CHAPTER - II

LITERATURE SURVEY: PEDAGOGY OF THE RIGHTS OF THE CHILD.

Production of Specialized Knowledge on Children:

A bibliographic compendium of academic research submitted to Indian Universities (1857-1990) on Indian Children\(^\text{1}\) has 4781 entries: 2824 on education, 334 on social behaviour, 176 on physical development, 630 on mental development, 312 on social work, 378 on family and social dynamics, 54 on child labour and 73 on depiction of children in literature. Content analysis of these entries reveals major influence of learning and socialization theories of child development. Situational sample-surveys abound. Behaviour of the child as an emergent being and her integration as a functioning member of the given social order seems to have interested most. Sociologically, the problems and prospects of social cohesion appear to be prime concerns.

\(^{1}\) A. Vyas & M. Usmani: The Child in India, A Bibliographic Compendium of Academic Research Submitted to Indian Universities (Delhi: Bibliographic Bureau, 1996).
Despite the vast and still growing literature on child development, it is only recently that satisfactory sociological conceptualisation of childhood -- independent of the grand theories of population, history, consumer behaviour, socialization & education -- has begun to emerge. Important theoretical and empirical work has recently, been done by scholars advocating primacy of child's perception & growth interests. Children, Jens Qvertrup\(^2\) aptly notes, have not been ignored, but marginalized in sociology. Children got marginalized in social sciences because of adults judging their status only in terms of capacities and due to an implicit adult-obsession with the safety of the social order created by them for children. Children, thus, were expected to acquire imparted information to the best of their capacity, smoothly internalize existing value-system and obediently accept roles structured for them. Through families, schools, welfare institutions & community networks, children were expected to be transformed into bricks of social stability and cohesion. This over-socialized conception of children as acceptance-seekers of given

functions\(^3\) has not helped in understanding children—both with and as social problems\(^4\).

There is a need to (i) identify core developmental interests of children, (ii) give a cold look at institutions (viz. families, schools, welfare institutions, community networks & governments) from the lens of justice\(^5\) and, finally, (iii) assess whether, epistemologically, children could be better viewed emphasizing the conflictual nature of social reality or not. Judging the problems (described earlier) of the majority of Indian children at the present point of time, I feel safe in preferring conflict-model of analysis. Whether inherent, situational or institutional, the core existential interests of the majority of our country’s children are in conflict with the

   (ii) D. H. Wrong; Skeptical Sociology (London: Heinemann, 1977).


5) "Justice is the first virtue of social institutions, as truth is of systems of thought. A theory, however, elegant and economical must be rejected or revised if it is untrue. Likewise, laws and institutions no matter how efficient and well arranged must be reformed or abolished if they are unjust.... In a just society the rights secured by justice are not subjected to political bargaining or to the calculus of social interests".

interests of the keepers and maintainers of social order at different steps of the pyramid. Indian scholars have already pointed this out while writing about families\(^6\), schools\(^7\) welfare institutions\(^8\),

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6) "It was assumed, and the assumption largely persists, that the family is an integrated and stable unit, a transmission belt of traditional culture values. Indeed this is true, but it is only a half-truth and all half-truths are dangerous. This view ignores the fact that a family is often unstable, internally fractured and the constituting units often maintain hostile relationship between them even as they project a picture of harmony for those outside of it". 


7) Studies on teacher - pupil relations in tribal areas:


8) "Not enough is known about the nature and dimensions of the problem of child abuse or exploitation, specially of girls, except for some newspaper reports which appear from time to time. The nature and dimensions of the problem need to be fully investigated and assessed since cases which get reported to the police could only be a small proportion. In case of uncontrollable children the set of forces which have led to such behavioural problems need to be assessed. The current response to treat such children in an institution without reference to the family, neighbourhood, or other factors responsible for this is inadequate. A good case work and counselling service is absolutely essential". 

tolerance of illiteracy, child labour, budget-priorities, laws and so on. What is required is to explain the dynamics of the conflict, its nature and, most important, its historicity in an

9) "One symptom of these adverse developments is a decline in absolute number of teachers in primary and upper-primary schools between 1991-92 and 1992-93 (the latest year for which the relevant data are available). There could hardly be a more inappropriate response to the current failure of basic education in India" (p.123).

"One implication of these vague pieties is that is has made it possible to combine the highly egalitarian slogan of free and universal education with extreme inequality in practice. One symptom of this elitism is the bias against elementary schooling within the educational system. Child labour is considered perfectly acceptable for the boys and girls of poor families, while the privileged classes enjoy a massively subsidized system of higher education" (Pp.119-20).


10) "I have tried to show how impracticable and unrealistic it is to draw a distinction between hazardous and non-hazardous processes in a particular industry. What is necessary is for whole industries to be listed as banned for child labour which will make the task of enforcement for simpler and strategies of evasion for more difficult" Neera Burra: Born to Work, Child Labour in India (Oxford: 1995) p. 249.

