Chapter Six

Human Rights Perspective of Crimes Against Juveniles:
Judicial Response
"Injustice anywhere is threat to justice everywhere."

-Martin Luther King Jr.
CHAPTER-SIX

6.0 GENERAL INTRODUCTION

Human rights are those rights which are inherent in human nature and without which a person cannot survive as a human being. They are inalienable and universal in nature and necessary for development of human beings. The United Nations set a common standard on human rights with the adoption of the Universal Declaration of Human Rights in 1948. Although this Declaration is not part of binding international law yet its acceptance by all countries around the world gives great moral weight to the fundamental principle that all human beings, rich and poor, strong and weak, male and female, of all races and religions, are to be treated equally with respect to their human rights. The United Nations has since adopted many legally binding international human rights instruments. Through these instruments, the principles and rights outlined become legal obligations on those States choosing to be bound by them. The framework also establishes legal and other mechanisms to hold governments of such states accountable in the event they violate human rights.

The instruments of the international human rights framework are the Universal Declaration of Human Rights and the six core human rights treaties: the International Covenant on Civil and Political Rights; the International Convention on the Rights of the Child; the Convention against Torture and other Cruel, inhuman or Degrading Treatment or Punishment. As part of the framework of human rights law, all human rights are indivisible, interrelated and interdependent. Understanding this framework is important for promoting protecting and realizing children’s rights.

6.1 Background of Human Rights

Human rights are the standards that recognize and protect the dignity of all human beings. Human rights deal with basic rights and obligations of a man with society, government and others i.e., these rights are not to be exercised to the

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disadvantage of others. Human rights are not absolute as a man has to respect rights of others and cannot do anything averse to interest of others. Human rights are inherent; we inherit them by virtue of being humans from cradle to grave. They are inalienable and the individuals cannot give them up and they cannot be taken away – even if governments do not recognize or protect them. They are universal; they are held by all people, everywhere – regardless of age, sex, race, religion, nationality, income level or any other status or condition in life. Human rights belong to each and every one of us equally.

Human rights are indivisible and interrelated, with a focus on the individual and the community as a whole. Although Human rights are often divided into two categories – civil and political rights and economic, social and cultural rights – rights cannot be treated separately or in distinct categories because the enjoyment of one right usually depends on fulfillment of other rights. People who are denied civil and political rights, such as political participation, have no means to protect the economic, social and cultural rights covering such needs as education and health care. Similarly when basic needs of survival are not (food and shelter) fulfilled then rights of education are useless, all rights are correlated and could not be met in isolation.³

6.2 Understanding the Rights of the Child

Human rights apply to all age groups; children have the same general Human rights as adults. But children are particularly vulnerable and so they also have particular rights that recognize their special need for protection. The Convention on the Rights of the Child sets out the rights that must be realized for children to develop their full potential, free from hunger and want, neglect and abuses. It reflects a new vision of the child. Children are neither the property of their parents nor are the subject of their own rights. The Convention offers a vision of the child as an individual and as a member of a family and community, with rights and responsibilities appropriate to his or her age and stage of development. By recognizing children’s rights in this way, the Convention firmly sets the focus on the whole child.⁴

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³ Id., p. 4.
The Convention and makes clear the idea that a basic quality of life should be the right of all children, rather than a privilege enjoyed by a few. Despite the existence of plethora of rights, children suffer from poverty, homelessness, abuse, neglect, preventable diseases, unequal access to education and justice systems that do not recognize their special needs. These are problems that occur in both industrialized and developing countries.

The Convention on the Rights of the Child applies to everyone equally, with special protections for particularly vulnerable groups, such as ethnic minority children. The principles outlined in the international human rights framework apply both to children and adults. Children are mentioned explicitly in many of the human rights instruments; standards are specially modified or adapted distinct for children. The children’s human rights are articulated in other international instruments. This Convention articulates the rights more completely and provides a set of guiding principles that fundamentally shapes the way in which we view children.

The Convention on the Rights of the Child was the first instrument to incorporate the complete range of international Human rights – including civil, cultural, economic, political and social rights as well as aspects of humanitarian law. The Convention on the Rights of the Child, a universally agreed set of non-negotiable standards and obligations, provides protection and support for the rights of children. In adopting the Convention, the international community recognized that is it children under 18 years of age often need special care and protection that adults do not. To help stem the growing abuse and exploitation of children worldwide, the United Nations General Assembly in 2000 adopted two Optional Protocols to the Convention in order to increase the protection of children from involvement in armed conflicts and from sexual exploitation.⁵

Commercial sexual exploitation of children – such as the sale of children, child sex tourism and child pornography – are prevalent all over the world. An estimated one million children (mainly girls but also a significant number of boys)

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⁵ Kinmu, Gunian, From bondage 50 freedom an Analysis of International Legal regime on Human trafficking. New Delhi, 2006. p. 33.
enter the multi-billion dollar commercial sex trade every year, suffering degradation and life-threatening risk.\textsuperscript{6}

Articles 34 and 35 of the Convention on the Rights of the Child mandate that governments should protect children from all forms of sexual exploitation and abuse and take all measures possible to ensure that they are not abducted, sold or trafficked. The Convention's Optional Protocol on the sale of children, child prostitution and child pornography further supplements the Convention by providing States with detailed requirements to end the sexual exploitation and abuse of children. It also protects children from being sold for non-sexual purposes – such as other forms of forced labour, illegal adoption and organ donation.

The Protocol provides definitions for the offences of 'sale of children', 'child prostitution' and 'child pornography'. It also creates obligations on governments to criminalize and punish the activities related to these offences. It requires punishment not only for those offering or delivering children for the purposes of sexual exploitation, transfer of organs or children for profit or forced labour, but also for anyone accepting the child for these activities. The Protocol also protects the rights and interests of child victims. Governments must provide legal and other support services to child victims.\textsuperscript{7} International human rights instruments such as the Convention on the Rights of the Child and its Optional Protocols are negotiated among United Nations Member States and are legally binding on the individual States that become parties to the instrument. There are two ways for a State to become a party: by signature and ratification or by accession.

In ratifying the Convention or an Optional Protocol, State accepts an obligation to respect, protect, promote and fulfill the enumerated rights – including by adopting or changing laws and policies that implement the provisions of the Convention or Protocol. The Convention places equal emphasis on all of the rights for children. There is no such thing as a 'small' right and no hierarchy of human rights. These rights are indivisible and interrelated, with a focus on the child as a whole. Government decisions with regard to any one right must be made in the light of all the other rights in the Convention.

\textsuperscript{6} www.nhrc.nic.in (Accessed on 09/03/2013).
\textsuperscript{7} Id., p. 5.
Signature constitutes a preliminary endorsement of the Convention or Protocol. Signing the instrument does not create a binding legal obligation but does demonstrate the State's intent to examine the treaty domestically and consider ratifying it. While signing does not commit a State to refrain from acts that would defeat or undermine the treaty's objective and purpose.

Ratification or accession signifies an agreement to be legally bound by the terms of the Convention. Though accession has the same legal effect as ratification, the procedures differ. In the case of ratification, the State first signs and then ratifies the treaty. The procedure for accession has only one step – it is not preceded by an act of signature.

Translating child rights principles into practice requires action and leadership by governments. By ratifying the Convention, States commit to undertake all appropriate legislative, administrative and other measures for the full realization of the rights it contains and to reporting on these measures to the Committee on the Rights of the Child, the body of experts charged with monitoring States' implementation of the Convention.8

The children are the future custodians of sovereignty, rule of law, justice, liberty, equality, fraternity and finally international peace and security. They are the potential embodiment of our ideals, aspirations, ambitions, future hopes. In fact they are the only messengers of our Ideologies, philosophies, knowledge and cultural heritage. They are the. 'future shoulders' in the form of great philosophers, rulers, scientists politicians, able legislators, administrators, teachers, judges, technologists, Industrialists, engineers, workers, planners on which the country would rest. Undoubtedly, the child by reason of his physical and mental immaturity needs special care and protection including adequate legal protection. At the international level 'the state parties to the United Nations convention on the rights of children have shown their concern over growth and well being of children. They convinced that it is all down to family and society to afford necessary protection and assistance to them so they could duly assure their responsibilities.

We as a society are under an obligation to train, equip, develop these tiny apostles of love with power, strength, abilities, insight, understanding and o At this

8 Supra note 1 at p. 5.
juncture an emphasis has been laid on the development of respect for human rights and basic freedoms.  

6.3 International Dimension

Long ago, the states had no concern with the children and their rights. The abuses of the factory system in England are still fresh in the minds of the people under which a child labour force, could be recruited and made to work for long hours from the age of eight years. Very often, the children while working at machines for long time used to sleep and consequently rolled into them along with the cotton bales. Similarly, at other places in the world children's plight was equally unmitigated till the end of the nineteenth century and the early decades of present century. They were treated equal to the adults in criminal cases and were given no consideration to their tender age and mind. However, it is a historical fact that common law had acknowledged the special status of the children before the courts in England. The children below the age of seven year were treated incapable of forming criminal intent and hence could not be tried for felony or misdemeanor. The beginning of the movement for the rights of the child can however, be traced back to the mid of the nineteenth century with the publication of an article in June 1852 by Slovak. The Rights of the Children' followed by Kate Kliggin's "Children Rights" in 1892.

With the advent of nineteenth century the legal position of the child in England began to change with the Introduction of the factory laws which concentrated on the amelioration of the working conditions for all employees including children. This created 'slow and tenuous understanding in the wind of the people that children in themselves are a group and they need to be treated separately as they need special care and protection. The generalisation and expansion of this understanding resulted in the international recognition and acceptance of the fact that the children need special care and protection. The Geneva Declaration on the Rights of the Child, 1924 which was adopted by the League of Nations, was the first convention in which the rights of the child were considered. However, the rights of the child were very narrowly interpreted as we find that the provisions were made for the measures to be taken only against slavery, child labour and traffic and prostitution.

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6.3.1 U.N. Charter and Universal Declaration of Human Rights, 1948

Through various provisions in the UN Charter, the members of the United Nations reaffirmed their faith in fundamental rights and in the dignity being human beings. It is to be noted that the dignity and worth of human person stated here also includes children. Further the UN Charter contains a provision for international cooperation in solving international problems including promoting and encouraging respect for human rights and fundamental freedoms for all without distinction as to race, sex, language or religion. Here too, the children are not left out. The guarantee envisaged includes children within its ambit.

The UNGA adopted the Universal Declaration of Human Rights on December 10, 1948, which embodies some more measures to protect the child. Through it, a “common standard” of achievement for all people and all nations was adopted, it says. Then it provides that everyone is entitled to all the rights and freedoms set forth in this Declaration without any distinction of any kind. It is notable that the word at used in Article I and the word “everyone” used in Article 2 obviously and necessarily includes the child also. Besides, this Declaration while dealing with the protection of family says that the family is the natural and fundamental group unit of society and is entitled to protection by the society and the State. No definition of ‘family’ has been given in the Declaration but by no Interpretation-the child ‘may be subjected to the exclusion from its ambit. Thus the only, conclusion is that the Declaration recognized several rights of the child including right to life and liberty, prohibition of slavery and slavery trade, prohibition of torture mid Inhuman treatment, right of equality before law and legal remedies, right to freedom of movement to leave any country and to return to his country, right to seek asylum, right, to nationality, right to own property, right to freedom of thought, conscience and religion, right to (in opinion and expression) and IR right to freedom of peaceful assembly and association, right to social security, right to work, free childhood employment etc. right to education, right to enjoy arts and to share in scientific advertisements. The Declaration, while dealing with the question of social security, said that the motherhood and the childhood entitled to special care and assistance. All children, whether born in or out of wedlock shall enjoy the same special protection. This Declaration though could not
assume any legal sanction behind it yet. It is beyond any reasonable doubt that it has acquired force of customary international law.

