CHAPTER - IV
INTERNATIONAL LAW OF THE RIGHTS OF THE CHILD AND THE INDIAN LAW.

This chapter deals with first the relationship between international law and then focuses on how far the Indian law ensures protection of the rights of the child.

A. INTERNATIONAL LAW AND MUNICIPAL LAW

This chapter focuses on the extent to which the international law of the rights of the child has been incorporated into Indian law. For this purpose it first examines the relationship between international law and municipal law, then explains the way in which international law gets embodied into Indian law and then finally, portrays the development of the Indian law on the rights of the child.

I. RELATIONSHIP BETWEEN INTERNATIONAL LAW AND MUNICIPAL LAW

There are two prominent theories that offer explanations to the tenuous relations between international law and municipal law namely monism and dualism. International law and municipal law are mutually complementary aspects of one system of law in general, according to monism. But to dualism, the two represent two entirely distinct legal systems of law with international law having an intrinsically different character from that of municipal law. Because of the extreme diversity and plurality of the existing legal systems that are involved, the dualist theory is also sometimes known as the "pluralistic" theory. However, it is believed that the term "dualism" is more exact and less confusing.1

1. \textit{MONISM}

Modern writers who favour the monistic theory\footnote{See Starke, n.24,p.74, See also Ian. Brownlie, \textit{Public International Law}, (London, Sweet & Maxwell, 1977), p.265. Wright, Kelsen and Duguit, etc. are some of the prominent of Monism.} endeavour for the most part to found their views upon a strictly scientific analysis of the internal structure of legal systems as such. By contrast with writers adopting dualism, the followers of monism regard all law as a single unity composed of binding legal rules, whether those rules are obligatory on states, on individuals, or on entities other than the states. In their view, the science of law is a unified field of knowledge, and the decisive point is therefore, whether or not international law is true law. Once it be accepted as a hypothesis, international law is a system of rules of a truly legal character, it is impossible, according to Kelsen (1881-1973)\footnote{Kelsen’s Monistic theory is founded on a philosophic approach towards knowledge in general. According to Kelsen, the unity of the science of law is a necessary deduction from human cognition and its unity. See. Luigi, ‘International Law and Municipal Law: the Complementarity of Legal System in the Structure and Process of International Law’ \textit{in} Ma McDonald and Johnston, eds, (1983) \textit{The Structure and process of International Law}, p.715, and Rubanov “International Law and the co-existence of National Legal Systems” \textit{in} Soviet-Law and Government. Vol.24 (1986),p.52.} and other monist writers, to deny that the two systems constitute part of that unity corresponding to the unity of legal science. Thus any construction other than monism (in particular dualism) is bound to amount to a denial of the true legal character of international law. There cannot, in the view of the monist writers, be any escape from the position that the two systems, because they are both systems of legal rules, are inter-related parts of the one legal structure as they demonstrate identical or similar jural traits.

There are however, other writers who have favoured monism for less abstract reasons and who maintain, as a matter purely of practical appraisal, that international law and municipal law are both part of a universal body of legal rules binding on all human beings collectively or singly. In other words, it is the
individual who really lies at the root of the unity of all law, as its ultimate beneficiary.

2. DUALISM

Probably it is true to say that it would not have occurred to the earliest writers on international law (for example, Suarez) to doubt that a monistic construction of the two legal systems was alone correct, believing as they did that natural law conditioned by the law of nations and the very existence of states. But in the 19th and 20th centuries, partly as a result of philosophic doctrines of Hegel emphasizing the sovereignty of the state will, and partly as a result of the rise in modern states of legislatures with complete internal legal sovereignty, there developed a strong trend towards dualistic view. The chief exponents of dualism have been the positivist writers, Triepel and Anzilotte. For the positivists, with their congenial conception of international law, it was natural to regard municipal law as a distinct system. Thus according to Triepel, there were two fundamental differences between the two systems:

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4 Positivism begins certain premises, that the state is a metaphysical reality with a value and significance of its own, and that endowed with such reality the state-may also be regarded as having a will. This psychological notion of state will is derived from the great German philosopher, Hegel. To the state-will, the positivists attribute complete sovereignty and authority.

5 The 'positivists' hold that the rule of international law are in final analysis of the same character as 'positive' municipal law (ie state law) inasmuch as they also issue from the will of the state. They believe that international law can in logic be reduced to a system of rules depending for their validity only on the fact that states have consented to them. This is the more specialised of the term 'positive'. In its broader sense, the term 'positive' denotes a writer, such as Bynkershoek and others, who maintains that the practice of states (custom and treaties) constitute the primary source of international law. Also, some 'positivists' held that the only true law, 'positive' law, must be the result of some externally recognizable; see Arechaga, 'Positive law and International Law', AJIL, vol. 51, (1957), pp. 691-733.

6 Triepel's view that the obligatory force of international law stems from the Vereinbarung, or agreement of states to become bound by common consent; this agreement is an expression of a 'common will' of states, and states cannot unilaterally withdraw consent.

7 A rule of international law is by its very nature absolutely unable to bind individuals, i.e., to confer upon them rights and duties. It is created by the collective will of states with the view of regulating their mutual relations; obviously it cannot therefore refer to an altogether different sphere of relations. If several States were to attempt the creation of rules regulating private relations, such as an attempt, by the very nature of thing, would not be a rule of international law, but a rule of uniform municipal law common to several states.

(a) The subjects of municipal law are individuals, while the subjects of international law are states solely and exclusively.

(b) Their juridical origins are different. The basis of municipal law is the will of the state itself, whereas the basis of the international law is the common will of states.

Anzilotti adopted a different approach; he distinguished international law and state law according to the fundamental principles by which each system is conditioned. In his view, state law is conditioned by the fundamental principle or norm that state legislation is to be obeyed, while international law is conditioned by the principle *pacta sunt servanda*, i.e., agreements between states are to be respected. Thus the two systems are entirely separate, and Anzilotti maintained further that they are so distinct that no conflicts between them are possible; there may be references (renvois) from one to the other, but nothing more. According to Anzilotti's theory, it is incorrect to regard *pacta sunt servanda* as the underlying norm of international law; it is a partial illustration of a much wider principle lying at the root of international law.

Apart from the positivist writers, the theory of dualism has received support from certain non-positivist writers and jurists and implicitly too from a number of judges of municipal courts. The reasoning of this class of dualists differs from that of the positivist writers, since they look primarily to the empirical differences in the formal sources of the two systems, namely that, on the one hand, international law consists for the most part in customary and treaty rules, whereas municipal law, on the other hand, consists mainly of judge-made law and statutes passed by national legislatures. In recent writings on international law another ground relied upon in support of dualism is the differences reflected in the fact that

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9 Anzilotti's view that customary rules are binding on states by virtue of an implied pactum (or treaty) is no more convincing than the 'tacit' consent agreements of other positivists.

10 See, *Commercial and Estates Co. of Egypt v Board of Trade* (1925) 1 KB p.271 at 295.
international law has expanded into many different areas, while domestic national laws have continued to be concerned with a more limited range of subject matters.\textsuperscript{11}

3. THEORIES OF CO-ORDINATION

An increasing number of jurists wish to escape from the dichotomy of monism and dualism, holding that the logical consequences of both theories conflict with the way in which international and national organs and courts behave. Sir Gerald Fitzmaurice\textsuperscript{12} challenges the premises adopted by monists and dualists that international and municipal law have a common field of operation. The two systems do not come into conflict as systems since they work in different spheres. Each is supreme in its own field. However, there may be a conflict of obligations, an inability of the state on the domestic plane to act in the manner required by international law: the consequence of this will not be the invalidity of the international law but the responsibility of the state on the international plane\textsuperscript{13}, Rousseau\textsuperscript{14} has propounded similar views, characterizing international law as a law of coordination which does not provide for automatic abrogation of internal rules in conflict with obligations on the international plane. These and other writers express a preference for practice over theory, and it is to the practice that attraction will now be turned.

\textsuperscript{11} J.G. Starke, note-24 p.73.
\textsuperscript{12} Hague Recueil, Vol. 92 (II), (1957,), pp. 68-94. In particular this writer criticizes monist doctrine on the role of the state. In his view the state cannot be regarded merely as an aggregation of individuals. At p.77 he says that “the concept of the State or Nation as an indivisible entity possessing its own separate personality, is a necessary initial hypothesis, which has to be made before it is possible to speak significantly of international law at all...”
\textsuperscript{13} Ibid., pp. 79-80., Anzilotti puts forward this view, but is often classified as a dualist.
\textsuperscript{14} Rousseau asserts the primacy of international law—but by this means primacy in its own field.
4. STATE PRACTICE

State practice on the relationship between international law and national law varies from state to state, mainly depending on the provisions of the constitutions and the practice of national judiciaries. Broadly put, what is generally accepted as international customary law is readily considered as part of the domestic law. But absorption of treaty law into municipal law follows divergent state practice. Generally, there are two principal strands of state practice in respect of absorptions of treaty law into municipal law. One is the American practice\(^{15}\) and other the Commonwealth practice\(^{16}\).

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\(^{15}\) The American practice regarding customary rule of of international law is more or less same the British practice. In America customary rules of international law are treated as a part of American law. In the leading case *Paquete Habana* (1900) 175 US 677 at p.700, Justice Gray remarked, “International law is a part of our law and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of rights depending on it are duly presented for their determination.” For this purpose, where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be held to the customs and usages of civilized nations; and as evidence of these, to the works of jurists and commentators, who by years of labour, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for the trustworthy evidence of what the law really is. Besides this the American courts also interpret the statute of the Congress in such a way that may not go against international law.

American practice regarding rules laid down by treaties is different from British practice. In case of international treaties, the American practice is not based on the constitutional rules governing the relationship of executive and Congress. In America, every thing depends upon the provisions of Constitution. Article VI of the American Constitution provides that Constitution of United States, all laws made in pursuance thereof and the international treaties entered into under the authority of US shall be the supreme law of the land. Thus international treaties have been placed in the same category as state law in America. It may, however, be noted that in America the practice is that if there is a conflict in between international treaty and statute law, whichever is later in date shall prevail. If there is a conflict between American constitution and international treaty, the former (Constitution) will prevail.

\(^{16}\) In Britain, customary rules of International Law are treated as part of British laws. British courts treat customary rules of international law as a part of their own law subject, however to following conditions: (i) rules of international law should not be inconsistent with the British Statutes; and (ii) if the highest Court once determines the scope of customary rule of international law, then all the courts in Britain are bound by it.

In regard to the treaties, the British practice is based on the constitutional principles governing the relationship between executive or crown and Parliament. In regards to treaties, the matters relating to negotiations, signatures, etc. are within the prerogative powers of the Crown. In Britain it is necessary that some type of treaties should receive the consent of Parliament. Either the Parliament accords its consent or adopt it in state law through the help of a statute. Such as (i) Treaties which affect the right of Britain Citizens; (ii) Treaties which amend or modify common law or Statute law of Britain; (ii) treaties which confer additional powers on Crown; (iv) Treaties which impose additional financial burden on Government. The consent of the Parliament is necessary for the treaties which cede the British territory and the applications of treaties.
Indian practice.

Before the adoption of the Indian Constitution the Indian practice in respect of relation of international law to internal law was similar to the British practice. This practice continued even after the adoption of the Constitution of India by virtue of the provisions of Article 372 until it was altered or repealed or amended by a competent Legislature or other competent authority. Article 51 is the most relevant provision in this regard.

But Article 51 does not give any clear guidance regarding the position of international law in India as well as the relationship between municipal law and international law because this article is contained in Part IV of the Constitution of India. Part IV of the Constitution deals with the Directive Principles of State Policy. Article 37 of this part clearly provides that the provisions contained in this part shall not be enforceable by any court. This Article falls in the Chapter on “Directive Principles of State Policy” which are non-justiciable. Secondly, it is doubtful if the expression ‘State’ includes the courts also within its ambit and if the Directive Principles have been addressed to them too. However, it would be wrong to contend that Article 51 is of no relevance and provides no guidance at all. Article 37 which provides that provisions contained in part IV of the Constitution are non-justiciable, adds in unmistakable terms that the principles there in laid down are “nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws.”

