

# **Freedom from Caste: Seeking Solutions through National and International Children's Rights Framework**

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## Declaration Statement



Date: 10 July 2023

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“Without fraternity, equality and liberty will be no deeper than coats of paint.”<sup>1</sup>

- *Dr. B. R. Ambedkar*

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<sup>1</sup> BR Ambedkar, Concluding Speech in the Constituent Assembly Debates,  
[https://eparlib.nic.in/bitstream/123456789/763285/1/cad\\_25-11-1949.pdf](https://eparlib.nic.in/bitstream/123456789/763285/1/cad_25-11-1949.pdf) Accessed 10 July 2023

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## EXECUTIVE SUMMARY

The religion of Hinduism has the hierarchical caste system at its core. The caste system had its origin from the ancient religious and sacred texts of faith and as a result, has had a religious sanction to it. The society was divided into four Varnas – Brahmins, Kshatriyas, Vaishyas and Shudras - each of which was associated with occupation and there was qualified mobility in the Early Vedic Period. Over time, the whole system was placed inside the ladder of hierarchy and the people belonging to different Varnas were graded based on purity and impurity. The Brahmins who were considered the purest were placed in the higher ranking, while the Shudras were placed in the end. The availability of resources also decreased as one went down the ladder of hierarchy. This practice solidified and intensified, creating multiple castes and sub-castes, which exhibited strong traits of superiority and inferiority. A group of people involved in “polluting jobs” like manual scavenging and cleaning garbage were considered to be permanently polluted and kept outside the system of caste. Today, on one hand, due to various developments, the concept of purity and pollution has dialed down and the social interaction among the members belonging to different caste has increased. On the other hand, the hierarchical mindset of the Hindu populace is being exhibited in varying degrees in the caste-based domestic as well as social practices. As the caste is determined at birth, depending on the caste of the parents, the children are assigned a specific caste for their entire life and are made to follow the practices as dictated by the parents and society.

After the independence from the British rule, several constitutional and legal guarantees were laid down by the legislators in order to protect the already divided society from any caste-based discrimination. The Fundamental Rights laid down in the Constitution guarantees various rights including, right to equality, right to non-discrimination, right to religion, etc. Most important of all, it abolishes the practice of untouchability of any kind. The Directive Principles of State Policy also lays down the obligation of the State to render social justice to the socially and historically weaker section of the society and to protect them from any kind of exploitation. The Constitutional bodies like the National Commissions for Scheduled Castes and Backward Castes has been set up to promote such goals. With regards to children, the Directive Principles lay down that the vulnerability of the children must not be abused and that they must be given opportunities and facilities for their development.

Despite this constitutional protections, the violations against the members of the lower castes continue to persists. When we examine the legal protections in the light of the principles and provisions of the UNCRC, it can be found that though there are sufficient legal protections, it is ultimately the social realities in India that trump. With regards to the four general principles of the UNCRC, it can be seen that there is a seriously lack of implementation and enforcement when it comes to the rights of the children. There is a general lack of awareness or guidance among the actors, including parents, who are closely involved with the child. Examining from the lens of the right to parental direction and guidance guaranteed in Articles 5 and 14(2) of the UNCRC, it can be seen that there are no explicit law or legal precedents that recognizes either the right to such parental direction or the principle of evolving capacities of the children.

The research has also delved into the question of whether the UNCRC framework provides the enough protection to the children who are stuck inside the caste system and this was examined in the context of the children’s right to parental guidance and direction and the right to the freedom of religion enshrined in the UNCRC. The research found that there is lack of clarity, among others, with regards to the application of the principle of capacities, enabling the children to exercising their rights autonomously and interpretation of the provisions when there is a conflict between the opinion of the child and that of the parents. This has been elaborated in the context of the caste system.

The research has found that there is a need for child-rights based approach when it comes to the freedom of religion and right to parental direction, especially in the context of the Indian caste system. Child-rights approach would entail enabling the child to exercise her rights autonomously in the light of

the provisions and principles of the whole Convention, including the right of the consideration of best interests principle (Article 3(1)), right to be heard (Article 12), right against exploitation (Article 19). This approach is needed to enable the child to autonomously exercise her rights, including the right to freedom of religion. This is especially relevant to enable the child to exercise her rights in the context of caste system where the child is placed in a rigid compartment of caste. In addition to the above-mentioned child rights approach, there is a need to implement the principles laid down in other provisions of the UNCRC like dissemination of the principles and provisions of the Convention (Article 42), development of guidance and awareness by the State (Article 24(2)(f)) not just to the primary actors like parents but also secondary actors like the extended family and community. The principle of evolving capacities must be explicitly recognized by the laws in India for the better enablement of the children to exercise their rights. In addition, the CRC Committee must adopt a different approach to the children who are trapped inside the caste system with the critical understanding of the concept of caste.

The research is divided into five chapters. The first chapter provides a brief introduction to the whole research. The second chapter explains the hierarchical system of caste and how intrinsic the system is to the individuals, including children, belonging to Hinduism. The third chapter lays down the legal framework of India dealing with caste-based discrimination and biases, and examines the laws in the light of the four general principles and right to parental right and direction in exercising the rights, including the right to freedom of religion. The third chapter critically examines the right to parental direction and the right to freedom of religion laid down in the UNCRC in the context of the Indian caste system. The final chapter concludes the findings of the research while emphasizing the need and proposing a child rights-based approach to enable the children to exercise their freedom of religion (including freedom from caste) of children, especially for the children inside the caste system.



## OVERVIEW OF THE MAIN FINDINGS

The thesis analyses the scope of the international and Indian legal framework to enable children inside the Indian caste system to exercise their rights, including the right to freedom of religion and right to parental direction and guidance in line with their evolving capacities. There is a need for child-rights based approach to better enable the children.

The thesis establishes the intrinsic relationship that the caste system has to the religion of Hinduism. The analysis shows that, though there have been significant improvements to the approach towards caste, the hierarchical mindset of the people still prevails in the Hindu society. The child who is assigned caste at birth is exposed to various caste-based practices, including discrimination, through their parents, extended family and community and is stuck inside the caste system, where she is obligated to follow various caste practices. India's response to caste-based discrimination in the Constitution and other legal statutes provide major protection to the socially and historically marginalized groups of people, including children. However, the discrimination and biases between caste continue to persist. When examined in the light of the children's rights framework (four general principles and right to parental direction and guidance) in the UNCRC, India's response to caste has been mostly limited to the legal sphere and there is general lack of implementation of not just children's rights provisions and principles of the UNCRC but also the Indian laws as well. With regards to the right to parental direction, the Indian law and the judicial precedents do not provide for differentiation of the children's right and the parental right to direction and guidance, even while discussing the right religious freedom.

The thesis also examines the scope of whether the child rights framework embedded in the UNCRC provides enough guarantee for the child to receive appropriate direction and guidance needed for them to exercise their rights, including their right to freedom of religion (and in extension, the right to come out of caste). The recognition of the principle of evolving capacities in Article 5 and Article 14(2) of the UNCRC is a huge leap forward in recognizing children as individual right-bearers. However, there is a need for deeper analysis and clarifications regarding the application of the principle and enabling their right to parental guidance. There is a lack of clarity in both the Articles as to how any tensions between a child and the parents must be resolved and it is also not clear about how the other interlinked rights, including the right to the consideration of the best interests of the child must be applied to the full realization of the rights, including the right to freedom of religion. In the context of the caste system, the emphasis of the parental right and the lack of precise scope of such parental right to direct their child contribute to making the position of the child inside the caste system more and more rigid. In addition, the approach of the CRC Committee towards caste system indicate the need for better and critical understanding of the system in order to better enable the exercise of the children's rights.

The thesis also proposes a child-rights based approach in enabling the children to exercise their freedom of religion in a better manner. Recognizing one of the major participatory rights enshrined in the UNCRC would go a long way in developing the autonomy and potential needed for the child to smoothly transition into the adulthood. The interpretation of the right to religious freedom must be in line with the provisions and principles of the whole Convention. More importantly, the intrinsically related rights such as the right to the consideration of best interests, right to be heard, right to freedom of expression, right to information and right against exploitation must be parallelly enabled while enabling the children's right to religious freedom. This is of specific relevance to children in the caste system who currently are not enabled to exercise their right to religious freedom autonomously. In India, the child-rights approach would also entail the improved role of the State in disseminating the principles of the Convention in the society where the children are not seen as a right-holders. The State must provide appropriate assistance to the parents as well as other care-givers, who are intimately involved in enabling the children to exercise their rights, by providing training and awareness programmes. Most important of all, there is an

imperative need to create a rights-based environment in the society for the children to overcome the perils of caste.

## **KEYWORDS**

INDIA – CASTE SYSTEM – UNCRC – CHILDREN’S RIGHTS – EVOLVING  
CAPACITIES – PARENTAL DIRECTION AND GUIDANCE – FREEDOM OF RELIGION

## **LIST OF ABBREVIATIONS AND ACRONYMS**

& - And

Art. – Article

CEDAW – Convention on Elimination of Discrimination Against Women

CERD – Committee on the Elimination of Racial Discrimination

CO – Concluding Observations

CRC Committee – Committee on the Rights of the Child

DPSP – Directive Principles of State Policy

GC – General Comments

HRC – Human Rights Council

i.e., - id est

Ibid or Id. – Ibidem

ICCPR – International Covenant on Civil and Political Rights

ICERD – International Convention on the Elimination of All Forms of Racial Discrimination

ICESCR – International Covenant on Economic, Social and Cultural Rights

NCBC – National Commission for Backward Classes

NCPCR – National Commission for Protection of Child Rights

NCRB – National Crime Records Bureau

NCSC – National Commission for Scheduled Castes

No. – Number

OBC – Other Backward Classes

OHCHR – Office of High Commissioner of Human Rights

Ors. – Others

Para - paragraph

PCRA, 1955 – Protection of Civil Rights Act, 1955

POA, 1989 – Scheduled Caste and Scheduled Tribe (Prevention of Atrocities) Act, 1989

SCs – Scheduled Castes

UN – United nations

UNCRC – United Nation Convention on the Rights of the Child

UNICEF – United Nations International Children’s Emergency Fund

v. – Versus

Vol. – Volume

## 1. Introduction

In its seventy fifth year of independence, India has seen tremendous growth in fields including space, science and technology, and agriculture, paving way for it to become a developed nation in the years to come. However, despite making great strides in human advancement, the nation regrettably continues to be haunted by the social evil of caste system. India, which has been a cradle for many advanced civilizations, is now home for many people who are fragmented by caste. In August last year, an innocent 9 year old boy who belonged to a lower caste met his unfortunate demise at the hands of a school teacher for attempting to drink water from a pot that was meant for the usage of upper caste members. This incident that happened in the town of Jalore in the State of Rajasthan Jalore is a poignant reminder that something as primitive as caste can hold back the development of an entire nation.

India has a diverse religious history. It is the birthplace of major religions, including Hinduism, Buddhism, Jainism and Sikhism.<sup>2</sup> The religion of Islam arrived in India through Arab traders and flourished during the rule of Muslim rulers.<sup>3</sup> The colonial rule in the 18<sup>th</sup>, 19<sup>th</sup> and the early 20<sup>th</sup> centuries introduced the religion of Christianity to India.<sup>4</sup> The present-day Indian population practises and follows many religions, including Hinduism, Islam, Christianity, Buddhism, Jainism, Sikhism and Zoroastrianism, although majority of the populace practises the religion of Hinduism.<sup>5</sup>

Through time, Hinduism has had the caste system at its core, a system of hierarchy that originated more than 2000 years ago<sup>6</sup> still “operates in all its pristine vigour.”<sup>7</sup> Constructs such as languages that originated more than 20 centuries ago in Indian history, have lost their original form and have evolved into new forms with varied characteristics.<sup>8</sup> However, the caste system and the resultant stratification have only intensified in Indian society.

Historically, the caste system or the varna system divided Hindus into four groups - Brahmins (priests and teachers), Kshatriyas (warriors and rulers), Vaishyas (traders and agriculturalists) and Shudras (labourers who serve the above three castes).<sup>9</sup> A fifth category of people who are outside the caste system and who were associated with occupations that are considered “dirty” or “polluting” were considered to be “untouchables.”<sup>10</sup> Even though the stratification based on caste was introduced to

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<sup>2</sup> D. Chand, 'An Effective Analysis of Indian Religions: An Historical Perspectives' [2019] 16(1) Journal of Advances and Scholarly Researches in Allied Education 1392-1395.

<sup>3</sup> Ibid.

<sup>4</sup> Ibid.

<sup>5</sup> Office of the Registrar General & Census Commissioner, Census of India 2011 [2011], Available at <https://censusindia.gov.in/>

<sup>6</sup> BR Ambedkar, Who were the Shudras? in Dr. Babasaheb Ambedkar Writings and Speeches Volume 7, (Ministry of Social Justice and Empowerment, 2019) 11-204.

<sup>7</sup> B. R. Ambedkar, Castes in India: Their Mechanism, Genesis and Development in in Dr. Babasaheb Ambedkar Writings and Speeches Volume 1, (Ministry of Social Justice and Empowerment, 2019) 3-22, 9.

<sup>8</sup>R Gautier, 'The Evolution of Indian Languages, A Scriptological and Linguistic Survey of the World: Prabhat Ranjan Sarkar' [2021] 10(1) Aligarh Journal of Linguistics 23-42

<sup>9</sup> Ibid.

<sup>10</sup> Ibid.

distinguish members of the society, through time, it evolved into a system that places people in a rigid compartment, sans mobility i.e., a person from the lower caste cannot become an upper caste member or vice versa.<sup>11</sup> Over the course of 2000 years, the caste system has gone through many stratifications, forming thousands of castes and sub-castes. The Constitution of India and legal instruments propagate equality and, in fact promote the empowerment of the socially and historically marginalised groups through affirmation policies. Despite this, stratification based on caste is a reality even in modern day India with the only difference being the degree and intensity of practice in various parts of the country.<sup>12</sup>

### **1.1. Problem Statement**

India is home to about 444 million children under the age of 18 years, the majority practising Hinduism as their religion. The caste system affects children's enjoyment and realization of rights in many ways. A child who is born into a specific caste enters into the system of stratification throughout his/her life and only a few come out of this system. The placement within a caste, which is determined by birth, decides which religious sites a person must visit, which schools one should attend, whom should one be friends with and whom should one play with, etc. Many children, especially the ones who belong to the lower rungs of the caste hierarchy, are subjected to discrimination. The existence of caste hierarchy is nothing but a barrier to the true realization of children's rights. A child who is born into a specific caste has his/her identity based on such caste. The primary and secondary care-givers – parents, family and the close community – are also involved in the caste-based customary practices that a child is exposed to. The task of coming out of caste or at the very least, staying away from any caste practices is an immensely challenging endeavour because the caste-based obligations are rooted in the realms of religious faith. While the process of navigating out of the religiously and socially sanctioned system of caste is nearly impossible, the primary aim of this thesis is to explore if there are any solutions in the domestic legal framework of India or the United Nations Conventions on the Rights of the Children (UNCRC) which are acknowledged and accepted by almost all nations, including India.

### **1.2. Objectives of the Research**

The objectives of the research are

- To analyze the intrinsic relationship between the system of caste and the religion of Hinduism.
- To identify the national legal and policy framework protecting children's rights in the context of the Indian caste system.
- To analyze whether the legal and policy framework is in line with the provisions of the UNCRC, especially the general principles and children's right to religious freedom.
- To analyze Article 5 and Article 14(2) of the UNCRC and explore whether children's right to 'parental guidance and direction' provides a basis for children to navigate out of the caste system.
- To propose recommendations to strengthen the children's realization and enjoyment of rights in the context of the caste system.

### **1.3. Research question and sub-questions**

#### **1.3.1. Main Research Question:**

Whether the domestic and international children's rights framework enable the children to navigate out of the socially entrenched caste system in India?

#### **1.3.2. Sub-Research Questions:**

- What is the caste system and what are the inherent problems in it?

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<sup>11</sup> BR Ambedkar, Annihilation of Caste in Dr. Babasaheb Ambedkar Writings and Speeches Volume 1, (Ministry of Social Justice and Empowerment, 2019), 23-98.

<sup>12</sup> Refer Section below

- What are the various rights of the children that are affected due to the persistence of the caste system in India?
- Does Indian legal and policy framework protect children from the ill-effects of the caste system? What is the extent to which India is in compliance with the international children's rights framework?
- Does the UNCRC framework, especially the children's right to 'parental guidance and direction' provided in Article 5 and Article 14(2) offer a good solution for the children to come out of the socially entrenched caste system?
- What can be done to promote children's enjoyment and realization of rights in the context of the caste system?

#### **1.4. Methodology and Research Techniques**

The thesis employs desk-based doctrinal research methodology exploring relevant national and international legal frameworks and academic sources including but not limited to books and scholarly articles, case laws, reports from various NGOs and the UN, and other internet resources. Using the above sources, there would be analysis based on historical contexts, judicial precedents and legal commentaries. A detailed analysis of the relevant General Comments and Concluding Observations of the CRC Committee will also be conducted. The research would involve critical evaluation of both national and international legal framework vis-à-vis domestic practices in relation to the children in caste system.

#### **1.5. Limitations and Scope of the research**

Caste as system had its origin in India; however, the system has spread to many other countries in the world where the system has assimilated in varying degrees based on the region. This thesis would delve into the discussion that is limited to caste system in **India**.

#### **1.6. Legal Framework**

For the purposes of the thesis, the following legal instruments and the provisions mentioned below would be primarily used.

##### **1.6.1. *International Legal Instruments***

- United Nations Conventions on the Rights of the Child - with specific emphasis on Article 2 - Right to non-discrimination, Article 3 - Best Interests Principle as a primary consideration, Article 5- Right to parental direction and guidance consistent with evolving capacities, Article 6 - Right to life, survival and development, Article 13 - Right to freedom of expression, Article 14 - Right to freedom of religion, thought and conscience and Article 18 - Obligation of the parent in the upbringing of the child
- International Convention on the Elimination of All Forms of Racial Discrimination,
- International Covenant on Civil and Political Rights, 1966 – with specific emphasis on Article 18 – Right to freedom of religion

##### **1.6.2. *Indian Legal Instruments***

- The Constitution of India, 1950 with specific emphasis on the Fundamental Rights including Article 14 (Right to Equality), Article 15 (Right to non-discrimination), Article 17 (Abolition of

Untouchability) and Article 25 (Right to freedom of religion), and the Directive Principles of State Policy.

- Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989.
- Protection of Civil Rights Act, 1955



## 2. Caste system in India

Caste system acts as an intrinsic element to the religion of Hinduism. It forms the structural basis of the Hindu society<sup>13</sup> and it has been dominating not just the society but also culture.<sup>14</sup> Before delving into the core of the current thesis, it is important to understand how intrinsic the caste system is to Hinduism. This chapter will deal with the origin of caste system, the transformation of Varnas into castes and subcastes, intensification of caste and manifestation of caste in the 20<sup>th</sup> and 21<sup>st</sup> century.

### 2.1. Origin of the caste system

The caste system has a strong structural basis as it originated from the sacred texts of faith and ancient religious ideology.<sup>15</sup> The religion of Hinduism is derived from the *Vedas*, *Smritis* and *Shastras* which are the “mass (mixture) of sacrificial, social, political and sanitary rules and regulations.”<sup>16</sup>

The caste system that exists today has its beginning from the concept called *Chaturvarnya* (four varnas). The origin of *Chaturvarnya* can be found in the ninetieth Hymn, Tenth Mandala, Rig Veda<sup>17</sup>, which is also known as the *Puruksha Sukta*.<sup>18</sup> According to the Hymn, a divine being was sacrificed by the Gods and divided into many parts leading to the creation of the world and its components.<sup>19</sup> With respect to *Chaturvarnya*, the following verse is relevant.

*“The Brahmana was his mouth, The Rajanya (Kshatriya) was made his arms; the being called the Vaishya, he was his thighs; the Shudra sprang from his feet.”*<sup>20</sup>

This verse explains how the four *varnas* - namely *Brahmins*, *Kshatriyas*, *Vaishyas* and *Shudras*, “arose from the body of the Creator.”<sup>21</sup> As it has the divine sanction, this verse and its essence were considered to have a mandatory injunction and it was inferred as “an ideal plan of society.”<sup>22</sup> Thus, the society was formed on the basis of four *varnas*.

Over hundreds of years, the sanctity of the *Chaturvarnya* was reiterated time and again. The most important contributor to the concrete solidification of the *Chaturvarnya* was Manu, an ancient Hindu scholar, also known as “the architect of the Hindu society.”<sup>23</sup> Manu, in the *Manusmriti*, enunciated afresh

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<sup>13</sup> MN Srinivas, 'A Note on Sanskritization and Westernization' [1956] 15(4) The Far Eastern Quarterly 481-496, 482

<sup>14</sup> A Béteille, 'Caste and Family: In Representation of Indian Society' [1992] 8(1) Anthropology Today 13-18, 13-14.

<sup>15</sup> K Adaney and A Wyatt, Contemporary India (Palgrave MacMillan Publishers 2010), 57.

<sup>16</sup> Ambedkar( n 11) 75.

<sup>17</sup> Rig Veda is one of the four Vedas and one of the major ancient Hindu texts. See R Dalal, Hinduism: An Alphabetical Guide (Penguin Books Limited 2014)

<sup>18</sup> Ambedkar (n 6), 21-25.

<sup>19</sup> Ibid, 21-22.

<sup>20</sup> Translation by Ambedkar, Ibid 22.

<sup>21</sup> Ibid, 23.

<sup>22</sup> A Béteille, 'Hierarchical and Competitive Inequality' [2002] 1(1) Sociological Bulletin 3-27, 10.

<sup>23</sup> Ambedkar (n 6), 24.

the divine injunction<sup>24</sup> and went a step further and emphasized the infallibility of the Vedas where he said, “Veda is the one and ultimate sanction for Dharma”<sup>25</sup>

Thus, by establishing the divinity and infallibility to the contents of *Veda*, the four classes are reinforced in the society. According to *Manusmriti*, a Hindu must adhere to the virtues of Vedas and Smritis.<sup>26</sup> *Manusmriti* and other Hindu texts like *Dharmashastra*<sup>27</sup> were the focal point of the creation of society where hierarchical practices and inequality were established and justified by religion, law and morality.<sup>28</sup> The prescribed rules and regulations are considered to be perpetual as there is no scope for modification and must be adhered to by all generations.<sup>29</sup>

The hierarchy of the Varnas was also backed by the concept of deeds in one’s past life. Hinduism and its texts provide that one’s caste is the “exact index of his soul’s behaviour and piety in previous births.”<sup>30</sup> The first three varnas are “twice-born” and are provided with varying special privileges.<sup>31</sup> If one is born a Shudra, it was considered to be indicative that he had not fulfilled his dharma in the past life and if one was born an untouchable, it is indicative of foul deeds in the past life.<sup>32</sup>

## 2.2. Transformation of Varnas to Castes – The beginning of stratification

The change of terms from *Varna* to *Jati* (Caste) is not merely a linguistic shift.<sup>33</sup> In the Vedic period, there was qualified social mobility among the members of the four *varnas*. However, over time, the membership gradually started becoming hereditary.<sup>34</sup>

At some point in the caste system’s evolutionary history, the *Brahmins*’ group socially detached itself from the prevalent social norm of inter-Varna mobility, thereby forming self-enclosed units called castes into which “others” could not enter nor could the Brahmins themselves exit, thereby resulting in a “closed-door policy”.<sup>35</sup> When the closed-door policy became a characteristic of the Brahmins, it became “the fashion in the Hindu society” and as a result, was “whole-heartedly imitated from the non-Brahmanical classes.”<sup>36</sup> The other classes slowly “underwent differentiation”<sup>37</sup> and became “self-enclosed units”<sup>38</sup>

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<sup>24</sup> Ibid.

<sup>25</sup> Translated by B.R.Ambedkar, Ibid.

<sup>26</sup> Ambedkar (n 11), 72

<sup>27</sup> Dharmashastra is believed to be the commands of sages which when disobeyed amounts to sin. See, *ibid*, 69.

<sup>28</sup> Béteile 2002 (n 22), 9-10.

<sup>29</sup> Ambedkar (n 11), 76.

<sup>30</sup> M Olcott, 'The Caste System of India' [1944] 9(6) *American Sociological Review* 648-657, 648.

<sup>31</sup> AA Macdonell, 'The Early History of Caste' [1914] 19(2) *The American Historical Review* 230-244, 235.

<sup>32</sup> Olcott 1944 (n 30), 649.

<sup>33</sup> A Béteile, 'Varna and Jati' [1996] 45(1) *Sociological Bulletin* 15-27, 15.

<sup>34</sup> MV Nadkarni, 'Is Caste System Intrinsic to Hinduism? Demolishing a Myth' [2003] 38(45) *Economic and Political Weekly* 4783-4793, 4790.

<sup>35</sup> Ambedkar (n 7), 18.

<sup>36</sup> Ibid.

<sup>37</sup> Ibid.

<sup>38</sup> Ibid.

called castes. This closed door approach led to the creation of “water-tight compartments”<sup>39</sup> which were “graded one above the other”<sup>40</sup> based on the concept of purity. It was in the Later Vedic period when the rigidity of the caste system began.<sup>41</sup>

### **2.2.1. Rigid characteristics of caste/sub-caste**

The caste system, as a whole, exhibited rigid characteristics such as caste based on heredity, common occupation among caste members and restrictions on inter-marriage.<sup>42</sup> It has the characteristic of “exclusiveness”<sup>43</sup> which prohibits or limits “social intercourse.”<sup>44</sup> According to Dr. Ketkar, there are two important and interrelated characteristics of caste: (1) prohibition of inter-marriage; and (2) limiting the membership of a specific caste to “only those born within the group” (membership by autogeny).<sup>45</sup>

Every caste/sub-caste “is characterised by an infinite number of special practices regulating the conduct of its members.”<sup>46</sup> For example, every caste/sub-caste has a distinctive way of performing rituals and ceremonies. Members of caste have distinction in their clothing as well.<sup>47</sup> Thus, the experience of a person is dependent on the position his/her castes holds in the ladder of hierarchy.<sup>48</sup> As the caste is determined at birth, one’s “domestic ceremonies and customs, home and temple worship, circle of friends and relatives (...) depend on the level of the group which (one is) born (into).”<sup>49</sup> Moreover, it is highly important for a traditional Hindu to fulfil all his caste obligations.<sup>50</sup> If a member broke caste, it is a practice to outcast him or her.<sup>51</sup> One of the cruelest sanctions of the *Manusmriti* is the prescription of cutting off the tongue if a Shudras speaks of Vedas and pouring molten lead in a Shudra’s ears who hears the Vedas.<sup>52</sup>

### **2.2.2. Untouchability**

Many ancient Hindu texts mention another category of people outside the category of the Varna system called “*avarna*” (without varna).<sup>53</sup> These people were “on the margin of the social order” and are considered by scholars as the people who were later categorized as “untouchables” in the evolution of

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<sup>39</sup> Ambedkar (n 11), 48

<sup>40</sup> Ibid, 47.

<sup>41</sup> S Gurusamy, *Dalit Empowerment in India* (MPJ Publishers 2019), 45-46.

<sup>42</sup> Macdonell 1914 (n 31), 236

<sup>43</sup> Ambedkar (n 7) 8

<sup>44</sup> Ibid.

<sup>45</sup> Ketkar quoted in Ambedkar 1990 (n 11) 7.

<sup>46</sup> Macdonell 1914 (n 31), 232.

<sup>47</sup> Ambedkar (n 11), 50

<sup>48</sup> S Jodhka et. al., 'Caste: Experiences in South Asia and Beyond' [2017] 25(3) *Contemporary South Asia* 230-237, 232

<sup>49</sup> Olcott 1944 (n 30), 648.

<sup>50</sup> Ibid.

<sup>51</sup> Ambedkar (n 11), 65

<sup>52</sup> Ambedkar (n 6), 49.

<sup>53</sup> AM Shah, 'Purity, Impurity, Untouchability: Then and Now' [2007] 56(3) *Sociological Bulletin* 355-368, 358.

the caste system.<sup>54</sup> The classification of the people as Untouchables can be witnessed in many Vedic texts,<sup>55</sup> *Manusmriti*<sup>56</sup> and in various Indian<sup>57</sup> and foreign literatures.<sup>58</sup>

Historically, untouchables were subjected to the heights of discrimination as they were considered impure.<sup>59</sup> They were denied access to common places used by the upper castes.<sup>60</sup> Their settlements were created only on the outskirts of the main village.<sup>61</sup> The members, including woman were not allowed to wear garments that would cover their upper bodies.<sup>62</sup> There were severe restrictions on the clothes they could wear and more often, they were prevented from wearing footwear.<sup>63</sup> They were prohibited to learning Vedas<sup>64</sup> and were denied access to all educational facilities.<sup>65</sup> The discrimination was seen not just during lives but also post-death. The last rites of the untouchables or lower castes members were not held in the same cemetery as that of the upper caste members.<sup>66</sup>

### **2.2.3. Dynamism and strong-hold of castes**

The caste system is also dynamic in nature.<sup>67</sup> The caste system has undergone large-scale mutations which can be witnessed from formation of new castes “through fission, fusion, (and) migration.”<sup>68</sup> Due to varying opportunities and circumstances in various periods of times, the castes in India have undergone division and subdivision into sub-castes.<sup>69</sup>

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<sup>54</sup> Ibid.

<sup>55</sup> An extract from R Thapar, *Indian Cultures as Heritage: Contemporary Pasts* (Aleph Publications 2018), <<https://www.dailyo.in/arts/caste-conflict-shudras-brahminism-golden-age-indian-cultures-as-heritage-romila-thapar-22790>> accessed 10 July 2023

<sup>56</sup> Manusmriti also mentions that Chandala wears clothes that are removed from dead bodies and are only allowed to wear iron ornaments. See *ibid*.

<sup>57</sup> For example, Arthashastra, an ancient Indian treatise, points out that the chandalas (untouchables) are the ones who have their settlements close to the cremation grounds or outside the main area of habitats. See *ibid*.

<sup>58</sup> For example, the accounts of the 4th century traveler named Fa Hien describe how the untouchables had to use a drum or clapper to warn the members of other castes about their entry so that the latter can make sure they don't get polluted. See, VD Mahajan, *Ancient India* (S Chand & Company Limited 2016), pg. 320.

<sup>59</sup> See below; In Hinduism, purity/impurity is not just limited to lower caste members. Impurity is also associated with menstruating women and girls, as well as corpse, See Shah 2007 (n 53), 357.

<sup>60</sup> MN Panini, 'Caste, Race and Human Rights' [2001] 36(35) *Economic and Political Weekly* 3344-3346, 3344.

<sup>61</sup> *Ibid*.

<sup>62</sup> *Ibid*.

<sup>63</sup> *Ibid*.

<sup>64</sup> *Ibid*.

<sup>65</sup> *Ibid*.

<sup>66</sup> D Taylor and H Kim, *Civil Society in South Asia* (United Kingdom: Taylor & Francis 2022).

<sup>67</sup> R Mukerjee, 'Caste and Social Change in India' [1937] 43(3) *American Journal of Sociology* 377-390, 382

<sup>68</sup> A Deshpande, *Caste, Class, Gender: Dynamism or Stasis?*. in A Goyal (ed), *A Concise Handbook of the Indian Economy in the 21st Century* (Oxford University Press 2020), 222-246, 226.

<sup>69</sup> Mukherjee 1937 (n 67), 379-380.

There were multiple religious reform movements in the Indian history. However, most of the anti-hierarchical movements failed in their mission to bring an end to the rigid caste system.<sup>70</sup> For example, the Bhakti movement took “a strong anti-hierarchical and anti-ritualistic stand.”<sup>71</sup> During the sixth and seventh century AD, the Bhakti movement had its origin in the South-Indian region and had Shiva and Vishnu in their different manifestations as their deities<sup>72</sup> It brought about a new change in the society because the saints of the Bhakti movement came from all castes. Though these Bhakti movements were powerful and propagated equality, they “failed to make any dent” on the caste system, especially in the rural regions.<sup>73</sup> Moreover, the glaring irony of the whole Bhakti movement is that various sects that were formed based on these movements “ended up becoming castes, or worse, a series of castes, politely imitating the master system of jati (caste).”<sup>74</sup>

#### **2.2.4. Hierarchy within hierarchy – Gradation based on purity and impurity**

The idea of purity and impurity has existed in the Hindu society for many centuries in both domestic and social life.<sup>75</sup> It persisted in the choice of food, occupations, marriage, religious beliefs, access to temples and wells and in many other contexts.<sup>76</sup> This ingrained idea played a vital role in the persistence of the hierarchy in the Hindu society.<sup>77</sup> The idea or the concern for purity always decreased depending on one’s status on the “ladder of hierarchy”<sup>78</sup> i.e., the purest being the brahmins and declining proportionally as one moves down the ladder with the untouchables, who were considered the most impure, at the end.<sup>79</sup> However, as Srinivas describes, there was constant strife among castes by changing their way of life and adopting higher levels of purity to improve their status in the hierarchy.<sup>80</sup>

In caste system, there are both vertical hierarchies (caste is ranked in relation to higher or lower caste based on purity/impurity)<sup>81</sup> and horizontal hierarchies (internal ranking within similar or same castes)<sup>82</sup>. The order of hierarchy in the caste system with respect to the four Varnas is fixed in a Hindu society. However, the local hierarchy of the caste/sub-castes is flaccid.<sup>83</sup>

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<sup>70</sup> MN Srinivas, 'An Obituary on Caste as a System' [2003] 38(5) Economic and Political Weekly 455-459, 458.

<sup>71</sup> Ibid, 458-459.

<sup>72</sup> Ibid, 458.

<sup>73</sup> Ibid, 455, 458-459.

<sup>74</sup> Ibid, 459.

<sup>75</sup> Shah 2007 (n 53), 357, 362-363

<sup>76</sup> Ibid, 355.

<sup>77</sup> Ibid, 355-361.

<sup>78</sup> Ibid, 356, 365.

<sup>79</sup> Nadkarni 2003 (n 34), 4783.

<sup>80</sup> Srinivas, 1956 (n 13),

<sup>81</sup> Béteille 2002 (n 7), 10

<sup>82</sup> Ibid.

<sup>83</sup> Srinivas 2003 (n 70), 456.

### 2.3. 20<sup>th</sup> and 21<sup>st</sup> century developments – Has there been any change?

In the current Indian society, the sense of caste identity or obligations to one's caste vary between different sections of society.<sup>84</sup> For example, it is different between people in rural and urban areas and between educated (academically as well as socially) and uneducated people.<sup>85</sup> However, the hierarchical mentality is still prevalent among many people in India. One can witness a radical change in the concept of impurity and purity in the past two centuries,<sup>86</sup> especially due to the exigencies of modern life.<sup>87</sup> Moreover, the adoption of the Constitution of India, 1950, led to rejection of any kind of caste-based discrimination in law and it is now not possible to enforce the “privileges and disabilities of caste” through law.<sup>88</sup>

The relationship among the people in India has seen a great change. Srinivas talks about the two concepts – westernization and sanskritization – which have had positive and negative transformative effects on Indian society. The former has relaxed the rigours of caste while the later has reinforced traditional values. The ideas such as “democracy, equality and individual self-respect”<sup>89</sup> have pushed members of the caste group to alter their interaction with the members of other castes. Today, there are many places of social interaction like schools and offices, where everyone has equal access. However, many places in India still witness constant disparities, economic and social, between higher and lower caste members resulting in continued social stigmatization of Dalits.<sup>90</sup> On one hand, the link between the caste and its traditional occupations has been greatly weakened due to the social, economic and technological developments<sup>92</sup>, while on the other hand, the association between caste and occupation is not completely eradicated. To this day, the “polluting jobs” such as cleaning toilets and collecting garbage are done mostly by Dalits.<sup>93</sup> The Hindu religion and the manner in which worship or ceremonies are conducted are still linked with ‘purity’ and maintaining ‘purity’.<sup>94</sup> For example, in many places in India, the sanctum sanctorum of temples is accessed only by members of the “pure” castes.<sup>95</sup>

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<sup>84</sup> Béteile 1992 (n 14), 16.

<sup>85</sup> Ibid.

<sup>86</sup> Ibid.

<sup>87</sup> MN Srinivas, *Social Change in Modern India* (Berkeley: University of California 1966), 117

<sup>88</sup> Béteile 1992 (n 14), 16.