Now let us see the provision of the International Covenant on the Economic, Social and Cultural Right 1966 and the International Covenant on the Civil and Political Rights, 'JGGL'11 and the optional Protocol providing for the protection and development of children. The International Covenant on Economic, Social and Cultural Rights provides (1) the widest possible protection and assistance would be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent Children, (2) special measures of protection and assistance should be taken on behalf of all children and young persons without any discrimination for reasons of parentage or other conditions.10

Similarly, the International Covenant on Civil and Political Rights provided, that in case of dissolution of marriage between the spouses "provision shall be made for the necessary protection of any child. It also provides, that every child shall have without any discrimination right to such protection as are required by his status as minor, on the part of his family, society and State. The same article also secures to a child the right to name and confer upon him right to acquire a nationality.

6.3.2 U.N. Declaration of the Rights of the Child, 1959

The adoption of a Declaration of the Rights of the Child by the GA of the United Nations on November 20, 1959 was indeed a very important event as regards the international recognition of the rights of the child. The GA affirmed that the child has the right to enjoy special protection and to be given opportunities and facilities to be able to develop in a healthy and normal manner. This Declaration considered of certain important principles speaking for the rights of the child to love and affection, understanding, adequate nutrition and medical care, free education, full opportunity for play and recreation, special care if handicapped, to be amongst the first to receive relief in times of disaster, to learn to be useful member of society and to develop individual abilities, to be brought up in a spirit of peace and universal brotherhood, and to enjoy these rights regardless of

race, colour, sex, religion, national and social origin. However, this document also lacked any legal sanction behind it.¹¹

6.3.3 U.N Declaration on Social Progress and Development

Then the UNGA adopted another Declaration on Social Progress and Development which in its Parts I while discussing with the concept of family as a basic unit of society observes that the growth and well-being of its members, particularly children and youth should be assisted and duly protected. Whereas in its Part II it provides for the protection of the rights of the child. This was followed by the Declaration on the Protection of Women and Children in Emergency and Armed Conflict, adopted by the UNGA in 1974. This Declaration provides for prohibition of attacks and bombings on civilian population inflicting incalculable sufferings specially on women and children who are the most vulnerable members of the population and that the measures such as persecution torture, inflicting heavy losses of civilian population including children shall be condemned should ensure that in military operations in punitive measures degrading treatment and violence against children is also prohibited. The Declaration also provides that the acts of repression and cruel and inhuman treatment of children including imprisonment, torture, shooting, mass arrests, collective punishment etc. committed by the belligerents in the course of military operation shall be criminal acts.¹²

In the field of juvenile justice UNGA has not been left behind. It adopted United Nations Standard Minimum Rules (Beijing Rules) for the administration of Juvenile justice. They include the rules relating to age of criminal responsibility, aims of juvenile justice, scope of discretion, rights of juveniles, protection of privacy, detention pending trial, competent authority to adjudicate, legal counsel parents and guardians, social enquiry reports, guiding principles in adjudication and disposition, least possible-use of institutionalization, avoidance of unnecessary delay, record, need for professionalization and training, effective implementation and training, provision of needed assistance, application of standard Minimum Rules for the Treatment of offenders adopted by the United Nations, frequent and

¹¹ Id., p. 12.
¹² Supra note 1, p. 17.
early recourse to conditional release and research as a basis for planning policy, formulation and evaluation.\textsuperscript{13}

The adoption of the Beijing Rules by the UNGA was followed by the Declaration on Social and Legal principles relating to the protection and welfare of children with special reference to roster placement and adoption Nationally and Internationally which the UNGA adopted on December 3, 1986. This Declaration puts the States under obligation to see that a high priority is given to family and child welfare and that the child welfare depends upon good family welfare. The child welfare basically requires that the child should be taken care of by his or her own parents and where they are not available care should be taken by the relatives of the child's parents or another substitute foster or adoptive family or if necessary by an appropriate institution.

\textbf{6.3.4 UN Convention on the Rights of the Child (CRC), 1989}

This convention deals directly with trafficking in children especially girl children, under the age of 18, unless, majority is attained at an earlier age under domestic laws. State Parties are to take all appropriate natural, bilateral and multilateral measures to prevent the abduction of the sale of or traffic in children for any purpose or in any form. Children are also protected from all forms of economic exploitation, sexual exploitation and sexual abuse.

The relevant provisions of the convention are as follows:

\begin{itemize}
    \item In all actions concerning children, the best interests of child shall be primary considerations (Article 3)
    \item Every child has a right to life (Article 6)
    \item Every child has a right to name and nationality. (Article 7)
    \item Ensure that no child is separated from his or her parents against their will except in cases where it is determined that separation is necessary for the ‘best interests’ of the child. (Article 9)
    \item Take measures to combat the illicit transfer and non-return of children abroad. (Article 11)
    \item Legal protection from arbitrary or unlawful interference with privacy, family home or correspondence and unlawful attacks on honour or reputation. (Article 11)
\end{itemize}

\textsuperscript{13} Ibid.
Protection against physical or mental violence, injury, abuse, neglect or negligent maltreatment or exploitation, including sexual abuse. (Article 19)

No child is to be deprived of his or her right to health. (Article 24)

Every child has the right to education. (Article 28)

Every child has the right to rest and leisure, engage in play and recreational activities. (Article 31)

On the 20th Nov. 1989, the General Assembly adopted the Convention on the Rights of the Child. With the exception of USA and Somalia, 192 countries have affirmed their commitment to the Convention. The United Nations Convention on the Rights of the Child (UNCRC) is the most comprehensive international instrument on the rights of the child. This Convention lays down the standards for the physical, moral, mental, spiritual and social development of the child and views the child as one of the most fundamental human rights concern. India ratified the convention in December 1992. The United Nations Convention on the Rights of the Child is based on the Universal Declaration of Human Rights and International Covenant on Human Rights. The Convention through its 54 Articles views the child as an individual possessing a number of economic, civil, social, political and cultural rights. The right to Survival, Protection, Development and Protection form the core of the convention.

India ratified the Convention on the Rights of the Child in the year 1992. The CRC draws attention to the four sets of civil, political, social, economic and cultural rights of the child:

1. **The Right to Survival**: includes the right to life, the highest attainable standard of health, nutrition and adequate standard of living. It also includes the right to name and nationality.

2. **The Right to Protection**: includes freedom from all forms of exploitation, abuses, inhuman or degrading treatment and negligence including the right to special protection in situation of emergency and armed conflicts.

3. **The Right to Development**: consists of the rights to education, support for early childhood, development and care, social security and right to leisure, recreation and cultural activities.
4. The Right to Participation: includes respect for the views of the child, freedom of expression, access to appropriate information and freedom of thought, consensus and religion.

6.4 Relevant Articles from the UN Convention on the Rights of the Child

Article 34: States Parties undertake to protect the child from all forms of sexual exploitation and sexual abuse. For these purposes, States Parties shall in particular take all appropriate national, bilateral and multilateral measures to prevent:
(a) The inducement or coercion of a child to engage in any unlawful sexual activity;
(b) The exploitative use of children in prostitution or other unlawful sexual practices;
(c) The exploitative use of children in pornographic performances and materials.

Article 35: States Parties shall take all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form.

Article 36: States Parties shall protect the child against all other forms of exploitation prejudicial to any aspects of the child’s welfare.

Article 37: States Parties shall ensure that:
(a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age;

(b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time;

(c) Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child’s best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances;

(d) Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the
legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority and to a prompt decision on any such action.

6.5 United Nations Convention on the Rights of the Child (CRC) at a Glance

Preamble

Part I Operational Articles

Article 1 Defines child as a person who is below the age of 18 years.

Article 2 Non-discrimination

Article 3 Best interest of the child

Article 4 Measures for implementation of rights

Article 5 Parents, family, community rights and responsibilities

Article 6 Right to life

Article 7 Right to name and nationality

Article 8 Preservation of identity

Article 9 Non-separation from parents

Article 10 Family reunification

Article 11 Illicit transfer and non-return of children abroad

Article 12 Expression of opinion

Article 13 Freedom of expression and information

Article 14 Freedom of thought, conscience and religion

Article 15 Freedom of association and peaceful assembly

Article 16 Privacy, honour, reputation

Article 17 Access to information and media

Article 18 Parental responsibility

Article 19 Abuse and neglect (while in family or in care)

Article 20 Protection of child who is deprived (temporarily or permanently) of family environment

Article 21 Adoption

Article 22 Refugee children

Article 23 Disabled children

Article 24 Health care

Article 25 Periodic review of children in care
Article 26 Social security
Article 27 Standard of living
Article 28 Education
Article 29 Aims of education
Article 30 Children of minorities, indigenous children
Article 31 Play, recreation and participation in cultural life and the arts
Article 32 Economic exploitation
Article 33 Protection from narcotic and psychotropic substances abuse
Article 34 Sexual exploitation
Article 35 Abduction/sale/trafficking of children
Article 36 Other forms of exploitation
Article 37 Torture, capital punishment, deprivation of liberty
Article 38 Armed conflicts
Article 39 Recovery and reintegration (following abuse, torture, armed conflicts etc)
Article 40 Juvenile Justice
Article 41 Rights in other national or international instruments

Part II Enforcement
Article 42 Dissemination of the principles and provisions of the Convention
Article 43 Establishment of the Committee
Article 44 Reports from States Parties
Article 45 Method of work of the Committee

Part III Administrative Issues
Article 46 Signature
Article 47 Ratification
Article 48 Accession
Article 49 Entry into force
Article 50 Amendments
Article 51 Reservations
Article 52 Denunciation
Article 53 Depository
Article 54 Authentic texts
As can be seen from the above Box, the Convention not only provides for monitoring the performance of States Parties at the international level but also what is being done for children at the national level. Article 43 sets out the criteria for the establishment of the United Nations Committee on the Rights of the Child, which receives and reviews reports prepared by States Parties about their progress in implementing the Convention as required by Article 44. Unlike other international initiatives that have been taken on behalf of children, in particular, the Declaration and Plan of Action that emerged out of the World Summit for Children that was held at New York in September 1990, there is no requirement per se that the Convention is to be fully implemented by all countries within a stipulated date. Instead, all countries are required to make constant progress towards its implementation, but at a rate that suits their economic and political situation within the resources that are available to them. In nutshell, the CRC does not have a time limit nor does it have an expiry date. The obligations on countries to live up to the rights of children will not cease, but will continue to require action and attention of each one of us, including the Government, to take the onus of protecting and respecting rights of children not because of an international agreement but because "that's just the way children are to be treated". A Special Rapporteur has also been appointed on the Sale of Children, Child Prostitution and Child Pornography by the United Nations General Assembly who analyses instances of sexual exploitation of children in various countries.\(^14\)

The battle for creating norms protection of rights of the child at the international plane has almost finally won with the adoption of the Convention on the Rights of the Child by the United Nations General Assembly on November 2, 1990. This convention has come into force-on September 2, 1990 after having received the adequate number of ratifications. On the subject of the rights of the child this is very important and comprehensive treaty. It is also notable that this treaty is the outcome of detailed negotiations of years. The convention provides for the first specific right namely the inherent right to life and that the States must ensure to the maximum possible the survival and development of the child. The rights regarding access to health care services, and adequate standard of living

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including food, clean water and a place to live and to name and nationality have been recognized under the head of survival aspect whereas under the developmental aspect of rights of the child the convention has guaranteed to every child the right to education to rest and leisure to freedom to expression and information and to freedom of thought, conscience and religion. The convention incorporates another very important right of the child against his/her parents that they shall give “due weight” to the views of the child in accordance with their age and maturity. Regarding the protective aspect the convention has extended protection to mentally and physically handicapped children, child refugees, or parentless children or children who are separated from their parents. The convention has also taken care of the children, who in certain cases, need to be protected ‘from their own parents, also where the parents are unable to take proper care of them because of their disease, bad habits or poverty. The children have also been protected from economic, sexual and other forms of exploitation. Appropriate measures are required to be taken to protect the children from the use and sale of drugs. The convention has also set out the rights of the children during the war and armed conflict.\footnote{Id., p. 135.}