So far as customary rules of international law are concerned, the position prevailing in India that the customary rules of international law are part of the

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18 Art. 51: The State shall endeavour to: (a) “Promote international peace and security; (b) maintain just and honourable relations between nations; (c) foster respect for international law and treaty obligations in the dealings of organized peoples with one another; and (d) encourage settlement of international disputes by arbitration
municipal law provided that they are not inconsistent with any legislative enactment or the provisions of the Constitution. As regards the treaty rules, India follows more or less the British dualist view. It is to say, international law can become part of municipal law of India if it has been specifically incorporated\(^\text{19}\). Art. 253 of the Constitution which provides: “Notwithstanding in the foregoing of this chapter, Parliament has power to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention with any other country or countries or any decision made at an international conference, association or body.” It would, however, be wrong to contend that the implementation of every treaty would require legislative aid\(^\text{20}\).

In case of conflict between a provision of an International treaty such as article 11 of International Covenant on Civil and Political rights to which India is a party and a provision of an Indian statute such as section 51, (Proviso) and Order 21, rule 37, Civil Procedure Code,1908) it is the latter which shall prevail if the International Treaty in question has neither been specifically adopted in the municipal field nor gone under transformation\(^\text{21}\). Chinnappa Reddy, J. of the Supreme Court observed in Gramphone Company of India Ltd. v Birendra Bahadure Pandey\(^\text{22}\) that if in respect of any principle of international law Parliament says ‘no’, the national court cannot say ‘yes’. National courts shall apply international law only when it does not conflict with national law. In case however the conflict is inevitable, the national law shall prevail\(^\text{23}\).


\(^{20}\) Shive Kumar Shrama and ors v The Union of India and ors, AIR 1969, Delhi, p.64. The case dealt with the question whether a constitutional amendment or legislation was necessary for implementation of the “Kutch award”. The Delhi High Court held that there was no cession of any territory belonging to India and no constitutional amendment was necessary for implementation of the “Kutch Award”. The same views were expressed by the Supreme Court of India in Maghabhai Ishwarbhai Patel and ors. V Union of India, AIR 1969, S.C. p. 783.


\(^{22}\) see. AIR.1984 S.C.p.667.

\(^{23}\) Ibid. at p.671.
From the above observation the following conclusion may be derived:

i. Customary rules of international law are treated to be part of domestic law in a large number of states and in case they do not conflict with existing municipal law, there is no need of their specific adoption.

ii. Only in a few states, customary rule of international law, without specific adoption are applied by municipal courts even in case of conflict with municipal statute or judge-made law.

iii. As regards practice relating to the application of treaties within the municipal sphere, practice of states is not uniform.

iv. In a large number of states, municipal courts give priority to the application of municipal law, irrespective of the applicability of rules of international law and the question of any breach of international law is to be settled at the diplomatic level.

This scenario needs to be kept in mind when we examine the corpus of international human rights law including the rights of the child and its relationship with municipal law.

II. HUMAN RIGHTS IN INTERNATIONAL LAW

Today it is generally believed, “the concept of international protection of human rights is firmly established in international human rights law”\textsuperscript{24}. The international protection of human rights has become part of international law after the Second World War. Before the Second World War, human rights were protected by national instruments like the Magna Carta, 1215, Petition of Rights, 1627, Bill of Rights, 1688, Act of Settlement, 1702, American Declaration of

Independence, 1776, American Bill of Rights, 1791, and French Declaration of Rights of Man and Citizens, 1789, were all important national instruments in which some human rights and fundamental freedoms have been protected. From these instruments three important concepts relating to human rights and fundamental freedoms have originated: principle of inalienability, the principle of inviolability and the doctrine of rule of law.

The Charter of the United Nations 1945, was the first international instrument by which international protection of human rights has been legally recognized. In its Preamble, the peoples of the United Nations record their determination “to re-affirm faith in fundamental human person, in the equal rights of men and women and of nations large and small...”. Human rights and fundamental freedom have been mentioned in Articles, 13, 55, 56, 62 and 76 and specific functions have been mandated in the General Assembly, the State Parties, the Economic and Social Council as well as the Trusteeship Council.

Following the Charter, on the 10th December 1948, the General Assembly adopted and proclaimed the Universal Declaration of Human Rights as “a common standard of achievement for all peoples and all nations”. The Declaration proclaims, “All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood”. It also sets out the basis principles of equality and non-discrimination and regards the enjoyment of human rights and fundamental freedoms.

26 Adopted by the General Assembly vide Res.217A(III) on 10th December, 1948; UN.Doc.A/810 at 71 (1948).
27 Preamble to the Universal Declaration of Human Rights, 1948.
28 Article 1.
The Universal Declaration of Human Rights, 1948, proclaims two categories of rights: civil and political rights and economic, social and cultural rights. Civil and Political rights, mentioned in Articles 3-22, are as follows: right to life, liberty and security of person, freedom from slavery and servitude, freedom from torture or cruelty, inhuman or degrading treatment or punishment, right to recognition as a person before the law, equality before the law and equal protection of law; right to an effective judicial remedy, freedom from arbitrary arrest, detention of exile, right to a fair trial and public hearing by an independent and impartial tribunal; right to be presumed innocent until proved guilty, freedom from arbitrary interference with privacy, family, home or correspondence, freedom of movement and residence; right to own property; freedom of thought, conscience and religion; freedom of opinion and expression; right to take part in the government of one’s country and to equal access to public service in one’s country.\(^\text{29}\)

The economic, social and cultural rights recognized in Articles 23-27 include: the right to social security; the right to work and free choice of employment; the right to equal pay for equal work; right to form and join trade unions; right to rest and leisure; right to a standard of living adequate for health and well-being; right to education; right to participate in the cultural life of the community; right to protection of the moral and material interests resulting from one’s authorship of scientific, literary or artistic productions.\(^\text{30}\)

Article 28 recognises that everyone is entitled to a social and international order in which the right and freedoms set forth in the Declaration can be fully realized. Article 29 provided that in the exercise of his right and freedom, every one shall be subject only to the limitations that have been established by law to


\(^{30}\) Ibid, p. 706.
secure due recognition and respect for the right and freedoms of others and to meet the just requirement of morality, public order and general welfare in a democratic society. These human rights and fundamental freedoms shall not be exercised contrary to the purposes and principles of the United Nations. Article 30 states that no state, group or person may claim any right, to do anything aimed at destroying the right and freedom set out in the Declaration.

All these rights contained in the Universal Declaration of Human Rights, 1948, are moral standards because the Declaration per se was not legally binding. But over the years, the Declaration has served as a benchmark in the constitution making in most countries. It remains the mother of all international legal instruments on human rights.

Whatever the merit and significance the Declaration may have, it was not a treaty legally binding on the member states of the United Nations. So, steps were taken to give legal effect to these provisions of the Declaration in the form of covenants. Thus, in 1966, two international covenants on human rights were adopted: International Covenant on Economic, Social and Cultural Rights and International covenant on Civil and Political Rights. In addition, an Optional Protocol to the International Covenant on Civil and Political Rights was also adopted. The two covenants proclaimed and elaborated almost all the rights mentioned in the Universal Declaration of Human Rights with a view to giving legal coverage under international law. Some new rights have been introduced by the International Covenants on Civil and Political Rights. For instance, Article 27

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34 See optional protocol I and II
of the covenant states, “In those states in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own culture, to profess and practice their own language.”

The international instruments contain provisions relating to implementation of human rights and fundamental freedoms. The Human Rights Committee established under Article 28 of the International Covenant on Civil and Political Rights, 1966, is responsible for monitoring implementation of human rights set out in the covenant. The Optional Protocol to the International Covenant on Civil and Political Rights, 1966 enables the Human Rights Committee to receive and consider communications from individuals claiming to be victims of violation of any of the rights set forth in the covenants. The Committee on Economic, Social and Cultural Rights is responsible for the implementation of economic, social and cultural rights set forth in the International Covenant on Economic, Social and Cultural Rights, 1966(Article 1). It should be noted in this connection that the International Court of Justice has no jurisdiction in connection with the enforcement of human rights contained in the International Bill of Human Rights.

From the above discussion it is evident that the Charter of the United Nations was the first international instrument, which has internationalized human rights and fundamental freedoms. The Universal Declaration of Human Rights interpreted and explained human rights and fundamental rights mentioned in the Charter of the United Nations Organisation. The International Convenant on Economic, Social and Cultural Rights, 1966, International Covenant on Civil and Political Rights, 1966, and the Optional Protocol to the International Covenant on Civil and Political Rights, 1966, have given legal validity to the rights proclaimed

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by the Universal Declaration of Human Rights, 1948\textsuperscript{36}. The Declaration and the Convents altogether are regarded as International Bill of Human Rights\textsuperscript{37}.

Undoubtedly, the International Bill of Human Rights represents a milestone in the history of human rights. It has had a far-reaching impact on the adoption of the European Covenants on Human Rights, 1950\textsuperscript{38}, and the Inter-American Convention on Human Rights, 1969\textsuperscript{39}, and African Charter on Human and Peoples Rights, 1981\textsuperscript{40}. Following the Bill many of the state constitutions adopted Bills of Rights, National, regional and international courts have frequently cited principles set out in the International Bill of Human Rights in their decisions and opinions\textsuperscript{41}. In fact, the International Bill of Rights remains the beacon light for all present and future efforts in the field of human rights, both nationally and internationally.

III. CHILD RIGHTS AS A PART OF THE HUMAN RIGHTS

Philippe Aries, a French historian, suggested that in the medieval Europe children were not distinguished from adults in any particular way\textsuperscript{42}. They were


\textsuperscript{37} Ibid, p.707.


\textsuperscript{39} For text: UN Yearbook on Human Rights (1969), pp.390-400. See also. Ian Brownlie, n.36, pp.391-417.

\textsuperscript{40} For the text: ILM, Vol.21 (1982), pp. 58-68.

\textsuperscript{41} The provisions of the UDHRs have influenced various national constitutions like, Algeria, Burundi, Cameroon, Chad, Democratic Republic of Congo, Republic of Congo, Dahomey, Gabon, Guinea, Ivory Costa, Madagascar, Mali, Mauritania, Nigar, Senegal, Togo and upper Volta etc., India, Bangladesh etc: The Indian Constitution bears the impact of the UDHR and this has been recognized by the Supreme Court while referring to Fundamental Rights contained in Part III of the constitution in Kesavananda Bharti vs. State of Kerala, Sikri, C.J. of the S.C.I., observed: “I am unable to hold that these provisions show that some rights are not natural or inalienable rights. As a matter of fact, India was a party to the UDHRs while I have already referred to and that declaration describes some fundamental rights as inalienable”. See.AIR, 1973, S.C. pp.15-36. At International level, South-West Africa case (Second phase), 1966, I.C.I.,p. 6., the U.S. Supreme Court in Brown vs. Board of Education, 1954, the European Court of Human Rights, in the Belgium linguistic case.

\textsuperscript{42} See P. Aries, Centuries of Childhood, (R, Baldick Trans, 1962). See also: D. Hunt, Parents and Children in History, (1970), See also: Wrightson, Infanticide in European History, Criminal Justice:
regarded simply as adults in miniature. The rights of the children have not been specifically treated until recently though scattered efforts were made since the time of the Geneva Declaration in 1924. Children were included in the general category of human beings when one dealt with human rights.

In due course of time, there was a gradual development of universally accepted principles concerning responses to the special vulnerability, needs and situations of children. The body of international humanitarian and human rights law is also being continually supplemented. This body comprises of a wide range of instruments, some are binding such as the Red Cross on Geneva Convention, the ILO Conventions, the International Covenants on Human Rights etc.; others are non-binding, for example, the Standard Minimum Rules for the Treatment of Prisoners, the Principles of Medical Ethics, and the Declaration on the Rights of the Child. Many of the provisions of both the binding and non-binding instruments, in fact, apply implicitly to children by virtue of the status of the latter as human beings or make specific and explicit reference to children. The Geneva Declaration, 1924, and the United Nations Declaration of the Rights of the Child, 1959, have declared the child to be the most privileged ward of humanity, when they stated that, “Mankind owes to the child, the best it has to give”.