<sup>89</sup> Srinivas 2003 (n 70), 455, 459

<sup>90</sup> The term Dalits was first used by Jyotirao Phule to refer to the historically and socially depressed classes. See A Gulati, 'Dalit: The Word, the Sentiment, and a 200-year-old History' (The Quint, 11 September 2018) <<https://www.thequint.com/news/india/dalit-history-of-term-political-social-usage#read-more>> accessed 8 July 2023

<sup>91</sup> A Deshpande, *The Origins and Effects of Affirmative Action Policies in India*. in T Khanna and M Szonyi (eds), *Making Meritocracy: Lessons from China and India, from Antiquity to the Present* (Oxford University Press 2022), 177

<sup>92</sup> Srinivas 2003 (n 70), 457-458

<sup>93</sup> A Ashraf, 'The Truth About Manual Scavenging In India' (Outlook India, 11 February 2022) <<https://www.outlookindia.com/magazine/story/india-news-the-truth-about-manual-scavenging-in-india/305414>> accessed 8 July 2023

<sup>94</sup> Shah 2007 (n 53), 362-363

<sup>95</sup> D Sivaramane, 'Constitution, not Caste, Must Govern Temple Spaces' (The India Forum, June 2023) <<https://www.theindiaforum.in/forum/constitution-not-caste-must-govern-temple-space>> accessed 8 July 2023

Irrespective of many legal developments, caste identity and the idea of superiority/inferiority still prevail in many social interactions.<sup>96</sup> Béteile argues that it is the family that functions as the “most active agent for the reproduction of inequality” in contemporary India.<sup>97</sup> Caste-based customs followed by families still take into account distinctions and differentiations based on caste.<sup>98</sup> An average Indian family still “remains strongly conservative.”<sup>99</sup> Parents play a major role as decision makers in their children's marriage and career.<sup>100</sup> One of the popular modes of marriage is the concept of arranged marriage.<sup>101</sup> Béteile puts forth an argument that “so long as the family arranges the marriage, the practice of caste endogamy will continue.”<sup>102</sup> Though there is protection in laws for inter-caste marriage, the system of caste endogamy is prevalent which enables the group “to maintain clear social boundaries” with other groups.<sup>103</sup> Systems like caste panchayats<sup>104</sup> also exist in rural India, which reinforce the “continued dependence of families on members of their castes.”<sup>105</sup>

## 2.4. Conclusion

In the Indian Hindu society, “caste is the monster that crosses your path.”<sup>106</sup> As Srinivas points out, though there have been significant developments, they “should not blind us to the fact that (caste) attitudes are fundamentally hierarchical”<sup>107</sup> The inequality based on caste is still a key part in today's reality and still “portends tremendous consequences.”<sup>108</sup>

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<sup>96</sup> R Singh, et. al., Voicing Vulnerabilities Around Caste Stigma: A Qualitative Study. in A Prakash et. al., (eds), Understanding Vulnerabilities in Contemporary Society: Psychological Insights and Reflections (India: SAGE Publications 2021), 73-83.

<sup>97</sup> Béteile 1992 (n 14), 15

<sup>98</sup> Ibid, 16-17.

<sup>99</sup> Ibid, 17.

<sup>100</sup> Ibid.

<sup>101</sup> 'Why arranged marriages are considered better than love marriages in Indian Society' (Times of India, 17 March 2021) <<https://timesofindia.indiatimes.com/life-style/relationships/love-sex/why-arranged-marriages-are-considered-better-than-love-marriages-in-indian-society/articleshow/81549410.cms>> accessed 8 July 2023

<sup>102</sup> Béteile 1992 (n 14), 17.

<sup>103</sup> Béteile 2002 (n 7), 44

<sup>104</sup> Caste Panchayat is a council of members of a specific caste which follows and reinforces caste practices and norms in the society. See A Ingole, Caste Panchayats and Caste Politics in India (Palgrave MacMillan Publishers 2021) 25-123

<sup>105</sup> Nadkarni 2003 (n 34), 4790

<sup>106</sup> Ambedkar (n 11), 47.

<sup>107</sup> MN Srinivas, Caste in modern India and other essays (Asia Publishing House, 1962), 96.

<sup>108</sup> Ambedkar (n 7), 5.

### 3. Analysing India's Compliance of the UNCRC

The first part of the chapter lays down the Indian legal framework against caste-based disabilities and second part of the chapter interrogates whether the Indian laws related to caste-based discriminations are in compliance with the child rights framework laid down in UNCRC.<sup>109</sup>

#### 3.1. Indian Legal Framework

Indian legal history, especially the 20th and 21st century laws and policies, indicate that there have been legal reforms targeted towards its socially and historically disadvantaged groups. The hierarchical caste system was one of the biggest threats to the “stability of a united, democratic India.”<sup>110</sup> At the time of independence, Indian society was fragmented by casteism, communalism, linguism and regionalism<sup>111</sup> which is why it was vital to protect the fundamental rights of the people to give them “a sense of security and confidence.”<sup>112</sup>

The noble ideals and relentless pursuits of leaders like Dr. B. R. Ambedkar towards securing social justice led to incorporation of fundamental rights in the Constitution of India.<sup>113</sup> The Preamble declares that India is a “sovereign, socialist, secular, democratic, republic” country.<sup>114</sup> In the context of protection against the perils of the caste system, it is important to examine the relevant provisions in Part III (Fundamental Rights)<sup>115</sup> and Part IV (Directive Principles of State Policy)<sup>116</sup> of the Constitution.

Part III of the Constitution prescribes the fundamental rights of the people, including substantive as well as procedural rights.<sup>117</sup> Right to Equality is guaranteed under Articles 14 to 18 of the Constitution.<sup>118</sup> Article 14 is one of the most significant provisions, which in a general sense outlaws discrimination and guarantees “equality before law” to *all* persons, not just citizens.<sup>119</sup> Article 15(1) goes a step further and specifically prohibits the state from discriminating against any citizen “on grounds only of religion, race, caste, sex, place of birth or any of them.” Article 15(2) bars subjection of the citizen to “any disability, liability, restriction or conditions” in

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<sup>109</sup> Convention on the Rights of the Child, (adopted 20 November 1989) 1577 UNTS 3 (UNCRC)

<sup>110</sup> S. Radhakrishnan, ‘Farewell Speech as President’, 25 January 1967. AR, 12- 18 February 1967, pp. 7540

<sup>111</sup> G Austin, Making and Preserving a Nation. in G Austin (ed), Working a Democratic Constitution: A History of the Indian Experience (Oxford University Press 2012), 143-170, 148-156.

<sup>112</sup> MP Jain, Constitution of India (NM Tripathi Publishing 1962), 1179.

<sup>113</sup> Dr. Ambedkar, who faced the brunt of caste-based discrimination from a very young age, dedicated his whole life in championing social justice and relentlessly worked for the empowerment of the marginalized. As the Chairman of the Drafting Committee, he played a significant role in creating a Constitution embedded with the principles of equality, justice and liberty. See <https://www.mea.gov.in/ambedkar.htm> accessed 10 July 2023

<sup>114</sup> Constituent Assembly of India, Constitution of India (adopted on 26 November 1949) (Indian Constitution), 26 January 1950, Preamble.

<sup>115</sup> *Ibid*, Part III.

<sup>116</sup> *Ibid*, Part IV.

<sup>117</sup> Jain 1962 (n 112), 1180.

<sup>118</sup> Indian Constitution, Article 14 to 18.

<sup>119</sup> Indian Constitution, Article 14.



- Accessing shops, public restaurants, hotels and places of public entertainment;<sup>120</sup> or
- The usage of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of state funds or dedicated to the use of the general public.<sup>121</sup>

It is important to note that Article 15(2) is not confined to the acts of State rather it prescribes a prohibition of general nature.<sup>122</sup> The Supreme Court of India has held that the prohibition of discrimination under Article 15 on the grounds of caste identities is “to foster national identity which does not deny pluralism of Indian culture but rather preserve(s) it.”<sup>123</sup>

Perhaps, the most important Article in relation to the caste system is Article 17, which abolishes untouchability, i.e., “the practice as it had developed historically in the country”<sup>124</sup> and forbids any form of its practice.<sup>125</sup> In addition, it provides that “the enforcement of any disability arising out of Untouchability” is an offence punishable in accordance with the law.<sup>126</sup> This Article is an “arch of the Constitution”<sup>127</sup> created to integrate the historically discriminated members of the society to integrate in the mainstream society. Article 17 also protects the individuals against the acts of the private individuals, institutions or juristic body of persons and not just the State.<sup>128</sup> This means that, as held by the Supreme Court, it is a constitutional obligation for the State to take necessary steps and ensure that Article 17 is not violated by any private individual.<sup>129</sup> However, it is not clear whether this Article protects individuals against out-casting or ex-communication from his/her caste.<sup>130</sup> In furtherance of Article 17 and to give effect to the same, the Parliament of India has enacted primarily two statutes, which are

- Protection of Civil Rights Act, 1955<sup>131</sup> (PCA); and
- Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989<sup>132</sup> (POA).

As regards religious rights, Article 25 of the Constitution guarantees the freedom of conscience, the right to freely profess, practice and propagate religion to *all* persons.<sup>133</sup> In crux, Part III of the Constitution provides basic human rights, outlaws discrimination, abolishes untouchability and protects religious and cultural rights.<sup>134</sup>

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<sup>120</sup> Indian Constitution, Article 15(1)(a)

<sup>121</sup> Indian Constitution, Article 15(1)(c).

<sup>122</sup> Jain 1962 (n 112), 1296.

<sup>123</sup> Valsamma Paul v. Cochin University & Ors, AIR 1996 SC 1011, para 22.

<sup>124</sup> Mariswamy & Ors. V. State of Karnatanaka (Police of Kuderu), 2003 (3) KarLJ 234, para 11.

<sup>125</sup> Indian Constitution, Article 17.

<sup>126</sup> Ibid.

<sup>127</sup> Supreme Court of India, State of Karnataka v. Appa Balu Ingale, AIR 1993 SC 1126, para 21.

<sup>128</sup> Ibid, para 11.

<sup>129</sup> Jain 1962 (n 112), 1400; Supreme Court of India, People’s Union for Democratic Rights v. Union of India, (1982) 3 SCC 235, para 15.

<sup>130</sup> Orissa High Court, Hadibandhu Behera v. Banamali Sahu, AIR 1961 Ori. 33, para 8

<sup>131</sup> Parliament of India, Protection of Civil Rights Act, 1955, Act No. 22 of 1955.

<sup>132</sup> Parliament of India, Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989, Act No. 33 of 1989.

<sup>133</sup> Indian Constitution, art 25.

<sup>134</sup> Jain 1962, (n 112), 1180.

Part IV is fundamental to the governance of the country. Article 38 obliges the State to render social, economic and political justice to historically and socially weaker section of the society<sup>135</sup> and Article 46, the “heart and soul of social justice”<sup>136</sup>, obliges the State to protect them from “social injustice and all forms of exploitation.”<sup>137</sup> It must be noted that all fundamental rights are justiciable and enforceable.<sup>138</sup> However, the DPSPs are only justiciable and not enforceable.<sup>139</sup> In addition to these constitutional provisions, the Constitution of India also enables affirmative action policies such as the policy of reserving seats for the disadvantaged groups in higher education<sup>140</sup>, employment<sup>141</sup> and political representations.<sup>142</sup> Beneficiaries of the affirmative action policies include the Dalits or Scheduled Castes<sup>143</sup> and Other Backward Classes (OBCs).<sup>144</sup> To provide safeguards against the exploitation of the members of the Scheduled Castes and to promote their interests and well-being, the Constitution of India established an independent Commissions such as the National Commission for Scheduled Castes (NCSC)<sup>145</sup> and National Commission of Backward Classes (NCBC).<sup>146</sup>

There are some exclusive provisions for children in the Constitution of India. Though Article 15 deals with non-discrimination, Article 15(3) enables the State to make special provisions in law for women as well as children.<sup>147</sup> In the DPSP, it has been mentioned that the State must direct its policy to secure that “the tender age of children are not abused”<sup>148</sup> and that “children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity.”<sup>149</sup>

As part of a federal structure, the states in India independently make laws which have varied approach towards caste system. On one hand, some states in India take progressive initiatives to combat the discriminatory aspects of the caste system. For example, the State of Tamil Nadu has progressive and inclusive policies like *Samathuvapuram* - a housing policy where the State government builds houses and neighbourhoods for dalits and people of other castes.<sup>150</sup> On the other hand, some states like Orissa

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<sup>135</sup> Indian Constitution, Article 38

<sup>136</sup> SW Ahmad and MA Ali, 'Social Justice and The Constitution of India' [2006] 67(4) The Indian Journal of Political Science 767-782, 767.

<sup>137</sup> Indian Constitution, Article 46.

<sup>138</sup> Jain 1962, (n 112), 1184-87

<sup>139</sup> Ibid.

<sup>140</sup> Ibid, art 15(4) – 15(6).

<sup>141</sup> Ibid, art 16 (4) – 16 (4A)

<sup>142</sup> Ibid, art 335.

<sup>143</sup> The term Scheduled Castes was introduced in the legal documents of British India; Now, it is legal term for Dalits. See <https://ncsc.nic.in/> accessed 10 Jul. 23

<sup>144</sup> The terms OBCs is a legal term for the group of socially and historically discriminated in the society as Shudras. This terms was coined by Mandal Commission. See <https://ncbc.nic.in/> accessed 10 Jul. 23

<sup>145</sup> Indian constitution, art 338.

<sup>146</sup> Ibid, art 338B.

<sup>147</sup> Ibid, art 15(3).

<sup>148</sup> Art 39(e)

<sup>149</sup> Ibid, art. 39(f)

<sup>150</sup> KJ Sivagnanam and M Sivaraj, 'Tamil Nadu: 'Samathuvapuram': Towards Spacial Equality' [2002] 37(39) Economic and Political Weekly

and Gujarat have enacted Freedom of Religion Acts that restrict freedom of religion. These Acts prohibit religious conversion by use of force, coercion or fraudulent means<sup>151</sup>. Research indicates that most of these laws are aimed “to keep the lower caste Hindus (...) within the fold of Hinduism.”<sup>152</sup>

### **3.2. Analysis of India’s Response to the caste system in light of children’s rights**

India ratified the UNCRC in the year 1992 and has been making significant progress in enabling the recognition of children’s right in India. In this part, the author seeks to analyse the legal framework dealing with the caste system in relation to the general principles of the UNCRC and the children’s right to direction and guidance that enables their exercise and enjoyment of rights, including but not limited to their right freedom of religion.

#### **3.2.1. General Principles**

Peleg emphasizes that both the State as well as individuals “who make decisions that affect lives and rights of the children” must implement the rights and principles mentioned in the UNCRC in line with the four general principles.<sup>153</sup> The four general principles are the following

- a) Right to non-discrimination (Article 2)<sup>154</sup>;
- b) Principle of the best interests as the primary consideration (Article 3)<sup>155</sup>;
- c) Right to life, survival and development (Article 6)<sup>156</sup>; and
- d) Right to participation (Article 12)<sup>157</sup>.

#### **3.2.2. Right to non-discrimination**

According to Article 2(1) of the UNCRC, the States must respect and ensure the right to non-discrimination to each child within their jurisdiction.<sup>158</sup> In addition, it also mentions various grounds of discrimination that the child must be protected from. In the context of caste-based discrimination, it is important to examine some aspects of Article 2 of the UNCRC. The plain reading of Article 2 indicates that it not just protects the children from discrimination based on their status but also goes a step further, to protect any kind of discrimination based on their parent’s or legal guardian’s status. Additionally, two other grounds mentioned in Article 2 include social origin status and birth status. A caste of a child is “hereditary” i.e., a child’s caste is determined by the caste of the parents.<sup>159</sup> Thus, though Article 2, UNCRC does not include the word “caste”, it must be taken to mean that it protects the children from any kind of discrimination against caste.

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<sup>151</sup> Asia Centre for Human Rights, ‘Status of Children in India - An Alternate Report to the UNCRC on India’s First Periodic Report,’ (2003), 9, 36-37 <<https://resourcecentre.savethechildren.net/pdf/2175.pdf>> accessed 8 July 2023,

<sup>152</sup> Anti-conversion laws, The Hindu, New Delhi, 17 December, 2002 in Ibid, 37.

<sup>153</sup>N Peleg, International Children’s Rights Law: General Principles. in U Kilkelly and T Liefwaard (eds), International Human Rights of Children (Springer Publishers 2018)), 135-157, 139.

<sup>154</sup> UNCRC, Article 2.

<sup>155</sup> Ibid, Article 3(1).

<sup>156</sup> Ibid, Article 6.

<sup>157</sup> Ibid, Article 12.

<sup>158</sup> Ibid, Article 2(1).

<sup>159</sup> See Chapter 2.

It must be noted here that the Indian State does not recognize caste-based discrimination as a form of discrimination based on “birth” or “descent” status. This is evidenced in India’s interaction with the Committee on the Elimination of Racial discrimination. The Committee on the Elimination of Racial Discrimination has recognized that any caste-based discrimination is a form of racial discrimination based on descent under Article 1(1), CERD.<sup>160</sup> This has also been re-emphasized in General Recommendations of CERD as well.<sup>161</sup>

India has strong constitutional provisions to protect all persons, including children against discrimination based on caste.<sup>162</sup> Despite constitutional and legal protection against caste-based discrimination and the criminalisation of its worst manifestations, caste-based stigmatization, discrimination and violence continue to happen even in present-day India.<sup>163</sup> The CRC Committee urges the States to ensure that all children are afforded equal respect and protection and “to diminish or eliminate conditions that result in direct or indirect discrimination (...) on any grounds.”<sup>164</sup> The CRC Committee has also recommended the Indian State to “systematically involve parliamentarians, community and religious leaders” in its programmes and measures “to eradicate the customs and traditions” that impede the full implementation of the UNCRC.<sup>165</sup> The CRC Committee has mentioned that, in line with Article 17 of Indian Constitution and Article 2 of the UNCRC, India must take *all* necessary steps “to abolish (...) untouchability, prevent caste-motivated abuse and prosecute State and private actors” who contribute to such practices.<sup>166</sup> In India, it can be observed that influential members, including “religious leaders, caste Panchayat members, locally elected representatives” also reinforce traditional norms.<sup>167</sup> They also look down upon adolescents who disobey such traditional norms and practices or “deliberately overlook” caste based practices.<sup>168</sup> Practices like caste-based child marriages, propagated by dominant members of the community,<sup>169</sup> are sometimes not in conformity with the beliefs of those adolescents who are subjected

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<sup>160</sup> International Convention on the Elimination of All Forms of Racial Discrimination, (adopted on 21 December 1965) 660 UNTS 195 (CERD), art 1(1).

<sup>161</sup> The Committee emphasizes that “discrimination based on “descent” included discrimination against the members of communities based on forms of social stratification such as caste.” Source: UN Committee on the Elimination of Racial Discrimination (CERD), CERD General Recommendation XXIX on Article 1, Paragraph 1, of the Convention (Descent), 1 November 2002, Preamble, para 1(a), 4(a).