11) "There are emergent problems from within the family system which gain momentum in the process of rapid social change. These may have to be anticipated and resolved through specific measures ... We witness major inadequacy in the domain of family laws; most of these have evolved randomly and have a mutually contradictory character.... The areas in which endeavours are urgently called for are: the rules of inheritance and succession, adoption, marriage and divorce, custody of children, adoption, marriage and divorce, custody of children and their guardianship, health and reproduction, rights of children and their well-being and rules for protecting women and children form abuse and violence" (p.10) Yogendra Singh: 'Family Systems, Social Change and Policies in India' in India's Commitment to Family Well-Being (Bombay: TISS, 1994).
empirical situation. Production of specialized knowledge on children has been particularly weak in these respects. We find illustrations of children in situations of deprivation, fewer studies of children in conflict with adult interests and very few on the overall status of conflicts children have within a social formation.

Duty vs. Rights: Dominant Discourses on Children:

Following Foucault\(^\text{12}\), we can treat discourses as structures through which power is exercised and through which it can be challenged. Social policy and social theory can also be understood as discourse because they explain points of view from which norms of action can be justified. Protection of children, therefore, necessitates scrutiny of dominant discourses on the rights of children--both, for and against.

Discourses, as Giddens\(^\text{13}\) suggests, are likely to have three ideological elements to which we need to be alert: they may represent sectional interests as universal ones, may de-emphasise contradictions or may make things appear natural & immutable.


In addition to these general points, caution is also required against international hegemonic discourses prescribing residual welfare-system in economic growth strategies. Thus, it is possible to argue in favour of children's rights only to the extent critiques of parental rights and 'welfare'-approach succeed in establishing their non-efficacy for at-risk children.

Since about 1970s, philosophical interest in the rights of children has grown substantially. This growth owes much to the social upheavals of the 1960s and 1970s, especially the civil rights and woman's movements, both of which employed the rhetoric of rights. When the plights of children and the disabled began to be highlighted, it was natural that advocates for these groups also proposed rights-based strategies for children. The invocation of rights for children, however, pre-dated the 1960s. In 1959 the U.N. General Assembly adopted a ten-principle Declaration of the Rights of the Child, itself a descendant of one adopted by the League of Nations in 1924. In 1989, the U.N. General Assembly adopted the U.N. Convention on the Rights of the Child dwarfing all previous child-right documents and international human rights treaties.

With unprecedented rate of ratification, the Convention could enter into force within less than a year. By now all countries of the world, excluding Somalia and the United States, have ratified it. Convention (1989) has the status of an international treaty. Therefore, ratifying countries (India since December, 1992) are legally bound to uphold a full range of rights—rights of survival, development, protection and participation -- for children prescribing a "cross-cultural moral minimum".

What do these progressive developments in international law and diplomacy mean for India, the country with highest number of children? What is the scope of rights-based strategy of child welfare in protecting core human rights of its voiceless population? How would the interests of Indian children be better served--through pro-active policy of rights or traditional wisdom of parental duties?


16. 'Parental' here has been used in broad legal sense, including the powers of the state as parents patriae.
Eekelaar\textsuperscript{17}, is right when he says that the social perception that a class of individuals has certain interests, which (in isolation from the interests of other) have to be protected is a precondition to the conceptualisation of rights. He puts a condition that such social perception should be supportable by objective evidence. In other words, a legitimate right of a class of persons can only be determined after assessing conflicting or competing claims of justice in society. Discourses on children's rights highlight the following agenda:

1. Obligation-based approaches of family well-being (proposed by O'Neill\textsuperscript{18}, F. Shrag\textsuperscript{19}, Schoeman\textsuperscript{20}, and J. Blustein\textsuperscript{21}, among others).


2. Desirability of conferring rights to minors (Proposed by V. Worsfold\textsuperscript{22}, Neil Mac Cormick\textsuperscript{23}, John Eekelaar\textsuperscript{17}, M. D. A. Freeman\textsuperscript{24}, Tom Campbell\textsuperscript{25}, etc).

3. Impact of children's rights on women's claims to right (Frances Olsen\textsuperscript{26}, P. Alston\textsuperscript{27}, Nancy Chorodew\textsuperscript{28}, and M. Minow\textsuperscript{29}, for example).


\textsuperscript{23) }N. Mac Cormick: 'Children's Rights: A Test - Case of the Theories of Right' in Mac Cormick N. : Legal Right and Social Democracy (Oxford, 1982).

\textsuperscript{24) } (a) M. Freeman: The Rights and Wrongs of Children (London: Frances Printer, 1983).


\textsuperscript{26) } (c) M. Freeman: Children, their Family and the Law (Macmillan: Basingstoke 1992).

\textsuperscript{27) } (d) M. Freeman: 'Children's Rights In a Land of Rites' in B. Franklin (Ed): The Handbook of Children's Rights (London : Routledge, 1995).