An international instrument of great importance for the protection of the children was the Geneva Declaration of 1924, also known as the Declaration of the Rights of the Child of 1924, which was adopted by the Assembly of the League of Nations in the name of “Men and Women of all Countries”. Though it did not proclaim or imply assumption of obligations by states as such. The Declaration

45 Charnlet and Morier, n.42,p.4.
introduced basic principles, which set the stage for the progressive development of international norms in the Area of the Rights of the Child.

The Universal Declaration of Human Rights of 1948 is looked upon by a substantial body of international legal opinion, as the *jus constitendum* of the United Nations Charter with regard to the, “human rights and fundamental freedoms”, and the predominant view is that its principles are part of customary international law.46

Most of the rights recognized in the International Bill of Rights devote upon children either directly47 or indirectly48 though some to a greater extent than others. Several of its provisions are particularly or exclusively relevant to children. The International Bill of Rights is thus the definitional matrix of internationally proclaimed human rights, in general and children’s rights, in particular49.

Eleven years after the proclamation of the Universal Declaration of Human Rights, the United Nations General Assembly unanimously adopted the United Nations Declaration of the Rights of the Child50, which fully incorporates and builds upon the provisions of the Geneva Declaration of 192451. It is significant that the preamble to the Declaration of the Rights of the Child expressly related its content to both the Charter of the United Nations and the Universal Declaration of Human Rights, thus affirming their interrelationship.

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47 Arts.3-15 and 18-20 for the catalogue of Civil Rights applicable to all. Such rights as the right to emigrate and to seek asylum (Arts.13-14) would obviously be circumscribed in the case of children to the extent that the consent of parent or guardian might be a pre-requisite.
48 Art. 16 on marriage and the family.
49 A.M. Pappas, (UNITER) p.xxii.
51 For the text, n.41, p.6. also see. AJIL (Supp),1924-25.
IV. INDIAN LAW WITH REFERENCE TO CHILD RIGHTS

Indian Constitution

The Constituent Assembly of the independent India appointed a Drafting Committee on 29th August, 1947\textsuperscript{52}, under the chairmanship of B.R. Ambedkar with a team of men of vast learning and varied experience in life. The process of constitution making began against the shadow of partition of India, transfer of powers from the British, and in the international context of the end of the Second World War. The importance of the Nuremberg and the Tokyo Trials of 1946-50 was not only for the recognition of the concept of war crimes, but also for international crimes against peace and humanity i.e. international crimes resulting from largescale violations of human rights Universal Declaration of Human Rights of 1948 has had a special impact on India’s Constitution making, as it has left an unmistakable impression on the Indian Constitution in regard to protection of human rights. Article 38 of the Constitution which is one of the Directive Principles of State Policy, provides that the state shall endeavour to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of the national life. The experience of the struggle for freedom in India led to the inclusion of Fundamental Rights in the Indian Constitution.

Articles 14, 15, 16, 17, 18, 19, 21, 25, 30, 31-C and 32 form the bedrock of human rights in the Indian Constitution\textsuperscript{53}. The right to equality (Art.14), the prohibition of discrimination on grounds of religion, race, caste, sex, place of birth (Art.15), equality of opportunity in matters of public employment (Art.16), abolition of untouchability (Art.17) and the rights conferred by Article 19 like

freedom of speech and expression, the right to assemble peacefully and without arms, the right to form associations, the right to move freely throughout the territory of India, the right to settle in any part of India and the right to practise any profession, occupation, trade or business, the right to freedom of conscience and to free profession, practice and propagation of religion, are some of the more important Fundamental Rights conferred by Part III of the Indian Constitution. These rights can be enforced by a petition under Article 32, which significantly, is itself a fundamental right. A new chapter on “Fundamental Duties” under Part IV-A, which was inserted by the 42nd Amendment in 1976, is a strong reminder that rights have corresponding obligations and those who assert their rights must be conscious of their social obligations.

The Indian Constitution provides for an impressive list of Rights for Children. The right of “equality before the law and equal protection of the laws” is available to any person (including children). The state is empowered by Article 15(3) to have special laws for children only, intended to enable them to enjoy the fruits of guaranteed equality. Hence the Child Labour Prohibition Laws, the Juvenile Justice Act, 1986 and the Children Act, 1960, are constitutionally permitted and mandated. A total ban has been placed on forced labour and such practices have been made punishable by law, under Article 24. This should benefit all persons including children.

54 Art.43A and Art. 48A was inserted in this part by the Constitution (42nd Amendment) Act, 1976; which states that the State shall take steps, by suitable legislation or in any other way, to secure the participation of workers in the management of undertakings, establishments or other organizations engaged in any industry and the State shall endeavors to protect and improve the environment and to safeguard the forests and wild life of the country.

55 This Act has been enacted for obtaining uniformity in the definition of child in various laws relating to child labour because the term ‘child’ is defined in different Acts in different ways. The Act defines the term ‘child’ under Section 2(ii) as a person who has not completed 14 years of age. It classifies occupation into ‘hazardous’ and ‘non-hazardous’ in nature. Section 7(4) prohibits night work between 7p.m. and 8a.m. and Section 7(5) prohibits dual employment of child in any employment.

56 Developing Human Rights Jurisprudence, n.53. p.147.
The Indian Law was also able to promote the jurisprudence of Child Rights through the provisions of Part IV of the Indian Constitution, under Article 39(e) & (f) and Articles 42, 45 and 47. Taking into consideration the relative performance of the three wings of the Indian Government in the matter of securing child rights, the Indian judiciary has accorded child rights and principles governing them, the topmost priority and has given every child, the neglected as well the delinquent, an opportunity to enjoy minimum guarantees of law.

B. DEVELOPMENT OF THE INDIAN LAW ON THE RIGHTS OF THE CHILD

I. RIGHTS OF THE CHILD IN INDIA

In terms of statutory prescriptions and prohibitions, India has by evolved wide range of laws seeking to protect and promote the rights of child. Under law, Children are entitled to special care, assistance and essential needs of children should be given highest priority in the allocation of resources at all times. They should get a fair and equitable deal in society, government as well as non-governmental, local, national, regional and international organizations should endeavor to promote the Rights of the Child. Childcare and the respect for the child’s right to welfare run deep in the Oriental Societies. Refer to the rights of the

57 Art.39 (e): the state shall, in particular, direct its policy towards securing that the health and strength of workers, men and women, and the tender age of children are not abused and that citizens are not forced by economic necessity to enter avocations unsuited to their age or strength; and in (f) that children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment. Art.42 says that make provision for securing just and human conditions of work and for maternity relief. Art. 45 says that the state shall endeavour to provide, within in a period of ten years from the commencement of the constitution, for free and compulsory education for all children until they complete the age of fourteen years. Art.47 says that the state shall regard the rising of level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties and in particular, the state shall endeavour to bring about prohibition of the consumption except for medicinal purposes of intoxicating drinks and of drugs which are injurious to health.
child, under the Hindu Law and the Mohammedan Law. There are more than 250 Central and State Laws in India, applicable to children in various spheres of life, which are regulatory, protective or correctional in nature. The following are the principal Central Laws seeking to protect the child:

1. The Apprentice Act, 1861.
2. The Children (Pledging) of Labour Act, 1933.
4. The Guardians and Wards Act, 1890.
5. The Hindu Minority and Guardianship Act, 1956.
8. The Reformatory Schools Act, 1897.
11. The Orphanages and other Charitable Homes (Supervision and Control) Act, 1960.
18. The Juvenile Justice (Care and Protection of Children) Act, 2000.\(^58\)

\(^58\) The Act received the assent of the President on the 30th December 2000 (Act No.56 of 2000).
Apart from these laws mainly concerning children, there are a host of related welfare and criminal laws, which have beneficial provisions for the care, and protection of children. Even the laws relating to commerce have protective provisions beneficial to children. Some of the Acts that are dealing with the child rights are discussed here.


The Act distinguishes between ‘child’, ‘adolescent’ and ‘adult’. ‘Child’ is a person who has not completed the age of fifteen years; ‘adolescent’ is a person who has completed the age of fifteen years, but is below the age of eighteen years, and ‘adult’ is a person who has completed the age of eighteen years. The Act defines a young person as one who is either a child or an adolescent. A child below the age of fourteen is not allowed to work in a factory. A child above the age of fifteen and below the age of eighteen cannot be employed to work for more than four and half hours and cannot be employed during the night.

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60 State Shops and Commercial Establishment Acts in Andaman and Nicobar, Arunachal Pradesh, Dadar and Nagar Haveli, Nagaland and Sikkim, Bihar, Gujarat, U.P, M.P, West Bengal, Tamil Nadu, Orissa, Karnataka, and Himachal Pradesh.
61 Section 2.
62 Section 2. (C)
63 Section 2.(b)
64 Section 2.(a)
65 Section 2.(d)
66 Section 67.
67 Section 71(i)(c), &71(i)(a)
2. **The Mines Act, 1952.**

The minimum age for employment in mines is 15 years of age [68]. The Act includes all excavations where any operation for the purpose of searching for orbiting millions is carried out [69]. The Act not only prophests the presence of children in any part of a mine which is below ground or in any part of a mine in which any mining operation is being carried on [70]. Even on adolescent in not allowed to work in part of a mine which is below ground, unless he has completed his 16th year and has a medical certificate of fitness for work [71]. The certificate is valid only 12 months [72].

3. **The Plantation Labour Act, 1951.**

The Act lays down that children who have not completed 12 years of age [73] shall not be employed in plantation (in tea, coffee, rubber or cinchona), which measures 10.117 hectors or more and employing thirty or more person. Every child above 12 years of age is required to obtain a certificate of fitness (valid for a period of one year at a time) from a certifying surgeon [74]. The Act makes provisions for education as a responsibility of the employer and is for the housing and medical and recreational facilities [75].

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68 Section 2(e)
69 Section 2 (j)
70 Section 45 (i).
71 Section 40 (i).
72 Section 41 (i)
73 Section 4 (a).
74 Section 26.
75 Sections 5,6,7.
3. **The Motor Transport Workers Act, 1961.**

Minimum age required for employment in every transport undertaking employing five or more workers\(^{76}\), is 15 years\(^{77}\). The adolescents are prohibited to work unless a certificate of fitness is granted\(^{78}\), which is valid only for one year\(^{79}\). An adolescent can work only for 6 hours including a rest interval of half an hour and between 10 A.M and 6 P.M only.

5. **The Beedi and Cigar Workers (Conditions of Employment) Act, 1966.**

No child who has not completed his 14\(^{th}\) year shall be required or allowed to work in any industrial premises\(^{80}\), where any manufacturing process connected with the making of Beedi or Cigar is carried on irrespective of the number of persons employed. The employment of young persons between 14 to 18 years is prohibited between 7 P.M. to 6 A.M.\(^{81}\) provisions for canteen\(^{82}\), first aid\(^{83}\), ventilation,\(^{84}\) and cleaning\(^{85}\) are made under the act.

6. **The Employment of Children Act, 1938.**

To prevent employment of children in hazardous employments and certain categories of unhealthy occupations, the Act prohibits the employment of children below 15 years of age in any occupation connected with the transport of

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\(^{76}\) Section 1(4).  
\(^{77}\) Section 21.  
\(^{78}\) Section 22.  
\(^{79}\) Section 23(2).  
\(^{80}\) Section 24(b).  
\(^{81}\) Section 25.  
\(^{82}\) Section 16.  
\(^{83}\) Section 15.  
\(^{84}\) Section 9.  
\(^{85}\) Section 8.
passengers, goods or mail by railway, or a port authority within the limits of a port. These prohibited categories of occupations include employment in railways, particularly in construction work, catering services, track and line work as well as clearing and picking of ash-pits and cinder.

The Act also prohibits the employment of children below 14 years of age in certain less hazardous occupations, such as beedi-making, carpet weaving, cement-manufacture, cloth-printing, dyeing and weaving, manufacture of matches, explosives and fire-works, mica-cutting and splitting shellac manufacture, soap manufacture, canning, etc. The Children's Act has been replaced with the Child Labour (Prohibition and Regulation) Act, 1986, under uniform age in 14 years. A child below the age of 14 years cannot be employed in any establishment.


The Act prohibits the employment of children in any capacity, who are below 14 years of age, on sea-going ship, except (a) in a scholarship or training ship; or (b) in a ship in which all persons employed are members of one family; (c) in a home-made ship of less than two hundred tons gross; or (d) where such person is to be employed on nominal wages and will be in the charge of his father or other adult near male relative.