\section*{6.6 Other International Mechanism}

The United Nations makes comprehensive recommendations for the Governments, regional and international organizations, with regard to law reforms and law enforcement, measures to address the root factors that encourage trafficking in women and girls for prostitution and other forms of commercialized sex. It further provides resource allocation for programmes to heal and rehabilitate into society victims of trafficking. The United Nations through its agencies like United Nations Development Fund for Women, United Nations Children's Fund, United Nations Development Programme and United Nations Educational, Scientific and Cultural Organization encourage governments to develop systematic data-collection methods and continuously update information on trafficking in persons, including the analysis of the modus operandi trafficking syndicates, and to strengthen national programmes to combat this problem through sustained
bilateral, regional and international cooperation. Given below are the work done by
the agencies of the United Nations in the field of trafficking.\textsuperscript{16}

6.6.1 **United Nations Development Fund for Women (UNIFEM)**

The United Nations Development Fund for Women provides financial
support and technical assistance to innovative programmes promoting women’s
human rights and issues related to women’s empowerment and gender equality.
The United Nations Development Fund for Women works primarily at the country
level but is moving towards regional programs in which individual country projects
are linked in terms of a common focus and approach adapted to national situations
and capacities. At the regional level, the United Nations Development Fund for
Women undertakes advocacy as well as sponsoring action-research in the area of
trafficking in women and children.\textsuperscript{17}

6.6.2 **United Nations Educational, Scientific and Cultural Organization**
**(UNESCO)**

One of the aims of the United Nations Educational, Scientific and Cultural
Organization is to promote human rights and fundamental freedoms. The United
Nations Educational, Scientific and Cultural Organization takes action in
international standard setting in the preparation and adoption of international
instruments and statutory recommendations. From time to time it convenes
meetings and prepares reports revolving around issues of trafficking and slavery-
like practices. The United Nations Educational, Scientific and Cultural
Organization has official with about 600 NGOs worldwide and about 1,200 NGOs
cooperate with the United Nations Educational, Scientific and Cultural
Organization on projects on an occasional basis.\textsuperscript{18}

6.6.3 **United Nations Children’s Fund (UNICEF)**

The United Nations Development Fund for Children looks at child labour
and sexual exploitation of children as a gross violation of children’s rights. It has
regional and country-level projects on trafficking. The United Nations
Development Fund for Children works closely with other UN agencies such as the
Office of the High Commissioner for Human Rights, the Committee on the Rights

\textsuperscript{16} Supra note 1, p. 17.
\textsuperscript{17} Id., p. 18.
\textsuperscript{18} Ibid.
of the Child, International Labour Organization (ILO) and the UN Special Rapporteur on the Sale of Children, Child Prostitution and Pornography in its projects on trafficking. In the areas of child labour and child sexual exploitation, the United Nations Development Fund for Children holds regular consultation with NGOs to discuss research findings, programme implementation findings and to develop complementary policies and programmes. For example, in West Africa, The United Nations Development Fund for Children has been networking regularly with NGOs on child trafficking.\textsuperscript{19}

\textbf{6.6.4 The United Nations Development Programme (UNDP)}

The United Nations Development Programme has projects on trafficking under its focus areas of gender and HIV/AIDS in some regions. For example, in South East Asia, the United Nations Development Programme had initiated a project between six countries "UN Inter-Agency Project on Trafficking in Women and Children in the Mekong Sub-Region" under its Gender Division. Under a the United Nations Development Programme HIV and Development project in South Asia, trafficking and related issues are key areas of focus. In Europe, a regional programme to support Gender and Development also focuses on trafficking in women. In each of these programmes there is partnership with relevant NGOs in the region.\textsuperscript{20}

So far we have seen the concern of the United Nations to protect the rights of the child and to provide for the basic needs but when we look towards other international institutions we find that they have also been very much concerned with the children and their rights and basic needs. The United Nations Development Fund for Children came into being in 1946 as the United Nations Children's Emergency fund) help the Children of was devalued Europe. This international institution a UN specialized agency, is primarily concerned with the well being and the rights of the children.

The next international organization devoted to safeguarding the rights of the workers which necessarily include the child workers is the International Labour Organisation. Since its coming into existence it has been struggling against the

\textsuperscript{19} Ibid.
\textsuperscript{20} Ibid.
child labour and played an important role in the protection of working children and in the elimination of the child labour.

The United Nations Educational, Scientific and Cultural Organization is another international organization that looks after the educational, scientific and cultural needs of children. It has focused a major share of its activism on the right to education of the children.\(^{21}\)

6.7 Regional Instruments Speaking for Rights of the Child

The American Declaration on the Rights and Duties of Man 1948, the European Social Charter. 1961, the American Convention on Human Rights, 1969 and the African charter on Human and people; Rights 1981 are some regional human rights Instruments which also provide for the protection of the rights of the child but of a limited perspective. We find several provisions providing for the special care and protection of the child in the European Social Charter (ESC) 1961, then the American Convention on Human Rights. AMR (1969) specifically provides that the law shall recognise equal rights for children born out of wedlock and those born in wedlock.\(^{22}\)

6.7.1 United Nations Conference on Environment and Development, 1992:

The United Nations Conference on Environment and Development met at Riodi Janeiro, Brazil, in June, 1992. Its real achievement was Agenda 21, which reinforces the commitments made at the World Summit for Children with the words 'specific goals for child survival, development and protection were agreed upon at the world Summit for children and remain valid also for Agenda 21, Chapter 25 of this Agenda 21 is devoted to children and youth and specifically urged government to-

a) Implement programmes to reach the goals set by the World Summit for children

b) Ratify and implement the convention on the Rights of the child

c) Promote primary environmental care activities to improve the environment by meeting' basic needs and empowering local communities

d) Expand children's education especially for the girl child,

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\(^{21}\) Ibid.

\(^{22}\) Supra note 3, at 34.
e) Incorporate children's concerns into all relevant policies and strategies for environment and development.

6.7.2 The World Conference on Human Rights, 1993:

In the world conference on Human Rights considerable urge was expressed for the protection and implementation of the rights of the child in the form of certain points including that World Conference reiterates the principle of “First call for children's” and in this respect underlines the Importance of major national and international efforts, specially those of the United Nations Children's Fund (UNICEF), for promoting respect for the rights of the child to survival, protection, development and participation and that the measures “should-be taken to achieve universal ratification of the convention of the Rights of the child by 1995 and the universal signing of the World Summit Declaration and Pl in of Action as well as their effective implementation.23

6.8 Judicial Response

It cannot be denied that the Constitution of India along with several other legislative enactments providing for various rights of the child has been existent since long but unfortunately they could not yield satisfactory results. The real credit goes to the Supreme Court for highlighting and enforcing the Juvenile Justice in India. We have come across great judicial activism displayed by the judges of the apex court. They indeed, have identified and brought to the notice of the people the areas 'where juvenile justice was conspicuous and therefore, needs careful implementation. With the help of some of the recent and representative cases decided by the Supreme Court and some of the High Courts an humble attempt has been made to have an idea of the judicial role on the rights of the child, in the pages to follow.

On the point of legitimacy and dignity of the child, the apex court in the famous case of Gautam Kundu v. State of West Bengal ruled that if a child is born during the continuance of a valid marriage then that is a conclusive proof about his legitimacy. A division bench comprising of Justice A.M. Ahmadi and Justice S. Mohan while reiterating sec. 112, I.E.A. observed that if the child was born during the continuance of a valid marriage between its mother and any or within 280 days after his dissolution and the mother remaining unmarried, it shall

23 Id., p. 36.
be taken as conclusive proof that he is the legitimate child of that man, unless it can be shown that the parties to the marriage had no access to each other at any time, when he could have been begotten. The courts have always desisted from hastily rendering a verdict and that too on the basis of slander materials, which would have the effect of branding a child a bastard and its mother as unchaste women. It was further held that the courts in India cannot order blood test as a matter of course and whereas applications are made for such prayers in order to have roving inquiry, the prayer for blood test could not be contorted. Making the point more clear Justice S Mohan said that there must be a strong prima facie case that the husband must establish non excess in order to dispel the presumption arising under Section 112 of the Evidence Act. The order may be lauded as it is bound to have a great impact Section125 of Cr PC. It is indeed a landmark contribution towards the protection of dignity of women and children at large.

The Supreme Court has also been very much active in the matter of individuals dignity. A division bench comprising of Chief Justice M.N. Venkatachalilah and Justice S Mohan while hearing the petition of Mr. Vir Singh, alleging that the police had taken away his seven-year-old daughter for interrogation in connection with the abduction of his other daughter has recently observed that they would stake their backs to protect the individual dignity. They would put every arm of law in action to implement their orders and that it was their highest duty to bring about a sense of constitutional culture in this country.

In this case the U.P. Police had resorted to a kind of "reprisal" against the petitioner's family for coming to court to get back his 13-year-old daughter allegedly abducted by his neighbours for marrying her with their son. The court asked Mr. Yageshwar Prasad, the senior counsel of U.P. Government, it proper that five uniformed police men questioned a 7-year-old girl at her house and later took her to the district police headquarter, 35 Kms away so that she could be interrogated by an officer of the bank of AS.P. What kind of message these policemen want to give? What should be done about this kind of monstrosity? On being informed that the 13-year-old girl could not be brought to the apex court as according to SHO, Bilaspur Police Station, she had to be taken to the court of the CMM, highly active and determined to protect the basic right of the child to dignity, the Chief Justice lamented, I think we will send all the police officers
straight to jail. The court then ordered the U.P. Government to pay a sum of Rs. 5000 to the petitioner to compensate for his travail of going from court to court for getting back his daughter.

On the issue of child rape, the Supreme Court through Justice S.R. Pandian and Justice M. Fatima Bibi in the month of May 1992 observed that the accused had created a private hell of till animated passions and sexual pleasure by assaulting and molesting young girls not only in utter disregard to the universal moral code, human dignity, professional ethics but also in flagrant violation of the law of the coolingly and sentenced him to seven years imprisonment and a fine of rupees 25,000 to be paid to the victim. In this case an eight years old girl was raped by the accused who was a medical practitioner at Jabalpur. However, the Supreme Court commenting upon the condition of the victim who was undergoing untold agony of the traumatic experience and deathless shame-observed with concern that she was under the impression that there was no monsoon in her life and that further mauled and settling down in a respectable family were completely marred. The Judges ruled that seriousness and gravity of that repugnant crime of rape perpetrated on the young child called for maximum punishment.

The UN Convention on the Rights of the Child, 1989 speaks of the inherent right to life and ordains that the States must ensure the maximum possible survival and development of the child. It goes on to say that parents shall give due weight, to the views of the child in accordance with his/her age and maturity. Respecting these noble mandates the Madras High Court recently upheld the right of minor to bear her child. It is notable that in this case Sashikala, a motherless, a minor girl of 16, was pregnant. Her decision to bear child was met with strong opposition by her father who went to the court of law to get her pregnancy medically terminated on the contention that she was a minor in the eyes of law and also, otherwise, too young and immature to decide on bearing the child. The Bench comprising Justice M. Srinivasan and Justice A. Abdul Hadi observed that in the Indian Constitution, Fundamental rights did not distinguish between majors and minor and Sashikala case could be taken as one involving the basic right of an Individual. The Judgment is landmark in the sense that it reflects court's individualistic approach to the problem. By upholding the right of a minor, though matures girl to bear her child out of wedlock, the court treated the child as an independence societal unit and the
mother as the best protector of the child's right. The judgment did away with the classical view that in societies like India, a child is not considered an independent social unit. His/her interest is best protected by the parents or guardians. To bear a child or to abort, comes with the ambit of one's right to privacy. It is this right to privacy which is held equally by the children and majors in our society and the court had been active in upholding this right of Sashikala.