<sup>162</sup> See Section 3.2.1

<sup>163</sup> A Waughray, 'Caste Discrimination and Minority Rights: The Case of India’s Dalits' [2010] 17(2) International Journal on Minority and Group Rights 327-353, 328-339.

<sup>164</sup> CRC Committee, ‘General comment No. 20 (2016) on the implementation of the rights of the child during adolescence’ (6 December 2016) CRC/C/GC/20 (GC 20) para 21;

<sup>165</sup> CRC Committee, ‘Concluding Observations of the Committee on the Rights of the Child: India’ (26 February 2004) CRC/C/15/Add.228, para 24(b).

<sup>166</sup> Ibid, paras, 28 & 31.

<sup>167</sup> UNICEF and National Institute for Urban Affairs, ‘Children and Adolescents in Urban India: Scale and Nature of Deprivation’ (April 2020), <<https://www.unicef.org/india/media/4421/file/Children%20and%20Adolescents%20in%20Urban%20India%20.pdf>> accessed 8 July 2023, pg 35

<sup>168</sup> Ibid.

<sup>169</sup> UNICEF Delhi, and S. J. Jejeebhoy, Ending Child Marriage in India: Drivers and Strategies, (2019) <<https://www.unicef.org/india/media/2556/file/Drivers-strategies-for-ending-child-marriage.pdf>> accessed 8 July 2023

to such practices. Consequently, such adolescents deviate from these diktats, thereby earning the ill-will and wrath of the community.

Children belonging to lower castes suffer from various instances of exclusion and discrimination.<sup>170</sup> For example, “structural discrimination” in schools violates the right to education of children. Though the right to free and compulsory education for children between the ages of 6 and 14 years is been guaranteed by the Constitution of India<sup>171</sup>, the drop-out rates amongst the Scheduled Caste children remain consistently high.<sup>172</sup> In addition, there have been discriminatory practices in schools against lower caste children.<sup>173</sup> For example, there are multiple instances where lower caste children are made to sit separately in the back of the classroom<sup>174</sup> and in school ceremonies<sup>175</sup>, and are discriminated in accessing water<sup>176</sup> and food facilities.<sup>177</sup> Teachers, school administrators and even other children treat the children belonging to lower caste groups unequally.<sup>178</sup> This often leads to the “effective exclusion (of the children) from school.”<sup>179</sup> A study indicates that the children belonging to lower castes have been often subjected to more corporal punishments in schools as compared to higher caste children.<sup>180</sup> There have been instances where the lower caste members, especially Dalits, are made to clean the toilets in schools.<sup>181</sup> The discriminatory environment in schools, as well as within the community - where the

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<sup>170</sup> NS, Sabharwal, ‘Dalit Children in Rural India: Issues Related to Exclusion and Deprivation’, (Indian Institute of Dalit Studies 2019); Swadhikar – National Campaign on Dalit Human Rights, ‘Status of Dalits in India: Children and Women & Access to Water and Sanitation’ (Equity Watch 2014), 16-20.

<sup>171</sup> Indian Constitution, Article 21A; Parliament of India, Right of Children to Free and Compulsory Education Act, 2009, Act No. 35 of 2009.

<sup>172</sup> CRC Committee, ‘Concluding Observations on the combined third and fourth periodic reports of India’ (7 July, 2014) CRC/C/IND/CO/3-4, para 71; Concluding Observations: India 228 (n 165), para 56; CERD Committee, ‘Concluding Observations of the Committee on the Elimination of Racial Discrimination: India’ (5 May 2007) CERD/C/IND/CO/19, para 25; Asia Dalits Rights Forum, ‘Progress towards Inclusive Sustainable Development in India: A Study of Dalits and Adivasis’, (2017), 16 <<http://www.ncdhr.org.in/wp-content/uploads/2018/12/293284207ADRF-report-for-web.pdf>> accessed 8 July 2023

<sup>173</sup> Human Rights Watch, ‘Access to education’ in ‘Report for the United Nations World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance, Caste Discrimination: A Global Concern’ (September 2001) <https://www.hrw.org/reports/2001/globalcaste/> accessed 8 July 2023

<sup>174</sup> CO 3-4, para 72(d), Swadhikar 2014 (n 170), 18.

<sup>175</sup> Swadhikar 2014 (n 170), 18.

<sup>176</sup> Ibid,

<sup>177</sup> Ibid.

<sup>178</sup> See Ibid; UNICEF South Asia, ‘Violence Against Children in Education Settings in South Asia’ (2016), 22-24 <<https://www.unicef.org/media/66581/file/Violence-against-children-in-education-settings-in-SouthAsia.pdf>> accessed 8 July 2023; Human Rights Watch, ‘“They Say We’re Dirty”: Denying an Education to India’s Marginalized’ (2014), <<https://www.hrw.org/report/2014/04/22/they-say-were-dirty/denying-education-indias-marginalized>> accessed 8 July 2023

<sup>179</sup> Swadhikar 2014 (n 170), 18.

<sup>180</sup> V Dehadray, ‘Discrimination Faced by the Socially Disadvantaged Students with Respect to Corporal Punishment’ [2019] 11(2) Contemporary Voice of Dalit 210-218; Child Rights International Network, ‘Discrimination: Briefing on Dalits and Caste System’ (2009) <https://archive.crin.org/en/library/publications/discrimination-briefing-dalit-and-caste-system.html> accessed on 9 July 2023 ; Swadhikar 2014 (n 170), 18.

<sup>181</sup> Swadhikar 2014 (n 170), 18.; Asia Centre for Human Rights, (2003), Supra note; ‘Denying an Education to India’s Marginalized’ (Deccan Herald, 2015) <<https://www.deccanherald.com/content/460735/over-73-pc-govt>>

prejudicial societal beliefs “often lead to objections and harassment by dominant communities”<sup>182</sup> - result in “increased dropout rates, irregular attendance and passive participation”.<sup>183</sup>

There have not been any dedicated programmes or training of the teachers to abolish these discriminatory practices in school. In fact, there is no general guidance or awareness among parents to end any discriminatory practice in schools to promote equal education or to end caste-based practices.<sup>184</sup> Specific programmes and measures taken by India are clearly not sufficient to address decreasing the drop-out rates among the lower caste children.

As mentioned by the CRC Committee, the right to non-discrimination is not merely a “passive obligation” where all forms of discrimination are prohibited by law,<sup>185</sup> but is a requirement for the State to take “proactive measures (...) to ensure equal opportunities for all children.”<sup>186</sup> This would be in line with the best interests principle as well.<sup>187</sup> The measures in India are not proactive enough to abolish the practice of discrimination.

### **3.2.3. Right to life, survival and development**

The children’s right to life, survival and development is enshrined in Article 6, UNCRC. Childhood is a phase of life where one develops life-long beliefs and identity.<sup>188</sup> The role as well as the concept of one’s position in the society comes “from everyday experiences, conversations and behaviours with caregivers, the stories we are exposed to and peer interactions.”<sup>189</sup> The right of the child to be free from discrimination is crucial to that child’s well-being, survival and development.<sup>190</sup>

Any practice that hinders a child’s development and their ability to reach their full potential is considered harmful in nature.<sup>191</sup> The practices which are grounded in discrimination of any kind have negative impact on one’s “dignity, physical, psychosocial and moral integrity and development.”<sup>192</sup> Caste-based

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schools.html> accessed 8 July 2023; Terres des Homes India Programme, ‘Children’s Alternate Report to UNCRC’, 4, 7 <[https://childrightsconnect.org/wp-content/uploads/gravity\\_forms/57-372cd51d8b8d5302d939d3212163e38e/2018/08/CCRTH\\_IN66.pdf?gv-iframe=true](https://childrightsconnect.org/wp-content/uploads/gravity_forms/57-372cd51d8b8d5302d939d3212163e38e/2018/08/CCRTH_IN66.pdf?gv-iframe=true)> accessed 9 July 2023

<sup>182</sup> Centre for Equity Studies, ‘India Exclusion Report: 2013-2014’ (2014), 55 <https://idsn.org/wp-content/uploads/2014/12/IndiaExclusionReport2013-2014.pdf> accessed 8 July 2023

<sup>183</sup> Swadhikar 2014 (n 170), 18.; See, Ibid 55-66.

<sup>184</sup> Swadhikar 2014 (n 170), 184.

<sup>185</sup> CRC Committee, ‘General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)’ (29 May 2013) CRC /C/GC/14, para 41.

<sup>186</sup> Ibid.

<sup>187</sup> Ibid.

<sup>188</sup> UNICEF, ‘Rights denied - The impact of discrimination on children’ (November 2022), 11 <<https://www.unicef.org/media/130801/file/rights-denied-discrimination-children-EN.pdf>> accessed 8 July 2023

<sup>189</sup> Ibid.

<sup>190</sup> Ibid, 5-6.

<sup>191</sup> CRC Committee and CEDAW Committee, ‘Joint general recommendation/general comment No. 31 of the Committee on the Elimination of Discrimination against Women and No. 18 of the Committee on the Rights of the Child on harmful practices’ (14 November, 2014) CEDAW/C/GC/31/CRC/C/GC/18, para 16 (b)

<sup>192</sup> Ibid, para 15.

discrimination affects the “physical, psychological and emotional well-being” of an individual.<sup>193</sup> Stigmatized identity based on caste imposed on a child from a very young age can become a barrier to have a healthy process of growth. Children of the lower caste communities in India have suffered from mental abuse due to discrimination, humiliation, threats, assaults and abuses.<sup>194</sup> This is not just in violation of Article 6 but also Article 19, UNCRC<sup>195</sup>, which protects the children from all forms of exploitation.

It is the Dalits who are predominantly involved in manual scavenging, a practice still prevalent in India, despite there being laws against it. Due to the persistence of rigid caste hierarchy as well as discrimination, the children of manual scavengers are also forced to enter the same occupation.<sup>196</sup> A recent study indicates that emptying of latrines are carried out certain specific caste groups, contributing to the perpetuation of historical biases towards certain castes.<sup>197</sup> As Peleg points out, the children’s right to development must enable them “to have as many options as possible for living her life”<sup>198</sup> and he suggests an intersectional approach to the right to development which requires acknowledging the children’s “social categories of exclusion.”<sup>199</sup> Applying the intersectional approach here, the lack of awareness or empowerment of children belonging to lower caste can be seen to seriously limit their right to development under Article 6 of the UNCRC. In addition, as held by the Supreme Court of India, the term “life” in the right to life is “not mere animal existence”<sup>200</sup> but a life with human dignity. However, data indicate that reformation of members of the community engaged in the business of manual scavenging has left much to be desired.<sup>201</sup>

The right to development of the child under Article 6 includes “physical, mental, moral, spiritual and social dimensions of the development.”<sup>202</sup> There have been instances where children belonging to higher castes have killed a lower caste member for marrying a woman of their caste<sup>203</sup>, reflecting a deep-entrenched caste bias in young minds. The indoctrination of caste in young minds, fuelled by regressive acts of various actors, including parents and community, severely restricts a children’s right to develop “to their fullest potential.”

### **3.2.4. Right to Best Interests as Primary Consideration and Right to be Heard**

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<sup>193</sup> CRC Committee, ‘UN Committee on the Rights of the Child: Concluding Observations, Nepal’ (21 September 2005), CRC/C/15/Add.261, 36.

<sup>194</sup> Swadhikar 2014 (n 170), 10.

<sup>195</sup> UNCRC, Article 19.

<sup>196</sup> Navsarjan, Voices of Children of Manual Scavengers – A survey based on interviews with 1,048 children between the ages of 6 and 17 in the state of Gujarat, (2009) in Swadhikar 2014 (n 170), 21.

<sup>197</sup> Study by Interational Initiative for Impact Evaluation in UNICEF Delhi and others, (n 169)

<sup>198</sup> N Peleg, A New Framework for Analysing the Child’s Right to Development. in N Peleg (ed), The Child’s Right to Development (Cambridge University Press 2019) 205.

<sup>199</sup> Ibid, 204.

<sup>200</sup> Supreme Court of India, Kharak Singh v. State of Uttar Pradesh, 1964 SCR (1) 332.

<sup>201</sup> Navsarjan, (n 196)..

<sup>202</sup> CRC Committee, ‘General comment No. 15 (2013) on the right of the child to the enjoyment of the highest attainable standard of health (art. 24)’ (17 April 2013) CRC/C/GC/15, para 16; CRC Committee, ‘General comment No. 7 (2005): Implementing child rights in early childhood’ (1 November 2005) CRC/C/GC/7, para 10.

<sup>203</sup> UNICEF and National Institute for Urban Affairs 2020 (n 167) 221.

Article 3(1) of the UNCRC provides that “in all actions considering children, (...) the best interest of the child shall be a primary consideration.” The principle of the best interest is a substantive right, an interpretative legal principle and procedural rule which applies to children, individually as well as in a group.<sup>204</sup> It has been recommended by the CRC Committee to “develop procedures and criteria to provide guidance (...) for determining the best interests of the child in every area and for giving those interests due weight as a primary consideration.”<sup>205</sup> In addition, such procedures and criteria must be disseminated not just to various organs of the State but also to “public and private social welfare institutions, as well as traditional and religious leaders and the public at large.”<sup>206</sup> In India, though the principle is gaining ground, the application of the principle of best interests is mostly limited. The principle is mostly used in family law cases, especially in cases involving the separation of parents<sup>207</sup> and has been incorporated in recent legislations in India.<sup>208</sup>

One of the most innovative provisions of the UNCRC i.e., the children’s right to be heard is intrinsically linked to both the right to the consideration of best interests<sup>209</sup> under Article 3(1) and right to parental direction and guidance under Article 5, UNCRC.<sup>210</sup> The CRC Committee insists that the States have the obligation to “carefully listen to children’s views wherever their perspective can enhance the quality of solutions”<sup>211</sup> In addition, the Committee also insists that the children must be included even “in the social processes”<sup>212</sup> of their community and society. Article 12 is intended to include children as active members “in decision-making processes affecting them at all levels of society.”<sup>213</sup>

Children’s interaction with the caste system is through their parents. There is a historical and cultural legacy that children’s voice remains “unheard, silenced, ignored or at best interpreted.”<sup>214</sup> Caste based discriminatory practices are not seen as discriminatory in nature and more often than not, the children are indoctrinated into the system. Hinduism provides that every Hindu, including children must adhere to their caste obligation. Any child who might think differently cannot move out of the caste system until he/she is legally independent i.e., 18 years and sometimes, not even then. Article 12, the “lynchpin” of the UNCRC,<sup>215</sup> is not being implemented in India to the fullest, at the very least in relation to caste system.

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<sup>204</sup> UNCRC, General Comment No. 20, para 22; General Comment No. 14, para 6

<sup>205</sup> General Comment No. 20, para 36 (a)

<sup>206</sup> Ibid, para 36 (a)

<sup>207</sup> Government of India, India’s Periodic Report of India, 16<sup>th</sup> July (2003), CRC/C/93/Add.5, pg. 68. – proofread

<sup>208</sup> For example, The Juvenile Justice (Care and Protection) Act, 2015 and The Protection of Children from Sexual Offences Act, 2012.

<sup>209</sup> General Comment No. 14, para 43-45; General Comment No. 12; Joint General Comment No. 18, para 53;

<sup>210</sup> General Comment No. 12, para 84-85.

<sup>211</sup> Ibid, para 27

<sup>212</sup> Ibid.

<sup>213</sup> L Lundy, J Tobin and others, Article 12 The Right to Respect for the Views of the Child. in J Tobin and P Alston (eds), The United Nations Convention on the Rights of the Child: A Commentary (Oxford University Press 2019), 398; See Ibid, para 9.

<sup>214</sup> A Bajpai, Making Child Rights a Reality. in A Bajpai and J Williams (eds), Child Rights in India: Law, Policy, and Practice (Oxford University Press 2017) 456.

<sup>215</sup> M Freeman, 'Whither Children: Protection, Participation, Autonomy?' [1994] 22(3) Manitoba Law Journal 307-327, 319



### **3.2.5. Right to Parental Direction**

In UNCRC, the right to freedom of religion is guaranteed under Article 14<sup>216</sup> and it also emphasized the children's right to parental direction in religious upbringing. Article 5, UNCRC deals with right to parental direction in enabling them to exercise their rights. The right to parental direction or guidance is not explicitly mentioned anywhere in the Constitution or any other statutes of India. The Committee had expressed concerns that the Indian law "does not allow children to choose a religion different from that of (their) parents"<sup>217</sup> and recommended that all appropriate measures must be taken so that a child enjoys the freedom of religion, "regardless of his or her parents' religion."<sup>218</sup> It must be the child who exercises the right of freedom of religion and not the parents.<sup>219</sup>

The Supreme Court of India, in the case of *Bijoe Emmanuel & Ors. V. State of Kerela & Ors*<sup>220</sup>, dealt with the freedom of religion for children in India. The Court held that the expulsion of children for not singing the national anthem as they held conscience religious belief was violative of Article 25, Indian Constitution which guarantees the right to freely practice a religion for all persons, including children. This landmark case law has upheld that even children have the right to freedom of religion. However, there have not been more discussions on the scope of parental rights in the religious upbringing of the children. In the case of *AP Christians Medical Educational Society v. Government of Andhra Pradesh & Anr.*<sup>221</sup>, parents' expectations of their children to grow up in an environment conducive to their religious convictions were briefly discussed. However, the discussion was only with respect to minority religious rights and not religious rights in general. Moreover, the minimum age for choosing a religion or attending religious school teachings has not been mentioned in any national legislation.<sup>222</sup>

Therefore, it can be seen that the children in India are assumed to opt for the same religion as that of their parents and there is no provision enabling the children to exercise their right to parental guidance or religious in line with the their evolving capacities with respect to right to freedom of religion or any other rights.

### **3.3. Conclusion**

The constitutional and legal provisions "serve only to mask the social realities of discrimination."<sup>223</sup> The CRC Committee acknowledges that India is a multicultural society and the existence of traditional customs, including the caste system, and societal attitudes is "an obstacle to efforts to combat discrimination."<sup>224</sup> The Supreme Court has also noted that the caste system is "a curse" on the nation

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<sup>216</sup> See Chapter V.

<sup>217</sup> CO India 3-4, para 45.

<sup>218</sup> CO India 3-4, para 46.

<sup>219</sup> General Comment No. 20, para 43.

<sup>220</sup> AIR 1987 SC 748.

<sup>221</sup> AIR 1986 SC 1490, para 9.

<sup>222</sup> India's Periodic Report 2003 (n 207) 64, Table 2.1.