4. Rights as a means to extract equal opportunities from the state (P. Williams, Myron Weiner, Amartya Sen, Partha Dasgupta, and Alan Hunt, among others), and


5. Cultural relativism vs. universal human rights standards (R. Barsh\textsuperscript{34}, Miljeteig-Olssen\textsuperscript{35}, J. Cerda\textsuperscript{36}, R.M. Mnookin\textsuperscript{37}, etc).

Children having rights means having legitimate claims against (i) state, (ii) employers, (iii) parental authorities and (iv) others causing significant harm to them, capable of being monitored through a network of proactive watch-groups and enforced through the institutions of law. Literature-survey shows that assessments differ on the efficacy of rights-based strategy in children's life chances.

1) **Obligation-based approaches:**

Obligation-based approaches focus on social and emotional bonds parents have with children that spring not from


threats imposed by external authorities such as law or social condemnation but, as Kant explained, from a deep sense of obligation arising primarily from the implacable demands of reason. Philosophical writing on ethical issues affecting the well-being of children (eg. O'Neill Blustein, Shrag and Schoeman) often stresses the danger of relying too much on positive rights which typically come into play in adversarial contexts and are destructive to intimacy and family life. The most influential among them, such as Onora O'Neill, argues that rights analysis fails to account for 'imperfect obligations' towards children and comes to the conclusion that well-being of children would be promoted and protected better by addressing not children but directly those whose action may affect children's life (i.e. parents, teachers, care givers etc.)

Obligation-based proponents for children are moral philosophers. They criticize views (eg. Rawls) which interpret Kant primarily as rights-based philosopher "de-emphasizing" categories such as virtue, need and obligation proposed by him in human and social well-being. In Kantian ethics word 'obligation' signifies the 'bond' by which one is bound to perform one's duty. Thus, obligation-based approaches to ethics give birth to duty-based
approaches to ethics and, thus, give birth to duty-based action
theories of justice in which moral quality of the acts of individuals
(eg. parents) assume primacy. As Ronald Dworkin\textsuperscript{38} aptly explains,
whereas right-based theories treat codes of conduct as
instruments necessary to protect rights of others, duty-based
theories treat codes of conduct themselves important. The man at
their centre is the man who must conform to such a code, or be
considered corrupted if he does not. He is supposed to lead a life of
virtue by complying to the demands of reason and conscience.

Philosophical examination of the moral foundations of
parenthood assumes significance in this context. Parenting has
gone along the history of human evolution and a large number of
children have been adequately cared and protected through the
generosity and sacrifices of their parents. In other words,
obligation-based approach to moral life has helped greater number
of children in human history in growing up reasonably well.
"Happy families", as Tolstoy once mentioned\textsuperscript{39}, indeed, "are all
alike", so much so that John Stuart Mill's utilitarian remark on the

\textsuperscript{38} Ronald Dworkin: \textit{Taking Rights Seriously} (Cambridge, M.A.: Harvard

\textsuperscript{39} Leo Tolstoy: \textit{Anna Karenina} (New York: The Modern Library Publishers, 1930)
p.3.
desirability of “extracting duty from persons as debt,” seems harsh as a rule. However, all families are not happy and as Tolstoy himself reminded us in the same sentence, "every unhappy family is unhappy in its own way," implying existence of infinite and irreducible number of problems created by parents for their children.

Philosophical examinations of parenthood have not been many. Blustein wrote a book in 1982 and a seminal article by Schoeman was published in Ethics two years earlier.

Compliance of virtue is, however, the most important problem with obligation/duty-based approaches to human well-being. Kant tried to demarcate the sphere of the problem by saying that morals only prescribe internal conduct of an individual: external conduct of individuals is taken care through laws.

40) "It is a part of the notion of Duty in every one of its forms, that a person may rightfully be compelled to fulfill it. Duty is a thing, which may be extracted from a person, as one extracts a debt. Unless we think that it might be extracted from him, we do not call it his duty". J. S. Mill: Utilitarianism (London: J. M. Dent, 1993 Edition) p. 50.


Demarcation between law and morality, as the students of contemporary normative jurisprudence know very well, is not so neat\(^{41}\), but it is true at the same time that well-being of children depends not exclusively on appeals to reason and good conscience of the parents nor on egoistical adversarial adjudication of rights between parents and children\(^{42}\). It depends on a policy-mix of judiciously balancing spheres of private morality\(^{43}\) and public

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(b) Habermas has a different position. He finds moral norms and legal norms complementary. Reference is to his discussion in chapter 3.2.1. of his recent work *Between Facts and Norms* (Polity Press, 1996. Pp.104-118).


43. I write under the conviction of pre-eminence of rights in social reconstruction. As Feinburg puts it::

'They are indispensably valuable possessions. A world without them, no matter how full of benevolence and devotion to duty, would suffer immense moral impoverishment ... Rights ... are not mere gifts or favours.... for which gratitude is the sole fitting response. A right is something which a man can stand on, something that can be demanded or insisted upon without embarrassment or shame ... A world with claim rights is one is which all persons, as actual or potential claimants, are dignified objects of respect... No amount of love or compassion, or obedience to higher authority, or noblesse oblige, can substitute for those values".