Justice K.K. Gupta of Jammu and Kashmir High Court in May 1987 held the defendant, liable and ordered him to pay rupees 2.5 lac as damages for his breach of promise to marry the plaintiff, Shakina. In this case the plaintiff alleged that in 1981 when she was only 14 years of age the defendant, Ghulam Mohd. proposed to marry her and to counter her reluctance promised many comforts to her and got her parents agreed. The promise to marry lowered her sexual defence and she succumbed to him time and again. Soon she was pregnant and gave birth to 'his child but when the marriage date was fixed he refused to marry and accept responsibility. The court observed that it is only the side effect or effect product and the cause of action is not based-on the promise of marriage and breach of such promise. Merely because of the parties had also illicit cohabitation would not make the legal and valid cause of action illegal and immoral. Thus the court staved the plaintiff and her child from destitution.

As regards the basic rights and plight of Juvenile offenders the Supreme Court has been very much active. Justice PN Bhagwati and Justice RS Pathak highlighted the plight of juvenile prisoners in *Munna v State of UP*24, as under Juvenile delinquency is by and large, a product of social and economic maladjustment. Even if it is found that these juveniles have committed any offence they cannot be allowed to be maltreated. They do not shed their fundamental rights when they enter the jail. Moreover, the object of the punishment being reformation, we fail to see what social objective can be gained by sending them to jails where they come in contact with hard criminals and lose whatever sensitivity they may have to finer and nobler sentiments. In this case many juvenile under trials were kept in Kanpur Central jail where they were being sexually exploited by the adult prisoners, inspite of the fact that there was a children's home in Kanpur. The court condemning this practice and declaring it illegal, observed that no person under 16

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24 (1992) 1 SCC 546.
years of age should be sent to jail, instead they must be detained in a children's home or any other suitable place of safety as the law is very much concerned with ensuring that a Juvenile does not come into contact with hardened criminals and his chances of reformation are not belied by contact with habitual offenders, The Supreme Court expressed similar concern in several cases. In *Jayendra vs State of UP*\(^\text{25}\), it was observed that if a child is found to have committed an offence punishable with imprisonment, even though the court may order him to be sent to an approved school but not to jail. Similarly, in *Umesh Chandra v. State of Rajasthan*\(^\text{26}\), the apex court observed that relevant date for the applicability of the Children Act, so far as age of the accused who claims to be a child' is concerned, is the date of the occurrence of the offence and not the date of the trial. The case of *Gopi Nath Ghosh v. State of WB*\(^\text{27}\), reflects high judicial activism as the Supreme Court in this case set aside the sentence-of imprisonment for life imposed by the trial court and confirmed by High Court against a minor who was tried with other accused for murder and remitted the case to learned magistrate for disposal according to the provisions of the Children's Act.

Again the Supreme Court condemned and discouraged the detention of children below 16 years in jails in a very famous decision in *Sheela Barse v. Union of India*\(^\text{28}\), when it had observed: It is a matter of regret that despite statutory provisions and frequent exhortations by social scientists there are still a large number of children in different jails in the country. It is the atmosphere of the jail which has a highly injurious effect on the mind of the child estranging him from the society and breeding in him aversion based on hatred against a system which kept him in jail. On no account should the children be kept in jail and if a state government has not got sufficient accommodations in its remand homes, the children should be released on bail instead of being subjected to incarceration in jail. Then in an other case Justice Mohan of the same court declared the admission of non-criminal mentally ill children and adults to jail illegal and unconstitutional as held in *M.C. Mehta vs. State of Tamil Nadu*\(^\text{29}\).

\(^{27}\) AIR 1984 SC 237.
\(^{28}\) AIR 1986 (1773)
\(^{29}\) AIR 1997 SC 699.
This case dealt with employment of child labour in manufacturing of matches and fire-crackers at Sivakasi. On 31st December 1985 there were 221 registered match factories in Sivakasi; these factories employed 27,338 workmen of which 2,941 were children. This judgment examines the reasons for continuation of child labour despite the Child Labour (Prohibition and Regulation) Act 1986.

The most violated human rights are the children rights. Around 185,000 children are working as domestic labour (2001 census). It is the most highlighted problem globally.

In *Bandhua Mukti Morcha vs. Union of India*\(^{30}\), it was held that the children are being forced in many labour works, domestic works, bonded labour, rag picking, forced to work in roadside eateries, prostitution, in factories etc. Which is an organisation that works for release of bonded labour in the country conducted a survey of stone quarries in Faridabad district. This survey reflected that there were a large number of labourers from Maharashtra, Madhya Pradesh, Uttar Pradesh and Rajasthan who were working in these stone quarries under 'inhuman and intolerable conditions', and many of whom were bonded labourers. The organization addressed a letter to the Supreme Court setting out these facts; this letter was converted by the Court into a writ petition.

In *Sanjay Suri v. Delhi Administration*\(^ {31}\), the Supreme Court while expressing judicial activism towards securing the human right of juvenile delinquents laid down some directions as follows that due care shall be taken to ensure that the juvenile delinquents are not assigned work in the same area where regular prisoners are made to work. Care should be taken to ensure that there is no scope for their meeting and having contacts: that steps should be taken to shift the warders at the end of every three years such transfers will instead be helpful in restoring discipline in the jails. The visitor's Board should consist of cross sections of society, people with good background, social activists, people having contacts with the news media, lady social workers, jurists, retired public officers from the judiciary and also the executives; that the session judge should be given an acknowledged position as a visitor and his visits should not be routine ones. Full care should be taken by him to have real picture of the defects in the administration

\(^{30}\) AIR 1984 SC 802.
\(^{31}\) AIR 1989 SC 414.
of the resident prisoners and under trials. The decision of the Supreme Court in *Kakoo v. State of AP*\(^{32}\), is very important and relevant as it shows the real judicial activism regarding the basic rights of the child. In this case a boy of only 13 years of age had committed rape on a small child of two years. Reducing the sentence on humanitarian consideration Justice Sarkaria observed that an inordinate long imprisonment term is sure to turn juvenile delinquent into hardened criminal and laid an emphasis that in case of child offender, current trends command a more humanitarian approach. Similarly, in *Hiralal Malik v. State of Bihar*\(^{33}\), Justice Krishna Iyer in relation to sentencing policy towards the juvenile delinquents had observed that the family tie of the juvenile in jail must be kept alive and with this idea in view, he referred to the need for parole in such cases. He directed that the appellant, who was quite a young boy when the offence was committed, shall not be forced to wear convict costume provided his guardians supply his normal dress.

Again the learned Justice in *Phul Singh v. State of Haryana*\(^{34}\), held that sentencing efficacy in cases of lust to criminality cannot be simplistically assumed by the award of long Incarceration, for often that remedy aggravates-the malady... one major method in securing this goal is to keep the family tie of the person in prison so that he may not deteriorate-into a non-person. Relating to juvenile justice system and various duties of the government, the Apex court in *Sheela Barse v. Union of India*\(^{35}\), observing that a child is a national asset, held that it was a duty upon the State to look after the child with a view to ensure full development of its personality and that every State government must take necessary steps so as to setting-up adequate number of courts, appointing requisite number of judges and providing them for necessary facilities. The court also stressed that the State Government must set up necessary remand home and Observation homes where children accused of any offence may be lodged pending investigation and trials. It is no answer on the part of the State that it has not got enough number of remand homes and observation-homes or other places where children can be kept and that is why they are lodged in jails. On the issue of the basic right of the deviant child to liberty the same court in this case observed that in dividing whether the juvenile

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\(^{33}\) AIR 1977 SC 226.
\(^{34}\) AIR 1980 SC 249.
\(^{35}\) AIR 1986 SC 177.
has to be deprived of liberty or released in the parental custody or to a third party or what conditions should apply to judge must follow due process followed by presumption favouring release. According to the court, we should abandon the notion that to secure detention is good for the child and so legality of preventive detention in juvenile courts needs to be tested. The court also emphasized on the point that the magistrate must be extremely can that person apparently under the age of 16 years is sent to jail but he must be detained in a children home or other place of safety. So as to improve the quality of justice in the juvenile Court for a better welfare of the child, the court further observed that the Juvenile Court has to be manned by it’s judicial officer with some special training. Creation of a court with usual judicial officer and labeling it as juvenile court does not serve the requirement of the statue. The statutory scheme contemplates a judicial officer of a different type with a more sensitivity oriented outlook. Without these, any judicial officer would, indeed, not be competent to handle the special problems of the children. On the point of right to free legal aid the court gave a direction to the state legal aid boards to provide the facility of lawyers’ services to the under trial children.

In Bhagwan Singh v. State of Punjab\(^{36}\), while affirming the punishment imposed by the High Court, the Supreme Court held that if the custodians of law themselves indulge in committing crimes then no member of the society can be safe and secure nor human rights will have a value to an individual. In Veena Sethi v State of Bihar\(^{37}\), the Supreme court identified itself as highly active when it ordered the release of children below the age to 10 years and under trial prisoners languishing almost for decades in different jails of the country of the basic right of the child to speedy trial. The court further laid down that so far as a child, accused of an offence punishable with imprisonment of not more than seven years is concerned, it would regard a period of three months from the date of filling of the complaint or lodging the FIR as the maximum time permissible for investigation and period of six months from the filling of the charge sheet as a reasonable period within which the trial of the child must be completed. If that is not done, the prosecution against the child would be liable to be quashed.

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\(^{36}\) AIR 1982 SC 1689.
\(^{37}\) AIR 1990 SC 1413.
Justice Krishna Iyer, expressing his concern over the non-enforcement of juvenile justice in the State of Uttar Pradesh, in *Sattoo v. State of UP*\(^38\), observed that the Uttar Pradesh Children Act appears to have been virtually a go by in the courts below a phenomenon which frequently happens because the practicing lawyers and judicial officers have not yet given the deeper reflection that welfare oriented rehabilitative legislation of the mentally and normally retarded in the criminal justice field deserve. He also pronounced the right of child to all the procedural safeguards, which are available to an adult, in case he is to be detained.

On the right to free legal aid to poor and the right to be defended by a legal practitioner Justice *P N Bhagwati in Khattri v. State of Bihar*\(^39\), has obliged the Magistrates or the session judge before whom the accused appears to inform the accused that if he is unable to engage the services of lawyer on account of poverty, he is entitled to obtain free legal services at the cost off State. This imperative is also applicable to children as well. This decision shows high quality of judicial activism in the field of human rights of those poor and downtrodden including the children who could not otherwise get justice.

Regarding right to bail of the child offenders the juvenile justice Act provides for mandatory grant of bail even for non-bailable offences unless there are reasonable grounds for believing that the release is likely to bring him into association with any known criminal or expose him to moral dare or that his release would defeat the ends of justice, the Supreme Court reiterated this mandate in *Gopi Nath Gosh v. State of WB*\(^40\), that no legal stigma can be attached in case a child is sent to some detention home and that he would also be assisted in overcoming the social stigma. Firing another missile of judicial activism for the rights of the prostitutes children the Supreme Court recently disposed of a petition filed long back by a Delhi based organisation, the Patit Uddhar Sabha. According to this revolutionary judgment, it shall now be sufficient to write the name of the mother only, in the place of child's father's name. Now the children of the prostitutes and unknown father would be equally eligible for the admission in the educational institutions who could so far not be admitted because of their ability to

\(^{38}\) 1979, 2 SCC 628.
\(^{39}\) 1979) CrI LJ 943.
\(^{40}\) AIR 1984 SC 237.
know the name of their father. Such children would now have more self confidence and start finding them on equal footing to the other children of the society.