<sup>223</sup> Human Rights Watch, 'Broken People (Summary)' <https://www.hrw.org/report/1999/03/01/broken-people>, accessed 9 July 2023

<sup>224</sup> CRC, India, Add.115, para 9

and it is crucial to abolish the system for the smooth functioning of the rule of law and democracy in India.<sup>225</sup>

The implementation of other legal protections under PCA, 1955 and POA, 1989 has also been ineffective.<sup>226</sup> The Statistics of the National Crime Records Bureau do not show any significant decline in the atrocities against the lower caste members.<sup>227</sup> Moreover, there is a high pendency of cases under PCRA and POA and also, high acquittal rates.<sup>228</sup> To date, there has been no country-wide data collection in order to assess the magnitude of problems arising out of caste-based discrimination.<sup>229</sup> There have been many policy initiatives for social development of the lower caste members, including children, albeit with poor implementation.<sup>230</sup> One of the major problems is the lack of coordination among various departments and commissions. For example, the NCPCR does not function effectively and has poor coordination mechanisms with different ministries and commissions, including NCSC and NCBC.<sup>231</sup>

The coexistence of statutory laws with traditional customary laws and practices “often contributes to the persistence of the practice.”<sup>232</sup> This is the case in India and the caste system. It may be impossible to eradicate the whole system of caste; however, there is a need for heightened awareness of rights and needs of the children across the whole society which would result in the change in the attitudes and perception of both the rights of the children and the perils of the caste system.

From the above discussion, it can be witnessed that though there are laws against the caste-based discriminatory practices, those practices are deeply entrenched to that level where it continues to exist in various parts in varying degrees. The analysis of the laws in comparison with the four general principles indicate that though the law in India has a preventive intent of any kind of discrimination based on caste, the legal awareness of the community is low, while the wilful ignorance among members of the society is quite high.<sup>233</sup> Human rights violations and atrocities against lower caste members, including children continue to persist. This indicates that although, in India, there may not be any *de jure* discrimination, there certainly is *de facto* discrimination. With regards to the child’s right to parental direction and guidance in a ‘manner consistent with the evolving capacities of the child’, the law, as well as the judicial precedents in India, is silent on the matter. The laws are also silent on the parents’ role in the religious upbringing of the children.

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<sup>225</sup> Supreme Court of India, *Arumugam Servai v. State of TN* (2011) 6 SCC 405, para 17; Supreme Court of India, *State of UP v. Ram Sajivan*, (2010) 1 SCC 528, para 1.

<sup>226</sup> Swadhikar 2014 (n 170), 10.

<sup>227</sup> National Crime Records Bureau reports in *Ibid.*

<sup>228</sup> Swadhikar 2014 (n 170), 11.

<sup>229</sup> *Ibid.*, 16.

<sup>230</sup> *Ibid.*

<sup>231</sup> *Ibid.*

<sup>232</sup> Joint GC 18, para 27.

<sup>233</sup> Swadhikar 2014 (n 170), 10.

## 4. Navigating children's right to freedom of religion in the context of the Indian Caste System

The relationship between children and religion is quite complex as the actors involved are not merely children and the State but also include parents and religious communities.<sup>234</sup> This is true in the case of Hindu caste system as well. Children don't have the choice of caste. Caste is determined by 'birth' and it is the same as that of the parents.<sup>235</sup> Children who are born in a specific caste are brought up within the same caste by the parents and are exposed to the caste rituals, ceremonies, customs and even discrimination through their parents and other members of the caste community. Therefore, we can see that there are actors other than the child himself/herself who are involved in the religious growth of the child in the specific caste. A child, while growing up, might want to get out of a caste or the whole caste system and might want to follow any religious practice he/she wishes to or none at all. In such a case, the question here is whether the child rights framework embedded in the UNCRC provides enough guarantee for the child to receive appropriate direction and guidance needed for them to exercise their rights, including their right to freedom of religion (and in extension, the right to come out of caste). In this chapter, the author will critically analyse the children's right to freedom of religion in Article 14(1) and the parental right to provide direction embedded in Article 5 and Article 14(2) in the context of Indian caste system.

As a starting point, it is important that we explore the children's right to appropriate direction and guidance enshrined in Article 5 of the UNCRC as the right is chronologically first addressed, in the general sense, and then in Article 14(2) in the context of freedom of religion.<sup>236</sup>

### 4.1. Navigating through Article 5 of the UNCRC

Article 5 of the UNCRC provides that the States are obligated to "respect the responsibilities, rights and duties" of the parents and other care-givers, including extending family and community, "to provide (...) appropriate direction and guidance" in line with the children's evolving capacities.<sup>237</sup> Article 5 is a unique provision and it has no parallels in any other human rights instruments.<sup>238</sup> One of the two novel and underpinning principles of the UNCRC is the principle of evolving capacities and the other is the best interests principle.<sup>239</sup>

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<sup>234</sup> S Langlaude, 'Children and Religion under Article 14 UNCRC: A Critical Analysis' [2008] 16(4) International Journal of Children's Rights 475-504, 476.

<sup>235</sup> See Chapter II.

<sup>236</sup> It must be noted that in the legislative history of the UNCRC, the principle of evolving capacity as well as the right to parental guidance and direction were first discussed in the context of the freedom of religion. The discussion of the drafting of Article 5 happened later.

<sup>237</sup> UNCRC, Article 5

<sup>238</sup> J Tobin and S Varadan, Article 5 : The Right to Parental Direction and Guidance Consistent with a Child's Evolving Capacities. in J Tobin and P Alston (eds), *The United Nations Convention on the Rights of the Child: A Commentary* (Oxford University Press 2019), 159-185, 159.

<sup>239</sup> G Van Bueren, The definition and status of the child in International Law. in G Van bueren (ed), *The International Law on the Rights of the Child* (Martinus Nijhoff Publishers 1995) 32-66, 46

Though children are dependent on their parents in early childhood, their capacities, including physical, cognitive, social and moral capacities, evolve as they grow older.<sup>240</sup> This stage of ‘dynamic self-determinism’<sup>241</sup> is recognized by Article 5 of the UNCRC which emphasizes the role of the parents or other care-givers to provide appropriate guidance and direction in conformity with the children’s evolving capacity. Tobin and Varadan stressed that the concept of evolving capacities of the child is “an affirmation that all children have a right to exercise their rights irrespective of their age, and as they grow and mature, they become entitled to an increasing level of responsibility, agency and autonomy on the exercise of those rights.”<sup>242</sup>

The State’s obligation under Article 5 mandates the State to refrain from taking unlawful or arbitrary measures.<sup>243</sup> In addition, the States must take measures to protect the children’s right to get parental guidance based on their evolving capacities from the interference of non-State actors.<sup>244</sup> The non-state actors referred here include parents themselves and other persons who might provide guidance, contrary to the “appropriate” direction and guidance.<sup>245</sup> It is important that the States ensure that they develop laws, policies and programmes, including awareness programs.<sup>246</sup> In the absence of such awareness raising measures, the right under Article 5, could be easily overlooked.<sup>247</sup>

From the reading of Article 5, it can be seen that not only the children’s evolving capacities are recognized but it also places the obligation on the parents to recognize such evolving capacities.<sup>248</sup> Article 5 indicates that the parents ought to play “an intimate and ongoing role in enabling children to enjoy their rights.”<sup>249</sup> The term “appropriate” is used to describe any direction or guidance to be given by the parent. Though the term is not defined, it implies that the parents or caregivers do not have unlimited discretion “to provide *any* type of direction for the child.”<sup>250</sup> For the nature of parental guidance to be “appropriate”, it must be in conformity with the whole Convention.<sup>251</sup> The State parties are also under an obligation to ensure that the parental right is exercised in line with the whole Convention.<sup>252</sup> The CRC Committee, in General Comment No. 7 and General Comment No. 20 has emphasized that the recognition of the evolving capacities of the children must “be seen as a positive and enabling process” rather than as “an excuse for authoritarian practices” to restrict their autonomy.<sup>253</sup> The General Comment

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<sup>240</sup> Tobin and Varadan 2019 (n 238), 160

<sup>241</sup> J Eekelaar, ‘The Emergence of Children’s Rights’ [1986] 6(2) Oxford Journal of Legal Studies 161-182, 162 in *Ibid.*

<sup>242</sup> Tobin and Varadan 2019 (n 238), 178

<sup>243</sup> *Ibid.*, 164

<sup>244</sup> *Ibid.*, 163

<sup>245</sup> *Ibid.*

<sup>246</sup> *Ibid.*

<sup>247</sup> *Ibid.*, 165.

<sup>248</sup> *Ibid.*, 170.

<sup>249</sup> *Ibid.*, 176

<sup>250</sup> Van Bueren 1995 (n 239), 50.

<sup>251</sup> CRC Committee, ‘General Comment No. 8 (2006): The Right of the Child to Protection from Corporal Punishment and Other Cruel or Degrading Forms of Punishment (Arts. 19; 28, Para 2; and 37, inter alia)’ (2 March 2007) CRC/C/GC/8, para 28.

<sup>252</sup> Van Bueren 1995 (n 239), 50.

<sup>253</sup> General Comment No. 7, para 17; See General Comment No. 20, para 18.

No.7 emphasizes that “Article 5 contains the principle that parents have the responsibility to continually adjust the levels of support and guidance they offer to a child”<sup>254</sup> The Committee has also recognized the role of extended family or community in the achievement of holistic children’s rights<sup>255</sup> and has stressed that the role of these members in “care, nurturance and development” of the child, must be “consistent with children’s rights and best interests.”<sup>256</sup>

#### **4.1.1. Critical Analysis of Article 5, UNCRC in the context of caste system**

Though the inclusion of Article 5 is a movement away from the doctrine of *patria potestas*<sup>257</sup>, it has its limitations. The UNCRC is silent on how to ensure that the right to appropriate direction and guidance under Article 5 can be realized without any kind of compromise. There is no clarity on the best ways to develop or design legal or policy measures to implement Article 5 of the UNCRC.

Incorporation of the principle of evolving capacity indicates that the children must be enabled gradually in order “to take responsibility for different areas of their own lives.”<sup>258</sup> When the evolving capacity principle is given enough consideration, it amounts to a “holistic” child rights approach where the emphasis is placed on the “strength and resources of the child (...) and all social systems of which the child is a part” like the family, community and religious systems.<sup>259</sup> Van Buren points out a problem in the implementation of this principle in UNCRC. It is unclear in the Convention whether children have “a right of action against their parents for failing to provide ‘appropriate direction and guidance’”<sup>260</sup> As McGoldrick apprises, the agents who ought to provide “appropriate direction and guidance” to the child “may well have an interest (...) in ensuring that the children does not exercise its rights.”<sup>261</sup>

The understanding and the scope of the application of Article 5 has not been static since the adoption of the UNCRC. Rather, it has been evolving like the capacities of the children themselves.<sup>262</sup> However, the CRC Committee’s approach has been minimal in referencing Article 5 of the Convention in the Concluding Observations,<sup>263</sup> including Concluding Observations on the India’s Periodic Reports.<sup>264</sup> The Committee has dealt with Article 5 in a general manner and its approach to the Article seems to lack detailed analysis of the meaning and application of the principle of evolving capacities in order to

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<sup>254</sup> Ibid, para 17.

<sup>255</sup> Ibid, para 15.

<sup>256</sup> Ibid.

<sup>257</sup> Tobin and Varadan 2019 (n 238), 167

<sup>258</sup> Van Bueren, 1995 (n 239), 50.

<sup>259</sup> CRC Committee, ‘General comment No. 13 (2011): The right of the child to freedom from all forms of violence’ (18 April 2011) CRC/C/GC/13, para 59.

<sup>260</sup> Van Bueren, 1995 (n 239), 50.

<sup>261</sup> McGoldrick, ‘The United Nations Convention on the Rights of the Child’ (1991) 5 International Journal of Law and Family, 132, 138 in S Varadan, Article 5 of the UN Convention on the Rights of the Child: parental guidance and the evolving capacities of the child (Meijers-reeks 2022), 15.

<sup>262</sup> E Sutherland, ‘The Enigma of Article 5 of the United Nations Convention on the Rights of The Child’ [2020] 28(3) International Journal of Children’s Rights 447-470, 468.

<sup>263</sup> Varadan 2022 (n 261), 15.

<sup>264</sup> In all three Concluding Observations on India’s Periodic Reports, there has been no mention of the principle of evolving capacities.

exercise other rights.<sup>265</sup> Varadan emphasizes the need for the CRC Committee to an “explicit acknowledgement (...) of the principle of evolving capacities within the framework of the CRC”.<sup>266</sup>

The recognition of the evolving capacities principle has the potential “to transform how we view, enable and empower children's agency” in order to fully realize the rights of the children.<sup>267</sup> Applying this “umbrella principle”<sup>268</sup> to the Indian caste system, ideally a child, irrespective of the caste, should be able to navigate out of caste as he or she gains autonomy over the years, provided that the parents enables such an autonomy in line with the evolving capacity of the child. As mentioned earlier, the parents also play a significant role in exposing the child to a specific caste and the caste practices. Unless the application of the principle of evolving capacities is clarified by the Committee, the discretion largely rests on the hands of the parents on the application of the evolving capacity, especially in a rigid phenomenon like caste. Moreover, in India, a strong perception persists that the children do not have the capacity to think or to make any decisions on their own.<sup>269</sup> Perhaps, owing to its lack of clarifications, the principle of evolving capacities of the UNCRC has little or no impact in weakening the perpetuation of the Indian caste system and caste-based biases that the children are exposed to.

#### **4.2. Caste system – in the lens of Article 14 of the UNCRC**

The right to freedom of thought, conscience and religion and the freedom to manifest one's religion is a fundamental human right that is widely recognized and protected in international treaties.<sup>270</sup> Article 14(1), UNCRC provides that the States have the obligation “to respect the right of the child to freedom of thought, conscience and religion.”<sup>271</sup> The plain reading of the Article indicates that a child has an absolute right to freedom of religion. However, Article 14(2) provides that the States must also respect the “rights and duties of the parents (...) to provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacity of the child.”<sup>272</sup> Therefore, it can be seen that the children are not given full autonomy in religion in the UNCRC.<sup>273</sup> This parental right and duty mentioned in Article 14(2) is must be interpreted as an “accessory to a right of the child”<sup>274</sup> and as Eva Brems emphasizes, it is definitely a “paradigm shift”<sup>275</sup> from the authoritarian approach towards religion of the children.

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<sup>265</sup> Tobin and Varadan 2019 (n 239), 181; S. Varadan, ‘The Principle of Evolving Capacities under the UN Convention on the Rights of the Child’ (2019) 27(2), 306-338, 331-332.

<sup>266</sup> Varadan 2022 (n 261), 89

<sup>267</sup> Ibid, 90

<sup>268</sup> Van Bueren, 1995 (n 239), 50.

<sup>269</sup> Bajpai 2017 (n 214), 456.

<sup>270</sup> UNCRC, Article 14; ICCPR, Article 18; UDHR, Article 18

<sup>271</sup> UNCRC, Article 14(1).

<sup>272</sup> UNCRC, Article 14(2).

<sup>273</sup> W Vandenhoele, GE Türkelli and S Lembrechts Article 14: Freedom of Thought, Conscience and Religion.

in Vandenhoele and others (eds), *Children's rights : a commentary on the convention on the rights of the child and its protocols* (Edward Elgar Publishing 2019) 171.

<sup>274</sup> E Brems, Article 14: The right to freedom of thought, conscience and religion in *United Nations Convention on the Rights of the Child* (Nijhoff Publishers 2006) 5.

<sup>275</sup> Ibid, 1.

#### **4.2.1. A Brief History of Article 14**

The children's right to religious freedom recognized in the UNCRC was one of the Articles that was subjected to extensive debate during the drafting stage.<sup>276</sup> During the end of the first reading, the draft article on religion expressly guaranteed to children "the freedom to have or adopt a religion or belief of their choice".<sup>277</sup> However, there was a lack of consensus in the second reading and it was due to the fact that the practice varies across different religions.<sup>278</sup> For example, some of the Islamic States argued that the child choosing the religion of her father is regarded to be in one's best interests.<sup>279</sup> There was a stark division between those States that insisted on parents raising their children based on their own convictions and those States that mentioned that the children must be allowed to exercise the freedom to choose the religion of their choice.<sup>280</sup> In order to strike a balance between the children's rights and the parental rights, the drafters seem to have compromised by recognizing parental rights but in way that it is "consistent with the evolving capacity of the child(ren)."<sup>281</sup>

##### **4.2.1.1. A Step away from Article 18, ICCPR**

UNCRC was not the first international instrument that discussed children and their religion. Before the adoption of the Article 14, UNCRC, it was the ICCPR that addressed the religion of the child. There are marked differences between Article 18, ICCPR and Article 14, UNCRC. Unlike 18(1), the specific right to "adopt and manifest religion or belief" is omitted in Article 14.<sup>282</sup> Article 14 does not include the protection from coercion "which would impair his freedom to have or adopt a religion or belief of his choice."<sup>283</sup> Article 18(4) of the ICCPR indicates the right of the parent to ensure "the religious and moral education of their children in conformity with their own convictions."<sup>284</sup> It must be noted that similar provision, which provided that the "State parties shall equally respect the liberty of the child and the parents" with respect to religious and moral education, was included in the earlier version of Article 14 but was later omitted.<sup>285</sup> Article 18(4), ICCPR didn't recognize children as an "autonomous (right) bearers"<sup>286</sup> rather it placed the children's religion within the realm of the adult's rights.<sup>287</sup> In contrast,

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<sup>276</sup> R Ahdar and I Leigh, Families, Parents and Children. in R Ahdar and I Leigh (eds), Religious Freedom in the Liberal State (Oxford University Press 2013), 216

<sup>277</sup> United Nations Commission on Human Rights, E/CN.4/1988/WG.1/WP.1/Rev.1, Article 7bis (1) in Office of the United Nations High Commissioner for Human Rights, 'Legislative History of the Convention on the Rights of the Child: Volume 1' (New York: United Nations, 2007), 460

<sup>278</sup> G Van Bueren, The Right of the Child to Freedom of Thought, Conscience and Religion. in G Van bueren (ed), The International Law on the Rights of the Child (Martinus Nijhoff Publishers 1995), 157.

<sup>279</sup> Ibid.

<sup>280</sup> OHCHR 2007 (n 277), 462-464.

<sup>281</sup> Brems 2006 (n 271), 10-11.

<sup>282</sup> J Tobin and SL Doné, Art14 The Right to Freedom of Thought, Conscience, and Religion. in J Tobin and P Alston (eds), The United Nations Convention on the Rights of the Child: A Commentary (Oxford University Press 2019), 477.

