CHAPTER II
Child Marriage: A Violation of Human Rights

Human right is a subject of global concern and gained great momentum during the last century. Human rights are those minimal rights, which every individual must have by virtue of his being a member of 'human family' irrespective of his race, religion and sex. The protection and promotion of the human right is the primary obligation of every society, especially in the case of the weaker sections like women and children. It has been internationally accepted that they require special care and assistance for their growth and development.

The international concern of the rights of the child1 began from the 19th century and came to be recognized during the last three decades. "The Declaration of the Rights of the Child, 1924" established the claim that

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"mankind owes to the child the best it has to give." The five principles\textsuperscript{2} embodied in the Declaration stressed the importance of the right to normal development and the right to protection against every form of exploitation. Though the Declaration is related to the rights of the child, its main concern is child welfare.

**Best Interest Concept**

The Declaration of the Rights of the child in 1959 enshrines the principle that children are entitled to special protection and such protection should be implemented with reference to the "best interests of the child".\textsuperscript{3}

\textsuperscript{2} The five principles are,

(1) The child must be given the requisite means for his normal material development and spiritual.

(2) The child that is hungry must be fed; the child that is sick must be nursed; the child that is backward must be helped; the delinquent child must be reclaimed; and the orphan and the waif must be sheltered and succoured.

(3) The child must be the first to receive relief in times of distress.

(4) The child must be put in a position to earn a livelihood, and must be protected against every form of exploitation.

(5) The child must be brought up in the consciousness that its talents must be devoted to the service of its fellow men.

However, the preamble of the Declaration does not impose any duty or obligation on the states but places duty directly upon men and women of all nations.

\textsuperscript{3} The ‘best interest of the child’ has not been defined or explained in the international instruments or national laws. It is evolved as a concept where paramount importance is given to the welfare of the child. It seems to be the guiding principle for parents and others in matters connected with the rights of the child.
The principles\(^4\) enumerated in the Declaration establish the rights and freedom of the child. It places a specific duty upon the voluntary organizations and local authorities to strive for the observance of these rights. The concept of the best interest of the child was reiterated and expanded in the United Nations Convention on the Rights of the Child, 1989 (hereinafter referred as CRC). The CRC stressed the significance of the ‘best interest’ principle which says,

"In all actions concerning children whether undertaken by public or private, social welfare institutions, court of law, administrative authorities or legislative bodies, the best interest shall be a paramount consideration."\(^5\)

It further requires, “State parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents or, as the case may be, the legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern.”\(^6\)

\(^4\) Under the Declaration of the Rights of the Child, 1959 a child is entitled to name and nationality, adequate nutrition, housing, recreation and medical services. Attention is paid to the special needs of physically, mentally and ‘socially handicapped’ children and to children who are without a family. See Principle 3, 4, 5, 6 and 7 of the Declaration of the Rights of the Child, 1959.

\(^5\) Article 3(1) of the CRC.

\(^6\) Art. 18.1 of the CRC.
The Indian Judiciary has made an attempt to explain the concept through its decisions. The concept varies from child to child under different circumstances. It first entered in the legal system of India through the laws dealing with custody and guardianship. The Hindu Minority and Guardianship Act, 1956 recognizes the custody of minor child under five years ordinarily with the mother and in all cases, the welfare of the child should be the paramount consideration. In Saraswati Bai Ved v. Shreepad, Justice Beaumont observed that in deciding the matters related to the child, especially the custody of the child, the supreme consideration of the judges is the welfare or the best interest of the child.

Avinash Devi v. Kazan Singh is another case in which the Court emphasized that it is the duty of the sentencing judge to consider the welfare

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7 Section 19 of the Guardian and Wards Act, 1890 reads, "Nothing in this chapter shall authorise the Court to appoint or declare a guardian of the property of a minor whose property is under the superintendence of a Court of Wards, or to appoint and declare a guardian of the person—(a) (b) Of a minor who is a married female and whose husband is not, in the opinion of the Court, unfit to be guardian of the person of the minor.

8 Section 6(a) provides the right to custody to mother in case of boy or unmarried girl below five years.

9 Section 13(1).

10 A.I.R. 1941 Bom. 103.

of the children especially at the times of conflict between parents. In this case, while allowing the custody of the child to the mother - a school mistress - Justice Grover considered the fact that the father had remarried, had children from his second wife and had no attachment to the child.

