

“Judiciary – The Key Player in Child Justice”

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ABSTRACT

We live in a welfare state where it is the duty of the government to provide welfare to its citizen rather than just protecting. Children are future India. It is the most important duty of the state to develop future India. But the present condition of future India is at the worst. Where 8 years old gets raped and the 16 year old rapes another. When an 8 year gets raped we can find wrong in law and its implementation, in the same sense when a 16 year old rapes someone we can find wrong in their foundation, society, law and all. It may be the legislators who make the law, but it is the judges and judiciary who construct it. Each time judiciary plays a major role in the rights of children. From child labour till child pornography, from the facts of Nirbaya till Kathuva judiciary has always played a special role. There can never be divine precision by a legislator, so it is the judiciary who are the most responsible for the welfare in any aspect. But the work of judiciary has not been adequate. It is only up to the God to have the character of divine precision, humans could not have it. But it is the need of the situation for the legislators and judges to develop the art of divine precision so that they can draw laws and construct it in the best way. The present condition of the state can be analysed by not the laws made but the judgement. A judgement made by a common man on an important judgement will depict the state of state at that time. These judgements turn the entire aspect of offence and crimes relating to children. They made the labour in hazardous work by children crime. They paved the way for the education to be mandatory and a lot. In this paper, the author tries to picturise the judicial outcome its merits and drawbacks, in a rational view, regarding the right to education and child pornography.

keywords: *child, divine precision, judiciary, values*

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Introduction

India is the home of 430 million children which approximately includes one in every five children below the age of 18 years in the world. We have a court of law and no court of justice. Though children are considered next to the pious version of all mighty, our courts consider even them just as the subjects of state and make a judgement only in regard to law and nothing else. Though the law is a reflection of social conscience, it may sometimes can't provide justice. This is the state as the judiciary is bound to follow the law to the fullest possible i.e they are bound to follow the rule of law. Though they follow the law to the utmost, the judgement made by them at every specific situation constructs the law in a different aspect according to the situation. These judgments are the once which actually depicts the law. They colour the entire society with what to do and what not. Thus even the child rights and law relating them though governed by the legislators, the judiciary gives the colour to the society the aspects in their judgement reveal the actual society. Also, they pave the way for the new law in the country. Thus judicial outcomes are the ones which control the entire society.

The present state of future India

India is the second most populated country in the world. It has the world's largest youth population between the age of 10 and 24. Over 356 million youth constitute 28 percent of the country's population.² Ours is the youngest country though with the highest children population. One of the main reasons for the fear and respect towards India by the world community is because of its young population. At the present situation not only the world community has fear on India but also the Indian society shall have fear on Indian youth and the law. This is because of the pity state and social condition of the youth community where a 16 year juvenile attempts a rape in the capital city. Also where a lot of small girls are raped, which depicts the weak enforcement of law and order and even justice. While India has made a great development in the rate of enrolment in schools it has been quite unsuccessful at

² The Hindu, *India has world's largest youth population: UN report*, The Hindu, (FEB. 11, 2019, 12:05p.m)
<https://www.google.co.in/amp/www.thehindu.com/todays-paper/tp-in-school/india-has-worlds-largest-youth-population-un-report/article6612615.ece/amp/>,

preventing the dropouts. About 47 million youth are dropping out from secondary and higher education. There is 77 percent of enrolment in class 10 whereas only 52 percent in class 11.³ Here we get the question where do they go? Why do they go? What will their condition and thoughts when they see their aged children having a good life but not them? Automatically the dropouts are due to their family conditions which lead them to drop out. Their condition may lead them in either way, towards responsibility or towards criminality. The statistical report says that though child labour is a punishable crime in India, it saw an increase in child labour from 11.28 million in 1991 to 12.59 million in 2001 and to 8.22 million in 2011.⁴ There had been a great initiative by the government to reduce the rate of child labor but it is not adequate. If this is the rate of child labour where do others go. A lot of trafficking of children occurs in India mainly to indulge in many labourous works. These works include beggary, household work of children as they will be so cheap and at the most, they are used for the pornography which will yield the most money. Shockingly India leads the child pornography. India has become one of the biggest consumer and the contributor to child pornography. Another biggest shock is that the state with the highest literacy rate, Kerala leads in uploading these contents of child porn and Haryana leads in viewing these contents of child pornography through mobile.⁵ The number of crime by the juveniles has been noted to be 43,506 in 2013 that are registered under the Indian Penal Code (IPC) and Special Local Laws (SLL) by juveniles. Where more than half of the crime committed is by the age group between 16 and 18.⁶ If the crime is committed in that young age then what about their future, their condition in the society, their ideas about the society. These facts and practical conditions regarding future India really frightens a lot.