There is a relationship between the tasks voluntarily performed by families under the commitment of parental obligations and those, which have to be compensated by the system processes of the society under public law by way of ultimate responsibility to the child. Rights of the child, thus, are safety nets for children floating, often along with their families, into the ocean of economic history. Public law must contribute to environmental stability and be more rather than less, inclusive of families in all situations as a means of preventing family disequilibria and breakdown. State, which during the past two centuries has expanded its hands to cover life and death questions of children, should have enough strength and precision to rescue at-risk children. Moral norms and legal norms have complementary functions in helping children grow adequately, but state has the final role in ensuring that all networks and institutionalised arrangements of social co-operation work for the

44. "Individual rights are political trumps held by individuals. Individuals have rights when, for some reason, a collective goal is not a sufficient justification for denying them what they wish, as individuals, or have or to do, or not a sufficient justification for imposing some loss or injury upon them'.
welfare of the voiceless children. By blaming parents singularly for inertia and moral incapacity, it cannot absolve itself out of the muddle through the support of obligation-based approaches of family well-being.

2) **Desirability of conferring rights to minors:**

We can begin examination of the proposition by perceiving rights as acknowledged priorities in favour of protecting essential virtues, on the grounds of which the weak can legally claim an interest as duty owned to them. (i) Prioritization of protectable virtues, (ii), vulnerability of the class seeking protection, (iii) capacity of an interest being claimed as duty and (iv) reasoned social acknowledgement of the priorities assigned in this process, are thus, factors determining desirability of conferring rights to a class of persons.

The first point has been most adequately explained by Rawls (on a general theoretical basis and by Victor Worsfold while offering a philosophical justification for children's rights in 1974). Rawls in 1971 theorised lexical ordering of principles in his theory of justice. Benefits and burdens of social co-operation, he argued,
should be distributed in lexical ordering of principles, i.e. an order of priority among principles, in which the prior principles define the constraints within which principles further down the line may operate. "Justice" he concludes, "is the first virtue of social institution, as truth is of system of thought". Being precious virtues to be protected at all costs, truth and justice are, thus, uncompromising priorities in rights-discourse even when they may necessitate major reconstruction of efficiently-arranged institutions, laws or calculus of social interests. Worsfold applies Rawlsian framework to justify rights for children. No entitlement of rights, he argues, can be resolved without reference to a comprehensive theory of justice in society because a broader framework is required through consensus to settle moral claims and counter-claims. By according primacy to personal rights (as against some other conception of the highest good), by equating justice as 'fair treatment as a right' and by including children as participants in the formation of the initial social contract (to the extent of their capability), John Rawls, Worsfold rightly


interprets, for the first time in the history of moral theory allowed a scope for philosophical justification of children's rights. While discussing 'paternalism' under a sub-chapter of his *A Theory of Justice (Equal Liberty of Conscience)* Rawls, indeed, writes:

"Those who care for others must choose for them in the light of what they will want once they reach maturity. Therefore, following the account of primary goods, the parties presume that their descendants will want their liberty protected... Trustees, guardians and benefactors are to act in this way. Since they usually know the situation and interests of their wards and beneficiaries, they can often make accurate estimates as to what is or will be wanted."  

The second point, vulnerability of children as a class seeking protection as a right, has little opposition. It is accepted that (a) lacking in physical strength, articulation and social standing, (b) depending exclusively on the good will, good conscience and good temper of their parents, employers & providers of social services and (c) trapped under the demands of socialization discipline, children are often sitting targets of violent assertion of superior physical strength, sufferers of criminal neglect or victims of


distorted adult needs. One of the ironies of law is that it so often offers to protect children from their 'natural protectors' - i.e. families (or their decisions), but that is how life is. Besides families and neighbourhood, children also require rights-protection from the state that regulates entire social life. Thus, an adequate system of rights should be capable of handling children's safety from families as well as from the state agencies. Law cannot unrealistically presume perfection of implementation mechanism or leave resource - support of welfare to populist ad-hocism.

The third point, i.e. capacity of children's interest being claimed as duty, is the main issue of debate, so much so that while Neil Mac Cormick calls children's rights as "a test-case for theories of rights\textsuperscript{25}," Onora O'Neill calls them mere "manifesto rights\textsuperscript{49}." At stake is the 'will' or 'rational choice' theory of rights which questions the legitimacy of attributing rights to a large segment of humanity -- children, persons with mental retardation, mentally ill persons, foetuses etc. -- on the ground that they lack rational autonomy to use rights. For H.L.A. Hart, the most salient modern

\textsuperscript{25.} N. Mac Cormick: 'Children's Rights : A Test - Case of the Theories of Right' in N. Mac Cormick : Legal Right and Social Democracy (Oxford, 1982).

exponent of the will - theory of rights, a right (bearing a correlative duty) is a power that right bearer exercises on right upholder\textsuperscript{50}. He, therefore, finds reasonable to confer entitlement of this delicate power to rational human beings capable of understanding implications of their statements or claims of rights in moral terms. A number of subsidiary arguments have been used to deny rights to the 'incapax' persons on this premise\textsuperscript{51}.