In C.S. Reddy v. Yamuna, the dominant fact considered by the court was the circumstances which would be the best for securing the welfare and happiness of the child. The word welfare of the child has been given a wide interpretation so as to include moral and religious welfare of the child as well as its physical well being. Justice Honniah elaborately discussed the importance of factors like age, sex, religion, character and capacity of the proposed guardian, his nearness to the kin, to the minor, the wishes of the diseased parent and the wishes of the minor if he was old enough to form any intelligent preference. Considering the best interests of the children aged 10 and 12, the Court permitted the mother to continue to be the guardian of her children.

12 The Court observed that whenever a marriage was for judicial separation was made, it became the duty of the Court to take the welfare of the child which is of paramount importance into consideration as the conflict and controversy between the parents disables the court from applying any other test for deciding the custody of the child. See Ibid., p.327.
14 See section 17(2) of the Guardian and Wards Act, 1890.
In *Thisty Hoshie Dolukuka v. Hoshian Shavaksha Dolukuka*\(^{15}\) after understanding the unhealthy atmosphere in the house the Court even directed to keep the minor daughter in a boarding school under the custody of the mother.\(^{16}\) The Court pointed out the need for realising the special responsibility and it is the duty of the Court to ascertain circumstance which will be more beneficial to the future of the child. The Court has to be guided by only one consideration, i.e. the welfare of the child.\(^{17}\)

In *Jameel Ahammed Ansari v. Ishratu Sajeeda*\(^{18}\), the Court taking into account the best interest of the child, entrusted to the father the custody of the child. In this case the mother had remarried and left for Saudi Arabia and had three issues from the second marriage. What the court looked for is the welfare or the best interest of the child and not the rights of the parents.

Again in *Bhagyalakshmy V. K. Narayana Rao*\(^{19}\), Justice Ratnam emphatically stressed the significance of upbringing and educating the

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\(^{15}\) A.I.R. 1982 S.C. 1276.

\(^{16}\) In this case, R.S. Pathak and Amarendra Nath Sen J.J. observed that family atmosphere plays a very important role in shaping the life of a child. When the atmosphere in a house is vitiated, as a result of the bitter squabbles between husband and wife, it causes misery and unhappiness to a child. *Ibid.*


\(^{19}\) A.I.R. 1983 Mad. 9
children in healthy surroundings in order to secure a footing in life. The court upheld the order of the lower court and handed over the custody of the children to the father who was placed in a financially better position.

In *Elizabeth Dinshaw v. Arvand M. Dinshaw*\(^{20}\) the Supreme Court of India came to the conclusion that,

> “Whenever a question arises pertaining to the custody of a minor child, the matter to be decided not on considerations of legal rights of the parties, but on the sole and predominant criterion of what would best serve the interest and welfare of the minor”.\(^{21}\)

In this case, while discussing the custody of a minor child, born to an Indian father and American mother Justice Balakrishna Erady and G.L. Oza held that it would be in the best interest of the minor child that he be sent back with his mother to the United States of America.

Though the father as natural guardian may have a prima facie right to the minor’s custody, this may be negated if the infant’s welfare lies in keeping him in his mother’s custody. The welfare has to be considered more on humanitarian grounds and with regard to the overall welfare of the child.


\(^{21}\) Ibid., p.5.
His overall welfare includes spiritual, physical and material well being.\textsuperscript{22}

The capacity of the custodian to supply daily necessities and means of keeping good health are the key factors for ascertaining the welfare or the best interests of the child. According to Justice Guttal neither economic affluence nor a deep mental or emotional concern for the well being of the child, by itself is determinative of welfare of the child.\textsuperscript{23} What is the best interest of the child depends upon the balancing of all these factors.\textsuperscript{24}

In a later case\textsuperscript{25} Justice Pareed Pillai emphasized the importance of the totality of the circumstances in deciding the best interest of the child and allowed the maternal parents to take the custody of the children. In \textit{Ibrahim v. Sainudeen}\textsuperscript{26}, the Kerala High Court observed:

\begin{quote}
"The sole consideration both in the case of guardianship and custody of the minor should be the welfare of the minor and
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\begin{footnotes}
\textsuperscript{22} Mohammad Khalid v. Zeenat Parveen, A.I.R. 1988 All. 252 at p.255.
\textsuperscript{24} In this case, the Court considered the willingness and capacity of the father to look after the child, his awareness about the need to educate the child, his regular income and presence of his parents to lend a helping hand to look after the child. \textit{Ibid.}, p.476.
\textsuperscript{25} Gopalan v. Rajan, 1994 (2) K.L.T. 753. The court observed that it could not presume that the interest of the minor would always be safe with the legal guardian under all circumstances. The court has to consider the totality of the circumstances and mental and emotional feelings of children. In this case, the mother committed suicide and the children were under the custody of maternal grandfather. The father challenged it and got an order from the Family Court in his favour. The maternal grand father filed an appeal.
\textsuperscript{26} 1998 (1) K.L.T. p.77.
\end{footnotes}
the Court is bound to take into consideration all the facts and circumstance of the case bearing in mind that the pivotal factor is benefit and well being of the minor."  