One Mr. Lakshmi Kant Pandey, an advocate practicing in the Supreme Court, sometime in 1982 wrote a letter to the apex court referring to a press report based on empirical investigation carried out by the staff of a reputed foreign magazine called ‘The Mail’ and alleged that not only Indian children of tender age are under the guise of adoption exposed to the long horrendous journey to distant foreign countries at great risk to their lives but in cases where they survive and where these children are not placed in the shelter and relief homes, they in course of time become beggars or prostitutes for the want of proper care from their alleged foreign foster parents. This letter was treated as writ petition by the court. The judgment was delivered by justice Bhagwati on behalf of the Bench wherein for the purpose of eradicating the alleged malpractices in the adoption of Indian children by the foreigners referred to in the petition, several principles were formulated based on the principles present in the Declaration of the Rights of the child adopted by the GA of United Nations on November 20, 1959 the court observed that: Every child has a right to love and affection and of moral and material security and this is possible if the child is brought up properly in a family. The most congenial environment would, of course, be that of the family, his biological parents or other near relative to look after the child or the child is abandoned and it is either not possible to trace the parents or the parents are not willing to take care of the child, the next best alternative would be to find adoptive parents for the child so that the child can grow up under the loving care and attention of the adoptive parents. If it is not possible to find suitable adoptive parents for the child within the country, it may become necessary to give the child in adoption to foreign parents rather than allow the child to grow up in an orphanage or an institution where it will have no family life and no love and affection of the parents and quite often, in the socio-economic conditions prevailing in the country, it might have to lead the life of a destitute half-clad, half-hungry and suffering from malnutrition and illness. Such inter country adoptions should be permitted after exhausting the possibility of adoption within the country by Indian parents. While supporting Inter-state adoption, the court further held that its primary object must be exercised in permitting child to be given in adoption to
the foreign parents. Thus after going through some of the chief principles referred to above, we find that the court has been very much active towards the welfare and safeguarding rights of the child. Further the same court represented by Justice Mishra, Justice Punchhi and Justice Agrawal on July 12, 1990 issued an order according to which the reference made in the main judgment to the Children’s Act in regard to production of neglected juveniles and the procedure adopted to be followed in regard to suitable custody now vests in the board. The main judgment shall, therefore, be deemed to have been modified by operation of law and reference made to juvenile courts for such purposes shall be taken to be the Board under Juvenile Justice Act, 1986. This order is good example of wishful judicial activism in the sense that it has executed new philosophy of juvenile justice.

There prevailed a general understanding that the provisions under Article 24 of the Indian Constitution would not be effective in the absence of any special legislation prohibiting and penalizing its violation. However, in People’s Union for Democratic Rights v. Union of India41, the Supreme Court observed that Article 24 must operate proprio vigore, even if the prohibition laid down in it is not followed up by appropriate legislation, then it was held that though the construction work has not been included among the hazardous industries in the employment of Children Act, 1938, which has been replaced by Child Labour (Prohibition and Regulation) Act, 1986. Construction work is plainly and indubitably a hazardous employment prohibited by Article 24 and therefore, no child below 14 years can be employed in the construction work. Then in Labourers, Salal Hydro Project v. State of Jammu and Kashmir, the position has been reiterated when the court held that employment of children below 14 years in construction work clearly violates Article 24 of the Constitution.

Despite Article 45 of the Constitution of India a specific Directive Principle stipulating a time bound obligation on the State to provide free and compulsory education for all children till they attain the age of 14 years, the right to education remains largely unrecognized in India. That is why after over four decades of independence, there is still a long way to go before we achieve the goal of universal primary education. Here too the Supreme Court displayed its activism as

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41 AIR 1982 SC 1473.
done in *Unni Krishnan v. State of AP*\(^2\), and thus recognised primary education as an important aspect of personal liberty and thus elevated it to the level of each child's constitutional right. The court, thus observed that a child (citizen) has a fundamental right to free, education up to the age of 14 years. It shall be relevant to quote the following observations of Justice B.P Jeevan Reddy speaking for himself and justice Pandian.

"The right to education which is implicit in the right to life and personal liberty guaranteed by Article 21 must be construed in the light of Directive Principles in Part IV of the Constitution. So far as the right to education is concerned, there are several articles in Part IV which expressly speak of it. It is in the light of Article 45, 46 and 4-I that the contents and parameters of the right to education have to be determined."

Similarly on the point of the importance of the child education Justice Mohan categorically observed:

‘Victories are gained, peace is preserved, progress is achieved, civilization is built-up and history is made not on the battle fields where ghastly murders are committed in the name of patriotism, not in the council chambers where insipid speeches are spun out in the name of debate, not even in factories where are manufactured novel instruments to struggle life, but in educational institutions which are seed beds of culture, where children in whose hand quiver the destinies of the future, are trained. From their ranks will come out, when they grow up, statesmen and soldiers, patriots and philosopher, who will determine the progress of the land’.

**6.9 Right to Healthy Environment**

The Supreme Court has been very much conscious of the right of the child to healthy ecological environment which is reflected in its judgment in Ganga Pollution Case when it observed that: We are conscious that closure of tanneries may bring unemployment and loss of revenue but life, health and ecology have greater importance to the people. Further the court declared that access to pollution free water and air is a fundamental right of the citizens and held that right to life under Article 21 of the Constitution includes right to enjoyment of pollution free water and air for full enjoyment of life. The High Courts have also been very much

active and conscious to the right to life of the people including children. They have indeed revolutionized the scope of the right to life by holding that environmental degradation in fact violates the fundamental right to life. The Supreme Court, However, could not maintain activism and championship for the rights of the child in *M C Mehta v. State of TN* 43, where it went out of tune with the constitutional spirit and aspirations envisaging a fair deal for children. It is a matter of surprise that the Supreme Court in this case allowed children to be employed in match factories of Sivakasi in Madras, where admittedly hazardous manufacturing process of matches and fireworks is carried on. It is to be remembered that the nature of hazardous process can be changed in such units by certain safety and welfare measures. The Hon'ble Supreme Court could not think that risk is also involved in sorting out and processing for the purpose of pocketing of such objects, when it observed that tender hands of young workers are more suited to sorting out the manufactured products and process it for the purpose of packing. Going a step further against the rights of the child it considered children's special adaptability working in match and fire work in sorting out and packing manufactured products and ruled that at least 60% of the prescribed minimum wages for an adult worker doing the same work should be given to the child workers, why only 60%? Why not equal to that is paid to the adult workers? Does this decision not go against the right of the child to education, which is the very foundation of good citizenship. It is a principal instrument in awakening the to cultural values in preparing him for later professional training and him to adjust normally to his environment.

Negative approach of the Supreme Court's consciousness towards the lights of the child was also reflected when it is a young couple for heir emotional-decision to run away and get married-against their parent’s lines. The Chief Justice told that by doing so the girl had done great damage to her father’s image. It is to be noted that in a case both were major and had married to each other though against the wishes of their parents. They had, indeed exercised their right to marry and not violated any right of the parents. Then where from the Hon’ble Supreme Court got opportunity to both of them for no violation of law on their parts. If a major girl marries a man of her choice even without his parent's approval then how

43 (1991) 1 SCC (L & S) 299.
is her father's image lowered and if it at all lowers then if there is any provision of law which may come to rescue the parents.

It may be taken as an impact of judicial activism on the rights of the child that we find a sort of awakening among the children towards their rights. They have now started to realise that they have certain rights even against their parents and guardians which they can of courses, exercise. The case of Rajeev Tanswaar should be a good example in corroboration of this fact. Rajeev Tanswar, a child of 14 years living in a Delhi village was a student of class VIII. His marriage was fixed to take place on February 25 1994 by his parents against his wishes. When he realised that his protest would yield no result he managed to contact some activists of the India Housewives Federation and All India Crimes Prevention Society. Then he was produced in Patiala House where he stated that his parents want to get him married against his wishes and pleaded to stop it.

Thus, the Supreme Court has been very much active and is has emerged as a champion of human rights of the child. It has played a vital role in securing for them and putting on solid foundation several important basic rights including right not to be sent to the jail, right to be tried by the judge who has special knowledge and training for dealing with cases against children, right to free legal aid to poor and right to be defended by a legal practitioner of his own choice, right to speedy trial, and right to bail etc.

This court, however in MC Mehta's Case as referred to above allowed children to be employed in the packing processes of match factories of Sivakasi in Madras where admittedly hazardous manufacturing process of matches and fireworks is carried out. With due regard it is submitted that the Hon'ble Supreme Court must review its decision in this case as it goes against the rights of the child to special care and protection for development-physical and mental. The court in this case considered special adaptability of the child fingers which are more suited for sorting out the products manufactured and packing process. Whereas the fact is that the sorting out and processing for the purpose of packing of the hazardous objects also involve high risk. After the decision of the Apex court in Unni Krishnan Case, the primary education has become an important aspect of personal liberty and thus is a human right of the child below 14 years. The children are very tender both in body and mind. They can not be expected to go to school for taking
education in the exercise of their basic right and to go for the work as well. They must be sent to schools only and prohibited from going for the jobs. The Supreme Court as well as the High Courts must declare long persisting unconstitutional unsocial and human evil of child labour illegal and ensure necessary implementation thereof.\textsuperscript{44}

The sole goal of the judicial activism cannot be only to declare that a child (citizen) has a fundamental right to free education upto the age of 14 years. The courts would also have to display great activism for the purpose of implementation of children's basic right to education. They would have to ensure that the children go to schools regularly and take education of quality. Besides, they must be ready to take action against the government department and the authorities concerned for not taking required interest and defeating the judicial activism on the point because often the government may be found busy with more important business-of votes etc.

As long as child labour exists in the country, employers must be directed by the apex court to pay wages to the child labour equal to the adult, overruling its judgment in MC Mehta Case referred to above. This would improve the lot of the working children and the employers would also have to think twice before employing a child.

The \textbf{Child Labour (Prohibition and Regulation) Act, 1986} was enacted to safeguard the right and interest of the child labour but has been infact enforced with effect from May 26, 1993. Such delay in enforcement of child welfare legislation shows lack of political will on the part of Government which can not be appreciated. Judiciary shall have to be active in finding out the ways as how to deal with the situations when the government adopts such delaying tactics.

The Apex court shall have to be extra ordinarily active as regards the rights of the child. As we find the directives of the courts on many times, are not taken with due seriousness by the government departments or the authorities concerned for example one can still find many juvenile delinquents behind the bars in flagrant violation of the highest courts directive. Judicial activism necessarily includes judicial vigilance and monitoring which is essential for getting judicial orders and decisions implemented in true spirit.

\textsuperscript{44} M.C. Mehta v. State of Tamil Nadu (AIR 1997 SC 699).
The poverty and population are two major factors responsible for the violation of rights of the child but the child has to take nothing either with the poverty or with population, it needs its basic rights exercise as the first claim. A child can not be required to wait for because tomorrow this child would no more remain a child. The state has declared the children a "supremely important asset" but this slogan is often filled with apathy on the part of the State that in practice they are found to be the most neglected and deprived lots.

The parents and guardians are in many cases are ignorant of the rights of their child and their own duties towards them, Hence they need to be educated on this count. This would to an extent, reduce the chances of child abuse, involving violation of their rights, by their parents or guardians. The courts shall have to be more conscious towards protecting the right of the child especially those against their parents or guardians. They should not chide the children when they exercise their right to marry even on the face of their parent's displeasure, if it is in due observance of marriage law. The penal provisions under various enactments relating to the rights of the child are not adequate. Hence they do not serve the purpose. They are needed to be amended.

