

## EXPLOITATION OF ORPHANAGES IN THE STATE OF TAMIL NADU V.

### UNION OF INDIA AND ORS: AN OVERVIEW

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As the Indian state celebrates its seventieth year of independence, it is perturbing to know that 35 percent of the population, which mainly comprises of children below the age of eighteen years, continues to remain unrepresented and voiceless. As early as in 1959, the United Nations General Assembly had declared the rights of the Child. While this declaration is pithy and all encompassing, the declaration was only persuasive in nature and was not binding on the member states. It took another 30 years for the United Nations Convention on the Rights of the Child, 1989 to take shape and become the binding law on the signatory states which had ratified it. Article 4 of United Nations Convention on the Rights of the Child reads as follows:

*“Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention. With regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international co-operation.”*

Despite the Government of India signing and ratifying the Convention as early as in 1992, it took thirteen long years to actually get the Parliament to legislate on the subject, which at that time had already affected the rights of over 41 percent of the Population.<sup>1</sup> The Commissions for Protection of the Child Rights Act technically came into existence in 2005 but it was not until 2007 that it actually started functioning. Under the Act, elaborate qualifications have been prescribed for persons to be nominated as Chairpersons and the members of the National and State Commissions for Protection of Child Rights, which are pivotal agencies to enforce the rights of a child.

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<sup>1</sup> See Census of India, 2001.

There is a comprehensive compendium of legislations including sections in the Indian Penal Code, Code of Criminal Procedure and the Constitution relating to the rights of the child and yet the Indian children continue to be the most exploited, abused, and neglected section of the population. India has lofty aspirations but sadly, when it comes to implementation one is bound to be shocked to see the complete lack of sincerity of purpose.

‘Welfare’ and the ‘best interest of the Child’ had been a mantra which guided the Indian courts in all pronouncements in the custody battles as well as some juvenile justice cases. Today, this mantra has been statutorily recognized; even so, there is only minimal number of cases that are filed for the enforcement of the constitutional rights of the child. This continues to be the state of affairs even after the creation of so many governmental and non-governmental agencies under the various legislations.<sup>2</sup>

The recent case of *Re: Exploitation of Orphanages in the State of Tamil Nadu v. Union of India and Ors.*<sup>3</sup> stands as a landmark judgment of the Supreme Court of India critiquing the functioning of the various agencies set up under the legislations to enforce child rights. In the coming paragraphs, the main findings of the judgment have been summarized.

The Judgment has brought to the fore serious discrepancies in the implementation of the enactments. It takes judicial cognizance of the fact that the National and many of the State commissions are only functioning on paper. The State and the Union territories have lost sight of constitutional rights of children and this is reflected in the lackadaisical manner in which they function. The Court lamented the total lack of concern of governments of some States and Union Territories for remedial and proactive measure for children. It took judicial cognizance of the lack of seriousness, and more tragically a lack of empathy towards the well being and welfare of children amongst some of the States and Union territories and the complete apathy with respect to the disturbingly increasing instances of child sexual abuse, often by someone in a position of authority, and the ineffective implementation of the laws passed by parliament virtually making parliamentary legislation irrelevant.

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<sup>2</sup> An example of such legislation is the Juvenile Justice (Care and Protection of Children) Act, 2015.

<sup>3</sup> AIR 2017 SC 2546.

It was rather unfortunate that this landmark judgment decided to restrict its focus on children in need of care and protection while excluding trafficked children and street children, for these two latter categories are more in need of 'care and protection'. The judgment gave a broad and inclusive interpretation to the definition of the words 'child in need of care and protection'. The Judges took judicial notice of the fact that many of the child care institutions run by both state governments and/or NGOs were not even registered, a primary and mandatory requirement under the Juvenile Justice Act. This ejected such non-registered institutions outside the purview of the law and scrutiny of the child rights enforcing agencies.