86 Section 3(3).
88 Section 3(A).
89 Section 109.
8. **Inland Steam-Vessels Act, 1917.**

The Act applies to steam ships ordinarily playing on inland waters. The Act does not have any provision regulating employment of children. The reason for this omission seems to be that it is an old enactment when the community was not conscious of the need to have legislation for protection of children.\(^{90}\)

9. **Radiation Protection Rules, 1971.**

Children below 18 years of age are not to be employed at places where radiation takes place.

10. **State Shops and Commercial Establishment Act.**

Different states have enacted their own laws regulating employment of children in shops and establishments, restaurants and hotels and place of amusement and notified urban areas etc. to which the Factories Act, 1948 does not apply.

The minimum age of employment in shops and commercial establishments is 12 years in Bihar, Gujarat, J & K, Madhya Pradesh, Karnataka, Orissa, Rajasthan, Tripura, U.P., West Bengal, Goa Daman and Diu and Manipur, and 14 years in Andhra Pradesh, Assam, Haryana, Himachal Pradesh, Kerala, Tamilnadu, Punjab, Delhi, Chandigarh, Pondichery and Meghalaya. The minimum age of employment is 15 years in Maharashtra. There is no separate Shops and

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\(^{90}\) S.N. Jain, "Laws relating to Child Labour", 14 published in Child and the Law, \(II,\) New Delhi.

11. The Child Labour (Prohibition and Regulation) Act, 1986

The Child Labour is a phenomenon all over the world, both in the developed countries and developing countries, though it is more pronounced in the latter. Even in 1929, the Royal Commission on Labour thus lamented about the child labour in several industries. Mr. Whitley, Chairman of the Commission laments:

"In many cities large number of young boys are employed for long hours and discipline is strict. Indeed, there is reason to believe that corporal punishment and other disciplinary measures of a reprehensible kind are sometimes resorted to in the case of smaller children. Workers as young as 5 years of age may be found in some of these places working without adequate meal intervals or weekly rest days, and 10 or 12 hours daily work on wages as low as 2 annas in the case of those of tenderest years92."

The situation was a shade better now as indicated by the Report of the National Commission of Child Labour93.

93 The gradual reduction in the Employment of Child Labour since independence is due partly to the expansion of educational facilities by the state and also to relatively better enforcement of statutory provisions, judicial intervention, participation of the NGOs and concern at the International level relating to child labour.
In the Child Labour Act of 1986, a Child is defined as a person who has not completed the age of 14 years\textsuperscript{94}. A child cannot be permitted to work in the following occupations:

(1) Transport of passengers, goods or mails by railway;
(2) Cinder picking clearing of an ash pit or building operation in the railway premises;
(3) Work in a catering establishment at a railway station, involving the movement of a vendor or any other employee of the establishment from one platform to another or into or out of a moving train;
(4) Work relating to the construction of a railway station or with any other work-where such work is done in close proximity to or between the railway lines;
(5) A port authority within the limits of any port.

He cannot be employed in the following processes:

(1) Beedi -making.
(2) Carpet-weaving.
(3) Cement manufacture, including bagging of cement.
(4) Cloth printing, dyeing and weaving.
(5) Manufacture of matches, explosives and fire works.
(6) Mica-cutting and splitting.

The Act has now laid down the minimum age of employment of children on the completion of 14 years and some of the statutes that provided the completion of 15 years have been amended to as to bring uniformity.

\textsuperscript{94} Section 2(ii).
12. **The Juvenile Justice Act, 1986**

With a view to provide a uniform pattern of justice to juveniles throughout the country, Juvenile Justice Act, 1986\(^{95}\) was passed. The Act has brought a change in the upper age limit of juveniles (from the earlier age limit of 21 years for both males and females) to 16 years for males and 18 years for females\(^{96}\). The Act provides for the care, protection, treatment, development and rehabilitation of neglected and delinquent juveniles and lays down a uniform legal framework to ensure that no child under any circumstances is in jail or kept in any police lockup. It provides for a different approach in the processing of the neglected juveniles *vis-à-vis* the delinquents. While neglected children are produced before Juvenile Welfare Board\(^{97}\), the delinquents are dealt with by the Juvenile Courts\(^{98}\).

One of the avowed objectives of the Act is to bring the operation of the juvenile system in the country in conformity with the United Nations Standard Minimum Rules for the Administration of Juvenile Justice. These universally accepted principles and standards have been incorporated in various provisions of the Act.

Under the Juvenile Justice Act, no delinquent juvenile can be tried in the same way as an adult under the court of criminal procedure. A delinquent juvenile can also not be charged and tried as an adult and also can't be sentenced to death or imprisonment. If the court comes to the conclusion that the child has committed the offence charged with, then it can pass several types of orders ranging from releasing the child on probation for good a conduct and placing him

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\(^{96}\) Section 2 (h).

\(^{97}\) Section 4, 6.

\(^{98}\) Section 5, 7.
under the care of any parent guarding or fit institution, to directing that the juvenile be sent to a special home.


The Act provided for comprehensive coordinated community based service for the children with disabilities. Some voluntary organizations have made a beginning by educating parents, grass-root level workers and the community by generating awareness on prevention, early identification and referral services for treatment of such disabilities.


It is an Act to consolidate and amend the law relating to juveniles in conflict with law and children in need of care and protection, by providing for proper care, protection and treatment by catering to their development needs, and by adopting a child-friendly approach in the adjudication and disposition of matters in the best interest of children and for their ultimate rehabilitation through various institutions established under this enactment.99

The Juvenile Justice Act lays down the basic principles of administering justice to juveniles and children, emphasizing developmental needs rather than criminal justice of juveniles, and brings the law in uniformity with the UN Convention on the Rights of the Child.

While ensuring speedy disposal of cases under the Act, it seeks to create juvenile police units with a humane approach and spells out the governments’ role as a facilitator rather than as a doer by involving voluntary organizations and local

99 The Act No.56 of 2000; Received the assent of the President on 30th December, 2000.
bodies in juvenile justice and childcare. Under the Act, juvenile justice boards\textsuperscript{100} and child welfare committees\textsuperscript{101} and homes will be set up in each district\textsuperscript{102}.

More importantly, the Act separates the juvenile in conflict with law from the child in need of care and protection, and provides for effective measures and alternatives for rehabilitation and social re-integration\textsuperscript{103}. However, several NGOs and legal luminaries have criticized the Act\textsuperscript{104}.

\section*{II SOME OF THE LEGAL ISSUES RELATING TO THE CHILDREN’S RIGHTS IN INDIA:}

The issues involved in the matters of child marriages, legitimacy, guardianship, adoption, maintenance, child welfare and protection, offences against children, child health, education, abolition of child labour is being discussed here.

1. \hspace{1cm} CHILD MARRIAGE.

Child marriage is one of the most notorious customs practiced in India\textsuperscript{105}. Recognizing its ill effects, a number of socio-religious movements\textsuperscript{106} influenced

\textsuperscript{100} Section 62.
\textsuperscript{101} Section 29; 37.
\textsuperscript{102} Section 9.
\textsuperscript{103} Chapter II of the Act.
\textsuperscript{104} Several Organisations dealing with Juvenile welfare have dubbed it as “Non-Progressive” and “Not in the best interest of the Child. A Resolution passed during the National Conference on Human Rights, Social Movements, ‘Globalisation and the Law’ in Panchagni soon after the new legislation was passed, it says, it is “detrimental to the interests of the child, overtly, statist in character, and places undue reliance and coercive policies process...””; Times of India (New Delhi), January 26, 2001, p.3.
\textsuperscript{105} Child marriage had religious sanction in India and references to this practice can be found in many Hindu scriptures, Paras Diwan; Children and Legal Protection (New Delhi: Deep & Deep Publications, 1994). pp.46-54.
\textsuperscript{106} The term ‘socio’ implies an attempt to re-order society in the area of social behaviour, custom, structure or control. The term ‘religious’ to the type of authority used to legitimize a given ideology and its accompanying programme. This authority was based on scriptures that were no longer considered to be properly observed, or a re-interpretation of doctrines, or on scriptural sources arising from the condition of a new religious leaders message.
the community to frame a new laws and a number of laws have been enacted in pre and post independent India regarding marriage age for boys and girls among Hindus and Christians. The Indian Muslims continue to practise their personal laws on this matter\textsuperscript{107}. The Civil Marriage Act was enacted in 1872. It laid down the age of marriage as 14 years of those seeking to register under this Act. Realising the dangers of early consummation of marriage to the health of young wives and their children, efforts were made to prevent the consummation of marriage before the girl was 12 years old by enacting the Consent Act 1891. In 1925, the age was raised to 13 years\textsuperscript{108}.

It was in 1929 that a comprehensive legislation known as the Child Marriage Restraint Act (also called the Sharada Act, after the name of its architect) was enacted. This Act fixed the minimum age of marriage for boys at 18 years and for girls at 14 years\textsuperscript{109}. Subsequent amendments to this Act, in 1949 and 1978 rose the age to 21 years for boys and 18 years for the girls\textsuperscript{110}. Although this Act is

\begin{flushleft}
All socio-religious movements demanded changes, ranging from the relatively limited approach of defensive and self-consciously orthodox groups to radical who articulated a sweeping condemnation of the status quo. In the 6\textsuperscript{th} and 5\textsuperscript{th} Centuries BC a number of socio-religious movement appeared; top of these, Jainism and Buddhism, began as Hindu cults, and eventually became separate religions. Both disagreed sharply with existing orthodoxy. They rejected the authority of the Vedas, the use of sacrifices, and the role of Brahman priests. As movements preaching new doctrines, they used the vernaculars rather than Sanskrit, were open to all social classes, including women as well as men, and discarded the current social distinctions. One socio-religious movement in southern India, Virashaivism stands out for its radical ideas and its institutional success. Founded by Basava (1125-70), this movement centered on the worship of Shiva. It was an aggressive, proselytizing, and uncompromising sect that rejected Vedic authority, the role of priests, caste distinctions, and the rite of cremation, favoring burial instead. The Virashaivas also attempted to restructure the place of women in society. They considered men and women equal; allowed widows to remarry; condemned child marriage and arranged marriage, and no longer classed women as polluted during their menses.

Socio-religious movements aroses, which called for the creation of an Egalitarian Society, rejected the role of priests and the rituals they conducted turned against the worship of idols, and promoted the concept of monotheism. Such movements often attempted to re-define the role of women, granting them equality that included marriage customs, the right to education and, at times, relief from the restrictions of ritual pollution.

\textsuperscript{107} Sunni and Shia Law; For details see Mulla, Principles of Mohemadan Law, (Bombay: N.M.Tripathi, Private Ltd., 1972), pp. 255-259.
\textsuperscript{109} Section 2(a).
\textsuperscript{110} Section 2(a)
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applicable to the whole country, it is inoperative in respect of communities, which have their own personal laws. Another drawback of this Act is that it simply imposes restrictions on the solemnization of the marriage of the minors, but does not invalidate such marriage\textsuperscript{111}.

The Hindu Marriage Act 1955 represented another effort to check the incidence of child marriage. The amendment to this Act in 1976 introduced the concept of “option of puberty”. This Act too, as its name suggests, excludes the Muslims, Christians, Parsis and other not included under the definition of ‘Hindus’\textsuperscript{112}. However, declaring the marriage of minors valid offsets the beneficial effect of the legislation, since imposing punishment does not relieve the girl from the ill-effects of child marriage. A more progressive legislation that affects the marriage of minors is the Special Marriage Act, 1954. The minimum age\textsuperscript{113} requirement is the same as under the Sharada Act, but it does not admit marriages of minors even with the consent of guardians. Any marriage procured by concealment of age in violation of the Act is void\textsuperscript{114}.