_Githa Hariharan v. Reserve Bank of India_ is another case in which the Supreme Court emphatically stated that in determining the custody of the children, the primary concern must be given to the best interest of the child. These decisions indicate how the concept of the best interests of the child has been safely guarded by the Indian Courts. In matters of Guardianship also the court gradually began to change by giving guardianship to mother considering the best interests of the child. That is, even the father as the natural guardian does not have absolute and unlimited right to the custody of the child and his right is subject to paramount consideration of the welfare of the child. The courts have so jealously guarded the best interests of the child when the atmosphere in the house becomes unhealthy as a result of quarrels between the husband and the wife. In _Meera Devi v. Shyam Sundar Agarwalla_ , the Orissa High Court ordered to send the

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27 Ibid., p.78.
29 In _Jijabai Vithalro Gajre v. Pathankhan_, A.I.R. 1971 S.C. 315, the Supreme Court stated that as the father was not taking any interest in the affairs of the minor daughter, the mother could be considered to be her natural guardian.
31 A.I.R. 1985 Ori. 65.
children to Boarding Schools. What the court considered is the circumstances where the best interest of the child is protected. In certain cases, if the mother is dead, the court has granted the custody of the child to maternal parents giving due weight to the best interests of the child.32

The best interest concept has helped to consider the child as a person with an individual identity. While dealing with laws on citizenship and domicile33, maintenance34 and adoption35, the courts considered the principle.36 Child marriage is a clear violation of the fundamental rights of children and is totally against the best interests of the child. It adversely affects the health, education and development of a child. Provision rights, protection rights and participation rights are closely linked with the best interests of the child and how these rights are recognized in India is another relevant issue in this context.

33 Section 3 of the Citizenship Act of India, (1955)
35 Hindu Adoptions and Maintenance Act, 1956.
Provision rights

Provision right consisting of the rights of survival and development is a dynamic concept and is mainly concentrated on key areas like health, nutrition and education. The right to survival is a precondition for the realization of all other rights and represents an acknowledgement of individual rights such as the right to life and health.

The CRC recognizes the right to life as an inherent right and requires the State parties to ensure to the maximum possible extent, the survival and development of the child. Thus Article 6 is the key article which provides the basic right of survival and development. The child’s right which includes the right to enjoyment of the highest attainable standard of health and access to health care services are provided in the CRC. It also recognizes the right of every child to development as well as right to education and the

37 Art. 6(1) of CRC reads, “States Parties recognize that every child has the inherent right to life.”

38 Art. 6(2) of CRC reads, “States Parties shall ensure to the maximum extent possible the survival and development of the child.”

39 See Art. 24. It reads, “States Parties recognize the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. States Parties shall strive to ensure that no child is deprived of his or her right of access to such health care services.”

40 See Art. 27(1). It reads, “States Parties recognize the right of every child to a standard of living adequate for the child’s physical, mental, spiritual, moral and social development.” See also 27(2), 27(3) and 27(4).

41 See Art. 28(1). It reads, “States Parties recognize the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity.”
right to rest and leisure\textsuperscript{42}, the freedom of expression and information\textsuperscript{43} and the freedom of thought, conscience and religion.\textsuperscript{44}

Right to life provided in the CRC has already been incorporated in the Constitution of India. The Constitution provides right to life or personal liberty in Art. 21 which says, “No person shall be deprived of his life or personal liberty except according to the procedure established by law”. This basic right is wide enough to include all rights connected with provisional rights of the child.

The Supreme Court of India has given a wider interpretation to the right to life so as to mean it as the right to live with human dignity. It means the right to grow freely and normally. In \textit{Maneka Gandhi v. Union of India}\textsuperscript{45}, Justice Bhagavati declared that the right to live is not merely confined to physical existence, but it includes within its ambit the right to live with human dignity. Later in \textit{Francis Corrie v. Union Territory of Delhi}\textsuperscript{46}, Justice Bhagavati affirmed it by saying that the right to life enshrined in Article 21

\textsuperscript{42}See Art. 31(1). It reads, “States Parties shall respect and promote the right of the child to rest and leisure, to engage in play and recreational activities appropriate to the age of the child and to participate freely in cultural life and the arts.”

\textsuperscript{43}See Art. 13(1). It reads, “The child shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of the child’s choice.”