Justice Krishna Iyer in Sattoo v. State of U.P., remarked that even the judges and lawyers are unaware of the details of juvenile system in our country. Hence the media, conferences, dramas, radio and television etc. need to propagate and educate the people regarding the rights of the child and their (of people) duties towards them (children).

To deal with the problems relating to child welfare, it is rather very important to be well versed in child psychology and social problems. Hence, the Magistrate, probationary officers, superintendents of juvenile homes, observation homes, and all those dealing with juveniles must be imparted the basic knowledge of child psychology, criminology, penology and sociology.

In our country children below the age of six years are made to learn and cram lessons. This is undoubtedly very injurious for their normal development. Hence an effective ban is needed so as to abolish this practice.

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45 Indian Parliament Resolution No. 1-14/4 CDD adopted on August 22, 1974 at New Delhi.
46 (1979) Cri LJ 943.
In the wake of the accession to the UN Convention on the rights of the child, 1939 by the Government of India, the State is now under special Obligation to provide for more rights to the children including right to development, right to fresh air and water, healthy society, social security, creation, physical, mental and emotional health, etc. The government has a pious duty to ensure that the abandoning and neglecting of the foundations of life no longer persists and the courts shall have to ensure that this duty is performed most sincerely.

After care and rehabilitation programmes play very significant role for the child welfare. Specially when they turn delinquents.

6.10 Other Decisions: A Glimpse

In *State of Bihar v. Projet Uccha Vidya Sikshak Sangh and others*\(^{47}\) it has been held that imparting of education is a sovereign function of the state and Article 21A of the constitution of India envisages that Children of the age group 6 to 14 have a fundamental right to education. The ruling further stated that clause 3 of Article 15 of the constitution envisages for women and children.

In *State of Maharashtra v. Sant Dnyaneshwar Shikshan Shastra Mahavidyalaya and others*\(^{48}\), it was held that Article 21A would cover primary as well as secondary education and people, by approaching the Court can claim the benefit of Part III of the Constitution as well.

Similarly in *Zee Telefilms Ltd and Anr. v. Union of India and others*\(^{49}\), it was held by the Hon’ble Supreme Court that the expression ‘education’ must be given a broader meaning having regard to Article 21A of the constitution as also the Directive Principles of State Policy. There is a need to look into the governing power, subject to the fundamental constitution limitations, which requires an expansion of the concept of State action.

In *Muzaffar Ali Sajjad and others v. State of Andhra Pradesh*\(^{50}\), the court opined that a muslim girl can marry on attaining the age of puberty and the marriage cannot be declared void because she is below the age of 18, as per the Act of 1929.

\(^{47}\) 3\(^{rd}\) Jan. 2006.

\(^{48}\) March, 2006, (4) SC 201.

\(^{49}\) AIR 2005, SC 2617.

\(^{50}\) 2002, Cri J 1068.
In *Joseph v. S.I. of Police*, 51 raising, the age of consent for sexual intercourse to 18, consistent with the stipulations in the Saner subsequent enactments, appears to be the unavoidable imperative before the system.

In *Forum, Fact Finding Documentation and others v. Union of India and others* 52. A petition was filed in the Supreme Court on the ground that child marriages when this matter was called out for hearing the Additional Solicitor General appearing on behalf of the Union of India produced before the court a copy of the Bill known as the prevention of Child Marriage Bill, 2004, which had been presented in parliament, and objections were invited from the general public. The court hopes and trusted that, in the meantime, the Collectors and Superintendents of Police of all the districts in the States would endeavour to prevent child marriages as far as possible, and more so events where mass marriage took place.

In *Krishna Prasad Paul v. State of West Bengal*, 53 the court had held that it would not compel a girl, though she was a minor to stay with her father or husband if she could decide what was in her interest on her own.

In *Jai Prakash Khadria v. Shyam Sunder Agarwal*, 54, the ruling of the court stated that orders related to the custody of a minor are not final but interlocutory in nature and subject to modification at any future time upon proof of change in circumstances.

In *Ranubala Moharana and Anr. v. Mina Mohanty and others*, 55 the court observed that, where the minor lived with the mother, the place of jurisdiction was the mother's residence and not the residence of the father.

In *Ramesh Chand v. Executive Engineer, Electricity Distribution Division-II, Uttar Pradesh Power Corporation Ltd. and others 2004* 56, it was held that though a child born out of marriage which is null and void under Section 16 restricts his rights in, or to the property of any person, other than the parents, in any case where but for the amendment Act, such child would have been incapable of possessing or

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51 2005 (2) KLT 269.
52  *Writ petition (civil) No. 212/2003*.
53 2005 (4) CHN 308.
54  *AIR 2000 SC 2172*.
55  *JT 2004 (5) SC 377*.
56 1 UPLBEC 794.
acquiring any such rights by reason of his not being the legitimate child of his parents.

In Ranubala Moharana and Anr. v. Mina Mohanty and others, it was held that the Family Court has no jurisdiction to grant declaratory relief as to legitimacy of the child.

In Bhagwan Singh and others v. State of M.P., regarding validity of a child’s testimony, the supreme courts have held that while the law recognizes the child as a competent witness, a child, particularly at the tender age of six years, who is unable to form a proper opinion about the nature of the incident because of immaturity of understanding, cannot be considered to be a witness whose sole testimony can be relied upon without other corroborative evidence. The evidence of a child is required to be evaluated carefully because he is an easy prey to tutoring. Therefore, the court always looks for adequate corroboration of his testimony.

In Ratan Singh Dalsukh Bhai Nayak v. State of Gujarat, it was held that a child of tender age can be allowed to testify if he has intellectual capacity to understand questions and give rational answers thereto.

In Centre for Enquiry into Health and Allied Themes (CEHAT) and others v. Union of India and others, the court issued a number of guidelines for the Central Government, the Central Supervisory Board, and the State Governments. The important directions are:

In State, through District Appropriate Authority-cum-Civil Surgeon, Faridabad v. Dr. Anil Sabhani, Kartar Singh and M/s Dr. Anil Ultrasound, Faridabad, the district appropriate authority-cum-Civil Surgeon, Faridabad filed a complaint against the accused on the ground that M/s Dr. Anil Ultrasound Centre, Faridabad—a registered genetic clinic was engaged in illegal sex determination in violation of the Act. A doctor and a decoy patient visited the clinic with marked currency notes. The doctor accompanying the decoy patient as her attendant carried a hidden tape recorder, while performing the ultrasound on the patient, the doctor prompted that he could disclose the sex of the foetus for an additional payment. On payment

57 JT 2004 (5) SC 377.
58 AIR 2003 SC 1088.
59 AIR 2004 SC 22.
60 AIR 2003 SC 3309.
of the required amount, the doctor performed ultra-sonography on her without any written consent and orally conveyed that it was a female foetus. No receipt for payment or any written report of sex determination was issued by the accused, except a routine ultrasound report. After getting the signal, the entire team entered the clinic and took into custody all files and records. The accused admitted to disclosing the sex of the foetus, which was video-recorder. On the basis of the above circumstantial and corroborative evidence, the accused were held guilty and convicted.

In *Ram Sanehi Pandey v. U.P. Rajya Vidyut Parishad and others v. State of Jharkhand and Anr.*\(^{61}\), the Supreme Court has held that on the point of proof of age, school leaving certificate is the best evidence and so far as the medical certificate is concerned, the same is based on estimate, and possibility of error cannot be ruled out.

In *Tara Devi v. Sudesh Choudhary AIR 1998 Rajya Vidut Parishad and others*\(^{62}\), regarding date of birth, the court observed that the Secondary School Certificate is not to be taken to be correct unless corroborated by parents who got the same entries made.

In *Rajan and others v. State of Rajasthan*\(^{63}\) the court held that the best evidence for determination of age is the birth certificate or the school certificate and in case it is available, that would be considered the best evidence, and so far as the medical evidence is concerned, since it has margin of error, it would be taken into consideration only when primary evidence which is found in the birth certificate or school certificate is not available.

In *Manoharlal v. State of Rajasthan*\(^{64}\), the court observed that Where the school leaving certificate shows the age of the child as below 18 years, but arrest memo shows it as 18 years, the court should first enquires about the current age of the child. The order of rejecting the bail without such inquiry in respect of the age in Narcotic drugs and psychotropic substances Act was improper.

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61 AIR 2995 SC 2731.
62 2004 (2) AWC 1211.
63 2002 CriLJ 3152.
64 2002 CriLJ 394.
In *Chandrika Kumar and others v. State of Bihar*\(^{65}\), the court held that if age of the accused during the recording of the statement under Section 313 of the Criminal Procedure Code was 22 years but was in fact a ‘juvenile’ at the time of Commission of the offence, he must be treated as juvenile for sentencing purposes.

In *Mehmood Khan v. The State*\(^{66}\), it was held that when there were various dates in various documents of the accused, viz. two sets of school certificates, ration card, voters list and medical report, the concurrent finding of the fact by both the courts that the accused was above 16 years was in the instant case, arose on the basis of Juvenile Justice Act 1986 based on the material on record cannot be disturbed.

In *Lalman Singh v. State of U.P. and Anrothers*\(^{67}\), the court opined that Section 20 of the new Act provided that in case the court finds that the accused was juvenile and he committed the offence, the court shall record its finding, but shall not pass any sentence and send the juvenile to the Board for appropriate orders. The sending of juvenile before the Board would arise after the conclusion of the trial and finding that the accused had committed the offence. But it is clear that except the said procedure, the provisions of the new Act would not be applicable to the above proceeding.

In *Abhishek Singh v. State of Jharkhand*\(^{68}\), the court held that the Additional Chief Judicial Magistrate in the state of Bihar was competent to hold an enquiry under Section 4 of the new Act for the purpose of determining the age of the juvenile.

In *Vijay Singh and Anr. v. State of U.P.*\(^{69}\), it was held that the new Act is not applicable to pending cases, only if trial is pending on the date of enforcement of the act, which is April 2001. Even though person’s between the ages of 16 and 18 have been brought within the definition of juvenile’ under the new Act, a person who has not been held to be juvenile under the old Act being above 16 years, cannot be treated as a juvenile under the new Act even if he is below 18 years.

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\(^{65}\) 2002 CriLJ (NOC) 38 (Patna (2001)) 1 BLJ 614.

\(^{66}\) 2002 CriLJ 2123.

\(^{67}\) 2002 CriLJ 1242.

\(^{68}\) 2002 CriLJ 380.

\(^{69}\) 2003 CriLJ 3461.
In *Vikky alias Vikram Singh v. State of U.P. and others*⁷⁰, the court held that bail cannot be refused to the juvenile merely because he has been charged with having committed a beinous offence triable exclusively by a court of sessions.

In *Munshi Khan v. State of Rajasthan*⁷¹, the court held that the plea of being juvenile could be taken anytime even before the appellate court.

In *Ratanlal alias Ram Ratan v. State of Rajasthan*⁷², it was unanimously decided that the conduct of trial of ‘juvenile’ by the Sessions Court without first enquiring his age in order to ascertain as to whether he was ‘juvenile’ or not is not proper and Rajasthan High Court directed the Session Judge first to conduct an enquiry about the age of the accused and if he was found juvenile, then to forward the relevant record to the competent court, and if found otherwise to decide Session case as per the law.

In *Bijender Singh v. State of Haryana*⁷³, the court held that the provisions of the Act would be applicable even to those cases initiated and pending for offences committed under the Act of 1986 provide the offender has not completed 18 years of age as on 1 April 2001.

In *Armit Das v. State of Bihar*⁷⁴, the court held that the reckoning date for determination of age of juvenile offender was the date of offence and not the date when he was produced before the court/Competent authority.

In *State of Karnataka v. Harshad*⁷⁵, considering the difficulty of transportation of juveniles from far-off places for trial and considering the fact that only 5 Juvenile Justice Boards were constituted to deal with the entire State of Karnataka, the High Court directed the State Government to consider the necessity of establishing one Board for each district.