Muslims in India are governed by their personal laws, according to which the appropriate age for marriage for a girl is considered as that of achieving puberty. As such marriage between a twelve-year-old boy and nine year old girl could be valid among Muslims\textsuperscript{115}. The only exception is the “option of puberty” provided under the Dissolution of Muslim Marriage Act, 1939\textsuperscript{116}. The marriage of minors among Christians is also possible. The Christians Marriage Act, 1872, has special procedures for the solemnization of minors’ marriages. Although this, Act was amended in 1978, raising the marriage age to the level of Sharada Act, the

\textsuperscript{111} N.K.Sharda,n.51,.62.
\textsuperscript{112} Section 2 (c)
\textsuperscript{113} The minimum age for boy is 21 years and for girl is 18 years.
\textsuperscript{114} Harendra Nath vs Suprora, AIR.1979. Cal.120.
\textsuperscript{116} Ibid.
provisions according to which minors' marriages are possible, were not abolished. Even the law governing the Parsis does not prohibit the marriage of minors. The only condition in the Parsi Marriage and Divorce Act, 1936, being that if any of the parties to the marriage is below 21 years of age, the consent of the guardian should be obtained \(^{117}\).

An encouraging contribution of these enactments has been the gradual increase in the minimum age of marriage. Although there is a strong international opinion against child marriage that is considered highly detrimental to the health of the child and various pieces of legislation have been enacted to prevent this practice, these statutes continue to be defied with the full knowledge of the law enforcement authorities. This defiance has to be understood against the background of the socio-economic and political aspects of this evil customs. Illiteracy, ignorance of the dangers inherent in the child marriage, economic compulsions, and the lack of political will to abolish the evil are some of the reasons for its continuation \(^{118}\).

The Convention on the Rights of the Child has no provision concerning the child marriage. However, it has many provisions that would in effect check the incidence of child marriage. Article 3 provides that all actions directed at the child should be for the latter's best interest. Article 6 calls for the survival and development of the child. Article 19 calls for the prevention of child abuse and Article 28 for compulsory primary education, etc. These indirectly prohibit child marriage.

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\(^{117}\) Section 3.

\(^{118}\) A Uniform Civil Code and an educated public opinion can help to abolish this heinous crime against children and especially against young girls.
2. **LEGITIMACY**

The social and legal status of a child plays an important role in its well-being. Its status is basically determined by the status of its birth\(^{119}\). Among Hindus and Christians, marriage is recognized as a permanent sacrament\(^{120}\). The off-springs of this sacramental bond carry with them the stamp of morality and legitimacy and the fruits of unlawful wedlock are considered illegitimate. Like the English Common Law, the Muslim Law has the notion *Filius nullius*\(^{121}\), where by the illegitimate child is recognised neither as the child of his father nor of his mother\(^{122}\). The Indian society is unprepared to grant equal status to children having vary birth status. All communities have either religious laws or statutory laws, which determine the legitimacy and illegitimacy of the child.

In olden days the Hindus recognized a child as legitimate or illegitimate depending upon whether it was conceived before or after the marriage of its parents. These rules now have been codified in the Indian Evidence Act, 1872, the Hindu Marriage Disabilities Act, 1946 and the Hindu Succession Act, 1956\(^{123}\), and the Hindu Marriage Act 1955\(^{124}\), and the Legitimacy Act, 1959\(^{125}\), Matrimonial Causes Act, 1950\(^{126}\).

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121 Nobodys' child.
122 In re Lloyd, (1841), 3 Man & G.547; See also Horner vs Horner, (1799) 1Hag.Con.337.
124 Section: 16
125 Section 2.
126 Section 9, Now Section 16 in Matrimonial Causes Act, 1973.
According to Muslim law children born outside the marriage of their parents or born of void marriages are illegitimate\textsuperscript{127}. As such, conception during the wedlock was the determining factor for the legitimacy of the child, the minimum period of gestation being six months\textsuperscript{128}. Their personal laws as well as the Indian Evidence Act, 1872\textsuperscript{129}, determine the legitimacy of Indian Muslim children. In matters of inheritance, however, they observe their traditional personal laws\textsuperscript{130}.

Among Christians children born of void marriages are illegitimate. Although the Christian Marriage Act, 1872, was amended in 1978, it does not consider the question of the legitimacy of void marriages. The Indian Succession Act, 1925, and the Special Marriages Act, 1954, which determine the inheritance rights of the Christian children, contains no specific provision enabling or disabling an illegitimate child.

The Parsi Marriage Act, 1936 is also silent about the status of children born of void or voidable marriages. The Special Marriages Act, 1954, as amended in 1976, applicable to persons whose marriages are registered under it, recognizes children of void or voidable marriages as legitimate, Matrimonial Causes Act, 1950.

It is strongly contended that the child who has no say in the matter of its conception should not suffer the social stigma or illegitimacy. In accordance with this plea in the National Plan of Action for the International Year of Child, the Government of India has entrusted the task of incorporating principles of “equality and non-discrimination” in respect of all persons born out of wedlock, to the

\textsuperscript{127} See. Mulla; Principles of Mohammedan Law, n. 106, p.262
\textsuperscript{128} Ibid, p.278.
\textsuperscript{129} Section 112.
\textsuperscript{130} See. Mulla, Principles of Mohammedan Law, n.106, pp.36-46...
Union law Ministry\textsuperscript{131}. Illegitimacy brings with it disabilities in the rights of inheritance, maintenance, and brings in problems of abandonment, neglect and delinquency. The psychological shock the child has to endure affects its growth and personality.

In order to eliminate the stigma of illegitimacy, the United Nations and several other international forums have specifically advocated the safeguarding of the interests of persons born out of wedlock. The UN Draft on General Principles on Equality and Non-Discrimination, the International Convention on the Elimination of All Forms of Racial Discriminations, 1966\textsuperscript{132}, the Universal Declaration of Human Rights, 1948\textsuperscript{133} and the Declaration on the Rights of the Child, 1959\textsuperscript{134} etc. set out principles of equality and non-discrimination whereby no limitations and handicaps, legal or social, could be imposed on persons because of the “nature” of their birth. These principles provide that every person born out of wedlock shall enjoy the same political, social, economic and cultural rights as persons born in wedlock. The Convention, in Article 2, also provides for non-discrimination of the child on the status of his/her birth. The provisions found in the Indian Law are generally satisfactory for conferment of legitimacy on children born of void or voidable marriages. But there is an obvious conflict between the existing personal laws relating to the legitimacy of the children and the UN Convention.

Therefore, there is a need to amend the personal laws of the communities who do not treat children of void and voidable marriages as legitimate.

\textsuperscript{132} Art.1.
\textsuperscript{133} Art.2: Every one is entitled to all the rights and freedoms set forth in this Declaration, without discrimination of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
\textsuperscript{134} Principle 1
3. GUARDIANSHIP

Social scientists agree that the child can best develop in a healthy family environment\(^{135}\). While parents can best serve the function, this assumes great significance when they are separated or dead. Guardianship is viewed not as a matter of parental control only but also as an important instrument of child development. In 1890, the Guardian and Wards Act was enacted as a pioneering attempt in consolidating the legislative precedence and measures that existed in this field till then. Although the Act co-exists with the personal laws it takes priority over the personal laws in cases of conflict. This Act, however, gives preference to personal laws while appointing the guardian and grants an inferior status to the child under guardianship when compared to natural children or adopted children\(^{136}\).

Among Hindus for a minor legitimate boy and unmarried girl the father and after him, the mother are the natural guardians\(^{137}\), and for an illegitimate minor boy and unmarried illegitimate girl\(^{138}\), the mother and after her the biological father are recognized as the natural guardians according to the Hindu Minority and Guardianship Act, 1956. This Act also provides for the guardianship of the married girls, adopted children, custody of children etc.\(^{139}\)

As for the Muslims, guardianship of a minor is determined by their personal law\(^{140}\), which provides for substitutes in case of failure of the father and mother to act as guardians. Christians do not have any specific law on the

\(^{135}\) The recent research conducted by the National Institute of Child Health and Human Development, USA, states that finally environment is the only environment which given better growth to a child rather than child care center or kinder garden center; reported in Eenadu News Paper (Hyderabad), 2nd May, 2001, p.3.

\(^{136}\) Sharda, n.51, p.47; See also Paras Diwan, Children and legal Protection, n.119, p.253.

\(^{137}\) Section 6.

\(^{138}\) Section 6(b).

\(^{139}\) Hindu Minority and Guardianship Act, 1956, Section 6.,7.

\(^{140}\) Mulla, Principles of Mahomedan Law, n.106, p.331.
guardianship of children. However, there is a provision in the Christian Marriage Act, 1872, which requires father’s or guardian’s consent in case of a minor’s marriage. The Parsis also face the same situation as the Christians. The Indian Civil Procedure Code 1908, provides that a judicial action cannot be taken against a minor or by a minor except through a guardian[141].

As noted earlier, the development of the child is an important social responsibility. The personal laws have different priorities. Therefore equality of opportunity is an imperative in a secular state like India. How to achieve that goal without transgressing the limits of personal laws is an important question to be studied. Article 20 of the Convention on the Rights of the Child provides for the protection of children without families. The state is under an obligation to provide special protection for children deprived of their family environment and to ensure that appropriate alternative family care or institutional placement is made available to them.

4. ADOPTION

Adoption establishes a parent-child relationship between persons not so related by the birth of the child. For the parentless or the abandoned child, adoption means a balanced physical and psychological family environment and to the desirous parents a chance to become parents and to experience family growth. The ancient Indian society had allowed adoption[142]. The major consideration in adoption has however, been religious. The need for a male child to perform the last rites of a person upon his death, so that he would be saved from entering

[141] The question of guardianship in litigations of a minor is dealt with in order 32; C.P.C. The Provision is also applicable to execution proceeding. The person who files the suit on behalf of the minor is known as ‘next friend’ (Rule:1.0.32) when a suit is filed against the minor, the persons appointed by the court to represent the minor is known as “guardian ad litem” or “guardian in the suit”.

[142] In the Vedic literature we find references to Khetraja (Soil born), Putrikaputra (Daughter’s son), Kanina (Maiden born), Dataka (adopted).
hell. Earlier, the adoption of only a male child was allowed under the religious rites. In 1956, however, the Hindu Adoption and Maintenance Act was passed, under which the right to adoption is equally available to males and females. As far as the Muslims are concerned, the Muslim Personal Law (Shariat Application Act, 1937) determines the scope of Muslim Law in India and it has no provision for adoption. The laws applicable to Christians in India are also silent about adoption. Generally they invoke the legal machinery under the Guardians and Wards Act, 1890, for the purpose of adoption. The Parsis believe that a person not born as a Parsi can never become one and therefore they do not recognize adoption.

Articles 39 and 44 of the Indian Constitution call for the protection of children and youth from material and moral exploitation. In an effort to evolve a uniform civil code, the government of India introduced an Adoption of Children’s Bill in 1972. But it was opposed by the Muslim community. The Bill was reintroduced in 1982 excluding the Muslims from its purview. Given the incidence of various malpractices and the large number of needy children in the country, there is an urgent need for enactment of a comprehensive adoption law. Article 21 of the Convention on the Rights of the Child provides for adoption of children in those states that recognise and permit it. With the best interest of the child in mind, state parties are required to ensure that adoptions take place in an authorized manner and all necessary safeguards are taken to prevent adoption being misused for financial gains of those involved in it. Keeping in mind the large-scale child trafficking in the world, the Convention requires that inter-country adoption

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143 Manu, V.138; see also. Baudhayana, 2.16.6; Vishnu, XV,44.46; Yajnavalkya, I,78.
144 Shripad vs. Dattaram, AIR, 1974, SC.878.
145 Before the Shariat Act, 1937, adoption among some Muslim communities was recognised by customs. The Oudh Estate Act, 1869, Section 29, Permits a Mahomedan Talukdar to adopt a son to him; See Abdul Halim Khan vs. Saadat Ali Khan (1932) 59 I.A. 200, 7 Luck; Moulvi Md. Vs. Mehaboob Begum, AIR, 1984, Mad.7.
146 Art.2 (d).
will receive only the last priority while searching for foster homes. Currently the foreigners apply for guardianship and later adopt them in their country in accordance to their national law. An inter-country adoption involves trans-racial, trans-cultural and trans-national aspects. The most unfortunate byproducts of adoption and more so of inter-country adoptions is that often it leads to misuse or ill-use of children. To eliminate this and to safeguard the interest of the child, the Supreme Court of India in several cases framed the guidelines for adoption and directed the Union Government to frame national policy on the matter.