³ first post, *UNESCO: 47 million youth in India drop out of school by 10th standard*, (FEB. 11, 2019, 1:30pm)

www.firstpost.com/india/unesco-47-million-youth-in-india-drop-out-of-school-by-10th-standard-2961334.html,

⁴ childline, *Child protection, and child rights*, (FEB. 11, 2019, 02:00 pm) childlineindia.org.in/child-labour-india.htm.

⁵ Abinesh.H, *shocking: India leads in child pornography*, news today (FEB. 11, 2019, 02:07 pm), <https://www.newstodaynet.com>.

⁶ save the children, *Statistics of child labour in India*, (FEB. 11, 2019, 02:10 pm) <https://www.savethechildren.in/articles/statistics-of-child-labour-in-india-state-wise>.

Judicial outcome:

When a doubt in law occurs, judiciary comes into play. By clarifying the doubt it has done a lot. Not only clarification of law but also intimate the legislators their duty to amend or change when there is a violation of the Constitution or when the constitution aspects are not followed. All the aspects of rights or abuse of children are interlocked in three main concepts they are their right to education, abuse of child labour and child pornography. These are the main reasons as any other discrimination will be related to any of these aspects such as trafficking related to pornography or education and labour is itself interlocked as when there is one aspect the other will dismiss.

Redefining the dignity - Right of education:

Article 21A explicitly provides right to education in our constitution. The biggest drawback is that it is a fundamental right and not a duty. It is not a crime to wave this right. So this right is not completely utilized by the people. The important outcomes of the court regarding this right are a lot.

Importance:

In Mohini Jain case⁷ it completely depicts the importance and need of the right to education. They compare the right provided by preamble with that of education. As preamble provides justice, "socio, economic and political" for the people. The peculiar fact is that it combines the social and economic rights along with the political and legal rights. The preamble enables these duties to the state to provide social justice to its citizens. The judgement in this case clearly depicts that social justice can be attained by attaining social dignity, dignity can be attained by improving the personality of each individual, and the improvisation of personality is possible only by education. And the right of education flows directly from the right of life as provided in article 21, therefore providing education is the much important duty of the state. This is why the UDHR 1948 emphasizes "education shall be directed to the full development of human personality. So the court held that it is mandated for the state to provide education to all its subjects.

⁷ Miss Mohini Jain vs State of Karnataka and Ors, 3 SCR 658, (1992).

The economic structure of state:

Courts later made that as far as high schools and senior secondary schools are concerned, the state government is again under an obligation to provide education to children studying in these schools who are fourteen years of age or less. The net result is that even in high schools and senior secondary schools, upto 8th/ 9th class - the students being 14 or below - the state government is bound to provide free education and bound to meet the total expenditure of the schools to the extent. Financial constraint is not an answer for the constitutional duty.⁸

But see in *Unni Krishnan K.P v. state of Andhra Pradesh*⁹ wherein it was held that the free education until the child completes 24 years, his right to education is circumscribed by limits of the economic capacity of the state and its development. In *maria grace rural middle school v. government of TN.*, wherein it was held that the right to receive the grant in aid for establishment and administration of schools is not a right. Grant in aid in an economic concept that would always depend upon subjective satisfaction, financial stability, and resources as well as the discretion of state government. It is also a policy decision in the matter of domain and of the executive and not a matter of principle laid down by the legislature.

Policies and schemes:

Courts clearly lay that the policies and schemes do not stop a state from performing its constitutional duty. It held that in a locality, where the habitual are mostly scheduled caste and scheduled tribes and was educational, socially and economically backward, and refusal to grant permission to a school on the ground that no policy decision is taken by the government in violation of this article.¹⁰

Another most important judgement made is regarding the midday meals that to be provided in schools. The court held that providing facilities for mid-day meal scheme

⁸ *State of H.P v. H.P state recognized and aided schools managing committee*, 4 SCC 507, (1995).

⁹ *Unni Krishnan, J.P. And Ors v. State of Andhra Pradesh*, 1 SCR 594, (1993).

¹⁰ *State of Kerala v. SC/ST Welfare Society of Kerala*, AIR KER, 158, (2007).

in schools is part of the right of education. The hungry stomach cannot be expected to a good education with attention.¹¹

These are some of the important judgements made by the court regarding education but it failed to provide some guidance on how education should be provided. As the rate of suicide by students is high in India, some guidelines should have been provided regarding schools exercising the doctrine of 'Parens partia'. This guidelines and clarity about what is education and how it to be done and also the role of society regarding the development of the youngsters are to be provided by the judges in their judgement, but they failed to do that.

