

Role of Indian Judiciary In Protection of Rights of The Children

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Abstract

Scriptures may proclaim God manifests in the innocence mind of a child, a philosopher may gaze at a sparkling of a growing child to feel the quintessence of the universe and the poet laureate may announce with divine solemnity that a child is the father of the nation. But in recent times, there have been unpleasant and unfortunate incidence against the children, and it become nostalgia when they succumbs to become victim of most inferior bestial propensities of lowly human nature. The apex court in some cases relating to violation of rights of children deserves appreciation, for playing an important role to make the right to live with human dignity a living reality for children to some extent. This research paper examines the role of the judiciary in the protection of children's rights.

Key words: Children, Exploitation, Rights, Judiciary etc.

Introduction

The role of the Indian judiciary and the scope of judicial interpretation have grown remarkably in recent times. Judiciary plays an important role in protecting the basic rights of citizens and non-citizens. The double guarantees of equality before the law and equal legal protection are recognized as two of the most important pillars of human rights in the universe of freedom, which recognizes the freedom to enforce human rights, whether in an unwritten or written constitution. India is the largest democracy in the world, a sovereign, socialist, secular, democratic and republic with a comprehensive charter of rights written into its constitution. The Indian constitution lays down the basis for its foreign policy and its international obligations¹.

The true nature of the function of the court has been debated in most countries with a written Constitution since long ago. The judicial function is to interpret the law and make sure it is applied correctly. Austin defines law as the command of political sovereignty. His sovereignty is indivisible and absolute. Only the legislature can make laws. The function of the court was to declare the pre-existing law or to interpret the law created by statute. But on the other hand, the realist movement in the United States is the latest branch of sociological jurisprudence which concentrates on decisions of law courts. Respectfully, and I affirm that the law is what the court says. For them judges are the law makers. The entire common law is the creation of the English courts but is posited on the myth that the judge merely found law. The English judges not only made law, but also changed it to suit entirely new conditions created by the industrial revolution. In the modern era, the term "Judicial Activism" emerged as a tool for protecting children from sexual exploitation, child trafficking, and child abuse.

Aim of the Study

The aim of study of this research paper is analyzed the role of judiciary for protection of child rights. This article pointed judicial activism in the field of protection of child rights.

Judiciary on Child Labour

In the landmark judgment, the Supreme Court² went a step ahead and held that it is the plainest requirement of Article 21 and Article 23 that the bonded labours must be suitably rehabilitated. Then and only then the liberty and freedom will become meaningful.

The Schedule to the Employment of Children Act 1938, did not prohibit the employment of the children in the construction industry but notwithstanding the explicit provision the constitutional mandate is to be complied with whereby children below the age of 14 cannot be employed in such works which by their very nature are hazardous.³ Besides the contractors who employ the children below the age of 14 years, in the construction work are under the constitutional prohibition and cannot employ the children for the said purposes. This proposition

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was made clear and the Central Government was directed to enforce this prohibition and thereby should persuade the workmen to send their children to school.⁴

In a very important landmark judgment known as child labour abolition case⁵, the Apex Court has held that children below the age of 14 years cannot be employed in hazardous industries or mines or other work. This matter was brought before the Apex Court through the public interest litigation. Under Article 32 of the Constitution, the petitioner stated to the Court about the plight of children engaged in Sivakasi Cracker Factories and how the constitutional rights of children have been seriously violated, and require the court to issue appropriate instructions to the government to take measures to abolish child labor. In the present case, the Apex Court observed that it is a Herculean task to eradicate the menace of the child labour in hazardous industry, it is required to be dealt with by an iron hand and children are to be protected under the constitutional provisions. Though some of the hazardous industries have been also identified in the schedule of Child Labour (Prohibition and Regulation) Act 1986 but the children are not completely stopped in working in the non hazardous industry and the inspectors are to see that they are permitted to work only 4 to 6 hrs a day and receives a minimum education of two hours a day and the responsibility of the employer to bear the entire cost of education. However in the case of unemployment it is the duty of the State to take care of such matters and to provide free education to the children⁶.

Judiciary on Right to Education

In *Unni Krishnan's case*⁷ education up to the age of 14 had been declared to be a fundamental right under the article 21 that is it had been elevated to the status of the right to life. The directive principles are thus designed to promote the economic democracy and welfare of the people with the view to achieve a welfare State. Thus the judiciary had been trying to make small leaps towards achieving greater targets which is undoubtedly appreciable but practically cannot be read under the fundamental rights of the constitution because otherwise they would defeat the very intent with which they were framed.

The UP high court⁸ said that, "We believe that if every child is ensured to attend school in accordance with 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". Apex Court⁹ actively participated in and gave instructions on a case that filed a petition in the public interest under Article 32 of the Constitution on the serious violations and abuse of children, many of whom are forcibly detained in circuses without access to their families among extremely inhuman ones Conditions. There are daily incidents of sexual abuse, physical abuse, as well as emotional abuse. The basic human needs for food and water are withheld from the children. The Court gave directions regarding children working in the Indian Circuses which are as follows:-

1. In order to implement the fundamental right of the children under Article 21A it is imperative that the Central Government must issue suitable notifications prohibiting the employment of children in circuses within two months from today.
2. The respondents are directed to conduct simultaneous raids in all the circuses to liberate the children and check the violation of fundamental rights of the children. The rescued children were kept in a state-run facility till they turned 18.

Judiciary on Sexual Abuse

The judiciary has also played an important role from time to time in cases where children are subject to sexual assault, sexual abuse, prostitution, etc., The subject of sexual abuse of the girl has attracted a lot of attention for some time due to increasing incidents. It used to be believed that the law on sexual offenses did not contain sufficient provisions to protect victims. The victim of sexual abuse who had undergone the trauma has to live with the tragedy.