There are a number of difficulties with the 'will' theory of rights. Prima facie, as Tom Campbell\textsuperscript{52} says, there is a serious flaw with a theory which makes it impossible to say for instance, that a child has the same right to life as an adult, or again, that a child does not have distinctive rights, such as right to receive primary education. Technical flaw as been pointed out by Mac


\textsuperscript{51} Philosopher Michael Toolay, has justified abortion and infanticide on the basis of the following criteria:

'An organism possesses a serious right to life only if it possesses the concept of a self as a continuing subject of experiences and other states and believes that it is itself a continuing entity'. Toolay, Michael: 'Abortion and Infanticide', Philosophy & Public Affairs, Vol 2(1), 1972 p.82.

\textsuperscript{52} Op. cit., note 25(b) : p.36
Cormick\textsuperscript{53}. He rightly argues that by making the criterion of rational autonomy to use right a pre-requisite to rights entitlements, the will-theory confuses substantive rights with ancillary remedial provisions of procedure. On remedial provisions for incapax person, Eekelaar\textsuperscript{54} has clarified that a claim can be made for her by her best friend, but only on the basis of what the incapax person would plausibly have claimed had she been capable. Buchanan & Brock\textsuperscript{55}, who have gone into the ethics of surrogate decision-making on children's health-care issues have reached similar conclusions. Important point is that an interest should be claimed as a substantive right. Just because it cannot be claimed directly, does not mean that it should be denied to the \textit{incapax persons} altogether.

Discussion on the first three points brings us to the question of 'reasoned social acknowledgement' of interests being claimed as rights. Following Freeman\textsuperscript{56}, Eekelaar\textsuperscript{57} has classified such

\begin{itemize}
  \item \textsuperscript{54} Op. cit., note 17 : p.169.
  \item \textsuperscript{56} Op. cit., note 24(a) : p.17.
  \item \textsuperscript{57} (i) J. Eekelaar: 'The Importance of Thinking the Children Have Rights' in Alston, P. et.al (Ed) \textit{Children, Rights and the Law} (Oxford, 1992).
\end{itemize}
interests in the order given below. It is a reasonable classification of claims children may make as a right to protect their interests: (i) 'basic' interests (to physical, emotional and intellectual care), (ii) their 'developmental' interests (that their potential should be developed so that they enter adulthood, as far as possible, without disadvantage) and (iii) their 'autonomy' interests (the freedom to choose a life-style of their own). Eekelaar\textsuperscript{58} says that first of these has a pre-eminence status, while the other two can be compromised. Another commentator, Archard\textsuperscript{59}, has doubts only about the autonomy rights of children. Contrasting 'nurturance' (or welfare) rights with 'liberty' (or self-determination) rights of children, he is of the opinion that while the interests of nurturance must be protected at all costs, liberty rights require that the right-holder must be capable of making and exercising choices.

There is also a third view which sees no reason in denying autonomy rights to children on the grounds of age alone.


"Argument about age-related rights regresses eventually to a debate concerning competence and, on this reasoning, it is not children who should be denied right but all incompetent people without regard to their age," argues Franklin, hinting at double standards in the rights discourse.


Rights of the Child, screened through the U.N. Committee on the Rights of the Child set up to review implementation country-reports. U.N. Convention on the Rights of the Child (1989) is the culmination of international consensus on children's rights. Papers relating to conceptualisation of children rights and implementation, thus, highlight problems of international consensus and national conflicts on rights of children relating to (a) protection (b) development and (c) participation. They can be used as a source for research on the perception of children's rights. These documents give an insight into complex sociological issues involved in realizing rights of the child.

3) **Impact of Children's Rights on Women's Claim to Rights:**

Strong conceptualisation of gender relations is required to examine competing claims to right between a mother and her child. Women and children have been weak entities in institutional set-ups created and maintained by male adults and have often shared ill fate together. Since ages, women have reconciled themselves to 'care ethics' in which 'motherhood' has been constructed with

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duties of providing 'last resort family protection' to offsprings in face of unfair division of labour within the households, undervalued wage-status in markets and state's reluctance to provide meaningful care and protection to children and women. Children's rights and welfare, under these circumstances, therefore, have a lot of common agenda-points with women's claim to rights. However, there are also areas of conflict in proposing individual rights to children. Foetal rights are one such problem area.