The biggest disaster - Child Labour

Right to education and labour is much interlinked with each other as the major reason for the denial of the right to education is labour. The labour may be due to the pity condition of the family of those children which forced them to leave their passion and work for their family or the kidnappers at the very age. It is the obligation of the state to provide the child with the at most care and health and to provide them with all the basic needs and education and to equate with that of their poverty and education.

The relation between labour and education:

One of the main reasons for the failure to exercise the right of education is because of the critical conditions prevailing for children in the society. The court held that as education is considered as the fundamental right and in the same way prevention of child labour is also a fundamental right under article 24. Though providing healthy development and preventing exploitation of children are provisions of DPSP, it is also an indictment to article 21 providing the right to life and liberty.¹² It is the duty of the state to fulfil the constitutional duty at all cost.

Causes;

The court has analyzed the main causes of poverty and has provided

¹¹ Rifahu Muslimean Educational Trust v. State of Karnataka AIR Kant 203, (2005).

¹² Hayath khan v. the deputy labour commissioner ILR, KAR 6001, (2005).

1. Extreme poverty
2. Lack of opportunity for gainful employment
3. Intermittency of income
4. Low standard of living

As the reasons for the wide prevalence of child labour¹³

These are the few causes but not the only causes, as some other important causes include

- Illiteracy
- The difference of pay in wages
- Failure of crucial implementation of the law
- Unawareness of their rights

these are some of the other reasons for child labour

To overcome:

The state has not achieved many feet in the eradication of the child labour. It is growing day by day in an unimaginable proportion. The government does not have any magical wand or something to eradicate child labour in a single day. It has to develop the special law to discourage the child labour. Not only these enactments should be made they should be implemented in the best way.¹⁴ Also, the public should be thought and given counseling by the NGO's regarding the child rights and their need to be implemented.

The weed in the field - child pornography:

It has to be noted from the above that India is one of the leading markets for child pornographic contents. All other wrongs are quiet based on the mistake in the

¹³ M.C. Mehta v. State of Tamil Nadu and Ors AIR SC 699, (1997).

¹⁴ Sriram babu v. the chief secretary, ILR KAR 2296, (1997).

enforcement of the law as well as a grudge in the mind of people. But when an 8 year old gets raped or the amount of child pornography in circulation is looked into, it clearly depicts that the society is completely in a wrong root that it induces more amount of thriving for sex in the minds of the people. A survey by UNICEF says that out of every 3 rapes in India a victim is a child, and this threat increases at an alarming rate.

These problems extremely contaminated the society to a great extent. In order to overcome this act, our legislators came with an act to protect child abuse naming POCSO Act in May 2012.

Judicial pronouncements on POCSO:

It was held in the case *K. Muthumariyappan v. The State*¹⁵ that In order to attract any offence under the provisions of the POCSO act, it should be proved by the prosecution that as on the date of the commission of the crime, she was a child. The term child has been defined in section 2(d) of the act, which states that child means any person below the age of 18 years. Thus, for the purpose of the offence of kidnapping as well as for any offence under POCSO act, the age of victim should be proved to be below 18 years as on the crucial date.

In *Vinod Kumar v. state*¹⁶ the court observed that any question that involves sexual intent will be a question of fact. Section 9 of POCSO act deals with aggravated sexual assault which is punishable under section 10 of the said act. In order to ascertain as to under which section the act committed by the appellate falls, it is necessary to refer to section 11 of the said act which particularly states that "-- a person is said to commit sexual harassment upon a child when such person with sexual intent, -- (iv) repeatedly or constantly follows or watches or contacts a child either directly or through electronic, digital or any other means"

¹⁵ *K.Muthumariyappan v. The State* MANU TN 1611, (2015).

¹⁶ *Vinod Kumar v. State* MANU DE 3515, (2014).