<sup>283</sup> International Covenant on Civil and Political Rights (adopted 16 December 1966) 999 UNTS 171 (ICCPR)

<sup>284</sup> Ibid, Article 18(4)

<sup>285</sup> (n 277), Article 7bis (4)

<sup>286</sup> Brems 2006 (n 274), 1

<sup>287</sup> Ibid; McAdams also points out that ICCPR as well as the jurisprudence of the HRC emphasize the primacy of the view of parents, while both are silent on the circumstances when there would be conflict between the interests of the child and

Article 14(2) emphasized the duty of the parent to provide direction while placing a caveat that such direction must be “in a manner consistent with the evolving capacities of the child.” Thus, as Eva Brems points out, Article 14 of the UNCRC, like the other participatory rights in the UNCRC, is a significant step forward in the recognition of children as individual subjects of law.

#### **4.2.2. *Intrinsic relationship with other rights in the Convention***

Article 14 of the UNCRC is closely linked with other rights in the UNCRC. Some of them are as follows.

Article 8 of the UNCRC provides the right to preserve identity of the children.<sup>288</sup> As mentioned in General Comment No. 14, the identity of the child includes aspects of religion and beliefs as well as culture.<sup>289</sup> Another closely linked right is the right to freedom of expression under Article 13, UNCRC.<sup>290</sup> It was clearly mentioned in the Travaux préparatoires that the right under Article 14 extends to expression in the context of religion as well.<sup>291</sup> In the context of a hierarchical caste system, the rigid and immobile position of the child’s caste would also interfere with one’s right to information under Article 13, when a child is informed about other caste/religions or when the direction that is provided by the parents reflects biases towards another caste. In order to genuinely exercise the right to freedom of religion, it is important that they are “exposed to alternate views”<sup>292</sup> and information. Article 14 is also intrinsically linked with Article 12 that guarantees every child the right to participate “in all matters affecting them.”<sup>293</sup> For the effective realization of the children’s religious right under Article 14(1) and the right to parental direction under Article 14(2), it is important that views of the child are taken into consideration by the parents and given due weight in accordance with Article 12 of the UNCRC.

#### **4.2.3. *Obligations under Article 14, UNCRC***

Article 14(1) uses the phrase “shall respect”. The opinions about the tripartite terminology’s distinction have been on the rise and scholars indicate that “shall respect” means the States have negative obligation. Negative obligation means that the State have the obligation “not to actively interfere with the right”<sup>294</sup> From the Travaux préparatoires, it can be understood that the term “respect” was purposefully used, instead of the term “ensure”, which can be seen to mean that the State does not have any positive obligations to protect this right of freedom of religion.<sup>295</sup> However, the Guidelines for Periodic Reports requires the State to “indicate the measures adopted to ensure” the freedom under Article 14(1),

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parents. See M Mcadams, Freedom from Parents. in M Mcadams (ed), Freedom from Religion and Human Rights Law (Taylor & Francis Publications 2017) 115-142

<sup>288</sup> UNCRC, Article 8.

<sup>289</sup> General Comment No. 14, para 55.

<sup>290</sup> UNCRC, Article 13.

<sup>291</sup> S Detrick, A Commentary on the United Nations Convention on the Rights of the Child (Martinus Nijhoff Publishers 1999), 247.

<sup>292</sup> H Laughlotte, 'Freedom of Religion and Children' [1989] 3(1) Public Affairs Quarterly 75-87, 87.

<sup>293</sup> UNCRC Article 12.

<sup>294</sup> Brems 2006 (n 274), 10

<sup>295</sup> Ibid.



UNCRC.<sup>296</sup> This indicates that though they didn't use the word "ensure" in the UNCRC with regards to Article 14(1), it can be interpreted to mean that the States do have positive obligations as well.<sup>297</sup>

Article 14(3) expands the scope of freedom of religion to "freedom to manifest one's religion or belief". However, Brems points out that it is not clear as to how to understand the types of manifestations that are included as well whether it includes the "right to change one's religion."<sup>298</sup> In the drafting stage, the States didn't seem to be in consensus especially when the debate about the right of the child and that of the parent seemed to stir a controversy concerning children's right to choose a religion.<sup>299</sup> However, in the Guidelines of the Period Reports that the States are requested to "indicate the measures adopted to ensure the child's freedom to manifest his or her religion or beliefs."<sup>300</sup> This indicates that the CRC Committee has also expanded the scope to indicate that "the idea of 'freedom'" under Article 14 includes the freedom to manifest as well.<sup>301</sup>

#### **4.2.3.1. Striking the Balance: Navigating between the Rights of the Children and Parents**

Article 14(2) of the UNCRC is a unique provision as it has no "direct equivalent" in any other human rights convention.<sup>302</sup> It protects the educational role of the parents and other caregivers in religious matters against State intervention.<sup>303</sup> However, it is limited by the condition that exercise of the role is in a "manner consistent with the evolving capacities of the child." Van Buren says that the State's obligation to respect the parental right under Article 14(2) is subject to two pre-conditions. Firstly, any parental right "should take into account the evolving capacities"<sup>304</sup> and secondly, the exercise of such right must not "amount to coercion"<sup>305</sup> Ardhar says that when the children are "sufficiently mature and intelligent to gainsay their parents' religious predilections", the State ought not to support the parental right under Article 14(2).<sup>306</sup> This notion has also been emphasized by de Jong who suggested that a child entitled to exercise her religious right autonomously based on his/her ability in the "sliding scale" that tilts according to the child's evolving capacity.<sup>307</sup> However, the CRC Committee has not elaborated on the duties and obligations of the State in realizing the religious right of the children under Article 14.

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<sup>296</sup> CRC Committee, 'General guidelines regarding the form and contents of periodic reports to be submitted by States Parties under Article 44, paragraph 1(b), of the Convention, adopted by the Committee at its 343rd meeting (thirteenth session)' (11 October 1996) CRC/C/58, para 57.

<sup>297</sup> Brems 2006 (n 274), 10-11.

<sup>298</sup> Ibid, 18.

<sup>299</sup> Ibid 18-19.

<sup>300</sup> CRC Committee 1996, para

<sup>301</sup> Tobin and Doné, 2019 (n 282), 487

<sup>302</sup> Brems 2006 (n 274), 25.

<sup>303</sup> Ibid.

<sup>304</sup> Van Bueren 1995 (n 278) 158.

<sup>305</sup> Ibid., 158.

<sup>306</sup> Ardhar 2013 (n 276), 216

<sup>307</sup> CD de Jong, *The Freedom of Thought, Conscience and Religion or Belief in the United Nations (1946-1992)* (Intersentia 1955), 53-54

Tobin points out that the emphasis of the parental direction in line with the evolving capacities principle is “arguably superfluous” as the principle, which finds mention in Article 14 vis-à-vis freedom of religion, is also explicitly provided in the Article 5 in a more general sense.<sup>308</sup> The double emphasis of the principle as contained in Articles 5 and 14 proves that the drafters of the Convention intended to resolve the most contentious Article of the Convention (Article 14) by arriving at balance of right to freedom of religion of the children and the right of the parent to provide direction in the religious upbringing.<sup>309</sup>

Article 14 replace the historical parental control in the religion of the child with parental direction that is subject to the principle of evolving capacities of the child.<sup>310</sup> Though the relationship of the parents and the children can be quite complex in religion, it is pertinent that the State must protect the children from interferences of any party (parents/carers/extended families) that might hinder the enjoyment of their rights, including the right to religious freedom.<sup>311</sup> Though the ‘evolving capacity’ approach seem to be an ideal compromise, it doesn’t protect the children from the “totalitarian exercise of parental authority.”<sup>312</sup> If Article 14(2) is interpreted to include positive obligations, then the States’ must ensure that the direction given by the parents or caregivers is in line with the evolving capacities of the child and if necessary, protect the children’s right against infringement of their religious freedom.<sup>313</sup>

The CRC Committee has insisted that the State adopt a child-rights based approach and take necessary measures in order to ensure that the children exercise the right to choose their religion (in extension, religious practices) freely.<sup>314</sup> The CRC Committee also mentions that the age of majority must not be the only criteria for them to choose a religion.<sup>315</sup> This rule also applies to the choice of religious practice. The practice of religion includes “ceremonial acts (...) (and) such customs as the observance of dietary regulations, the wearing of distinctive clothing or head coverings, participation in rituals associated with certain stages of life, and the use of a particular language customarily spoken by a group.”<sup>316</sup> The children must be able to choose or give up a religious practice even before they attain the age of majority. The freedom of such a choice must also be in a “manner consistent with the evolving capacities of the child.”

Some scholars like Langlaude emphasize the need for the primacy of parental right and the scope of religious upbringing on the basis of convictions of parents. She says that the right to religious freedom of the child must be “based on the interest of the child to be unhindered in their growth as an independent autonomous actor in the matrix of parents, religious community and society.”<sup>317</sup>

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<sup>308</sup> Tobin and Doné 2019 (n 282), 493

<sup>309</sup> Ibid.

<sup>310</sup> Ibid, 477.

<sup>311</sup> S Langlaude, ‘The Right of the Child to Religious Freedom in International Law’ (Martinus Nijhoff Publishers 2007), 58-59.

<sup>312</sup> U Kilkelly, *The Child’s Right to Religious Freedom in International Law: The Search for Meaning in ‘what is Right for Children? The Competing Paradigms in Religion and Human Rights’* MA Fineman and K Worthington (eds) (Ashgate, 2009), 246.

<sup>313</sup> Brems 2006 (n 274), 29.

<sup>314</sup> CRC Committee, Summary Record of the 1216<sup>th</sup> meeting: Malaysia, CRC/C/ SR.1216, para 33 (2007).

<sup>315</sup> Ibid.

<sup>316</sup> UN Human Rights Committee, ‘CCPR General Comment No. 22 on Article 18 (Freedom of Thought, Conscience or Religion)’ (30 July 1993) CCPR/C/21/Rev.1/Add.4, para 4.

<sup>317</sup> Langlaude 2008 (n 234), 480.

The very fact that the parental right to provide appropriate direction is limited by the evolving capacities principle indicates that there is a possibility of conflict that could arise between the parent and the child in religious matters. However, it is the author's opinion that there is an assumption inherent in Article 14(2) that the parents would *always* give direction to the child to exercise her right "in a manner consistent with the evolving capacities."

#### **4.2.4. Critical Analysis of Article 14 in the context of the caste system**

The CRC Committee has been criticised for having an "impoverished understanding of religion"<sup>318</sup> The Committee insists that it is "the child who exercises the right to freedom of religion, not the parent, and the parental role necessarily diminishes as the child acquires an increasingly active role in exercising choice throughout adolescence."<sup>319</sup> However, the Committee's interpretation of Article 14 and even Article 5, lacks clarity as to how any tensions between a child and the parents must be resolved<sup>320</sup> and it is also not clear about how the other interlinked rights, including Article 3(1), UNCRC – Right to the consideration of the best interests of the child must be applied to the full realization of Article 14<sup>321</sup>.

Brems points out that the "best interests of the child" and the children's autonomous exercise of their rights in line with the evolving capacities must be the determining factors when the parents disagree on the religion of the child.<sup>322</sup> This must be the case under normal circumstances as well for the child to exercise his/her right to religious freedom. There is no clarification by the CRC Committee to the question of what are the best interests of the child in so far as religious upbringing is concerned. Van der Vyer points out the need to take into account factors such as social practices and religious convictions in determining the best interests of the child.<sup>323</sup> Despite such considerations, the question that still lingers is whether the 'best interests of a child' would again be a compromise between the children's right and the parental right like Article 14 of the UNCRC. This because child's best interests is often decided from an adults perspective.<sup>324</sup>

Article 14(2) can also be used to interpret the children's right to freedom of religion in a restrictive way, associating it with the parental choice of religion. In a case where the child does not want to adhere to a practice of one's parents, a parent could impose their will on their child, where the parents abuse the power they hold, rather than "true exercise of responsibility."<sup>325</sup> In reality, the parental right to impose a belief or manifest religion mostly precedes the children's right to be free from any such belief or

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<sup>318</sup> Ibid, 499.

<sup>319</sup> General Comment No. 20, para 43.

<sup>320</sup> Langlaude 2008 (n 234), 493.

<sup>321</sup> Ibid.

<sup>322</sup> Brems 2006 (n 274), 28.

<sup>323</sup> JD Vyver 'Limitations on Freedom of Religion or Belief: International Law Perspectives'(2005) 19 Emory International Law Review, 499, 517.

<sup>324</sup> Van Bueren 1995 (n 239), 32

<sup>325</sup> G Van Bueren, The Right to Be the Same, The Right to Be Different: Children and Religion in T Lindhom and others (eds.), Facilitating Freedom of Religion or Belief: A Deskbook (Springer, 2004), 562.

religion.<sup>326</sup> When an attempt is made to balance the right of the child and that of the parents, there is always scope for some kind of right violation.<sup>327</sup> McAdams points out that *“when the point (of time) is called too late, the child’s freedom of religion and belief may be curtailed. But where it is called too early, the rights of the parents to bring their children up according to their own convictions may be inappropriately interfered with.”*<sup>328</sup>

Article 14, UNCRC is not clear at what point the evolving capacities have reached the stage where the children can autonomously exercise their freedom of religion. This is for a good reason because evolving capacity is not “a single, fixed, universal experience”<sup>329</sup> and the lack of definitive age would be in line with the approach based on evolving capacities adopted in the UNCRC.<sup>330</sup> Differing evolving capacities and the “ethereal nature of some religions and beliefs” make it impossible for determine the criteria to determine fixed age limits after which the child could make her choice autonomously.<sup>331</sup> However, the UNCRC does not give enough protection for a child (who is at a higher point in the evolving capacity scale) to exercise their right to freedom of religion against the imposition of will by the parents. Tobin says that when there is a conflict between the parent and the child, the child’s view must be used to determine based on their maturity.<sup>332</sup> However, the discretion to decide whether the child has enough maturity or not generally lies with the parents.

Langlaude criticizes that the Committee on one hand, “uses the concepts of evolving capacities, best interests and participation” and on the other hand, reacts to age-limits set by the States.<sup>333</sup> However, any “subsequent tensions between any of these concepts” have not been explained or resolved by the Committee.<sup>334</sup> The question still remains as to at what point can a child choose a religion, belief or religious practice for oneself.<sup>335</sup> The Guidelines for Periodic Reports requires the State to provide information of the legal age defined for a child to choose the religion or to attend the religious school teaching. This can be interpreted to mean that the “right to autonomous choice in religion must be granted below the age of 18”.<sup>336</sup> In order to truly recognizes the rights of the children, as well as help them develop to their fullest potential, it is important that the children are able to exercise their right under Article 14 autonomously at some stage. The Committee insists that the direction and guidance that the parents offer must be in a “child-centered way (...) in order to enhance young children’s capacities to exercise their rights.”<sup>337</sup> The Committee is also silent about specifically what form of guidance must be given by the parents for the children to exercise the right under Article 14.<sup>338</sup>

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<sup>326</sup> McAdams 2017 (n 287), 115

<sup>327</sup> Ibid, 116.

<sup>328</sup> Ibid.

<sup>329</sup> Van Bueren 1995 (n 239), 50

<sup>330</sup> Tobin and Doné 2019 (n 282), 490.

<sup>331</sup> McAdams 2017 (n 287), 121.

<sup>332</sup> Tobin and Doné 2019 (n 282), 484.

<sup>333</sup> Langlaude 2008 (n 234), 493.

<sup>334</sup> Ibid.

<sup>335</sup> Van Bueren 1995 (n 278), 156.

<sup>336</sup> Brems 2006 (n 274), 30.

<sup>337</sup> General Comment No. 7, para 17.

<sup>338</sup> Tobin and Doné 2019 (n 282), 495.

Langlaude points out a will theory: for the children to have a right, they require the power to enforce and to waive.<sup>339</sup> One of the major problems is that neither the UNCRC nor the CRC Committee provide clarifications as to how to arrive at a balance to enable the child to exercise the right to freedom of religion and the right to appropriate direction. Without that clarity, children don't have the full right to freedom of religion nor do they have the right for 'appropriate' direction and guidance. A child must be able to "engage on a mature basis with religious claims and practices (...) (and must be) able to make her own religious judgments" in order to exercise true religious freedom.<sup>340</sup> Though sometimes paternalistic interventions are necessary, two important criteria to attribute rights to a child are "rationality and competence"<sup>341</sup> he or she possesses. The application of these criteria by parents are questionable in countries like India where the child are generally not seen as right holders in the society.

Another problem is that this Convention or any other international convention "cannot purport to compose, directly, any duties upon entities other than its State parties."<sup>342</sup> So, it is the State who is the primary actor in international law for the realization of the rights of the child, including the right to freedom of religion. The negative obligations mentioned in Article 14(2) and the approach of the consideration of the 'evolving capacity' do not consider the power or influence a parent might have i.e., the parent may be someone who respects the independence and the autonomy of the children or the parent may control the life of the children even beyond the point where the children can exercise their rights independently.<sup>343</sup> Without enabling the child exercise the right under Article 14, there is always the risk where the parents could indoctrinate concepts like caste into a child, without exposing her to alternative options. When the "adult-centred liberal relativism" is given primacy, religious, cultural and customary practices that are harmful may take precedence over human rights.<sup>344</sup>

In reality, the nature and scope of the protection of religious freedom of children differ based on cultural and religious practices and the level of parent's understanding of the capacities of the children and this varies based on the region of the world one is in.<sup>345</sup> In addition, most children exercise their religious right, while being influenced by the parents, family and community.<sup>346</sup> When it comes to caste system, the traditional and customary rules and regulations among various castes and sub-castes are different and some enforce it stricter than the others. The child who is assigned a caste "at birth" does not have the option to get out of the same. His/her identity is etched based on the caste he/she belongs to. It is not easy for a child to autonomously come out of caste. The only thing he/she can do is to silently watch the practices and customs, sometimes even discrimination that takes place.

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<sup>339</sup> Langlaude 2008 (n 234), 478.

<sup>340</sup> H Brighthouse , 'How Should Children Be Heard?' [2003] 45(3) Arizona Law Review 691-711, 704.

<sup>341</sup> Langlaude 2008 (n 234), 479.

<sup>342</sup> P. Alston, The Legal Framework of the Convention on the Rights of the Child, United Nations Bulletin of Human Rights: The Rights of the Child, (1992) 13-14 in Varadan 2022 (n 261), 14.

<sup>343</sup> Kilkelly 2009 (n 312) 246.