5. MAINTENANCE

In India all minor children are entitled for maintenance under either the personal laws or the statutory provisions. The amended Criminal Procedure Code, 1973, makes it obligatory on the part of parents to maintain their minor children. However, it does not clarify if, in case of the inability of parents to maintain their children other relatives have any obligations. It also has no provision for minor widowed daughter or daughter-in-law. The Hindu Adoption and Maintenance

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147 Art.21 (b).
149 In the name of adoption a number of NGOs are involved in child trafficking. The recent one is the 73 infants were rescued from two illegal adoption centers: 'Action for Social Development' and 'John Abraham Brethren' Home in Andhra Pradesh who are involved in the child trafficking in the name of inter country adoption. It is surprising to know that both the NGOs are not having the permission from CARA. It is also surprise to know that one of the organization run by a wife of a top cadre IPS officer. See. The Times of India (New Delhi), 23rd April, 2001, p.1; also see. Eenadu (Hyderabad), 21st April, 2001, p.1.
150 See.Laxmi Kant Pandey vs. Union of India, AIR, 1984 SC 469; AIR 1987 SC 232, AIR 1989 SC, AIR 1991 SC. In order to facilitate the implementation of norms, principles and procedures relating to adoption of children laid down by the Supreme Court in this Judgments, the Government of India framed certain guidelines vide Ministry of Welfare resolution No.13-33/85-ch(Ac) dated 4th July, 1989, and subsequent some more judgments in the same case by the Supreme Court in 1989, 29th October, 1991, 14th November 1991 and 20th November, 1991, Government of India constituted a task force constituting of a cross section of representatives of agencies involved in adoption under the Chairmanship of Justice (Retd.) P.N. Bhagwati was constituted in 1992: The Chairman of the task force submitted its report on 28th August, 1993 and accordingly the Government of India revised the guidelines for the adoption of Indian children in 29th May, 1995, but that is also not effective. See.Supra.n., 91.
151 Criminal Procedure Code, 1973, Section 125.
Act, 1956, provides for the maintenance of legitimate and illegitimate children by their parents. This however is not applicable when the minor is capable of maintaining him/herself. The Hindu Marriage Act, 1955, also empowers the courts to pass suitable orders relating to maintenance, education and custody of children. The Criminal Procedure Code, the Hindu Adoption and Maintenance Act, and the Hindu Marriage Act are complimentary to each other and they are applied to protect the interests of the child.

The Special Marriage Act, 1954, also provides for the maintenance, custody and education of children of parents whose marriage is registered under the Act. In Muslim law a father is bound to maintain his son till the latter attains the age of puberty and the daughter till she is married. As for the Christians, there is no separate law for the maintenance of children except the provisions that are found in the Indian Divorce Act, 1869, about the custody, maintenance and education of children whose parents seek separation under this Act. Like any other community, Christians are also bound under the Criminal Procedure Code for the purpose of determining maintenance liability. The Parsi Marriage and Divorce Act, 1936, confers power on the courts to pass orders relating to the custody, maintenance and education of children. Like the Christians, they are also governed by the Cr.P.C.

Article 5 of the Convention on the Rights of the Child provides that the states are to respect the rights and responsibilities of the parents to provide the

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152 Section 20.
153 Section 26.
155 Special Marriage Act, 1954, Section 38.
157 Section 42.
158 Section 49.
159 Section 125 Cr.P.C.
child guidance for its development. Article 18 provides that the parents have a joint primary responsibility for up bringing the children and that states should support them in the task. Article 6 provides that state parties shall ensure to the maximum extent possible the survival and development of the child. The state is to develop institutions, facilities, services etc. for the care of children.

6. CHILD WELFARE AND PROTECTION

Concern for protecting children against the rough and tumble of life in society, and promoting their general welfare for proper growth is another area where law has a role to play. Welfare: includes the whole gamut of activities that contribute to the development of the mental, physical, emotional and psychological faculties of the child. As far as the child welfare is concerned, the law is restricted to the control and channeling of the activities of certain categories of children to areas, which lead to their growth. The treatment and rehabilitation of handicapped children, including the neglected, the destitute, the victimized, the delinquent and the exploited are the major concerns of law in this field. The legislative support and protection for these categories is mainly found in the Children’s Act of the States and Union Territories. The Juvenile Justice (Care and Protection) Act, 2000\(^{160}\) is the latest legislation to protect the Juvenile. The Act lays down the basic principles of administering justice to the Juvenile children, and emphasis on their developmental needs by Act ensures speedy disposal of cases and provides for creating Juvenile Police Units, Juvenile Justice Boards and Child Welfare Committees and Homes in each District of the every State.

Article 19 of the Convention on the Rights of the Child provides for situations of abuse and neglect of the child while still in the custody of the parents. Article 20 provides for protection of children who are deprived of family

\(^{160}\) The Act received the assent of the president on 30\(^{th}\) December, 2000.
environment. Article 26 recognises the children’s rights to avail themselves of the social security and state parties are under an obligation to provide benefits, taking into account the resources of those responsible for the child’s maintenance.

7. OFFENCES AGAINST CHILDREN

Cruelty to children, including their exploitation for begging, abandonment, abuse and the sexual exploitation of girls are some of the other areas that require legal safeguards. The Juvenile Justice Act, the Indian Penal Code, The Anti Beggar and Anti-Smoking Acts etc. protect the children from these evils. Yet another crime that is prevalent in some parts of the country is the female infanticide\textsuperscript{161}. The legal measures to protect the interests of the girl child have been largely unsuccessful\textsuperscript{162}.

The framers of law have been considerate to provide for differential treatment for children with regard to offences committed by or against them, Section 82 of the Indian Penal Code provides that “nothing is an offence which is done by a child under 7 years of age\textsuperscript{163}”. The law absolves the child below 7 years

\textsuperscript{161} Lakes of unborn girls aborted every year by unscrupulous doctors through out the country. A ‘diabolic link’ existed between the sex selection technologies, female foeticide or infanticide, and the falling sex ratio. The indiscriminate misuse of advanced technology for effecting female foeticide and the decline in the female- to- male ratio. The sex ratio in the 0-6 age group has decline sharply from 945 females per 1000 males in 1991 to 927 females in 2001, except in Kerala, Tripura, Mizoram, Sikkim and Lakshadweep. According to the 2001 Census, there has been a dramatic drop in the child sex ratio (0-6 year age group) in Panjab, Haryaana, Chandigarh, Delhi, Gujarat, and Maharasra as compared to 1991 census. All these states had allowed the setting up of private foetal sex determination clinics and the practice of selective abortion of female fetuses became popular in the late 1970s and early 80s. See. The Times of India (New Delhi), 5\textsuperscript{th} May, 2001, p.1, also see. CEHAT vs Union of India, Judgments Today, Supreme Court, 4.5.2001.

\textsuperscript{162} The Female Infanticide Act, 1870, could not check this gruesome offence. Recently the Supreme Court of India has directed the Union Government, and state Governments stringently to enforce the existing law banning sex determination and selection procedure. The Apex Court said on a PIL filed by Centre for Enquiry into Health and Allied themes (CEHAT) and MASUM that the pre-Natal Diagnostic Techniques Regulation and Protection of Misuse ) Act must be implemented and even amended, if necessary in order to plug any loopholes. It further stated that to launch a vigorous media campaign against female foeticide and practice of pre-natal sex determination.

\textsuperscript{163} Indian Penal Code, 1870, Section 80.
of age of criminal liability and limited exemption is given to the child between 7 years and 12 years of age. The Probation of Offenders Act, 1958, places restrictions of the imprisonment of young offenders. The intention is to provide conditional and absolute release or release with admonition. The Children’s Act, 1960 provides for the separate detention for child offenders and prohibits trial of children with adult offenders.\(^\text{164}\)

The Indian Penal Code and several other laws provide protection in cases of offence committed by others against children. For example the Children Act, the Suppression of Immoral Traffic in Women and Girls (Amendment) Act, the Probation of Offenders Act, the Young Persons Harmful Publications Act, Child Marriage Restraint Act, the Criminal Procedure Code etc. contain certain provisions on the protection of children against cruelty and indignity. However, notwithstanding the several legal provisions, child exploitation is widespread due to exploitative economic and social system, lack of social awakening and want of political and social commitment to promote environment conducive of child development.

Article 40 of the Convention on the Rights of the Child recognizes the right of a child alleged as accused of or recognized as having committed an offence, to respect their global human rights and in particular to benefit from all aspects of the due process of law, including legal and other assistance for its defence. They are to receive prompt hearing according to law, taking into account their age and situation. States are required to promote enactment of special laws for child offenders, and establish a minimum age below which the children shall be presumed not having the mental capacity to infringe the penal law. As far as possible, resorting to legal proceedings against children are to be avoided. Resort to other suitable methods is preferred. To deal with child offenders a variety of

\(^\text{164}\) Children’s Act, 1960, Section 18-26., This act has been replaced by ‘the Juvenile Justice Act, 1986.
dispositions, such as care, guidance and supervision orders, counseling, probation, foster care, education and vocational training programme and other alternatives to institutional care, shall be made available by the states.

8. CHILD HEALTH

The first piece of legislation in the Indian Statute book on child health was the Central Vaccination Act, 1880\textsuperscript{165}, which was directed against small pox. There also exist State Acts for prevention of smallpox among children. The Narcotic Drugs and Psychotropic Substance Act, 1985, also provides for the treatment of juvenile addicts through specially created centers. The incidence of a large number of diseases which are the direct result of malnutrition, insufficient awareness about health and less than appropriate societal behaviour in health and hygienic matters are traceable to the adverse economic and environmental conditions in which most of the people of India are compelled to live.

There are several government programmes that provide health care to mothers and children. The important ones are the following\textsuperscript{166}:

1. Guineaworm Eradication Programme.
2. Expanded Programmes on Immunization.
3. National Sexually Transmitted Disease Control Programme.
4. Prophylaxis against Anaemia among Mothers and Children.

\textsuperscript{165} The Act gives power to Prohibit inoculation and make the vaccination of children compulsory in certain municipalities and cantonment with free of costs: "No person who has undergone inoculation shall enter such area before the lapse of 40 days from the date of the operation without a certificate from a medical practitioner, of such class as the state government from time to time by a written order authorizing to grant such certificate, stating that such person is no longer likely to be produced small pox by contact or by near approach (Section 6); it gives vaccination child with free of costs (Section 9, 16) if any person violates this Act, he shall be punished (Section 22)"

5. Prophylaxis against Blindness in Children.
6. Immunization of Mothers and Children against Tetanus.
7. Village Health Guides.
8. Traditional Birth Attendance Training Scheme.
9. Integrated Child Development Service Scheme.
10. Goitre Control Programme
11. National Tuberculosis Control Programme.
15. National Mental Health Programme.
18. National Programme for Control of Blindness.
20. Yawus Eradication Programme.
21. Pulse Polio Immunisation Programme
22. Reproductive and Child Health Programme.

In order to prevent diseases arising out of nutritional deficiencies, the Government has also started several programmes to improve the nutritional status of children\textsuperscript{167}.

\textsuperscript{167} Expansion of nutritional intervention net through ICDS so as to cover all vulnerable children in the age group of 0-6 years; A concerted effort to bring about appropriate behavioral changes among the mothers through existing programmes such as the Integrated Child Development Services (ICDS), safe motherhood, Urban Basic Services (UBS), Development of Women and Children in Rural Areas (DWCRA) and programmes of Food and Nutrition Board; Improvement in growth monitoring between the age group 0-3 years with closer involvement of mothers to be taken; Encouraging small family norms and adequate spacing through intensive family welfare and motivational measures so that availability of food is sufficient; Involving the community in the identification of problems and management of nutrition programmes and related interventions such as health education, involvement of women in food production and processing activities and other employment generation activities; Emphasis on women’s employment and education particularly nutrition and health education’ Convergence of service by strengthening linkages between the concerned sectors like agriculture, food, health, women and child development, education, rural development, urban development, etc.; Creation of conducive environment by providing safe drinking water, clear environment, immunization service, health care etc.
Articles 24 of the Convention on the Rights of the Child provides the child with a right to the highest possible level of health and access to health and medical services, with special emphasis on primary and preventive health care, public health education and elimination of infant mortality. State parties to the Convention have an obligation to take all appropriate measures to implement these rights. Health continues to be a neglected area in India. The medical profession is in the hands of the elite who rarely exhibit a sympathetic understanding of the problems of the vast majority of the rural people and children. The government’s interest in the health standards is reflected in the limited support it extends to this sector. Although several programmes have been initiated, a fast growing population, weak economy, disinterest and inadequacy of the infrastructure etc. have made these programmes insufficient and ineffective.