65. Harvard philosopher Carol Gilligan in her book In a Different Voice (Harvard University Press, 1982, 2nd Ed. 1993), has contrasted gender perception of ethics as 'Ethic of Justice (Masculine)' and 'Ethic of Care (Feminine)'

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<th>Ethic of Justice (Masculine)</th>
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<td>1. Learning</td>
<td>Moral</td>
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<td>2. Key Concepts</td>
<td>Rights and Justice</td>
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<td>3. Reasoning</td>
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In the justice perspective the moral agent is an autonomous relational individual, while the authentic female moral perspective sees moral agents as interdependent, more responsive to the needs of others than to the demands of abstract rules. On the basis of Gilligan's theory, Ann Willard (ed): Mapping the Moral Domain (Harvard, 1988) Pp.225-48 has discussed cultural scripts of mothering.


The intimate relationship between a woman and foetus developing within her body has long given rise to vital questions of ethics, law and public regulation. Historically, the foetus has not been recognized as a person with full rights. Instead, protection to the human unborn was planned through criminal law intervention by treating foetus a part of mother's body (e.g. Sections 312-316 of the Indian Penal Code, 1860) and permitting a few 'suspended' rights under civil law69 (capable of being claimed after birth). With advances in medical sciences making it possible to directly view, monitor, diagnose and treat foetus as a patient, the term 'foetal rights' came into wide usage recommending rights to live human foetuses. As result, during the last 26 years, 'Roe's protection' has been sought in the U.S.A. to protect foetuses against (i) mother's

68. Lois Bryson: Welfare and the State (London Macmillan: 1992): "The crisis of the capitalist state is seen to involve significant stress on governments as they juggle conflicting pressures. These pressures are to maintain a viable economy and the conditions for capital accumulation at the same time as they retain electoral legitimacy with voters who have come to expect a certain level of social provisions" (p.11). "The more the details of state intervention are examined, the clearer it becomes that the Welfare State is essentially different for different people. Women experience the Welfare State differently from men. So do the various classes and people of differing racial and ethnic backgrounds. We could also consider Welfare from the point of view of the old, the young, people with disabilities, people from different regions, and so on". (p.159).

69. Section 20 of the Hindu Succession Act, 1956 has conferred a right to succeed to the father's estate to a child who was in mother's womb when his father died intestate.
refusal to undergo physician – recommended caesarean sections, (ii) use of illicit drugs during pregnancies and (iii) anyone causing a viable unborn child to die during the course of pregnancy of birth. West German Constitutional Court has been more radical than the American Supreme Court. In Abortion Reform Law Case (1975\textsuperscript{71}) it interpreted that Article 2 of the West German Constitution (1949), by conferring "everyone" right to life & inviolability of person, extended to unborn human beings. The court gave protection of the foetus priority over women's right to self-determination, by treating (i) the foetus an autonomous human being under the protection of the Constitution and (ii) termination of pregnancy only a "social dimension of the Constitutional order" subordinate to protect a developing life existing in embryo from the fourteenth day after conception. Steps were taken in 1981 by a Canadian Court to intervene in extreme cases of Foetal Alcohol Syndrome\textsuperscript{72} and in 1994 by the Indian Parliament to prevent misuse of pre-natal sex-determination

\textsuperscript{70} Likewise, \textit{Medical Termination of Pregnancy Act 1971} recognises civil action/damages for pre-natal injuries.

\textsuperscript{71} 39 B Brief GE 1.

\textsuperscript{72} The Court took cognisance of the fact that excessive drinking during pregnancy can lead to growth retardation, facial disfigurement, still birth, spontaneous abortion and central nervous damage.
techniques contributing to female foeticide. There have been several other attempts to prevent foetal harm. Problem is that such attempts to prevent pre-natal harm often impose risks or burden on pregnant women. Reasonable expectation from the pregnant mother, therefore, would be to avoid 'unreasonable risk to substantial harm' to the foetus (to be ultimately determined by expert medical opinion). There can be no support for life-style misdemeanours (alcoholism, illicit or harmful drug-use, disregard of fair medical advise, irresponsible sex-life etc.) or for unjust social practices (such as female foeticide). Rational adults should be expected to take timely and informed decisions to enter parenthood and should enter parenthood with responsibility. Law can only prescribe a presumption amidst conflict of views and circumstances in which individuals are placed in specific situations. Vis-a-vis foetal rights, the presumption should be pro-life and protection of human beings.


since conception. Compartmentalization of human life protection\textsuperscript{74} on the basis of capability of independent survival (the stand taken in \textit{Roe vs. Wade}, 1973\textsuperscript{70}) or construction of personhood exclusively on possession of a concept of self (Michal Tooley's justification of abortion and infanticide\textsuperscript{75}) are arguments neither humane nor rational. Contributions by Holland (1990\textsuperscript{76}), Cooney (1991\textsuperscript{77}), Maclean (1993\textsuperscript{78}) and, above all Ronald Dworkin (1995\textsuperscript{79}), have exposed fallacies of 'all person - denying arguments' of right to life. Maclean (1993\textsuperscript{78}) has also answered utilitarian calculation of maximizing "valuable" life by J. Harris\textsuperscript{80}.