\textsuperscript{44}See Art. 14(1). It reads, “States Parties shall respect the right of the child to freedom of thought, conscience and religion.”

\textsuperscript{45}A.I.R. 1978 S.C. 594.

\textsuperscript{46}A.I.R. 1981 S.C. 746 at p.752...
cannot be restricted to animal existence. It means something more than just physical survival. Again in *Mohini Jain v. State of Karnataka*\(^47\), the Supreme Court of India clarified that the right to life is the right to live with dignity and includes all aspects which contribute to making a person's life meaningful, complete and worth living.\(^48\) Thus every child has an inherent right to live with human dignity.

The right to health and education implicit in the right to life has been specifically incorporated in the Constitution of India.\(^49\) Right to health includes various aspects of health care of the child and mother.\(^50\) The CRC requires the state to pursue full implementation of this right and to take appropriate measures to diminish the mortality rate in children. Preventive health care is also included in this right.

Art. 24(3) of the CRC is a significant one which reads, “The State parties shall take all effective and appropriate measures with a view of

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\(^{49}\) See Art. 39(e) and (f) of the Constitution of India. 39 (e) reads, “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.”

39(f) reads, “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.”

\(^{50}\) It consists of primary healthcare, immunization compacting mal nutrition, child care and maternal health and appropriate prenatal and postnatal care for mothers. See also Art. 12 of *International Covenant on Economic, Social and Cultural Rights*, 1966.
abolishing traditional practices prejudicial to the health of the children."

The directive principles impose a duty on the State to evolve a policy eliminating the abuse of tender age and to free children from circumstances forcing them to enter avocations unsuited to their age and strength. As a follow up to this commitment the Government of India adopted a National Policy for children in 1974 which reaffirms the constitutional provisions and declares that the policy of the State is to provide adequate services to children before and after birth and through the period of their growth, to ensure their full physical, mental and social development. In formulating programmes, in different sections, the National Policy for children recommends that the first priority should be given to the preventive and promotive aspects of child health.51

51 The National Policy for Children suggests adoption of a comprehensive health programme covering all children. It also recommends adopting means and programmes to provide nutritional services, general improvement of health, education of the female child and also to pregnant and lactating mothers. It further directs the State to create social and economic conditions and infrastructure for the healthy development of children and also to provide facilities for the excessive of their freedom and maintenance of dignity. See The National Policy for Children 1974, Govt. of India, Ministry of Human Resource Development – Department of Women and Child Development, (1986) pp. 1-5.
International law recognizes that the right to education is essential for children, as it helps them to realize their full potential through its instruments.\textsuperscript{52} The CRC specifically requires the States to provide education on the basis of equal opportunity.\textsuperscript{53} It suggests compulsory and free primary education.\textsuperscript{54} The Directive principle of the State Policy of the Constitution of India contains the right to education of the child. It provides for the provision of free and compulsory education for children below the age of 14 years.\textsuperscript{55} The duty to prove this right to education is subject to the economic capacity of the State.\textsuperscript{56}

In \textit{Mohini Jain v. State of Karnataka}\textsuperscript{57}, the Supreme Court recognizes the right to education as a fundamental right. The Court observed

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\begin{enumerate}
\item Principle 7 of the Declaration of the Rights of the Child, 1959 embodies the right to education. See also Art. 26.1 of the Universal Declaration of Human Rights, 1948 which made it clear that every one has the right to education. Art. 13(1) of the International Covenant on Economic, Social and Cultural Rights, 1966 establishes the duty of the State to provide education. See also Geraldine Van Bueren, \textit{The International Law on the Rights of the Child} (1998), pp.232-239.
\item See Art. 28.1, "States parties recognize the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity."
\item See Art. 28.1(a) which reads, "Make primary education compulsory and available free to all."
\item See Art. 45 of the Constitution of India. It says, "The State shall endeavour to provide, within a period of ten years from the commencement of this Constitution, for free and compulsory education for all children until they complete the age of fourteen years."
\item See Art. 41 of the Constitution of India. It reads, "The State shall, within the limits of its economic capacity and development, make effective provision for securing the right to work, to education and to public assistance in cases of unemployment, old age, sickness and disablement, and in other cases of undeserved want."
\item \textit{Supra}, n.47.
\end{enumerate}
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that without education the dignity of the individual cannot be assured. Article 21 of the Constitution had been interpreted to include the right to live with human dignity. The right to education follows directly the right to life. In other words the right to education is concomitant to the fundamental right.