In *Master Salim Ansari and Anr. v. Officer-in-charge Borivali Police Stateion, Mumbai and others*⁷⁶, a juvenile was not presented before the Court on various dates. The copy of order of the court declaring the petitioner to be juvenile and directing to shift him to observation board was misplaced by the jail authorities.

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⁷⁰ CriLJ 3457.
⁷¹ 2004 CriLJ 3463 (Rajasthan).
⁷² 2004 CriLJ 734 (Rajasthan).
⁷³ 2005 CriLJ.
⁷⁴ 2000 CriLJ 291.
⁷⁵ 2005 CriLJ 2357.
⁷⁶ 2005 CriLJ 799.
So, the juvenile had to remain in an adult jail for 25 months. The juvenile was granted compensation of rupees one lakh.

In *Pankaj and Anr. v. State of U.P. and Another*\(^\text{77}\), the Session Courts held that it cannot refuse to make enquiry for purpose of determination of the age of alleged juvenile offender on the sole ground that a Board is constituted.

In *Om Prakash Alias Raja v. State of Uttarakhand*\(^\text{78}\), it was held if the accused had admittedly opened an account in a bank, his contention that he was a minor at the time of the Commission of the offence could not be accepted because he could not have an open account, had it been so.

In *Rajinder Chandra v. State of Chhatisgarh*\(^\text{79}\), while dealing with the question of determination of age the accused, for the purpose of finding out whether he was a juvenile or not, hypertechnical approach should not be adopted while appertaining the evidence adduced on behalf of the accused in support of the plea that he was a juvenile in borderline cases.

In *Rahul Sharma v. State of Maharashtra*\(^\text{80}\), proper care was expected from all the agencies, institutions and the government to ensure that necessary effort was made to take appropriate and prompt steps to provide necessary infrastructure and opportunity for reformation of juveniles and not to allow them to become hardened criminals.

In *R.D. Upadhyay v. State of A.P. and others*\(^\text{81}\), the Hon'ble Supreme Court brought to light the existing provisions in various state prisons to care for female pregnant convicts and female convicts with small children. Directions by the Supreme Court Pg. No. XLiv, xlv, xlvi, xlvii, xlviii

In *Sakshi v. Union of India*, the Court gave the following directions in holding a trial of child sex abuse or rape:

(i) A screen or some such arrangement may be made where the victim or witnesses (who may be equally vulnerable like the victim) do not see the body or face of the accused;

\(^{77}\) 2005 CriLJ 3683.
\(^{78}\) 2003 CriLJ 483.
\(^{79}\) 2002 CriLJ 287.
\(^{80}\) 2005 All MR (Cri) 1973.
\(^{81}\) 2001 ISCC 437.
(ii) The questions put in cross-examination on behalf of the accused, in so far as they relate directly to the incident should be given in writing to the Presiding Officer of the court who may put them to the victim or witnesses in a language which is clear and is not embarrassing;

(iii) The victim of child abuse or rape, while giving testimony in court, should be allowed sufficient breaks as and when required.

In *State of A.P. v. Oikanaka Raju alias Raja Rao*\(^{82}\), it was held that the accused who has committed aggravated sexual assault shall be liable to rigorous imprisonment for a term which shall not be less than 14 years.

In *Laxman Naik v. State of Orissa*, the court held that a calculated, cold-blooded and brutal murder of a girl of very tender age after committing rape on her would undoubtedly fall in the category of rarest of rare cases attracting no punishment other than the capital punishment.

In *State of Punjab v. Gurmit Singh*\(^{83}\), the court lamented that all court hearings and proceedings in which a child is involved shall be completed within 4 months. The courts, therefore, shoulder a greater responsibility while trying an accused on charges of rape. They must deal with utmost sensitivity.

In *the Oriental Insurance Company Limited, Bangalore v. Smt. Rathnamma and others*\(^{84}\), it was held that the scheme of the workmen's compensation Act nowhere states that there is a prohibition against employing a child. In view of Section 3 and in the absence of any specific prohibition under the workmen’s compensation Act, it can be very well held that work provided this work does not come under the parts A and B of the schedule of the Child Labour (Prohibition and Regulation) Act Compensations.

In *M.C. Mehta v. State of Tamil Nadu and others*\(^ {85}\), the directions given by the Supreme Court for rehabilitation of children employed as labourers have still to be implemented.

In *Antaryami Patra v. State of Orissa*\(^ {86}\), the court held that the said provision contained in Section 37 of the Narcotic Drugs and Psychotropic substances Act

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\(^{82}\) 2000 (7) SCC 75.

\(^{83}\) 1996 SCC (CR) 316 p. 384.

\(^{84}\) 2001 ACJ 2311.

\(^{85}\) AIR 1997 SC 699.

\(^{86}\) 1993 CriLJ 1908.
would over-ride the earlier general provision of Section 18 of the Juvenile Justice Act and consequently a juvenile delinquent being accused of commission of an offence under the former Act cannot be reversed unless the pre-conditions continued in Section 37 of the former Act are complied with.

In *Matadin v. State of M.P.*\(^{87}\), the Court has held that the provisions of Juvenile Justice Act over ride the provisions of NDPS Act, that irrespective of Section 36A of NDPS Act, a juvenile has to be dealt with under Juvenile Justice Act.

In *Gopu Itaih and others v. The State of A.P.*, it was held that a juvenile is accused of an offence under the provisions of the NDPS Act, be 95 certainly entitled to the necessary benefits under the special enactment, namely Juvenile Justice Act.

In *Vishaka v. State of Rajasthan*, the Supreme Court observed that in the absence of a domestic law the contents of international conventions and norms are relevant for the purpose of interpretation of the fundamental rights.

In *Sanjay Suri v. Delhi Administration*\(^{88}\), the court ordered the transfer of some guilty officers and laid down rules to protect children in jails.

In *Gaurav Jain v. Union of India*\(^{89}\), the Supreme Court held that segregating the children of prostitutes would not be in their interest. In Peoples *Union for Democratic Rights (PUDR) v. Union of India*\(^{90}\), it was held by the court that Employment in construction work was held to be hazardous for children.

In *Dukhtar Jahan v. Mohammed Farooki*\(^{91}\), the Supreme Court asked the husband to pay maintenance to the child even though he had divorced the wife. The allegation of the husband that the child was illegitimate was rejected.

In *Sheela Barse v. The Secretary, Children’s Aid Society and others*\(^{92}\), the petition was filed in public interest with regard to improper functioning of child care institutions in Mumbai. The Supreme Court directed that in no case should a child be kept in jail and a central law must be enacted to bring uniformity in juvenile justice system.

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87 1994 (3) CRIMES 510.
88 AIR 1986 SC 414.
89 AIR 1990.
90 AIR 1982 SC 1473.
91 AIR 1987 SC 1049.
92 AIR 1987 SC 656.
In *Delhi Domestic Working Women’s Forum v. Union of India and others*\(^{93}\), the Supreme Court directed the setting up of the Criminal Injuries Compensation Board to award compensation to the rape victims.

In *Sarita Sharma v. Sunita Sharma*\(^{94}\), the court held that in the issue relating to custody of children, paramount consideration should be given to the welfare of the children.

In *Unnikrishnan J.P. and others v. State of Andhra Pradesh*\(^{95}\), the court held that the right to education is implicit in the right to life.

In case of *Inder Singh v. Kartar Singh*\(^{96}\), the object of adoption was mainly to secure performance of funeral rites and to preserve the continuance of one’s lineage.

In *Bhola Nath v. Sharda Devi*\(^{97}\) and *Smt. Bhawat Devi v. Murlidhar Sahu*\(^{98}\), the court stated that the principle matter to be considered is the welfare of the minor irrespective of the personal law of the child.

In *Mrs. Elizabeth Dinshaw v. Arvand M. Dinshaw*\(^{99}\), it was well settled that whenever a question pertaining to custody of a minor child arose before a court, the matter had to be decided not on consideration of legal rights of parties but on the sole and predominant criteria of what would best serve the interest and welfare of the minor.

In *Thompson v. Moseley*\(^{100}\), the basis of doctrine of recognition of a foster child and enforcement of his claim to share in the estate of the deceased foster parent who had agreed to adopt him is that it is inevitable and unjust to allow the parent to escape obligations of an adoptive parent by his failure to comply with the agreement made with the parent or custodian of the child.

In *Roberts v. Roberts*\(^{101}\), the court held that the doctrine of equitable adoption will not be applied to enforce rights in the estate of the deceased promisor where the

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95 AIR 1993 SC 2178.
96 AIR 1966 Punj. 258.
97 AIR 1954 Pat. 489.
98 AIR 1943 PC 106.
100 344 MO 240, 125 SW 2nd 860.
101 (CAB MO) 223 F 775 Cert der 239, 4563960.
contract was made to do so would be contrary to the fundamental basis of the doctrine, and open the door to fraudulent claims.

In *A.R. Krishnan Chetty v. Vallia Chani*\(^{102}\), the court held that once a certificated guardian is appointed or declared, the powers of natural or testamentary guardian under the personal law stands suspended.

In *Gohar Begum v. Suggi Alias Nazme Begum*\(^{103}\), the Supreme Court held that the mother was entitled to the custody of the child. The fact that the mother had a right under GWA to recover custody of the child is no justification for denying rights under Session 491 CrPC.

In *Jijabai Gajre v. Pathan Khan and others*\(^{104}\), the High Court held the mother to be considered as the natural guardian, since the father was not interested. The Supreme Court held that the father was alive but was not taking any interest in the affairs as if he was non-existent. So far as the minor was concerned. Therefore, in this case, the mother can be considered as the natural guardian of the minor daughter.

In *Rosy Jacob v. Jacob*\(^{105}\), the Supreme Court considered a Christian father application to obtain custody of his children under Section 25 of the GWA. The court was entrusted with a judicial decision to order return of the ward to the custody of the guardian. The court held that Section 25 of the GWA is attached only if a ward leaves or is removed from custody of a guardian of his person and the court is empowered to make an order for the return of the ward to his guardian if it is of the opinion that it will be for the welfare of the ward to return to the custody of his guardian. The court stated that in disputes between a mother and a father a just and proper balance must be struck between the child’s welfare and the parents’ rights, even though the child’s more important. In considering this application, the court declared that the controlling consideration governing the custody of he children is the welfare of the children concerned and not the rights of their parents.

\(^{102}\) AIR 1914 Mad. 648.

\(^{103}\) AIR 1960 SC 93.

\(^{104}\) (1970) 2 SCC 717.

\(^{105}\) AIR 1973 SC 2090.
In *Thrity Hoshie Dolikuka v. H.S. Dolikuka*¹⁰⁶, the High Court had refused custody of the daughter to the mother mainly on the ground that the mother was a working girl. The Supreme Court held that the father cannot be considered to be a fit person to be given the custody of the child. The mother was given the custody of the minor daughter till she reached the age of sixteen years.

In the case of *Bhagyalakshmi v. K. Naranayanna AO*¹⁰⁷, the wife left the husband and took with her three minor children aged fourteen, twelve and nine. After three years the father sued for custody. The court granted custody to the father viewing the minors’ welfare including material as well as spiritual well-being. The father was better off financially. While the mother’s father was in debt. Besides, a fourteen year old son needed his father’s advice, hence the father was given custody.

In *Thrity Hoshie Dolikuka v. Hosheam S. Dolikuka*¹⁰⁸, the eleven year old girl was with the father. The court held that the daughter needed her mother’s guidance, hence the mother was given custody (partly on this ground).

In *Jaswant Kaur v. Manjit Singh*¹⁰⁹, the mother gave birth to the child at her parent’s house and the child remained in their custody. When the boy was ten, the father sued the maternal grandparents for custody. A ten year boy needed his father’s control, hence the father was given custody despite the fact that the child had been in the continuous care of his grandparent. The court viewed the minor’s welfare including material as well as spiritual well-being. Importance was given to the financial capacity of the father.

