Section 327(3) prohibits the publication of the court proceeding except with the permission of the court.

The other landmark cases are-

In a Public Interest Litigation related to the rehabilitation of the children of prostitutes for their better life and future upbringing. The Supreme Court held and issued various directions, directing the government and NGOs to rehabilitate these children to a better place or protection homes so that they can be protected from sexual abuse and can be curbed from going into the profession of prostitution.<sup>11</sup>

In *Independent Thought v. Union of India*<sup>12</sup> – Exception 2 of section 375 was challenged on the ground that it was violative of child rights and was arbitrary as it violated articles 14,15&21 of the Indian Constitution. The issue was whether intercourse done with a girl between the age of 15-18 years after marriage amounts to marital

<sup>10</sup> Tuka Ram and Another V. State of Maharashtra, 1979 SCR (1) 81

<sup>11</sup> Gaurav Jain v. Union of India, AIR 1997 SC 3021

<sup>12</sup> Independent Thought v. Union of India, (2017), 10 SCC 800

rape or not? The Supreme Court held that the intercourse done with the girl who is below the age of 18 amounts to marital rape as she is not capable of giving consent for this.

**B. CHILD LABOUR-** Child labour is one of the most subtle issues of today. Many children are forced into this to earn for their families. The main reason behind this is poverty in India. Children are forced to do work in haphazard conditions which are very dangerous for them. Sometimes due to working in such situations, either their health deteriorates or they lose their precious life. Our judiciary has been very strict in these matters and pronounced very rigid judgements against those who have employed children in such jobs.

In its landmark judgment, the Supreme Court has stated that the basic requirement of articles 21 and 23 is that the bonded child labourers should be rehabilitated<sup>13</sup>. In another case, the court held that the contractors cannot employ children below the age of 14 years in the construction work area as they were prohibited from doing this under a constitutional mandate. Further directions were given to the central government to ensure the schooling of such children. In the other celebrated landmark case which is also known as the child labour abolition case,<sup>14</sup> the court held that children below the age should not be employed in hazardous activities and the state must ensure the protection of children and provide them with the proper education.

**C. Education-** Education is considered one of the basic needs of an individual, it is the right of each person to get educated and our system has understood this well and enshrined the right to education as part of fundamental rights under Article 21A, which provides for elementary education as a fundamental right. Although the concept of providing education to children was mentioned in the directive principles of the state policy in part IV of the constitution. But it is the judiciary which through its vigilance understood the importance of education for children and through its landmark verdicts helped in establishing the right to education as a part of the fundamental right. The court in its landmark judgment of Unnikrishnan<sup>15</sup> broadened the scope of article 21 which is the right to life and stated that the right to life also includes the right to education. The Uttar Pradesh high court in one of its judgments quoted, *"We believe that if every child is ensured to attend school by the constitution, then when any child is found to be out of school during school hours, it can be presumed that the child has escaped because he is at home or he/she is a trafficked child or engaged in Unacceptable or illegal child labour"*<sup>16</sup>.

**D. Dignity-** The right to live with dignity is the one right that everyone should be provided with. It is generally seen that this thought is sensitive in the case of adults as they consider it more valuable to live with dignity and children are often kept deprived of this. We all have seen this in our daily working lives how a child who is working at a tea shop or restaurant or any other place is treated by its owner or by the people. The Indian courts in many instances pronounced that the right to live with dignity is everyone's right under Articles 14 & 15. In

<sup>13</sup> Neerja Chaudhary v. State of M.P, AIR 1984 SC 1099

<sup>14</sup> M.C.Mehta v. State of Tamil Nadu, (1991) 1 SCC 283

<sup>15</sup> Unni Krishnan P. J. v. State of A. P., AIR 1993 SC 2178

<sup>16</sup> Meydha (Meritorious Education For Youths Development & Humane Activities) v. Govt. of India, Thru. Secy., School Education & Literacy Deptt and Others, 2014 SCC OnLine All 13565

its landmark judgment of *Gaurav Jain v. Union of India*,<sup>17</sup> the Supreme Court has stated that the children of the prostitutes have also the right to live with dignity and the right to equality in every sphere of life.

E. Juvenile Justice- Children these days are also becoming offenders and many children are facing the trials of very heinous crimes. The issue is that not only children from poor backgrounds are the offenders but children from rich and well-to-do families are also indulging themselves in offences which are prohibited under the law. The data published by the National Crime Records Bureau states that 31,170 cases were registered against juveniles in 2021<sup>18</sup>. As the children also indulge in the crimes, they are liable to be prosecuted but as their cases are sensitive they are tried differently. The Juvenile Justice Committee is specially established in the Supreme Court/ High Courts which look into these matters and take proper care of the rights of juveniles under trial. The chief justice conference held in the year 2006 passed the resolution of establishing the Juvenile Justice Committee which is headed by the high court justice. The committee look over the mechanism of disposal of cases of juveniles, it looks over the basic needs of the children are fulfilled when they are in observation homes and also for the rehabilitation of the children. In short, it looks like juveniles who conflict with laws their rights do not get violated<sup>19</sup>.