In J.P. Unnikrishan v. State of Andhra Pradesh\textsuperscript{58}, Justice B.P. Jeevan Reddy affirmed that citizens have a fundamental right to education. However this right is not an absolute right but subject to the provisions of Art. 41 and 45 of the Constitution of India. In other words any child of the country has a right to education until he completes the age of fourteen years, thereafter the right is subject to limitations based on the economic capacity of the State. The Constitution Review Committee specifically recommends girls and members of Scheduled Castes and Scheduled Tribes should have the right to free education till they complete the age of 18 years.\textsuperscript{59}

Later in Bandhua Mukti Morcha v. Union of India\textsuperscript{60}, Justice Ramaswamy and Justice Sageer Ahamad observed that primary education to children, in particular to the child from poor and weaker section, Dalits

\textsuperscript{58} A.I.R. 1993 S.C. 2178.

\textsuperscript{59} The recommendation of the Constitution Review Committee was to amend the constitution so as to provide the right to education to the children from 6 years till the completion of 18 years. See 30.C in para 3.20.2 of the Chapter III of the Recommendation of the Constitution Review Committee. For more details, see Summary of Recommendation of the Constitution of Review Committee, Chapter 3 Fundamental Rights, Directive Principles and Fundamental Duties. A.I.R. 2002 (Jour.) pp. 351-355.

\textsuperscript{60} A.I.R. 1997 S.C. 2218.
and Tribes and minorities is mandatory. The basic education and employment oriented technical education should be imparted for empowering the children and developing the basic abilities and skills and capacities to live a meaningful life for economic and social empowerment. Art. 21, together with Art. 41 and 45 of the Constitution of India contain the right to education as a fundamental right of the child. Thus imparting compulsory primary education is one of the prime duties of the State.

The National Policy for children also requires the State to take steps to provide free and compulsory education for all children up to the age of 14 years. According to the National Policy for children, special efforts are to be made to prevent the dropouts, especially the girl children and the children of the weaker sections of the society. It requires providing formal or informal facilities for education to children of weaker sections and socially handicapped ones. In short, legislature, the executive and the judiciary held the view that the fundamental right to education is one of the basic needs of the child.

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61 See the National Policy for Children supra, n.51 at p.2.
Participation rights

Participation of child means child partaking and influencing processes, decisions and activities. This right can be explained as seeking information, forming views, expressing ideas, being informed and consulted, analysing situations and making choices. Thus the child's right to be treated as a person or an individual is embodied in participatory right. The earlier concept of non-status position of the child has now changed by realizing the identity, capacity and personality of the child. The participation right refers to personal autonomy that involves the right to freedom of thought and conscience, the right to be heard and to participate in decision making which affects one's life. However, the International law recognized this right of the child only recently. The CRC creates an obligation on the States to provide the child capable of forming his or her views, to express the views freely in all matters affecting him or her and also insists that the views of the child are to be duly considered in accordance with the age and capacity of the child. It envisages a participatory role for children who are capable of forming their views and expressing them in all matters which affect them. It demands that the child should be given an opportunity to be heard in all judicial and

62 Though the CRC contains participatory rights, it focuses its attention mainly on provision and protection rights. Even the World Summit Declaration of 1990 was silent about the participation right.

63 See Art. 12(1) of CRC.
administrative matters affecting him.\textsuperscript{64} It is interesting to note that the rights and duties of the parents and guardian to provide direction to the child in the exercise of his right or her right should be subject to the evolving capacity of the child.\textsuperscript{65}

The right of the parent and other concerned adults to provide guidance and direction must be exercised in a manner consistent with his or her evolving capacities. Thus the CRC provides for the participation right, depending upon the maturity of the child. It is a concept which widens in scope as the child grows to maturity. Duty is imposed on the state to assure that the child will be heard and participated in decision making with regard to matters affecting his or her life depending upon the capacity of the child.\textsuperscript{66}

\textsuperscript{64} See Art. 12(2). It reads, "For the purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law."

\textsuperscript{65} Art. 14(2) says, "States Parties shall respect the rights and duties of the parents and, when applicable, legal guardians, to provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child."

\textsuperscript{66} See Articles 5, 12 and 15 of the CRC. See also section 83 of the Indian Penal Code, 1860 which fixes criminal liability on children depending upon his capacity to understand the nature and consequences of their own act and section 17(3) of the Guardian and Wards Act, 1890 which reads, "If the minor is old enough to form an intelligent preference, the Court may consider that preference."
Rights such as freedom of expression and the right to seek and receive information, freedom of thought, conscience and religion and freedom of association and peaceful assembly provided in the CRC are already incorporated in our Constitution. The fundamental rights in the Constitution of India accommodate the novel concept of participation rights of the child. The Constitution guarantees fundamental freedom to all its citizens. Since children have been considered as persons entitled to fundamental right, these rights are available to them also. The freedom of speech and expression provided in the Constitution is similar to the freedom of expression contained in the CRC. Freedom of expression in the CRC covers speech since it includes the right to receive and impart information. However it is limited to reasonable restriction imposed under both national and international law.