<sup>344</sup> G Kamchedzera, Article 5: The Child's Right to Appropriate Direction and Guidance. in A Alen and JV Lanotte (eds), A Commentary on the United Nations Convention on the Rights of the Child (Martinus Nijhoff Publishers 2012), 14.

<sup>345</sup> G Lansdown, The Scope and Limitations of the Concept of Evolving Capacities within the CRC. in C Fenton-glynn (ed), Parental Guidance, State Responsibility and Evolving Capacities (Brill Nijhoff 2020) 45

<sup>346</sup> Tobin and Doné 2019 (n 282), 492.

When a child in an Indian caste system are not enabled to exercise their right to religious freedom (that includes the right of the child to leave a caste or give up a caste practice), the right to fully exercise her freedom of religion is compromised. Moreover, the Committee has only a limited understanding of the complexity of the Indian caste system that has survived throughout many centuries. The Committee has mentioned caste-based discrimination only a few times in India's Concluding Observations<sup>347</sup> as well in the General Comments<sup>348</sup> and has not directly addressed any inherent problems that exist within a caste system. In this complexity, without the enabling the child to exercise his/her religious freedom, the full realization of the right to receive any 'appropriate' direction and guidance is not easy to implement. Considering the firm and unyielding nature of religious systems like caste, the CRC Committee's silence on the better enforcement of the children's right to religious freedom would not contribute to the full realization of the rights of the child stuck inside the caste system.

The problems of the hierarchical Hindu system are an intra-religious problem. Caste system is an inherent problem inside Hinduism. Does the CRC consider these complexities in the Hindu system? The approach of the CRC Committee when it comes to religion has been about considering a religion as one big set. However, Hinduism is complex. It is inherently divisive and there is definitely minimal or no mobility inside the religion itself. The main problem of the hierarchical Hindu system is that it is etched in the Hindu psyche to adhere to the same because of the religious sanction it has. The child who might question the whole discriminatory structure of the caste system which is strongly backed by religious sanctions would present a strong apprehension in the minds of the parents. Even if we apply the evolving capacity or the best interests principle here, the big question is whether the children (or even adults for that matter) have the autonomy to move out of the caste-based system. The answer seems to be no. The emphasis of the parental right and the lack of precise scope of such parental right to direct their child contribute to making the position of the child inside the caste system more and more rigid.

### **4.3. Way forward**

The right to freedom of religion is one of the crucial components needed to exercise autonomy.<sup>349</sup> Interpretation of Article 14 of the UNCRC must be child-centred.<sup>350</sup> Children at the age of early childhood are vulnerable and they need to have some kind of guidance and direction. However, children who are sufficiently mature must have the autonomy to choose the religion or at least the religious practice. When the aim is to help the children to move into adulthood and help them develop to their fullest potential, it is highly important they have exposure to choose any religion and exercise their autonomy, especially when they are in the higher scale of evolving capacity.

There is a need for the Committee to provide clarifications as to the scope of rights and duties of the parents, children and the State. Article 14 has been given little attention by the Committee when compared to other Articles of the UNCRC, both in the General Comments as well as in the Concluding Observations.<sup>351</sup> The critical issue of freedom of religion must be prominently features in the works of the Committee, including the General Comments and Concluding Observations to the State party. It is vital for the CRC Committee to give consideration to how a child is brought up within a particular religion

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<sup>347</sup> Refer Annexure I.

<sup>348</sup> Refer Annexure II.

<sup>349</sup> C Evans, *Towards a Theory of Freedom of Religion or Belief*. in C Evans (ed), *Freedom of Religion under the European Convention on Human Rights* (Oxford University Press 2001), 29.

<sup>350</sup> Tobin and Doné 2019 (n 282), 492.

<sup>351</sup> Langlaude 2008 (n 234), 500-501.

and the “extent to which that upbringing supports his capacity to choose his own religion or belief.”<sup>352</sup> There is a need for the presumption is the children’s favour because it is their right which is ultimately at stake.<sup>353</sup> Therefore, the systems like caste which violate multiple rights of the children must be critically examined in the spotlight, especially with respect to the children’s right to freedom of religion (including the right to freedom from caste) and their right to receive parental direction and guidance. It is pertinent that the CRC Committee provide clarifications to better navigate and interpret the rights of the children to religious freedom and the full realization of Article 14, and approach the Indian caste system from a very critical perspective, rather than having a bird’s eye view of the problem.

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<sup>352</sup> McAdams 2017 (n 287), 118.

<sup>353</sup> *Ibid*, 123.

## 5. The need to adopt a child-based approach

Right to religious freedom enables a person to practice, profess and follow the religion of his/her choice, which in the Indian society, a predominantly religious one, aids in the complete development of the person. In exercise of such right to religious freedom, it is essential that free choice be available to the person exercising it, perhaps with a degree of parental guidance in the case of children. Such parental guidance must necessarily be consistent with the capacity of the child and never in the form of imposition. This chapter will propose a child rights-based approach to enable the children to exercise their freedom of religion.

### 5.1. Importance of enabling children to exercise their right to religious freedom

It must not be forgotten that the rights and responsibilities of the parents to provide direction are “to *enable* the child to exercise his or her right.”<sup>354</sup> Therefore, such must *always* be in line with the principle of evolving capacities and directed towards enabling the child to exercise her rights, including the right to religious freedom, autonomously. Enabling them to be an individual decision-maker in their religious interests would ultimately result in enabling them to exercise their true right to freedom of religion.

The emphasis of parental direction in Article 14(2) can be problematic, especially when the parents’ and the children’s idea of religion don’t go hand in hand or the parent’s direction is not in accordance with the evolving capacities of the child. The recognized right of the children is redundant if the children are not enabled to exercise their right to religious freedom, especially when they are in higher position in the evolving capacity scale. The recognized religious right in Article 14 does not explicitly enable the children to exercise their right in full. It is definitely true that children would need some kind of “direction and guidance” in order to explore their religious practices and beliefs. However, such direction and guidance must be inversely proportional to the evolving capacities of the children, i.e., lower the child is in the scale of evolving capacity, higher must be the amount of guidance and direction and vice versa. This way, the children would be able to exercise their right to freedom of religion autonomously. This would go a long way in developing the autonomy and potential needed for the child to smoothly transition into adulthood, by recognizing one of the major participatory rights enshrined in the UNCRC.

### 5.2. Proposing a Child-rights based approach to enable children to exercise their right to religious freedom

Various scholars and academicians have commented on the application of Article 14(2) in practice as well. Hodgkin and Newell point out that when the parents or caretakers give directions with regards to religion, it must be in accordance with the whole Convention.<sup>355</sup> In addition, Brems points out three key provisions that must be borne while giving directions.<sup>356</sup> Firstly, the best interests of the child must be a primary consideration (Article 3). Secondly, the views of the child must be given due weight in accordance with the age and maturity of the child (Article 12(1)). This is true because the application of the principle of evolving capacity has “special relevance” in the implementation of participatory rights

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<sup>354</sup> General Comment No. 12, para 90

<sup>355</sup> R Hodgkin and P Newell, Implementation Handbook for the Convention on the Rights of the Child, 198 in Brems 2006 (n 239), 31.

<sup>356</sup> Brems 2006 (n 239), 31.



embedded in Article 12.<sup>357</sup> And lastly, while imposing an idea, the parents or caregivers must never adopt means of physical or mental violence (Article 19).

Parents play a considerable role in influencing the religion of the children. Article 18(1) of the UNCRC recognizes the primacy of the parents in the “upbringing and development of the child” and lays down that the “best interests of the child must be the basic concern”. While assessing the best interests of the children, it is important that one considers that child’s capacity evolve over time.<sup>358</sup> The person determining the best interests of the child, especially the parents, must “consider measures that can be revised or adjusted” as the child moves up the evolving capacity scale.<sup>359</sup> While determining the child’s best interest, the short-term, as well as the long-term considerations must be taken into account so that there there’s stability not just in the children’s current situation but also their future situation.<sup>360</sup>

Article 18(2) places the obligation on the State parties to “render appropriate assistance to parents and legal guardians” in order to help them perform their child-rearing responsibility. Daly stresses that adopting a rights-based approach in assessing the child’s capacity would entail that any determination of the capacity must be well-informed by the principles and the provisions of the UNCRC, and the appreciation of autonomy.<sup>361</sup> As the determination of the where the child is in the scale of evolving capacity is primarily in the hands of parents, it is the obligation of the State to ensure that the primary care-givers are aware of the rights, especially the capacity rights of the children.<sup>362</sup>

The CRC Committee, in General Comment No. 12, emphasizes the need and the legal obligation for the States to invest in the realization of children’s participatory rights, which would enable the children to “build and demonstrate capacities.”<sup>363</sup> It is the duty of the State to enable parents to support their children “in realizing the right to express freely and to have children’s views duly taken into account at all levels.”<sup>364</sup>

In addition, adopting a children’s rights-based approach in implementing the right to religious freedom would be first recognizing the children’s right to information enabling them to make an independent and autonomous choice. Children must be made aware of the fact that “their religion is one out of many”<sup>365</sup> and that it is a personal choice of everyone, including children, to adopt a religion that they are inspired by or to not adopt a religion at all.<sup>366</sup>

Most importantly, adopting a child-rights based approach would also mean keeping check on the parental right to provide direction and such right operates only within the scope of the evolving capacities of the children. Regarding child’s right to religious freedom, McAdams insists that it should “trump the parent’s right to dictate the child’s religion or belief to her.”<sup>367</sup> The role of the State in protecting the

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<sup>357</sup> General Comment No. 14, para 59.

<sup>358</sup> Ibid, para 84, 93.

<sup>359</sup> Ibid, para 84.

<sup>360</sup> Ibid.

<sup>361</sup> A Daly, 'Assessing Children's Capacity' [2020] 28(3) International Journal of Children's Rights 471-499, 480.

<sup>362</sup> Ibid, 495.

<sup>363</sup> General Comment No. 12, para 135.

<sup>364</sup> Ibid, para 92.

<sup>365</sup> Piet de Klerk Speech in McAdams 2017 (n 287), 125.

<sup>366</sup> Ibid.

<sup>367</sup> McAdams 2017 (n 287), 128

children's right would be to intervene in the best interests of the child, provided that such interference does not "undermin(e) the continuity of the religion or belief."<sup>368</sup> Without such interference, the child's right under Article 14 "would be reduced to private domain."<sup>369</sup> In addition, without appropriate intervention, there would be no balance between the right of the parent and that of the child and there is considerable scope in Article 14 for it to be unfairly used to the parents' advantage. The obligation of the State to simply "respect" the parental rights over the rights of the children would amount to "quieting the already hushed voices of children in contravention to their (...) right to be heard."<sup>370</sup> Any religious practice that violates the right to non-discrimination, the right to protection against violence or the protection against traditional practices that are prejudicial to the child's health should not be considered "legitimate parental direction."<sup>371</sup>

More importantly, the CRC Committee would do good to provide clarifications and guidance on the role of the State in ensuring the children's right to receive appropriate direction is in line with the evolving capacities laid down in both Article 5 and 14(2) of the UNCRC.

### **5.3. Importance of enabling children to exercise freedom of religion, especially in the context of caste system**

Caste system is complex. The UN Special Rapporteur on Freedom of Religion or Belief pointed out that "every individual child is a rights holder in his or her capacity"<sup>372</sup> and "not just through membership in a family or community."<sup>373</sup> On the contrary, a child who is born in a particular family is accorded a caste and he or she forever remains in the same system till he or she dies. It is not easy for a child from a specific caste to embrace or follow another caste's practice or completely come out of it because of the religious sanction as well as the "closed-door policy" of the Indian caste system. From the discussion, it can be seen that India has relevant laws and policies that are directed to prevent any caste-based discrimination or untouchability among individuals, including children. However, the problems associated with caste continue to persist.

Article 29(1) of the UNCRC provides that the children's education must be directed towards "the development of the child's personality, talents and mental and physical abilities to their fullest potential"<sup>374</sup> and "the preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes and friendship among all people."<sup>375</sup>

A child must be equipped to lead an "individual life in society."<sup>376</sup> When we read the Convention as a whole, we can see that these are not just the aims of education but all also the ultimate aim of the whole

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<sup>368</sup> Ibid, 129.

<sup>369</sup> Ibid.

<sup>370</sup> Ibid, 127.

<sup>371</sup> Tobin and Doné 2019 (n 282), 496.

<sup>372</sup> OHCHR, Press Release, Children also have the right to freedom of religion or belief, and that must be protected, (2015), <<https://www.ohchr.org/en/press-releases/2015/10/children-also-have-right-freedom-religion-or-belief-and-must-be-protected>> accessed 8 July 2023

<sup>373</sup> Special Rapporteur, Interim Report on Freedom of Religion, para 14.

<sup>374</sup> UNCRC, Article 29(1)(a)

<sup>375</sup> Ibid, Article 29(1)(e)

<sup>376</sup> Ibid, Preamble.

convention. It can be seen from the discussion that the Indian hierarchical caste system has not been contributing to the development of the child to their fullest potential nor has it been promoting peace, tolerance or equality. In this scenario, it is crucial to enable the child to exercise her right to religion and right to parental direction in line with not just the principle of evolving capacity but also the principles and provisions laid down in the whole Convention.

As put forth by Feinberg, every child has the “right to an open future”<sup>377</sup> and in order to exercise the same, the parents have a duty to provide opportunities “to exercise their burgeoning inner capacities for decision-making and self-hegemony.”<sup>378</sup> It is truly challenging to find the right balance between parental rights, children’s rights and religious beliefs in the whole matrix of caste system but every child who is trapped in a rigid caste system has the right to freely exercise their rights under Article 14, UNCRC.

#### **5.4. Recommendations to advance child rights based approach to freedom of religion in the context of caste system**

In addition to the child rights approach discussed above, there is a need for adopting additional measures in the context of caste system.

##### **5.4.1. The need for better awareness and guidance**

Article 42, UNCRC directs the States “to make the principles and provisions of the Convention widely known to adults and children *alike*” by taking appropriate and active means of dissemination.<sup>379</sup> In the General Comment No. 5, CRC Committee emphasizes that without the dissemination of the recognized principles and provisions, the children’s carers, including parents and family members, would not understand the actual implication of the convention or the fact that the children are right-holders as well.<sup>380</sup> This is true for India as well because it is one of the societies where “children have not been regarded as right holders.”<sup>381</sup> Therefore, as a first step towards the realization of the children’s rights, it is important that the State take active measures to disseminate the internationally recognized principles and provisions in UNCRC to all the populace of the nation.

Article 24(2)(f) mandates the States to take measures in developing guidance for parents, including the extended family who like the parents play a strong role in influencing the socialization process of the children.<sup>382</sup> This mandate of the UNCRC must be extended beyond the Article 24 and the guidance for the parents must include the guidance with respect to realizing all the rights of the children, including their right to freedom of religion. The CRC Committee’s interpretation of the Article 24(2)(f) indicate that the State’s must “adopt evidence-based interventions” like parenting skills education and counseling, to enable parents to adopt good parenting practices.<sup>383</sup> In the context of caste system, these awareness,

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<sup>377</sup> J Feinberg, The Child’s Right to an Open Future. in W Aiken and H LaFollette (eds), *Whose Child? Children’s Rights, Parental Authority and State Power* (Totowa, NJ: Littlefield 1980).

<sup>378</sup> M Lotz, ‘Feinberg, Mills, and the child’s right to an open future’ [2006] 37(4) *Journal of Social Philosophy* 537-551.

<sup>379</sup> UNCRC, Article 42

<sup>380</sup> CRC Committee, ‘General comment no. 5 (2003): General measures of implementation of the Convention on the Rights of the Child’ (27 November 2003) CRC/GC/2003/5 (GC 5), para 66.

<sup>381</sup> *Ibid.*

<sup>382</sup> General Comment No. 12, para 93.

<sup>383</sup> *Ibid.*, para 94.

guidance and training programmes on a regular basis, would, at the very least, create a dent in the discriminatory practices.

These parent education programmes must be aimed at building on “existing positive behaviours.”<sup>384</sup> More importantly, such programmes must emphasize the importance of giving due weight to the views of the children and must address “the understanding, promotion and respect for children’s evolving capacities ” and “ways of dealing with conflicting views within the family.”<sup>385</sup> In addition to the State actors, the non-State actors like the NGOs and media must also communicate to the parents “that their children’s participation is of high value for children themselves, their families and society.”<sup>386</sup>

The CRC Committee has also emphasized the need for an integrated approach, where the State is obligated to develop in-service training and capacity building “for all those involved in the implementation process.”<sup>387</sup> These include government officials, law-makers, judicial members, community and religious leaders and professionals.<sup>388</sup> In addition, there is also need for the “promotion of values and policies conducive to human rights within (...) the broader community”.<sup>389</sup> The CRC Committee, in GC 1, emphasizes the need of realizing Article 29(1) of the UNCRC as it would act as an “antidote” to various forms of social differences that exist in a society.<sup>390</sup>

#### **5.4.2. Explicit recognition of the principle of evolving capacities**

In India, there is no explicit law that provides for distinction of the children’s right to freedom of religion and the parental right to provide direction in the religious upbringing of the children “in a manner consistent with the evolving capacity of the child(ren)”. Rather, Article 25 of the Indian Constitution provides the right to the freedom of religion for *all* persons. It can be seen from judicial precedents and prevalent societal practices that the children’s religious rights are exercised based on parent’s conviction and the importance of principles of the evolving capacities are not recognized.<sup>391</sup> There is need for a change in the law, especially in relation to the explicit recognition of the evolving capacities of the child.

#### **5.4.3. Need for change in the approach of the CRC Committee in dealing with Article 14**

Committee’s clarifications to the scope of Article 14 would have a huge relevance especially for a child who might be trapped inside the hierarchical caste system. Therefore, there is a need for a child’s autonomy and individuality to be recognized for him/her to navigate inside or out of the caste system if he/she wishes to. The CRC Committee must recognize the complexity of the Indian caste system that has survived hundreds of years. The Committee’s approach may be a solution to recognize the children’s right to religion in the context of Anglo-Judeo-Christian religions. It is important for the CRC Committee to enquire into ways that the children’s right to religion are fully realized even in complex societies such as India where the caste system plays a key role in Hindu populace of the nation.

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<sup>384</sup> Ibid, para 96.

<sup>385</sup> Ibid, para 94

<sup>386</sup> Ibid, para 96

<sup>387</sup> General Comment No. 5, para 53, 69

<sup>388</sup> Ibid, para 53

<sup>389</sup> General Comment No. 1, para 19.