F. COVID-19 & Rights of Children- COVID-19 was an unpredictable event which disturbed the functioning of the whole world and turned into misery for millions. Everyone was clueless about this and was only left with the hope and prayers to remain safe. This calamity made many people vulnerable but the most impacted section of the society were children. The impact of COVID-19 was also seen in India, but because of the vigilance and proper functioning of the three organs of the government, a major devastating event was curtailed to limits. The Indian judiciary played a major role and once again proved why it is known as the protector of the rights of an individual. The judiciary through PILs and by taking suo-motu cognizance protected the right of the individual to a particular right i.e. "right to life" which was an issue in the limelight. The judiciary did not step back when it came to protecting the rights of children it took up PILs and passed the appropriate orders. The Supreme Court passed guidelines to subordinate courts for video conferencing of the child witnesses in trafficking. Then ordered for rehabilitation of children living on the streets and asked for data from the state governments to present before it. It also took care of children living in the protection homes the juvenile justice committee of the Supreme Court during the second wave of the covid focused on the protection of children by providing medical facilities to them whenever required, the court also asked to vaccinate the workers on priority who were working in these protection homes<sup>20</sup>. The court also presented its sympathy towards the children who lost their parents in COVID and emphasised that state governments should formulate some schemes regarding the benefits of those children. Directions by the court were given to the District Magistrates to ensure the distribution and monitoring of the PM care funds to the beneficiary children. The court also

<sup>17</sup> *Id.* at 11

<sup>18</sup> THE NEW INDIAN EXPRESS, <https://www.newindianexpress.com/opinions/2022/dec/24/why-children-conflict-with-law-and-order-2531149.html>, (last visited Oct,29,2023)

<sup>19</sup> JUVENILE JUSTICE COMMITTEE DELHI HIGH COURT, <https://jjcdhc.nic.in/> (last visited on.Oct.29.03.2023)

<sup>20</sup> WION NEWS, <https://www.wionews.com/india-news/need-to-step-up-measures-for-well-being-protection-of-children-during-covid-19-second-wave-sc-judge-383754>, (last visited on, Oct,29,2023)

protected the right to education of the children as it directed the authorities to identify the students who have dropped out inquire why this happened and take appropriate measures regarding this.

## RIGHTS OF LGBTQ+ CHILDREN AND JUDICIARY

LGBTQI has always been a subject of discrimination in our country. Whether the person is an adult or a child both have been through this trauma. LGBTQ+ people have fought for their rights for a long time and it was the two judgments delivered by our Hon'ble Supreme Court which changed the world for them, it impacted both LGBTQ+ children and adults. The first judgment was Navtej Singh Johar which decriminalised homosexuality and the other was the NALSA judgment which recognised the transgender as a third gender and provided them the rights that the other genders have. There are many other examples where the courts have worked in the direction of providing the LGBTQ+ children their rights.

Firstly, in April 2019, in *Arunkumar and Anr. v. Inspector General of Registration and Ors*<sup>21</sup>, the Court upheld the right to informed consent for intersex children. The Bench inter alia took note of the World Health Organisation's report, "Sexual Health, Human Rights and the Law", which proposed a 'deferment of Intersex Genital Mutilation (IGM) until the intersex persons are old enough to make decisions for themselves, and the Supreme Court's decision in NALSA that no person shall be forced to undergo any medical procedures to be able to legally assert their gender identity. In doing so, the Hon'ble Court, as a first of its kind, prohibited the performance of sex reassignment surgery on intersex infants and children

Secondly, the Madras High Court in 2021 *Mrs S. Sushma & Ors. v. The Director-General of Police & Ors*,<sup>22</sup> passed an order in which guidelines were given by the court to make an inclusive environment for LGBTQ+ children. The guidelines were as follows-

1. Ensure the availability of gender-neutral restrooms for gender-non-conforming students.
2. Change of name and gender on academic records for a transgender person
3. Inclusion of 'transgender' in application forms for admission, competitive exams, etc.
4. Appointing counsellors who are LGBTQ+ inclusive for staff and students to address grievances and provide solutions.
5. Implement measures laid down concerning health, education and social security for transgender persons.

Thirdly, in the same case<sup>23</sup> the NCERT has submitted before the high court that it is going to make a manual relating to "Integrating Transgender Concerns in Schooling Processes", the manual will aim at making the school more inclusive for LGBTQ+ children by changing the school curriculum to gender equality.

<sup>21</sup> *Arunkumar and Anr. v. Inspector General of Registration and Ors*, W.P. (MD) NO. 4125 OF 2019 AND W.M.P. (MD) NO. 3220 OF 2019

<sup>22</sup> *Mrs S. Sushma & Ors. v. The Director-General of Police & Ors*, W.P. NO. 7284 OF 2021

<sup>23</sup> *Id.* at 20



## SUGGESTIONS

Although the judiciary has been very active in protecting the rights of children and played its role very well. But there are some issues which need to be dealt with so, that the children can be protected or they can get timely justice. Firstly, setting up more courts to complete POCSO trials, as per the data presented in 2022 in Lok Sabha by the law ministry there are 2.26 lacs of POCSO cases pending<sup>24</sup>. There is a need to resolve the cases related to children at a fast pace so that they can progress in their lives. Moreover, most of the cases related to the violation of the rights of children are not registered this needs to be ended. The judiciary should give direction to the educational departments to make children aware of their rights and remedies from their school days so, that they can become vigilant about their rights and can protect them. Furthermore, if a child is to be given punishment then it should be based on reformatory theory so, that when the child completes the punishment he/she should be an asset not a liability for society.

## CONCLUSION

As we see a garden consists of many plants, shrubs, big trees and beautiful flowers. And for their protection from unwanted things or natural calamities, a gardener is there who protects them and helps them in growing up so, that the garden looks beautiful. Similarly, children in our society are those beautiful flowers along with other people. There are many instances when these flowers are tried to be plucked down or destroyed by the unwanted creatures of our society. At that time the judiciary played a role similar to the gardener and protected the children by protecting them from being a victim of any wrong and protecting their rights so, they were not destroyed and helped them to grow. Hence, the role of the judiciary is considered as vital so, that our society looks like a civil society.

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<sup>24</sup> THE WIRE, <https://thewire.in/law/over-2-26-lakh-pocso-cases-pending-in-fast-track-courts-up-has-over-60000-govt>, (last visited on , Oct,29,2023)