\textsuperscript{74} Existence has been compartmentalized first between pre-embryo and foetal stages and, then, between (a) viable \& (b) non-viable stages of foetal development.

\textsuperscript{70} 410 U. S. 113.

\textsuperscript{75} Michal Tooley: \textit{Abortion and Infanticide} (Oxford : Clarendon Press, 1983).


\textsuperscript{78} A. Maclean: \textit{The Elimination of Morality: Reflections on Utilitarianism and Bioethics}. (London : Routledge, 1993).


\textsuperscript{80} J. Harries: \textit{The Value of Life, An Introduction to Medical Ethics}. (London : Routledge, 1985) says "Not all lives are valuable in the morally relevant sense" (p.159).
Utilitarian principle of maximizing 'valuable life' poses several problems of ethics, law and regulation. Morries (1991\textsuperscript{81}), Wolfensberger (1992\textsuperscript{82}) and Margaret Kennedy (1995\textsuperscript{83}) have questioned 'the legitimation of death making of devalued human classes' through abortion, right up to the moment of birth, by citing the example of foetuses with potentiality of physical or mental disability [Section I (i) (d) of the U.K. Abortion Act, 1967]. Pro-abortion arguments in such cases are three: (a) intolerable quality of life after birth, (b) insupportable burden of care imposed on parents and (c) high economic and social costs -- arguments society has already rejected in case of human beings born alive and living life with disabilities. Likewise, foeticide permitted on account of rape has been questioned by Willke and Willke (1988\textsuperscript{84}) saying that there is no justification in killing innocent unborn babies for the crime of their fathers.


4) **Rights as a means to extract equal opportunities from the state:**

State care and protection of children in health, education and juvenile justice sectors are primary aids to enhancing their well-being and opportunities. State intervention deepened when ideology of treating children as exclusive parental property increasingly got attacked by paediatricians, child psychologists, educational reformers, lawyers, on the Rights of the Child (1989), attempt was made to empower children with rights of development, protection and participation amidst competing demands for resources, legal intervention and institutional support.

Grounding of rights depends on the capabilities of citizens to use democratic systems to their advantage. Rights are, in a system, relational opportunities. They are institutionally defined rules specifying what people can do in relation to one another or claim from individuals or institutions. Time, resources or capacity

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85. As Williams (1993) puts it, they help vulnerable populations to bargain for a better deal.
to claim and turn human rights opportunities into well-being are the main issues, particularly for persons suffering deprivations and disabilities. A way out suggested in such situation is by John Rawls. His second principle of justice stipulates complete institutional rearrangement on the basis of justice so that all social primary goods -- liberties and opportunities, income and wealth and the bases of self-respect -- are distributed to the utmost advantage of the least favoured. Amartya Sen agrees with Rawls on the principle and method of institutional rearrangements but says, I think rightly, that more important than 'distribution of social primary goods' is the need to expand 'capabilities' of such persons to earn a decent living through dynamic state intervention. Capability-building is prior to all other principles of justice because implementation of


87. "There is a good case for judging individual well-being, neither in terms of commodities consumed nor in terms of mental metric of utilities, but in terms the 'capabilities' of persons. This is the perspective of 'freedom' in positive sense: who can do what, rather than who has what bundle of commodities, or who gets how much utility."

88. Rawls (in *Political Liberalism* (New York, 1993) p.7) has now articulated 'needs principle', stipulating that the goal of meeting basic need is prior to all other principles of justice, because these needs must be met if citizens are to be able to understand and exercise the rights and liberties justice i supposed to guarantee.
rights demands sacrifices from 'capable' persons, and sacrifices do not come voluntarily in favour of persons lacking capabilities. Capability building through nutrition, maternity & child-care, disability-prevention, community care & protection, primary education and health injects strength to human beings to understand rhetoric, reality and politics of unimplemented human rights.

Children, by virtue of their vulnerability and tactical position in human life-span\textsuperscript{89}, are, in all countries, most eligible recipients of capability-building investment package of their governments.

As largest\textsuperscript{90} single at risk-group in the world today, they are also most eligible to fulfil the criterion set by Rawls to get justice through institutional reforms and fair distribution of resources.

\begin{itemize}
\item \textsuperscript{89} Amartya Sen in \textit{(Inequality Reexamined} Oxford, 1992 : Pp.92-93) has raised the issue of inter-age distribution of opportunities.
\item \textsuperscript{90} (a) 1996- UNICEF estimate are that nearly 200 million children of the developing world are malnourished, 30% do not complete even four years of schooling and 20% do not have access to basic medical care (UNICEF : \textit{The Progress of Nations} 1996 (New York, 1996) p.35).
\item (b) On Child poverty in developed countries there are many important publications. The most sophisticated is the analysis of U.S. A. by Aletha C. Huston: \textit{Children in Poverty} (Cambridge University Press: New York, 1991).
\end{itemize}
Eligibility expands in countries and regions in inverse proportion to the prevalence of historically entrenched inequalities, limited social consciousness of rights and hold of a few dominant groups on investment-allocation mechanisms. However, as we see in case of Indian children, despite pressing advocacy to invest in capability-building sectors and reform institutions and laws in favour of children's rights, well-being of at-risk children is sought to be achieved by India's policy-makers through 'non-committal,' 'non-justiciable' model of 'Directive Principles of State Policy' and an administration, which can, at best, be described as a liability on day-to-day existence of country's suffering pockets and populations.