In *Sumitra Devi v. Bhikan Choudhary*¹¹⁰, an application for maintenance under Section 125 of CrPC was filed by a woman for herself and her minor daughter. She asserted that the child was from her marriage but the husband denied this and alleged that she was already three months pregnant at the time of marriage. The magistrate granted maintenance both to her and to her child. The Session Judge reversed the order and the Patna High Court approved the Session Court order. The SC Chastised the lower courts for not examining the witnesses properly. The SC

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¹⁰⁶ AIR 1982 SC 1276.
¹⁰⁷ AIR 1983 Mad.
¹⁰⁸ AIR 1982 SC 1277.
¹⁰⁹ AIR 1985 Del. 159.
¹¹⁰ AIR 1985 SC 765.
reminded the magistrate that under Section 125 of CrPC even an illegitimate minor child was entitled to maintenance. The Supreme Court said that the role of the Court in this type of cases is not that of a silent spectation but it must take genuine interest to find out the truth.

The petitioner and her husband were living in the USA. They divorced and the child (minor) continued to lie with the mother pursuant to a divorce decree. The father was given visitation rights who secretly took the child with him. The court, after going into the facts and circumstances of the case looked into what would best serve the interest and welfare of the minor and held that the minor child should go back with his mother to USA and continue there as a ward of concerned court. The court further held that the father cannot claim advantage of the wrongful act of abduction. Whenever a question arises before the court pertaining to the custody of a minor child, the matter is to be decided not on the considerations of the sole and predominant criterion of what should serve the interest and welfare of the minor.

In *Poonam Datta v. Krishan Lal Datta*111, it was under Section 6 of the HMGA 1956 and Sections 12 and 17 of the GWA 1890 that the court directed the parties to consider the interest of the child as paramount.

In *Kirti Kumar Maheshankar Joshi v. Pradip Kumar Karunashankar Joshi*, after the unnatural death of their mother, the children were living with their maternal uncle. The father was facing charge under Section 498 IPC. Before the Supreme Court, the children expressed their willingness to remain with their maternal uncle, who according to them, was looking after them very well. In the interest and welfare of the children, custody was handed over to the maternal uncle instead of the father. In the welfare of the child, the legal rights were superseded.

In *Chandra Kala Menon v. Capt. Vipin Menon and another*112, the principle reiterated is that the question regarding the custody of a minor child cannot be decided on the basis of the legal rights of the child of the child has to be decided on the sole and predominant criterion of what would serve the interest and welfare of the minor.

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111 1989 Supp(1) SCC 587.
In *Pannilal v. Rajinder Singh*\(^{113}\), the land owned by respondents was sold, while they were still minors, by their mother acting as their guardian. On attaining majority, the respondents sued Pannilal for possession on the ground that the sale was made without permission of the court though the sale deed was signed by the mother and attested by the father. The Supreme Court held that there was no evidence to show that the father was not taking an interest in their affairs. Sale by the mother was not sale by the father who was the natural guardian.

In *Anjali Anil Rangari v. Anil Ragari*\(^{114}\), the writ petition was filed by the appellant—a mother of two minor children. The father averred in application before CJM's court that the mother left matrimonial home along with two children without informing him as well as his parents. The children were in illegal custody and were in wrongful confinement by the mother. The Supreme Court held that the custody of the children with the mother was neither unlawful nor were they wrongfully confined by the mother in Delhi. The father was directed to handover the custody of both the children to the mother.

In *Dhanwati Joshi v. Madhav Unde*\(^{115}\), the respondent married the appellant (who was then in the USA) in 1982 in the USA on 19th June, a separate marriage ceremony as per Hindu rituals was performed. Nine months later, a baby was born to them in USA. The appellant left respondent when the child was thirty-five days old. The petition was filed for custody and divorce. The Family Court granted custody to the father. The High Court held that the custody is to be given to the father who has acquired citizenship in America and will provide a comparatively superior upbringing. The Supreme Court gave the custody to the mother and visitation rights to the father when he is in India.

In *S.N. Nirmala v. Nelson Jaya Kumar*\(^{116}\), the Division Bench of the Gujarat High Court denied the mother’s right to her minor daughter while dismissing her appeal against the single judge’s order conferring custody to the father. The Supreme Court held that the mother should not be denied visiting rights in relation to minor daughter in the custody of the father without adequate justification.

\(^{113}\) 1993 2 SCC 38.

\(^{114}\) 1997 10 SCC 342.

\(^{115}\) 1997 (9) Judgments today 220.

\(^{116}\) 1999 3 SCC 126.
In *Ahmed v. Dehnaton*\(^{117}\), it was held that a child of tender years should be in the custody of the mother.

In *Tara Bai v. Mohan Lai*\(^{118}\), it was held that a boy of seven years would be much better off living with his mother than with his father.

In *Saraswati Bai v. Sripal*\(^{119}\), it was observed that if the mother is a suitable person to take charge of the child, it is quite impossible to find an adequate substitute for a child of tender years.

In *Budhan v. Bahadur Khan*\(^{120}\), it was held that the conversion of a mother does not matter. A non-Hindu mother of a Hindu child of tender age is entitled to its custody.

In *Githa Hariharan and Another v. Reserve Bank of India and Another and Vandana Shiva v. Jayanta Bandhopadhyaya and Another*\(^{121}\), the Supreme Court has held that the mother is also the natural guardian of her minor child, in the absence of father.

In *People's Union for Democratic Rights v. Union of India*\(^{122}\), apart from the requirement of ILO Convention No. 59, there is Article 24 of the Constitution which even if not followed up by appropriate legislation must operate proprio Vigore and undoubtedly a hazardous employment of the children, below fourteen years can not be allowed to be engaged in construction work by virtue of Article 24 of the Indian Constitution. The Supreme Court has suggested that it is the duty of the government to ensure education of children of parents who are working in construction sites.

In *Labourers working on Salal Hydro Project v. State of Jammu & Kashmir and others*\(^{123}\), the Supreme Court directed that whenever the Central Government under takes a construction project which is likely to last for a considerable period of time, it should ensure that children of construction workers who are living at or near the project site are given facilities for schooling. The court also specified that this may be done either by the Central Government itself or if the Central Government

\(^{117}\) (1917) 40 IC 1070.

\(^{118}\) AIR 1932 Bom. 405.

\(^{119}\) AIR 194/Bom 103.

\(^{120}\) AIR 1942 Pesh. 41.

\(^{121}\) AIR 1999.

\(^{122}\) AIR 1982 SC 1480.

\(^{123}\) 1983 Lah I.C. 542.
entrusts the project work or any part thereof to contractor, necessary provision to this effect may be made in the contract with the contractor.

In *Rajangam, Secretary, District Beedi Workers Union v. State of Tamil Nadu and others*\(^{124}\), the Supreme Court opined that tobacco manufacturing was indeed hazardous to health. Child labour in this trade should therefore be prohibited as well as possible and employment of child labour should be stopped either immediately or in a phased manner that is to be decided by the State Government but it should be within a period not exceeding three years.

In *M.C. Mehta v. State of Tamil Nadu and others*\(^{125}\), the Supreme Court allowed children to work in a prohibited occupation like fireworks. According to Justice Ranganath Mishra and Justice M.H. Kania, the provision of Article 45 in the Directive Principles of State Policy still remained a far cry and though according to this provision all children up to the age of fourteen years are supposed to be in school, economic necessity forces grown up children to seek employment. Children can, therefore, be employed in the process of packing of fireworks but packing should be done in an area away from the place of manufacture to avoid exposure to accident.

In *M.C. Mehta v. State of Tamil Nadu and others*\(^{126}\), when news about an accident in one of the Siva Kasi cracker factories was published in the media wherein several children were reported dead, the court took Suo motu cognizance of it. The court gave certain directions regarding the payment of compensation.

In *Bandhua Mukti Morcha v. Union of India and others*\(^{127}\), the court emphasized that when the allegations revealed that the workers were being held in bondage without basic amenities like shelter, drinking water or two square meals a day, it was a violation of the fundamental rights as in this country everyone has a right to live with dignity and free from exploitation. The court also ruled that its power under Article 32 is very wide and it can adopt any appropriate proceedings.

In *Neeraja Choudhary v. State of Madhya Pradesh*\(^{128}\), the Supreme Court stated that it was imperative that the freed bonded labourers are properly rehabilitated.

\(^{124}\) (1992) ISCC 221.
\(^{125}\) 1991 SC 283.
\(^{126}\) AIR 1997 SC 699.
\(^{127}\) AIR 1984 SC 802; (1984) 3SCC (6).
\(^{128}\) 3SCC 243, 1984.
after their identification and release. The Supreme Court also ruled that it is the plainest requirement of Articles 21 and 23 of the constitution that bonded labourers must be identified and released and on release they must be suitably rehabilitated. Any failure of action on the part of the State Government(s) in implementing the provisions of the Bonded Labour System (Abolition) Act would be the clearest violation of Article 21 and Article 23 of the Constitution.

In *Raju v. State of Karnataka*\(^{129}\), considering the young age of the accused persons, one being twenty-four years and the other being twenty-one years and the long lapse of time during which they suffered disrepute, sentence was reduced from seven years of rigorous imprisonment to three.

In *Smt. Sushila Gothala v. State of Rajasthan and other*\(^{130}\), the petition was a public interest litigation. The petitioner had appreciated the court under Art. 226 of the Constitution of India for issuance of direction to the respondents to stop immediately the menace of child marriage in Rajasthan in an effective manner, and further for a direction to punish the officer who is responsible for not prohibiting the child marriage as per the provision of the Child Marriage Restraint Act 129. On the occasion of Akha Teej festival every year, child marriages are performed in contravention of the Act as it is considered as an auspicious day for performing marriages.

The writ petition was disposed of with the observations that this social evil can be eradicated only if the people of Rajasthan themselves revolt against it cannot be justified by any civilized society. The court further held that as per Section 13 of the Act, if the child marriage prevention officers have not been appointed, the government should consider the feasibility of making the provision of the Act more stringent, and punishment for contravention of the Act should be severe.

6.11 Conclusion

Human rights are those rights which are essential for living as a human being. There are basic rights. Without the human rights it is not possible to live freely. Human rights are the standards that recognize and protect the dignity of all human beings. Human rights deal with basic rights and obligation of a man with

\(^{129}\) 1994 (1) SSC 453.

\(^{130}\) AIR 1995 Rajasthan 90.
society, government and others i.e. there rights are not to be exercised to the disadvantage of others. Human rights are applicable to all age groups it means that they are available to adult as well as to child. The children are particularly valuable and so they also have particular rights that recognize their special head for protection. Children are neither the property of their parents nor are the subjects of their own rights. The convention of the rights of the child makes clear that a basic quality of life should be the right of all the children. The rights of the child applies equally to all which provide due protection to the them. At the international level too the State parties to the United Nation Convention on the Rights Of Children adequately provides for the well being of children. There are so many other organizations which are providing protection to the children at large scale. We as a society are under an obligation to train, equip, develop these tiny apostles of love with power, strength, abilities, insight, understanding and care. At this juncture an emphasis has been laid on the development of respect for human rights and basic freedoms of children attached to it.

The courts in India have been deeply concerned with the social and legal issues of children. In fact, they have played a very significant and active role in protecting the basic rights of children. This is evidenced by the large number of judgments given by various courts with regard to the child’s right and its protection.

Needless to emphasize that children of today are not only future citizens but also valuable assets of the nation. In this regard, parents and teachers have a heavy responsibility for taking due care of the well being and the social welfare of the children. This would surely, facilitate them to grow into a robust and responsible citizens of India.