The law amended as a result of sustained campaign against an infamous Supreme Court judgment in Mathura Case¹⁰. Incidentally in Mathura, policemen within a police compound raped a sixteen years tribal girl. The trial court held that

since the victim eloped with her boyfriend and was habitual to sexual intercourse, the charges of rape against the policemen could not be sustained.

On appeal, the high court's held differently that mere passive or helpless surrender, induced by threat or fear cannot be equated by desire or will and held the policemen guilty of offence. But the Supreme Court adjudicated that as the victim did not raise any alarm at the time of commission of offence; the allegations of rape were considered to be untrue and accordingly acquitted the policemen. The law commission accordingly recommended that not only the onus of proof about the allegation should lie on the accused, but also the past sexual history of the victim should be ignored in all such trials. In response to the feelings of public, change in the Indian Penal Code¹¹, Criminal Procedure Code¹², as well as in the Indian Evidence Act¹³. In the India Penal Code, persons in custodial situations, such as policemen, public servant, added new provisions which made sexual intercourse in custody of manager of public hospitals and remand homes, etc., would amount to rape even if it was with the consent of the victims.

The Supreme Court held that rape is not only a crime against the victim but it is a crime against the entire society. It destroys the victim's entire psychology and plunges them into a deep emotional crisis. It is her sheer will power, which helps her to rehabilitate in spite of the fact that the society looks down upon her in decision and contempt. Therefore in all cases of rape, law should take care about the social aspect of the mater¹⁴.

In a Historic Judgment¹⁵, the petitioner a public spirited advocate "Gaurav Jain" filed a PIL seeking appropriate direction to the Union of India for the improvement, protection and rehabilitation of the children of prostitutes. The Court issued the various directions and held that it is the duty of Government and all voluntary non-governmental organizations to take necessary measure for protecting them from prostitution and Recover them and enable them to live a dignified life. The Court directed to constitute a Committee which would make an in-depth study into these problems and evolve suitable schemes for their rescue and rehabilitation.

The Supreme Court¹⁶ recognized the right of the victim for compensation and even to the extent of payment of interim compensation in certain cases. In a case, the evidence on record clearly established that the accused was close to the family of the deceased and she used to call accused as 'uncle'. Obviously her closeness with the accused encouraged her to go to his shop, which was near the saloon where she had gone for a haircut with her father and brother, and asked for some biscuits. The accused took her to a nearby grocery store and unfolded with kidnapping, brutal rape, and horrific murder as many of her injuries testify, a packet of biscuits as a prelude to his sinister design. Immediately responded to the request by passing. And the finale was to throw her body into the well. When a seven-year-old innocent girl receives such barbaric treatment from a trusted person, his responsibilities assume an extreme rate of corruption and arouse disgust in the minds of the common people. From the motivation of the perpetrator, the vulnerability of the victim, the enormity of the crime, the execution thereof it can be said that this is 'rarest of rare' case where the sentence of death is eminently desirable not only to deter other from committing such atrocious crimes but also to give emphatic expression to society's abhorrence of such crimes¹⁷.

In Independent Thought v. Union of India¹⁸, a division bench of the Supreme Court of India laid down Exception 2 to Section 375, Indian Penal Code, which has now been changed to "Sexual intercourse by a man with his wife, the wife not being less than 18 years of age, is not rape". The response to the decision was mixed, although the general consensus appeared to be that the decision raised issues related to child sexual abuse and child marriage, because it clarified the marital rape of minor wives. However, at a certain point, the Supreme Court is clear: the decision does not apply to marital rape of adult women. The Court stated that they have refrained from making any observations on the marital rape of a woman who is 18 years of age and above because that issue is not before

them at all. Therefore, we should not be construed as even mentioning the issue incidentally. "

Conclusion

The Supreme Court has been very much active and is champion of human rights of the child. From time to time it has played a vital role in protecting them where legislature or executive lacks. Be it the case of child labour, child sexual abuse, child education or any other acts which effects the rights of the children, the judiciary has always have given various directions, guidelines and decisions and upheld the true spirit of Constitution of India and various other legislations relating to children.

But it has been seen that the directives of the courts on many times are not taken with due seriousness by the government departments or the authorities concerned. So it is very important that the apex court should deal these cases with iron hand and make sure that the offender should be punished. Giving directions alone will not solve the problem, the abuser/culprit should be send behind the bars and special care should be taken to handle cases of child sexual abuse.

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8. *Bachpan Bachao Andolan vs. Union of India & Ors.*, Writ Petition (c) No.51 of 2006-Decided on 18-04-2011.
9. *Changes in Sec.376, 376A, 376B, 376C, and 376D were introduced by Amendment Act, 43 of 1983.*
10. *Amended sub-section 372(2) says trial of rape cases could be held in camera; likewise sub-section (3) prohibits/regulates publication of names of victims and proceedings; and the consequential 1st schedule changes.*
11. *Section 114 A was introduced in The Evidence Act, 1982 which states: Presumption as to absence of consent in certain prosecutions for rape.- In a prosecution for rape under clause (a) or clause (b) or clause (c) or clause (d) or clause (e) or clause (g) of sub- section (2) of section 376 of the Indian Penal Code, where sexual intercourse by the accused is proved and the question is whether it was without the consent of the woman alleged to have been raped and she states in her evidence before the Court that she did not consent, the Court shall presume that she did not consent.*
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13. *Gaurav Jain v. Union of India*, AIR 1997 SC 3021.
14. *Delhi Domestic Working Women's Forum v. Union of India*, (1995) 1 SSC 14.
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