Impact of society

The family, the peer group, the neighbourhood, school, and work, and the broader society all have the impact on adolescent development. The entire social condition i.e the society can have a clear influence on the course of adolescent development, through the policies and the resultant social arrangements, also mainly by the values shared by the society.¹⁷ The character of a person is mainly based on all the values influenced over him during his adolescence. Law gives to provide the compulsory education but not the good values compulsorily. Although most young people move successfully through adolescence, there is a problem that typically arises in this period. These are the years in which delinquency both minor and serious, is at its height and in which abuse of tobacco, alcohol, and illicit drugs begins if it ever will.¹⁸ This is the age they learn what they see. What they observe in the society is the character they learn. It may be both good as well as bad character. Some of the major impacts from the society are

*The decline of occupational opportunity:*¹⁹

An important factor in the increase in adolescent problems is probably changing in world's economic structure. The birth rate is even now higher than the death rate. The development of the number of jobs as compared with the growth of population is very much less. This unemployment depresses the adolescent, which may lead them to criminal activities for survival.

*Changing family structure:*²⁰

The major changes in the family structure over the last forty years may in part be attributed to the effect of rapid urbanization, which disrupts extended family networks that formerly assisted in the socialization of children and turns parents into emigrants from rural settings. In this transition, age parents thought that their children playing in tabs are mobiles or any other gadgets will give them more prestige which resulted in

¹⁷ Anne C. Petersen & Nancy Leffert, *what is special about adolescence?* 1, psychosocial disturbances in young people. 3, 17 (1997).

¹⁸ Lee N. Robins, *socio-cultural trends affecting the prevalence of adolescent problems*, 1, psychosocial disturbances in young people. 367, 368, (1997).

¹⁹ *Id.* at 369.

²⁰ *Id.* at 373.

lack of socialization by the children. Another major change in family structure is that the mother working outside the home, in divorce and remarriage and in children born out of wedlock. Also the transition from joint family to the nuclear which made the experienced persons who cultivated the young mind with rich values and thoughts move away from contact with children.

Education:

Even though the right to education has been made compulsory²¹ to everyone in India, Whether it is fully implemented or not is another question. But what to be thought should be the major question. Should our society learn how to memorize and mug up books or learn how to think or how to be creative or how to be prosperous. A school should teach not only the subject but morals, values, and thoughts.

Social media:

Television is one of the major problems in the society. It may be considered either as a boon or a bane. It has the highest reach in a society, The physical coverage of T.V. reach is 82.5% of the total population of the country there were about 33million T.V. sets in India which about one third are in urban areas.²² Anything depicted in the televisions is considered to be true by the people. It cultivates the young society when an adolescent watch a social awareness program is mind gets tuned towards the society when he watches a movie where a crime or a rape commences his mind move towards those as it is the transition and changing period.

Suggestion and conclusion:

It is quite clear that judicial field plays a quiet impressive role in constructing the law as it stands with the different point at the different situation. Though court constructs the law in the best way as it can it is the society that constructs the present generation. Any change may come in law but unless the youngsters are cultivated, the change in the society cannot take place. The children are future India they are going to behave the same way they were treated by the society and even worse. Our system must focus

²¹ INDIA CONST. Art. 21, cl. A.

¹¹citeman,, *MediadevelopmeninIndia* , (FEB. 13, 2019, 05:05 p.m)

<https://www.google.co.in/amp/s/www.citeman.com/241-media-development-in-india.html/amp>

on developing the young generation rather than concentrating somewhere else. So the focus should be made for the betterment of the society for the development of future India, some of the suggestions are:

“Paren patriae” :

For the parentless children, the government should take complete responsibility. It should concentrate much on those children as they have the most chances to get discriminated. Any case of them should be treated with utmost care. The court should enact the doctrine of: *paren patriae*” at those times being the parent of the child doing the best to them.

Work of NGO's:

It is the duty of the government to imbibe the knowledge of their own rights to the citizens. It is not completely possible for a government to do that so at least it should initiate the NGO's to teach the importance of this knowledge of rights to the poor people. Only then they may know the importance of the child rights.

Strong law:

The rape of children clearly shows the present condition of the law in India. The laws should contain much punishment and it should be enforced in the better way. As 40 percent of cases go unattended as they fear about the consequences in the court and the loopholes in the procedures which makes the criminals much easier way to escape.

Standard:

Though education is free and compulsory in India, the standard is not adequate. The main reason for education should be at first fulfilled. According to the Oxford dictionary of philosophy, the education is nothing but the teaching what is necessary and to imbibe it in the best way. What is necessary at first should be clearly defined and then it should be thought with social virtues.

Social prospective:

All the youngsters by the parents and by the educational institutions should be thought the concept of the social view, morality, and justice. Their thought should be diverted towards the welfare of the nation.

These are only a few suggestions regarding the development of the society to provide the betterment to the children. But unless these types of welfare changes are brought by the government, an expectation of change would be a word written in water.