There are numerous studies substantiating the assertion. We can recall Gunnar Myrdal's remarks\(^\text{91}\) of 1968 on the 'softness' of the Indian State to impose discipline needed to implement economic, political and ideological change and refer to recent studies by Amartya Sen\(^\text{92}\), Rajni Kothari\(^\text{93}\), Myron


Weiner\textsuperscript{94}, Partha Dasgupta\textsuperscript{95}, Sudipta Kaviraj\textsuperscript{96}, Partha Chatterjee\textsuperscript{97} and Niraja Gopal Jayal\textsuperscript{98}, to name a few. The basic point is that the main anchor of India’s social welfare – the Direct Principles of State Policy -- is based on an assumption that welfare is a discretionary response to need rather than a right or an obligation on the state in terms of monitorable performance. Constitutional expert Subhash Kashyap has a forthright comment:

\begin{quote}
"We consequently have a state which is crippled by corruption, unable to protect common and scarce resources from illegal appropriation, unable to collect its dues from the rich and powerful and unable to deliver even the small percentage of its remaining meagre resources to the poor, who desperately need them" (p.160). ... Indian society is being polarized through injustice" ...
"
Its poverty is not a poverty of resources. It is a poverty of justice" (p.145). Rajni Kothari: Growing Amnesia (New Delhi: Viking, 1993).
\end{quote}


\textsuperscript{96.} Sudipta Kaviraj: ‘On State, Society and Discourse in India’ in James Manor (Ed) : Rethinking third World Politics (Longmans : Harlaw Press, 1991).


"It was perhaps the class character and the elitist composition of the Constituent Assembly that was responsible for distribution of basic human rights into the enforceable fundamental rights and non-enforceable directive principles of state policy. The poor, illiterate, hungry masses had no use for most of the rights like the right to property, freedom of thought and expression, equality of opportunity in matters of public employment etc. In any case, they were in no position to claim any benefit from these rights. The rights they needed were freedom from hunger, right to education, right to living wage etc. All these were relegated to the non-enforceable principles."

Seen from this perspective and India’s poor human development record in meeting planned-targets, the inescapable solution for children's existence and even a moderate well-being seems to lie in adopting a 'rights-approach' to education, health and juvenile justice. The Indian Supreme Court has been creatively enforcing non-justifiable human rights for children by issuing directions and the U.N. Convention on the Rights of the Child has been ratified, but both the strategies have limitations of jurisdiction beyond a stretching-point. Legislation, constitutional amendment, plan-finance, significant institutional reforms and implementation-management are essentially matters between the executive and the legislative wings of the state.
Unless executive and legislative wings, too, show progressive dynamism, there is no hope for at-risk children in India.

5) **Cultural relativism vs. universal human rights standards:**

Cultural relativism has been an argument to oppose universal human rights. The whole issue of Asian Convention for Human Rights is held up due to relativist arguments of cultural representations, including an argument to push 'Asian' concept of duty-based conflict-resolution and moves to oppose 'Eurocentric' notions of adversarial rights.

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Cultural relativism has been an argument to reject inclusion of foetal rights proposals in the final compromise document of the U.N. Convention on the Rights of the Child, acceptance of India's reservation on the child labour abolition at the time of India's ratification and almost total non-commitment by many countries on budgetary and institutional support to ratified child rights. Within nation-states, cultural relativism is, at times, used as an argument to oppose personal law reform\textsuperscript{101}. Indian jurists have shown how non-implementation of Article-44 of Indian Constitution (uniform civil code) on the grounds of cultural relativism is irrationally coming in the way of making adoption services available to all Indian children, declaring child marriages void and granting equal protection to children under uniform divorce laws\textsuperscript{102}.

Either way, examination of cultural variation and universals in human rights standard-settings is a delicate legislative function of the nation-states. Resource commitment and reformed institutional support for each human right are other related sovereign functions. Countries have to be run by their people and running administration includes determining timings and paces of development within a country.
From children's point of view, the task before India is to reconcile culture and public finance with universal consensus on children's rights and legislate a few rights to rescue children from intolerable situations. But here there are several problems. We will provide an independent assessment of these issues in the next chapter.

101. See Tahir Mahmood: Personal Law Reform in India (New Delhi, 1995).