While directing the compliance with the various provisions of the Act the Supreme Court warned that in a welfare state like India, negligent officers could not be absolved of the responsibility for violation of the human rights of children. While holding that non-availability of funds would not be a ground for the government to shirk its obligations under the statute, the judgment found that the factual picture was quite the reverse *viz.* most of the States showed huge numbers in their year wise statement of unspent and unutilized grants. The judgment reminded the government of its obligation to honor its international treaty commitments in a clear reference to the United Nations Convention on the Rights of Child, 1989. It further held that the agencies such as NCPCR and SCPCR had a very crucial role to play in fostering child rights but in reality, what was seen was nothing more than 'lip service' and a complete 'lack of serious attention' to the constitutional rights of children.

The Court expressed dissatisfaction at the failure of the various agencies to keep proper records and reports and blamed these serious deficiencies on the lack of interest and will shown by the Union as well as the State governments. The judgment found that the serious deficiencies in the functioning of the various agencies arose because 'they were not allowed to function as independent statutory bodies'. The Judges expressed their deep concern that there were no inspection committees as required under Section 54 of the Juvenile Justice Act, 2015 to ensure that the children were housed in a safe and a healthy environment.

The most astonishing of all the findings was that the personnel put in charge of administering the legislations such as the child care institutions, District Protection Officers and other NGOs were found to be totally untrained and it turned out to be a classic case of 'the blind leading the blind', in that, the untrained personnel of the institution equipped with unburdened manuals containing the model guidelines and regulations on the police and the Juvenile courts where none of the parties were properly informed of

its letter or spirit. A basic fallacy in the perception of most of the child care officers was to make institutionalization of a child as the first option when in fact it should be the very last of the options, preceded by adoption and foster care (*in that order*). The judgment underscores the importance of social audits to bring in transparency and accountability in the implementation of the laws. It noted that even after the coming into effect of the Juvenile Justice Act there is no data on the child care institutions with either the State or the Union government. The Court has expressed its bemusement at the absence of this very fundamental information, that too in these times of high technology and that without this fundamental information it would be impossible to know how many children are in these institutions and the information regarding each child in the institutions so as to draw up the individual plan. It adjourned the matter with a series of directions to both the Union and the State governments to enforce the various provisions and for due compliance of the legislation.

This Judgment has not come a minute too early. The over-worked Article 21 of the Constitution which is invoked every single day in the High Courts and Supreme Court of the Country for seeking redressal in matters pertaining to violation of the rights in the case of adult citizens has strangely eluded and discriminated against the vast section of the innocent, exploited and vulnerable child citizen population. All that they need is that we too, along with them, cherish their childhood, allow them to grow physically and mentally to realize their fullest potential and save them from abuse and exploitation. These requirements are the barest minimum, which we owe them.

Slumdog Millionaire might have won an Oscar for its portrayal of the child smuggling industry of India, but it failed in addressing the issue leave alone bringing any change to it, of the rampant and abhorrent criminal business of smuggling children as beggars. We have the Juvenile Justice Act, 2015 in place and we have the various child rights enactments which lay down a stricture of laws protecting the children from being doomed to a life of indignity and begging in the most dangerous conditions, and yet there has been no change in the lives of the children.

These serious breaches of children's rights are not happening in the dark but right under our noses. We need not bring them up from the dark and desolate valleys of child abuse and exploitation; they, unfortunately, co-exist with our 'peaceful environment'. It is sad that no authority has taken cognizance of the serious breaches of children's rights, of their exploitation and their physical and mental abuse, which mostly happens in open streets. Right to Education Act is yet another empty promise to bolster our

international image but to this date even the most esteemed of schools can turn away students with impunity, thus violating the child's right to education. Will we be able to redeem the debt that the United Nations Declaration of the Rights of the Child, 1959 promised in its prefatory grand clause: "WHEREAS MANKIND OWES TO THE CHILD THE BEST IT HAS TO GIVE?" When will we bridge the gap between Parliamentary promises and practical enforcement of the rights promised to our children?