67 Art. 19 of the Constitution guarantee following fundamental freedoms:
- Freedom of speech and expression, freedom of Assembly, freedom to form association, freedom of movement, freedom to reside and settle, freedom of profession, occupation, trade and business.

68 Art. 13 of the CRC says, “The child shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of the child’s choice.”

69 See Art. 19(2) of the Constitution of India. It provides that the state is empowered to put reasonable restrictions on the following grounds, security of the state, friendly relations with foreign states, public order, decency and morality, contempt of Court, defamation, incitement and offence and integrity and sovereignty of India.

70 Art. 13(2) of CRC says that, “The exercise of this right may be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
(a) For respect of the rights or reputations of others; or
(b) For the protection of national security or of public order, or of public health or morals.”
The freedom of speech and expression means the right to express one’s own convictions and views freely. It means that the right to participation is based upon the right to express views and participate in decision making in matters connected with the life of a child. In *Bijoy Immanuel v. State of Kerala*\(^7\) (popularly called the National Anthem case) the Supreme Court emphatically stated that there is no law under which fundamental rights under 19.1(a) can be curtailed. The right under 19.1(a) can only be regulated by law and on the grounds mentioned in the Constitution and not by executive instructions. In this case the apex court upheld the participation right of the children.\(^7\)

**Protection Rights**

The right of protection is realized as an inherent right of the most vulnerable section of the society especially, the child. International and national law imposes a duty on parents, family and the state to protect the interests of the child. The exercise of the rights of the child is closely connected with the fulfilment of the responsibilities of the parent to the

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72 In this case three children belonging to Yahoha’s witness were expelled from the school for refusing to sing the national anthem. However they stood up respectfully when the national anthem was sung in the school refused to sing the national anthem. The Kerala High Court upheld their expulsion on the ground that it was their fundamental duty to sing the national anthem. On appeal, the Supreme Court held that the expulsion from school was violation of their fundamental rights under 19.1(a) which included right to silence.
child. The duty of protection is vested within the family itself. However, the concept of ‘protection’ permits the state’s intervention to safeguard the rights of the child in the circumstances where family is dysfunctional or not fulfilling its responsibilities. The state is also empowered to protect the child from external abuse or exploitation. Laws and legal control are relevant when a family fails to fulfil its responsibilities to the child or when the adults exploit him or cause anguish and sufferings to him.

The child’s right to protection includes freedom from all forms of exploitation, abuse and neglect. Exploitation usually involves cumulative breaches of several fundamental rights, the most common being unlawful interference with family life and the rights of education, health and leisure which are equally essential for the healthy development and survival of the child.

The preamble of the Declaration of the Rights of the Child, 1989 refers to the special safeguards and care for the protection of the rights of the child. Principle 2 of the Declaration enshrines the right of the child to enjoy special protection whereas principle 9 declares the right of the child to be protected against all forms of neglect, cruelty and exploitation. CRC

73 See Principle 4 of The Declaration of the Rights of the Child, 1924. See also Art. 25(2) of the Universal Declaration of Human Rights, 1948 which provides ‘Motherhood and childhood are entitled to special care and assistance.’
develops the concept further, highlighting specific forms of exploitation like economic\textsuperscript{74}, sexual\textsuperscript{75} and all other forms of exploitation\textsuperscript{76} prejudicial to any aspects of child welfare.

Art. 19 of the CRC imposes a duty on the state to protect the child from all forms of exploitation including sexual abuse, while in the care of parents or guardians or any other person who has the care of the child.

Considering the tender and vulnerable nature of the children, which often results in their exploitation, the framers of the Constitution made provisions enabling the state to make laws for the welfare of the children giving preferential treatment over other persons in the society.\textsuperscript{77} Art. 24 of the Constitution of India prohibit the employment of children below the age

\textsuperscript{74} Art. 32 reads, “States Parties recognise the right of the child to be protected from economic exploitation and form performing any work that is likely to be hazardous or to interfere with the child’s education, or to be harmful to the child’s health or physical, mental, spiritual, moral or social development.”