9. EDUCATION

Education is universally recognized as a fundamental need for the full growth of human personality. In India, however, education has practically remained largely accessible to the elite and that too mostly to male children. For children of the weaker sections of the society, it still remains denied. Educational advancement of the common people was seen as a threat to the continuance of the feudal society. The role of the women was limited to their household work, procreation and serving their husband. The rural communities still continue to hold this view on girl’s education.

168 South Asia has emerged by now as the most illiterate region in the world, with 395 million illiterate adults (nearly one-half of the world total) and 50 million out of school children (over two-fifths of the world total); See also Human Development in South Asia, 1998, Human Development Centre, p.2. Also see the 165th Report of the Law Commission of India on 'Free and Compulsory Education for Children,' 1998, p.37.

In India the need to legislate for universal and compulsory education had been in focus since 1911 when the Gokhale Bill for elementary education was prepared. The first law on compulsory education was the Bombay Municipality (Primary Education) Act, 1918. Many states followed suit. Some princely states also had laws for the promotion of education. Some notable ones are: The Baroda Education Act, 1893; The Mysore Education Act, 1913; and the Kolhapur Education Act, 1917. Article 45 of the Constitution of the independent India postulates as a directive principle of state policy, the achievement of free and compulsory education for all children upto the age of 14 years of age\textsuperscript{170}. During the post independence era the educational laws aim at creating equal opportunities for all sections of the society and to meet the constitutional goals\textsuperscript{171}. In 1960 the Union Ministry of Education prepared the Delhi Primary Education Bill\textsuperscript{172}. It was circulated to all states and union territories as a model to be followed while preparing primary education laws. Before 1976, education was exclusively the responsibility of states, the Central Government was only concerned with certain areas like co-ordination and determination of standards in technical and higher education, etc\textsuperscript{173}. In 1976, through 42\textsuperscript{nd} Constitutional Amendment, education became a joint responsibility. The National Policy on Education (1967) advocates the early fulfillment of the Directive Principles of State Policy. The National Policy of Children (1974) also clearly states its

\textsuperscript{170} Scope of the Article: Not being justifiable, the present Article does not confer legally enforceable right upon primary schools to receive grants-in-aid from the Government; Joseph vs. State of Kerala AIR 1958 Ker.290; The Directive does not empower the State to overwrite the fundamental rights of the minorities communities to establish educational institutions of their own choice under Art.30(1). It is possible for the state to discharge its obligations under the present Article through government owned and aided schools; RE. Kerala Educational Bill, AIR 1958 SC 956 at 986; It is not worthy that among the several articles in part four only article 45 speaks of the time limit. The question remaining “Can the State float the said direction? Does not the passage of 45 years convert the obligation into an enforceable right?”; Unnikrishnan vs. State of Andhra Pradesh, AIR, 1993 SC 2178.

\textsuperscript{171} Plan out-lay on Education increased from 153 crore in First FiveYear Plan to Rs.19,600 crore in the 8\textsuperscript{th} Five Year Plan (1992-97). The expenditure on education is a percentage of GDP also rose from 0.7% in 1951-52 to 3.3% in 1995-96(RE) see.165\textsuperscript{th} Report of the Law Commission, n.110, p.49.

\textsuperscript{172} Thereafter it becomes the Delhi Educational Act, 1960 (Act No.39 of 1960).

commitment in this direction\textsuperscript{174}. There is also a need to remove the imbalance in the planning process created by the improper emphasis on higher education at the cost of primary education\textsuperscript{175} The National Policy on Education (NEP)\textsuperscript{176}, Programme of Action (POA), 1986 and a revised NEP and POA (1992) \textsuperscript{177} attempted to remove these inadequacies by laying special emphasis on early childhood care and education. Girl’s education and the needs of the children of the weaker sections have also received special attention\textsuperscript{178}. The Education Acts of the various states should be suitably amended to include pre-school education as an essential element of compulsory education\textsuperscript{179}.

Article 28 of the Convention on the Rights of the Child recognizes the child ‘s right to education and the states are duty bound to ensure that at least primary education is made free and compulsory. Article 28 directs that education should be aimed at developing the child’s personality and talents, preparing the child for

\textsuperscript{174} It declared “it shall be the policy of the State to provide adequate services to children, both before and after birth and through the period of growth, to ensure their full physical, mental and social development. The State shall progressively increase the scope of such services so that, within a reasonable time, all children in the country enjoy optimum conditions for their growth.” See n.172, p.52.

\textsuperscript{175} Based on the data contained in 1991 census report; 328.9 million Indians were illiterate. See n.115, p.11.

\textsuperscript{176} The policy sets the stage for the Central Government to play an increasingly important role in primary education. The policy explicitly recognized the need to make a concerted effort to expand and improve basic education, meaning formal and non-formal primary and adult literacy education. At the primary schools level, the policy gave priority to reducing the disparities in enrolment for girls and for students from Scheduled Castes and Scheduled Tribes. To carry out the policy, the Department of Education created a set of centrally sponsored grant schemes to assist States in developing basic education.”

\textsuperscript{177} In order to operational the revised policy of the Government, the following three sub-schemes were proposed under Operation Blackboard during the Eights Plan: (i) continuation of the ongoing scheme to cover all the remaining schools identified as on 30th September 1986; (ii) expanding the scope of the scheme to provide three rooms and three teachers in primary schools with enrolment exceeding 100 with provision for about 50 per cent women teachers in primary schools as mandatory for all States/UTs; and (iii) extending the scope of the scheme to upper primary schools. The expanded schemes have been started since 1993-94.

\textsuperscript{178} Art. 46 of the Constitution of India; Regarding expression “:Weaker sections of the society” the Supreme Court had directed the Central Government to draw a guidelines; See. Shanthishan Builders vs. Narayan Khimlal Zaloma, AIR 1990 SC 630 (Paras 12-13). In Indira Sawhney vs. Union of India, the Supreme Court has clarified that the expression “Weaker sections” of the people is wider than the expression “Backward class” of citizens, which is only a part of weaker sections., AIR 1992. Supp.(3) S.C.C. 217.

\textsuperscript{179} The Law Commission of India in its 165th Report on ‘Free and Compulsory Education’ also recommended that the Central Government to provide free and compulsory education for all children upto the age of 14 years; See also Unnikrishnan vs. State of A.P, AIR 1993 SC 2178.
active life as an adult in society. Article 40 of Indian Constitution too imposes a
duty similar to Article 28 of the Convention\textsuperscript{180}.

10. **ABOLITION OF CHILD LABOUR**

Article 23 of the Constitution prohibits forced labour by implication; it
prohibits forced child labour as well\textsuperscript{181}. According to the 1971 census there were
10.7 million child workers in India. This figure swelled to 14.5 million by 1981
census\textsuperscript{182}. Yet another estimate puts the number of working children at 44
million\textsuperscript{183} now it has reached more than 100 millions\textsuperscript{184}. The International
Seminars on the ways and means of achieving the elimination of child labour in
different parts of the world identified poverty, general level of employment,
inadequacy of the legislative system, armed conflict and apartheid as the major
causes of child labour exploitation. Using children as a cheap labour is common
all over the world, especially in the under-developed countries. As such when the
child has to work for the purpose of its survival or that of its family, it has a direct
impact on his faculties and greatly inhibits his attaining full-fledged adulthood.

In India some efforts have been made in the past to regulate the child
labour and improve their working conditions. The focus has been on the
regulation of the child labour rather than on improving their working conditions.

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\textsuperscript{180} In the light of the Supreme Court contributions in 1993 and 1996 in the case of *Unnikrishnan vs. State of A.P.*; and *M.C. Mehta vs. State of Tamilnadu*, Government of India introduced the 83\textsuperscript{rd} Constitutional Amendment Bill in the Rajya Sabha which provides, free and compulsory education for all children upto
the age of 14 years. Fundamental, but unfortunately still it is not passed by the Parliament.

\textsuperscript{181} Legislative relevant to Article 23: This Article envisages legislation for the enforcement of the
Constitutional prohibitions. Section 374 of the Indian Penal Code is one such enactment, through a pre­
constitutional one. Specific legislation also exists regarding immoral traffic in women and girls and
bonded labour. Directions were issued by the Supreme Court in a public interest litigation , as to the
children of prostitutes in *Vishaljeet vs. Union of India*, AIR 1990 SC 1412, 1993 S.C.C. 318, paragraphs 1,
3, 7 and 8; *Gaurav Jain vs. Union of India*, AIR 1990 SC 292.


\textsuperscript{184} 165\textsuperscript{th} Report of the LCI ,n.172, p.18.
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The first law to regulate the employment of children and their hours of work was the Factories Act, 1881\textsuperscript{185}. The Royal Commission on Labour (1929) was another step\textsuperscript{186}. On its recommendations, the Pledging of Child Labour Act, 1933\textsuperscript{187}, and the Employment of Children Act, 1938\textsuperscript{188}, were adopted. The Labour Investigation Committee of 1944\textsuperscript{189} led to the enactment of the Factories Act of 1948 providing for elaborate hours of work, the minimum age of employment, training of young persons, medical examination of child employees and punishment for violation of laws etc. Some other Acts on the same problem are the Minimum Wage Act, 1948, the Plantation Labour Act, 1951, the Mines Act, 1952\textsuperscript{190}, the Merchant Shipping Act, 1958\textsuperscript{191}, the Apprentice Act, 1961, the Motors Transport Workers Act, 1961\textsuperscript{192}, the Atomic Energy Act, 1962, the Beedi and Cigar Workers (Conditions and Employment) Act, 1966\textsuperscript{193} and the Shop and Establishment Acts of state governments\textsuperscript{194}.

\textsuperscript{185} The Act laid down: (a) No child under seven years of age could be employed in any factory; (b) the working hours for children between the age group of 7 and 12 were limited to 9 hours a day with an interval of one hour for rest; and (c) a week holiday was given to all children.

\textsuperscript{186} Report 35; The Report stated that: in many cities large number of young boys are employed for long hours and discipline is strict. Indeed, there is reason to believe that corporal punishment and other disciplinary measures of a reprehensible kind area sometimes restored to in the case of smaller children. Workers as young as five years of age may be found in some of these places working without adequate meal intervals or weekly rest days, with 10 or 12 hours daily sums as low as 2 annas are paid in the case of those of tenderest years”. See Report of the Royal Commission on Labour, pp96-97. also see the Report of the National Commission on Labour, 1969, Ministry of Labour, Govt. of India, p.384.

\textsuperscript{187} Act No. 2 of 1933.

\textsuperscript{188} This was amended subsequently by the Amending Act 1951, 1975 and 1986; is the first serious effort to regulate the Child Labour; The Act, and its subsequent amendings are as sequel to ILO Conventions. The Act has been repealed by the Child Labour (Prohibition and Regulation) Act, 1986.

\textsuperscript{189} The committee stated that the important fact that has emerged from the investigations is that in various industries mainly smaller industries, the Prohibition of Employment of Children is disregarded quite openly, and owing to the inadequacy of the inspection staff it has become difficult to enforce the relevant provisions of the law”. Labour Investigation Committee, Main Report, 1946, p.35, also reproduced in the Report of the National Commission on Labour 1969, p.385.

\textsuperscript{190} The minimum age for employment in mines above ground is 15 years, for workers in under ground mine is 16 years and a fitness certificate issued by an authorized surgeon, certifying the fitness from such work, is also required.

\textsuperscript{191} The act prohibits employment of children below the age 15 in any capacity on sea going ships.

\textsuperscript{192} The Act prescribes minimum age of employment in transport undertakings, five or more workers at 15 years which has been reduced to 14 years by the aforesaid statute of 1986.

\textsuperscript{193} The Act says, “No child who has not completed the age of 14 years is allowed to work in any industrial premises where any manufacturing process connected with the making of bedies or cigar is carried on irrespective of the number of persons employed there”.