<sup>390</sup> Ibid, para 11

<sup>391</sup> See

## 5.5. Concluding Remarks

“An ideal society should be mobile, should be full of channels for conveying a change taking place in one part to other parts. (...) In other words, there must be social endosmosis”<sup>392</sup>, says Dr. B. R. Ambedkar. The existence of the caste system acts as a major barrier in achieving such social endosmosis in a society due to the inherent divisiveness and the placement of individuals in closed compartments.

CRC committee, in the general comments, does not specifically discuss the caste system. However, it has discussed how a social norm or cultural practice tend to be both positive in strengthening the identity and cohesion among the society and negative, while leading to harm.<sup>393</sup> It acknowledges the existence of such practices that the members of the community are expected to follow and the lack of “social support and mobility” if the members don’t follow the practice.<sup>394</sup> In those cases, it is recommended that the States that aims to tackle such practices must take efforts that are “holistic, community-based and founded on rights-based approach that includes active participation of all relevant stakeholders.” This is not an approach that can easily be taken against religiously sanctioned systems like caste. It requires immense political will and more important of all, transformation of people’s perspectives and societal attitudes among the religious populace. However, it is not an impossible thing to achieve. When given enough time, a tiny spark can engulf an entire forest. Such spark could be the recognition of children as autonomous right holders and the enforcement of the children’s rights in the Indian society. This can lead to harmonious society where such recognition and enforcement of the rights of the new generations of children would play a major role in fostering a change. The existence of caste, *per se*, is not the problem. It has contributed, for more than 2000 years, unique culture and practices among various groups of individuals. The problem lies in the creation of differences, which at all costs must ends. The UNCRC offers the “building blocks for a more just and equal society”<sup>395</sup> where the child can live in harmony. The Convention as well as the upcoming works of the CRC Committee must be sensibly applied in overcoming the negative aspects of the caste, thereby building a just and equal society.

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<sup>392</sup> Ambedkar (n 11), 57.

<sup>393</sup> Joint General Comment No. 18, para 57

<sup>394</sup> *Ibid.*

<sup>395</sup> PE Veerman, Examining the UN Committee on the Rights of the Child through the Lens of Caste- and Descent Based- discrimination in J Tordes. and SM King (eds), *The Oxford Handbook of Children’s Rights Law* (Oxford University Press 2020), 532

## ANNEXURE I (Analysis of Concluding Observation of India's Periodic Reports)

<p>Concluding observations on the combined third and fourth periodic reports of India</p>	<p><b>B. General principles (arts. 2, 3, 6 and 12)</b></p> <p><b>Non-discrimination</b></p> <p>31. The Committee is concerned at the disparity among different groups of children in access to education, health care, safe water and sanitation and other social services and to the enjoyment of the rights enshrined in the Convention. It is also concerned at <b><u>the persisting discrimination against children from scheduled castes</u></b> and scheduled tribes, children with disabilities, children with HIV/AIDS, as well as asylum-seeking and refugee children.</p> <p>32. The Committee recommends that the State party:</p> <p>(a) Adopt and implement a comprehensive strategy to address all forms of discrimination, including multiple forms of discrimination, <b><u>against all categories of children in marginalized and disadvantaged situations</u></b> and ensure adequate human, financial and technical resources to implement it in collaboration with a wide range of stakeholders and involving all sectors of society, with a view to facilitating social and cultural change;</p> <p>(b) Ensure that <b><u>children in marginalized or disadvantaged situations</u></b>, such as children from <b><u>scheduled castes</u></b> (...) have access to basic services and enjoy their rights under the Convention, and to that end, adopt adequate programmes and assess their results.</p> <p><b>F. Disability, basic health and welfare (arts. 6, 18 (3), 23, 24, 26, 27 (1-3) and 33)</b></p> <p><b>Standard of living</b></p> <p>70. The Committee recommends that the State party:</p> <p>(b) Take all necessary measures to eliminate urban/rural, social, <b><u>caste and tribe-based disparities</u></b> in children's standard of living through, inter alia, social protection and targeted programmes for children and families who are particularly vulnerable to poverty;</p> <p><b>G. Education, leisure and cultural activities (arts. 28, 29, 30 and 31)</b></p> <p><b>Education, including vocational training and guidance</b></p> <p>71. The Committee welcomes the adoption of the Right of Children to Free and Compulsory Education Act, 2009, and the almost-universal enrolment rate of children in Grade 1. However, it is <b>concerned at the high drop-out rates, in particular among children from the scheduled castes</b> and scheduled tribes and girls. The Committee is also concerned about the large number of children who are not in school, the high drop-out rates at Grade 5, poor numeracy and literacy skills, the low quality of education, as well as the shortage of qualified teachers and classrooms.</p> <p>72. The Committee recommends that the State party:</p> <p>b) <b>Address various discriminatory practices</b> in the education setting, such as <b>forcing children in marginalized situations to sit at the back of the classroom</b>;</p> <p>f) Further adopt specific programmes aimed at decreasing the high dropout rates and ensure that (...) children in <b>disadvantaged and marginalized situations</b> (...) are supported and assisted in exercising their right to education;</p>
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<p>Concluding observations on the combined third and fourth periodic reports of India</p>	<p><b>H. Special protection measures (arts. 22, 30, 32, 33, 35, 36, 37 (b)–(d), 38–40)</b>  <b>Children belonging to religious minorities, scheduled castes and scheduled tribes</b></p> <p>79. The Committee is seriously concerned that, despite the State party's initiatives aimed at addressing inequalities and improving living conditions and access to education, health and social services of religious minorities, <b>scheduled castes</b> and scheduled tribes, many children belonging to these groups continue to be deprived of a number of their rights under the Convention.</p> <p>80. The Committee urges the State party to strengthen its efforts to ensure that all children, irrespective of their religious background or whether they are from a <b>scheduled caste</b> or scheduled tribe, enjoy the entire range of rights enshrined in the Convention.</p>
<p>Concluding observations: India  CRC/C/15/Add.228</p>	<p><b>D. Principal subject of concern and recommendations</b></p> <p><b>1. General measures of implementation</b>  <b>Data collection</b></p> <p>22. The Committee recommends that the State party develop a system of data collection and indicators consistent with the Convention and disaggregated by gender, age, <b>social status (Scheduled Castes and Tribes, or religious community)</b>, and urban and rural area and make it publicly available. This system should cover all children up to the age of 18 with specific emphasis on those who are particularly vulnerable.</p> <p><b>2. General principles</b>  <b>The right to non-discrimination</b></p> <p>25. In light of article 2 of the Convention, the Committee is deeply concerned at the widely disparate levels of enjoyment of the rights in the Convention by girls, children living in certain states, rural areas and slums, and children belonging to <b>certain castes</b> and tribal and indigenous groups.</p> <p>27. The Committee is deeply concerned at persistent and significant social discrimination against children belonging to <b>Scheduled Castes</b> (...) reflected, inter alia, by the many violations of the 1989 <b>Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act</b>, the low number of such violations dealt with by the courts, and the fact that a majority of the states have failed to set up the special courts provided for under this Act.</p> <p>28. The Committee recommends that the State party, in accordance with article 17 of its Constitution and article 2 of the Convention, take all necessary steps to <b>abolish the discriminatory practice of “untouchability”</b>, prevent <b>caste- and tribe-motivated abuse</b>, and prosecute State and private actors who are responsible for such practices or abuses. Moreover, in compliance with <b>article 46 of the Constitution</b>, the State party is encouraged to implement, inter alia, <b>special measures</b> to advance and protect these groups. The Committee recommends the <b>full implementation of the 1989 Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act</b>, (and) <b>the 1995 Scheduled Castes and Scheduled Tribes Rules (Prevention of Atrocities)</b> (...). The Committee encourages the State party to continue its efforts to carry out comprehensive public education campaigns to <b>prevent and combat caste-based discrimination with a view to changing social attitudes</b>, by involving, inter alia, religious leaders.</p>

	<p>31. While welcoming the special temporary programmes and other activities to improve the enjoyment of rights by girls and vulnerable groups such as <b>children belonging to Scheduled Castes</b> and Tribes, the Committee expresses its concern at the possibility that other children in situations similar to that of those groups are not receiving the same benefits.</p> <p>32. (...) The Committee further recommends that the State party start to develop special programmes for the allocation of educational and other benefits that are based on the child's needs and rights rather than on the basis of sex, <b>caste</b> or tribe, or any other characteristic that may result in unjustifiable discrimination.</p> <p><b>6. Education, leisure and cultural activities</b></p> <p>65. The Committee recommends that the State party:</p> <p>(b) Strengthen its efforts to progressively ensure that that all girls and boys, in urban, rural and least developed areas and children belonging to <b>Scheduled Castes</b> and Tribes, have equal access to educational opportunities;</p> <p><b>C. Factors and difficulties impeding the implementation of the Convention</b></p> <p>4. The Committee acknowledges that the very large population and the high rate of growth are major impediments to the implementation of the Convention. In addition, (...) <b>persistence of deeply discriminatory attitudes</b> (...) represent serious difficulties in the fulfilment of all of the State party's obligations under the Convention.</p>
<p>Concluding observations of the Committee on the Rights of the Child: India CRC/C/15/Add.115</p>	<p><b>B. Positive aspects</b></p> <p>3. The Committee is encouraged by the existence of a broad range of constitutional and legislative provisions, and institutions (e.g. the National Human Rights Commission, the <b>National Commission for Women</b>, and the <b>Scheduled Castes</b> and Scheduled Tribes Commission) for the protection of human rights and children's rights</p> <p><b>C. Factors and difficulties impeding the implementation of the Convention</b></p> <p><b>Legislation</b></p> <p>9. Given such a diverse and multicultural society, the Committee further notes that the existence of <b>traditional customs (i.e. the caste system)</b> (...) is an obstacle to efforts to combat discrimination, and compounds, inter alia, poverty, illiteracy, child labour, child sexual exploitation, and children living and/or working on the streets.</p> <p>12. The Committee notes that insufficient efforts have been made to implement legislation and decisions of the courts and the commissions (i.e. the National Human Rights Commission, the <b>National Commission for Women</b>, and the <b>Scheduled Castes</b> and Scheduled Tribes Commission); and to facilitate the work of such institutions with respect to children's rights.</p> <p>13. (...) The Committee further recommends the State party to provide adequate resources and to take all other necessary steps to strengthen the capacity and effectiveness of national human rights institutions, including (...)the National Commission for Scheduled Castes.</p> <p><b>Independent/monitoring structures</b></p> <p>16. The Committee is concerned at the absence of an effective mechanism to collect and analyse disaggregated data of all persons under 18 years for all areas covered by the Convention, including the most vulnerable groups (i.e. (...) belonging to different castes (...)).</p>



	<p><b>D3. General principles</b>  <b>The right to non-discrimination (art. 2)</b>  28. In the light of article 2 of the Convention, the Committee is deeply concerned at the widely disparate levels of enjoyment of the rights in the Convention by children (...) <b>belonging to different castes</b>(...).</p> <p>30. In the light of article 2 of the Convention, the Committee is concerned at the <b>existence of caste-based discrimination</b> (...), despite these practices being prohibited under the law.</p> <p>31. In accordance with article 17 of the Constitution and article 2 of the Convention, the Committee recommends that the State party take steps to ensure <b>states abolish the discriminatory practice of “untouchability”</b>, prevent caste- and tribe-motivated abuse, and prosecute State and private actors who are responsible for such practices or abuses. Moreover, in compliance with <b>article 46 of the Constitution</b>, the State party is encouraged to implement, inter alia, affirmative measures to advance and protect these groups. The Committee recommends <b>the full implementation of the 1989 Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, (and) the 1995 Scheduled Castes and Scheduled Tribes Rules (Prevention of Atrocities)</b> (...). The Committee encourages the State party to continue its efforts to carry out comprehensive public education campaigns to prevent and combat caste-based discrimination. In line with the Committee on the Elimination of Racial Discrimination (CERD/C/304/Add.13), the Committee <b>stresses the importance of the equal enjoyment by members of these groups of the rights in the Convention, including access to health care, education, work, and public places and services, such as wells.</b></p> <p><b>D7. Education, leisure and cultural activities</b>  <b>Right and aims of education (arts. 28 and 29)</b>  56. (...) There is serious concern regarding the striking disparities in terms of access to education, attendance at primary and secondary levels and drop-out rates between: different states, rural and urban areas, boys and girls, the affluent and poor, and <b>children belonging to scheduled castes and tribes.</b></p> <p><b>D8. Special measures of protection</b>  <b>Sexual exploitation and sexual abuse (art. 34)</b>  74. The Committee notes the Plan of Action to Combat Trafficking and Commercial Sexual Exploitation of Women and Children. However, in view of the scale of the problem, the Committee is concerned about the sexual abuse and exploitation of children especially those belonging to the lower castes (...) in the contexts of: religious and traditional culture.</p>
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The above discussion of the Concluding Observations of India indicates that the caste-based discrimination has been discussed only a few times. The discrimination only with respect to the education section has been dealt with in detail. The discrimination persists in other sectors including access to health care. Moreover, caste-based discrimination is one of the main problems social problems such as child marriage, poverty and bonded-labour. This has been dealt with only minimally. CRC Committee has acknowledges the existence of caste-based attitudes but has not dealt with the inherent problems with respect to the system of caste and the violation of many other rights of the children.

## ANNEXURE II (Reference to Caste-based Discrimination in General Comments)

Date Adopted	General Comments	Reference to caste/caste-based discrimination
17 Apr 2001	General comment No. 1: The Aims of Education ( <b>CRC/GC/2001/1</b> )	None
15 Nov 2002	General comment No. 2: The Role of Independent National Human Rights Institutions in the Protection and Promotion of the Rights of the Child ( <b>CRC/GC/2002/2</b> )	None
17 Mar 2003	General comment No. 3 (2003): HIV/AIDS and the rights of the children ( <b>CRC/GC/2003/3</b> )	None
21 Jul 2003	General comment No. 4: Adolescent health and development in the context of the Convention on the Rights of the Child ( <b>CRC/GC/2003/4</b> )	None
03 Oct 2003	General Comment No. 5 (2003): General Measures of Implementation of the Convention on the Rights of the Child ( <b>CRC/GC/2003/5</b> )	None
01 Sep 2005	General Comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside Their Country of Origin ( <b>CRC/GC/2005/6</b> )	None
20 Sep 2006	General comment No. 7 (2005): Implementing child rights in early childhood ( <b>CRC/C/GC/7/Rev.1</b> )	<p><b>III. GENERAL PRINCIPLES AND RIGHTS IN EARLY CHILDHOOD</b></p> <p><b>11. Right to non-discrimination.</b></p> <p>Article 2 ensures rights to every child, without discrimination of any kind. The Committee urges States parties to identify the implications of this principle for realizing rights in early childhood:</p> <p>(b) Article 2 also means that particular groups of young children must not be discriminated against. (...) Discrimination may also be expressed through harsh treatment and unreasonable expectations, which may be exploitative or abusive. For example:</p> <p>(iv) Discrimination related to ethnic origin, class/<b>caste</b>, personal circumstances and lifestyle, or political and religious beliefs (of children or their parents) excludes children from full participation in society. It <b>affects parents' capacities to fulfil their responsibilities towards their children</b>. It affects children's opportunities and self-esteem, as well as encouraging resentment and conflict among children and adults;</p>
02 Mar 2007	General Comment No. 8 (2006):The right of the child to protection from corporal punishment and other cruel or degrading forms of punishment (arts. 19; 28, para. 2; and 37, inter alia) ( <b>CRC/C/GC/8</b> )	None

27 Feb 2007	General Comment No. 9 (2006) : The rights of children with disabilities (CRC/C/GC/9)	None
25 Apr 2007	General Comment No. 10 (2007):Children's rights in juvenile justice (CRC/C/GC/10)	None
12 Feb 2009	General Comments No. 11 (2009) Indigenous children and their rights under the Convention (CRC/C/GC/11)	None
20 Jul 2009	General Comment No. 12 (2009): The right of the child to be heard (CRC/C/GC/12)	None
18 Apr 2011	General comment No. 13 (2011) - The right of the child to freedom from all forms of violence (CRC/C/GC/13)	None
29 May 2013	General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1) (CRC/C/GC/14)	None
17 Apr 2013	General comment No. 15 (2013) on the right of the child to the enjoyment of the highest attainable standard of health (art. 24) (CRC/C/GC/15)	None
17 Apr 2013	General comment No. 16 (2013) on State obligations regarding the impact of the business sector on children's rights (CRC/C/GC/16)	None
17 Apr 2013	General comment No. 17 (2013) on the right of the child to rest, leisure, play, recreational activities, cultural life and the arts (art. 31) (CRC/C/GC/17)	<p><b><u>VII. Children requiring particular attention to realize their rights under article 31</u></b></p> <p><b>35. Children from indigenous and minority communities:</b> Ethnic, religious, racial or <b>caste discrimination</b> can serve to exclude children from realizing their rights under article 31. Hostility, assimilation policies, rejection, violence and discrimination may result in barriers to enjoyment by indigenous and minority children of their own cultural practices, rituals and celebrations, as well as to their participation in sports, games, cultural activities, play and recreation alongside other children. States have an obligation to recognize, protect and respect the right of minority groups to take part in the cultural and recreational life of the society in which they live, as well as to conserve, promote and develop their own culture. However, children from indigenous communities also have the right to experience and explore cultures beyond the boundaries of their own family traditions. Cultural and artistic programmes must be based on inclusion, participation and non-discrimination.</p>
14 Nov 2014	Joint general comment No. 18 of of the Committee on the Rights of the Child and joint general recommendation No. 31 of the	None

	Committee on the Elimination of Discrimination against Women on harmful practices (CEDAW/C/GC/31/CRC/C/GC/18)	
21 Jun 2017	General comment No. 19 on public budgeting for the realization of children's rights (art. 4) (CRC/C/GC/19)	None
06 Dec 2016	General comment No. 20 on the implementation of the rights of the child during adolescence (CRC/C/GC/20)	None
21 Jun 2017	General comment No. 21 on children in street situations (CRC/C/GC/21)	None
16 Nov 2017	Joint General Comment No. 3 of the CMW and No. 22 of the CRC in the context of International Migration: General principles (CRC/C/GC/22)	None
16 Nov 2017	Joint General Comment No. 4 of the CMW and No. 23 of the CRC in the context of International Migration: States parties' obligations in particular with respect to countries of transit and destination (CRC/C/GC/23)	None
18 Sep 2019	General comment No. 24 on children's rights in the child justice system (CRC/C/GC/24)	None
24 Mar 2021	General Comment No. 25 on Children's Rights In Relation To The Digital Environment (CRC/C/GC/25)	None

The table indicates that the General Comments of the CRC Committee addresses caste-based discrimination has been addressed only twice and in a very narrow sense.

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