\textsuperscript{75} Art. 34 reads, “States Parties undertake to protect the child from all forms of sexual exploitation and sexual abuse. For these purposes, States Parties shall in particular take all appropriate national, bilateral and multilateral measures to prevent:

(a) The inducement or coercion of a child to engage in any unlawful sexual activity;

(b) The exploitative use of children in prostitution or other unlawful sexual practices;

(c) The exploitative use of children in pornographic performances and materials.”

\textsuperscript{76} Art. 36 reads, “States parties shall protect the child against all other forms of exploitation prejudicial to any aspects of the child’s welfare.”

\textsuperscript{77} Art. 15(3) of the Constitution of India which enables the State to make special laws to protect women and children, shows the intention to protect the interest of the child.
of fourteen years in mines, factories and hazardous jobs.\textsuperscript{78} Art. 39(e) and (f) direct the state to evolve a policy eliminating the abuse of tender age and to free children from the circumstances forcing them to enter into avocations unsuited to their age and strength.

On a perusal of the Constitution of India, there are other provisions which though do not deal directly, are of great significance in the protection and welfare of the children. Art. 23 prohibits ‘traffic in human beings’, ‘begar’ and other similar forms of forced labour and exploitation. Even though, this provision does not specifically refer to children, it applies to them because of the fact that they form the most vulnerable section of the society. It is a known fact that children are exploited even by parents due to poverty. There are instances where parents silently allow or permit such exploitations for the sake of getting money.\textsuperscript{79} In the absence of parents, children are exploited by close relatives also. In rural areas children are pledged by destitute parents to rich persons as full time servants or part

\textsuperscript{78} Art. 24 of the Constitution of India reads, “No child below the age of fourteen years shall be employed to work in any factory or mine or engaged in any other hazardous employment.”

\textsuperscript{79} Minor girls from West Bengal were being sent to Mecca and Saudi Arabia for begging. The story of Merina told by her father was a shocking one. She had been burnt and crippled for life in an accident. When she was barely four years old she was made to beg by exhibiting her burns to attract sympathy. Several thousands of children are being smuggled out of rural Bengal and sold in West Asian countries every year. \textit{The Hindu} 22 July 2000.
time servants in the domestic or agricultural operations. In urban areas exploitation of children in myriad forms exists such as helpers to artisans and skilled workers and also as domestic servants. Sometimes children are captured by criminal gangs to employ them in begging or drug trafficking and connected matters. They are enticed even for the flesh trade by the criminal gangs, thus resulting in the violation of the fundamental rights enshrined in Art.23. Though Art.41 does not mention children, the ending words “undeserved want” cover the children who suffer for want of basic necessities of life. In short, the Constitution of India clearly shows its concern about the protection of the rights of its future citizens.

Thus the International law and the domestic legal system provide ample safe guards and measures to protect the rights of the ‘child. They need special care and assistance for their growth and development. But in practice, what happens is a significant question particularly in the context of child marriage.

Child Marriage infringes upon the victim’s right to life, right to health and right to education. These fundamental rights are violated all on a sudden by performing child marriage without considering the best interest of the

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80 See the report of Manas Das Gupta, “Five Members Gang Held”, The Hindu 2 August 2000, p.11.
81 See supra, n.56.
child. One can imagine the plight of the child who is forced to enter into wedlock without any knowledge about marriage.

It is doubtful whether the parents or guardians are even aware of the right of participation of the child in such an important event like marriage. The marriages of young Muslim girls with rich old Arabs in Malappuram District in Kerala and in the State of Hyderabad are clear illustrations of the abuse of the participation rights. They are the least concerned about the fact that the legal requirement of a valid marriage in all legal systems is the attainment of legally prescribed minimum age at marriage and free and voluntary consent.

International Law also recognizes free and full consent as valid requirement of marriage. Art. 1 of the United Nations Convention on Consent to Marriage, Minimum Age of Marriage and Registration of Marriage 1962 clearly states the significance of consent in the following words.

“No marriage shall be legally entered into without full and free consent of both parties, such consent to be expressed by them in person after due publicity and in presence of authority to solemnize the marriage and of witnesses, as prescribed by law.”

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82 Art. 16(b) of the Convention on the Elimination of all Forms of Discrimination against Women, 1979 makes it obligatory for the State parties to ensure that the right to select a spouse, to enter into marriage only with free and full consent and to decide freely and responsibly the number and spacing of the children is available to both men and women.
This requirement necessitates the parties giving personal consent in the presence of a competent authority immediately after the public announcement of marriage. To what extent the requirement of consent is adopted in child marriage is a question of paramount importance with respect to the participation rights of the child.