\textsuperscript{194} Child Labour in India, n.90, p.56.
The main emphasis of the laws has been on regulating (1) minimum age for employment of children, (2) medical examination, (3) minimum hours of work, and (4) prohibition of night work for children\(^\text{195}\). National Commission on Labour in 1969\(^\text{196}\) commented, “If the education of the child is a casualty in the process it is the poverty of the parents that is to be blamed\(^\text{197}\).” In 1974, the government adopted the National Policy for Children, which declares children as the supreme national asset and their protection and safety as the main concern of the nation. The Child Labour Act of 1986, prohibits employment of children below 14 years and imposes stringent punishment in cases of violation of the Act\(^\text{198}\). A National Child Labour Policy aiming at the welfare and rehabilitation of children in employment is being formulated\(^\text{199}\).

It is important here to mention that the concentration of labour laws has so far been on the children employed by others on wages. However, children also do other kinds of jobs like domestic work, agricultural works, bonded labour, household production, apprenticeship and other marginal economic activities\(^\text{200}\). Their impact on the physical health and mental development of these children is same as that of the wage earning ones. What is required is to create conditions for recognizing the needs of children, mobilize national and international resources to prevent the exploitation of children.

\(^{195}\) Ibid.
\(^{197}\) Ibid, p.387.
\(^{198}\) Section 14.
\(^{199}\) The policy includes (i) Education Programmes, (ii) Health Programmes (iii) Anti-poverty Programmes, (iv) Project based plan of action. See also; Ashok Narayan., “Child Labour Policy and programme: The Indian Experience”. Combating Child Labour (ed), by Assefe Bequek and Jo Boyden (1988), p.147
\(^{200}\) The Census disclosed that 78.71 per cent of child labour is engaged in cultivation and agriculture, 6.3 per cent in fishing, hunting and plantation, 8.6 per cent in manufacturing, processing, repairs, household industry, 3.21 per cent in construction, transport storage, combination and trade and 3.15 per cent in other services. See, India 2000, Ministry of Information and Broadcasting, Government of India.
Article 32 of Convention provides for the obligation of states to protect children from engaging in work that constitutes a threat to their health, education or development, to set minimum ages for employment and to regulate conditions of employment. State parties are to take legislative, administrative, social and educational measures to implement this Article. The Parliament of India has enacted several laws regarding minimum age, regulation of working conditions, medical examination etc. Indian laws also have the provisions for maximum hours of work for children of certain age. This is one step ahead of the ILO Conventions, which are silent on this point; In fact the Indian situation is quite satisfactory if one looks only at the statutory provisions. The ILO and other international standards are well taken care of in our legislations. However, most of these remain on papers. There is no adequate follow up to ensure that the well intended provisions of the law do not remain a theoretical exercise, and are not circumvented due to failure to put them into practice in a consistent manner.

The architects of independent India had a dream to create a free India to enable the future generations to avail the benefits of the joy of living. They laid down a policy in the Constitution for the provision of facilities for the healthy development of children and for the protection of childhood and youth against exploitation\(^\text{201}\), and for the free and compulsory education within a period of ten years for all children until they complete the age of 14 years\(^\text{202}\). The Constitution also has provisions to prohibit employment of children below the age of 14 years in factories, mines and other hazardous occupations\(^\text{203}\). More than 40 legislative acts regulate and protect the welfare needs of the Indian children. It would seem that our country should be a paradise for children. But this is not true. The state machinery has failed to deliver the promises made in the Constitution and

\(^{201}\) Articles 21, 23, 24, 39(f).
\(^{202}\) Article 45.
\(^{203}\) Article 24.
legislative acts. Children continue to remain the most neglected and abused section in our society.\textsuperscript{204}

Ours is a country of paradoxes. It has been practicing the message of love and compassion for centuries, but it has a high incidence of child abuse and exploitation.\textsuperscript{205} The Indian child suffers the scourge of diseases and epidemics. In the land of Vedas and Shastras, most are illiterate.\textsuperscript{206} The development process which was initiated immediately after the independence, by introducing progressive legislative and supportive measures to regulate child labour in factories, but this has failed to eliminate or at least mitigate the problems of child labour. This has been because of the rapid growth in the population and the absence of a pragmatic approach to pursue different programmes. Child development should be promoted through the introduction of various welfare measures, by persuasion and application of legal sanctions.

III. NON-GOVERNMENTAL ORGANISATIONS

India has a large number of NGOs, activists and autonomous groups working with children in various parts of the country, and the range of issues they have taken up covers all the rights enshrined in the Rights of the Child Convention. Their involvement in preparation of the country report ensures that it accurately reflects ground realities and incorporates a critical focus on the progress made in translating policies and programmes into action at the grassroots.

\textsuperscript{204} Vishal Jeevs. Union of India, AIR, 1990 SC 1412; Gaurav Jain vs. Union of India, AIR, 1990 SC 292, Peoples Union of Civil Liberties vs. Union of India, AIR, 1982, SC 1473
\textsuperscript{206} According to 1991 census some 328.9 million were unlettered and according to the latest estimates of the Planning Commission, some 61 million families or 305 million people lived below the poverty line; See National Human Rights Commission, Annual Report 1996-97, p.45.
There exists a need for a clearly articulated "rights" approach in relation to all children's issues. The "basic needs" or "minimum needs" approaches which formed the basis of several initiatives both governmental and non-governmental in the past were considered no longer valid, since they were essentially palliative. On the other hand, affirmative of Children’s Rights was the starting point for questioning of structures and systems which result in the denial of these rights, and could form the basis of fundamental and sustainable change in the situation of the children. The large number of successful NGO’s approaches and experience in alternative models of development should be incorporated into government strategies.

The Constitution of India, it its Parts III and IV, has provided clear guarantees for most of the rights detailed in the Constitutions. Since 1990, these rights have been enlarged through the process of judicial interpretation and review.

Adequate and reliable data on the situation of the children are not available, either to government or NGOs. This has proved to be a serious constraint in planning, resource allocation and monitoring, for the Government. There exists the need for innovative and effective partnership between the State, NGOs, professionals and community organizations in planning, implementation and monitoring of interventions and in initiating and supporting collective social action for Child Rights.

207 A number of NGOs involved in child trafficking racket in the name of adoption, child care homes, run by some NGOs have no basic amenities though they are getting funds from the government as well as foreign aids. These type of NGOs were not maintaining the proper records. See child trafficking racket busted in state of Andhra Pradesh. See The Hustan Times (New Delhi), 21st April, 2001.

NGOs cannot be the vehicle for totally eliminating child labour as they cannot affect the crucial factors responsible for children working i.e., NGOs cannot ensure full employment, bring about a change in wages nor affect structural changes within a trade. At best, NGOs can initiate and support social mobilization and public education on the evils of child labour. Further, the NGOs cannot substitute the State. The basic function of NGOs is to empower community groups to raise their voices, initiate mobilization on social issues and make recommendations to the Government policy makers. For playing an effective and useful role, the NGOs need to educate themselves on the various laws/legislations prevailing in the country especially those related to Child Rights and Human Rights. Whenever a child/children/communities are deliberately denied their fundamental rights to survival, growth and development, the NGOs must file cases and writ petitions and do investigative reports which can be verified, and publish them so that a public opinion is created. Indeed many of the Public Interest Litigation petitions emanated from them\textsuperscript{209}, as evidenced by the above study of a selected number of cases. NGOs may either move the judiciary directly or alert the NHRC to move the Supreme Court after due investigation.

IV. THE ROLE OF THE NATIONAL HUMAN RIGHTS COMMISSION

Pursuant to the Protection of the Human Rights Act, 1993\textsuperscript{210}, the National Human Rights Commission was established in October 1993, for the protection of the human rights in India, mainly to seek redressal and remedy for immediate wrongs and to strive for the development of the culture of the human rights over

\textsuperscript{209} for example; Centre for Enquiry into Health and Allied Themes (CEHAT) and others vs Union of India, AIR, 2001,SC., Bandhua Mukti Morcha vs Union of India, 1984, S.C., Peoples of Union for Democratic Rights vs UOI, AIR,1982, S.C., Vishall Jeet vs UOI, AIR,1990,S.C

\textsuperscript{210} The Act enacted by the Parliament in the Forty-Fourth Year of the Republic of India and it came into force on the 28th day of September, 1993.
the length and breadth of the country. Amongst priorities of the NHRC has been the protection of civil liberties. For this, the Commission was required to adopt a well-informed and unambiguous position on the Terrorist and Disruptive Activities (Prevention) Act (TADA), and follow-through upon its convictions.

Among the numerous priority concerns of the Commission are; female infanticide, child labour, protection from torture, treatment in areas of armed conflict, to mention but a few. Under article 44 of the Convention, States parties are required to undertake the necessary legislative, administrative and other measures for the implementation of the rights recognized in the Convention.

The Commission has been particularly determined to make progress to end child labour, starting with those employed in hazardous industries. The establishment of the National Authority For The Elimination Of Child Labour, headed by the Union Labour Minister, was welcomed by the Commission and is extremely useful to the Commission in specially monitoring child labour and Child Rights-related issues.

The Commission has made a special effort to study and to seek remedies to the problems of child labour in the glassworks and carpet-making industries of Uttar Pradesh, the beedi, matchsticks and fireworks industries in Tamil Nadu and the slate-pencil making industry in Madhya Pradesh. It has focused, in

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212 Section 12 of the National Human Rights Commission.
213 Ibid, p.5
214 In 1997 the NHRC had written to the Government of India that employing of any child under the age of 14 years must be made a criminal offence, at least for Government Servants. The proposed amendment in the service rules was that no Government Servant shall employ any child below the age of 14 years and any breach of this will attract a major penalty. This amendment was supposed to be placed in the rule book of the Central Civil Service Conduct Code; on 14th October, 1999 the Government of India issued a notification following the guidelines of the NHRC, the one line notification, under Article 309 reads, “No Government Servant shall employ to work any child below the age of 14 years”. But surprisingly there is no a single word about any kind of punishment if the rule is breached.
particular on a project for the glass-works industry of Ferozabad, Uttar Pradesh. The project is based on three inter-related concepts: income-support for the families from whom children go to work in the glass-ware industry; schooling, including the creation of new facilities, for children weaned away from employment; and rigorous implementation of the Child Labour (Prohibition and Regulation) Act, 1986.

For the persistence of the debilitating practice of Child Labour, it is not the absence of law or treaties that is responsible, but the absence of will to end this practice, and it has been accompanies by a miss-direction of national priorities including financial resources. After over four decades, the provisions of the Directive Principles contained in Article 45 of the Constitution concerning universal primary education remain largely unfulfilled, to the great detriment of the nation and the children in particular. The Commission has recommended the adoption of appropriate legislation on compulsory primary education, matched with the necessary resources required for this purpose. Many laws have been enacted, at regular intervals since the nineteenth century, when the Indian Factories Act was passed in 1881. Even the Constitution under, Article 24, prohibits any child below the age of 14 from employment.

The Commission concluded that the prevalence of poverty cannot or should not be permitted to provide an endless alibi for the persistence of child labour in the often brutal and exploitative forms in which it continues, to this day in our country. The Commission understands that legislation has been drafted to amend Child Labour (Prohibition and Regulation) Act with a view to strengthening its provisions. It is both necessary and imperative that early action is taken in this regard.
Despite its dedication to the cause of Child Rights in India, the NHRC has not been able to make any notable progress in accessing to the judiciary on Child Right matters. The Commission has power under Section 18 of the Protection of the Human Rights Act, 1993, to move the Supreme Court on matters relating to its sphere of activity. For instance, in the case of the complaint alleging that some 400 children had died in Phulbani district of Orissa, as a result of acute malnutrition, accompanied by repeated attacks of malaria, chicken-pox and various water-borne diseases\textsuperscript{216} and over 8000 children who have died of hunger and malnutrition since May 2000 to April 2001 in the tribal belt of Maharashtra desired their rights to life, like all children\textsuperscript{217}. It is not clear why NHRC preferred not to go to the Supreme Court.

\textsuperscript{216} Ibid, p.39.

\textsuperscript{217} Thousands of tones of food grains rotting or spoiling out of the Food Corporation of India go downs, or left to be ravaged by rats and cockroaches, while fresh stocks of post harvested wheat and rice have no takers, even then the Government doesn't want to supply nutrition to the needed children.