The parents in India often exercise their parental authority particularly in matters like marriage. The marriages in India, especially, Rajasthan during festival occasions are usually infant marriages. Marriage of the babies of two or three months old in the cradle or in the lap of the mother are a common phenomenon in Rajasthan. How can they give consent? Even the consent of the 15 or 16 year old children cannot be treated as a real consent in the legal sense. It should not be taken to mean that they are ready to enter marriage.\(^83\) Do they have the capacity to understand the nature and responsibilities of marriage? At such an early age, can a child understand the implications of accepting a marriage partner? Is he or she able to give effective consent without attaining sufficient maturity to understand the responsibilities of marital life. The question of marital consent becomes more difficult when the consent to sexual intercourse and the legal age for

\(^83\) A case is reported from Delhi in 1994 where Rajeev, a fifteen year old boy had moved an application before the Delhi Court seeking orders restraining his parents from getting him to the nuptial knot. See “Minor Wriggles Out of Forced Nuptial Knot”, The Pioneer New Delhi, 22 February 1994.
marriage varies as in India. The problem of runaway brides in India highlights the issue of consent or lack of it. The number of runaway brides in Rajasthan is on the increase.

Many societies view marriage as a family affair and parents often take decisions with respect to marriage deliberately neglecting the participatory rights of the minors. Reports from the United Kingdom about the forced marriages of British girls of South Asian origin also reflect this fact. Parents who are Indian citizens residing in England usually return to India for conducting the marriage of their children with Indian partners. Pressures from the parents may be very severe and the young bride or groom rarely gets a chance to exercise their right to consent.

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84 As per section 375, sexual intercourse with a girl below the age of 16 years with or without her consent amounts to the offence of rape. But sexual intercourse of man with his wife above 15 years is permitted. In such cases, it seems that the law prohibits marital rape, only in the case where the wife is below 15 years.

85 Hundreds of women in Rajasthan have taken the radical decision to desert their husbands forced on them in their childhood and elope with men they prefer. See Rohit Parihar, “Runaway Brides” India Today 11 February 2002, pp. 58-60. See also, an incident summarized from an article in Washington Post 3 May 1987, Dateline Kano Nigeria. Here the child was married at the age of nine years to a man old enough to be her father to whom her father was an unpaid debtor. At 12, she was forced to go to her husband’s house; twice she ran away from him; both the times her father forced her to return. The third time when she tried to run away, her husband caught her and hacked her legs off with an axe; as a result, later she died – See Lucy Cannoll, “Marriageship and Minor’s Marriage at Islamic Law” Islamic and Comparative Law Quarterly Vol. VIII, No.4 Dec. 1987 pp 279-299 at p.286.

The most significant fundamental right, i.e. right to be informed, consulted about the matters connected with such an important event like marriage, has been deliberately neglected. This right to take part in decision making is a key right associated with participation right and the exercise of child marriage in this respect involves a clean violation of participation rights. The state has a role to play when religion and customary practices force individuals to the risk of exploitation from the abuse of family authority.

In some countries parental consent is also required for marriage. Parental consent to the marriage of a minor child is recognized in various legal systems. It is an additional requirement rather than a substitute for the child’s consent. It is adopted as a measure to prevent hasty and ill considered marriages by teenagers. Legislation in many countries accepts the concept of parental consent and invariably recognizes that the Courts can express consent if parents unreasonably withhold their consent. These legislations recognize child’s right to be consulted in an important area like marriage while conceding a role for parental and adult guidance. It represents a legal development that recognizes a role for parents and Courts without violating the participatory rights of the child.

For example, in Iraq, the Law of Personal Status, 1959 prescribes eighteen years as the lowest age at which a person, boy or girl, can freely marry. But it empowers the court to sanction the marriage of any person who is not below sixteen years of age, if that person is ‘physically fit’ and has obtained his or her parents’ consent. The court can dispense with the requirement of parental consent where it is unreasonably refused. See for details, Tahir Mahmood, “Marriage Age in India and Abroad—A Comparative Conspectus”, 22 JILI (1980) pp. 65-67.
The Fourth World Conference on Women in Beijing in 1995 explicitly declared that human rights of the women include their right to have control over their body and allied matters.88 Her right to decide freely and responsibly in matters relating to their sexuality including sexual and reproductive health, freedom from coercion, discrimination and violence is clearly violated in child marriage. She who has been brought up in a traditional culture, meekly accepts her fate without having any capacity to resist the age old social restraints. She is hardly left with any choice but succumb to the consummation of marriage resulting in early pregnancy. The gravity of health risk is rather high on girls than on boys. Consequently it curtails her educational and employment opportunities. It is to be noted that child marriage can be used as a device for selling the minor girls which culminates in trafficking of the girl across the national boarders for prostitution.