CHAPTER – IV
PROTECTIVE DISCRIMINATION IN FAVOUR OF CHILDREN AND WOMEN

4.1 INTRODUCTION

After Scheduled Castes, Scheduled Tribes and other backward classes the next group which required protective discrimination is that of children and women. They form the major portion of world’s population. The human society perpetuates through children and future of a country depends upon them. According to Subba Rao, “Social justice must begin with children, unless the tender plant is properly tended and nourished it has little chance of growing into a tree.”1 Thus, the first priority in the scheme of social justice must be given to the welfare of children. The importance of child welfare services lies in consideration that the personality of man is built up in the formative years, and the physical and mental health of nation is determined largely by the manner in which it is shaped in early stages.”2 The expression child welfare, “embraces those services and institutions concerned with physical and psychological well being of children and it is particularly concerned with children lacking normal parental care and supervision.”3 The welfare of children is a matter now not only of a national but international concern, and the year of 1979 was designated as the International Year of the Child by the United Nations Organisation.

3 Encyclopedia Britannica 52.
4.2. PROTECTIVE DISCRIMINATION IN FAVOUR OF CHILDREN

The framers of the Constitution were aware of the plight of children in the country and this led them to enact provisions for their protection and welfare.

Before analyzing the constitutional provisions for child protection it is very pertinent to find out what is meant by the term ‘child’. Article 336 of the Constitution which contains definitions has not defined it. There is no provision in the rest of the Constitution dealing with the definition of ‘child’. However, keeping in view Article 24 and 45, it is suggested that the term child may be understood as a Child upto the age of fourteen years.

The constitutional provisions enacted for the protection of children are as under:

4.3 FUNDAMENTAL RIGHTS AND CHILD PROTECTION

Every child with the prescribed qualifications becomes a citizen of India and acquires all the rights under the Constitution.\(^4\) Article 15 (3) of the Constitution provides:

Nothing in this article shall prevent the state from making any special provision for women and children.

The insertion of the word ‘children’ in clause (3) of the Article 15 is inexplicable because there is nothing in clause (1) any discrimination on the ground of age. However, it seems that the framers included the word children as an abundant caution.

\(^4\) Subba Rao, op.cit., Supra note 1.
Article 24 provides:

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.

Article 23 lays down:

Traffic in human beings and beggar and other similar forms of forced labour are prohibited and any contravention of this provision shall be an offence punishable in accordance with law.

This Article prohibits traffic in women including children.

4.4 DIRECTIVE PRINCIPLES AND CHILD PROTECTION

Article 39 (e) and (f) and Article 45 incorporated in Part IV of the Constitution deal with the Directive Principles of State policy. The principle underlying this part is “to fix certain social and economic goals for immediate attainment by bringing about a non-violent social revolution.” Relevant portion of Article 39 reads as under:

The State shall in particular, direct its policy towards securing:-

(e) 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.

(f) that children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity

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and that childhood and youth are protected against exploitation and against moral and material abandonment.\(^6\)

Article 45 lays down:

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.

There are some other provisions in Part IV which apparently don’t talk of child directly but children are bound to be the beneficiaries thereunder. Such Article are 36, 41, 42 and 46.

Article 36 provides that “the State shall strive to promote the welfare of 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 national life.” It is obvious that implementation of this provision would promote child welfare also.

Article 41 requires that the State shall within the limit of its economic capacity and development, make effective provision for securing, inter-alia, the right to education. This provision if implemented will promote child welfare. According to Article 42, the State is enjoined to make provision for securing just and humans conditions of work and maternity benefits. The measures of maternity benefits for women before and after child birth are expected to promote health and healthy psychological environment for children during their up bringing. Article 46 lays down that the State shall promote with special care, the educational and economic interest of the weaker sections of the people and in

\(^6\) Clause (f) has been substituted by Constitution (Forty Second Amendment) Act, 1976 Section 7 (w.e.f. 3.1.1977).
particular of the Scheduled Castes and the Scheduled Tribes and shall protect them from social injustice and all forms of exploitation. If this directive is implemented, it will also result in promotion of welfare of children of these weaker sections.

These Directive Principles are not enforceable by the courts and so they do not create any justiciable right in favour of individuals.\(^7\) These directives have been declared to be fundamental in the governance of the country.\(^8\) It is for the State to implement them by legislation. The Constitution (Twenty Fifth) Amendment Act, 1971 inserted Article 31C, which provided that ‘Not withstanding anything contained in Article 13 no law giving affect to the policy of the State towards securing the principles specified in Clause (b) or Clause (c) of Article 39 shall be deemed to be void on the ground that it is inconsistent with or takes away or abridges any of the rights conferred by Articles 14, 19 or 31’. Under the Constitution (Forty Second) Amendment Act, 1976, the protection provided by the Twenty Fifth Amendment Act was extended to legislation for implementation of any of the directives enumerated ion Part IV. Section 4 of Amendment made a provision in Article 31 which reads, ‘no law giving effect to the policy of the state towards securing all or any of the principles laid down in Part IV shall be deemed to be void on the ground that it is inconsistent with or takes away or abridges any of rights conferred by Article 14 or Article 19 or Article 31’.

However, in Minerva Mills Limited v. Union of India,\(^9\) the Supreme Court struck down section 4 of the Constitution (Forty Second) Amendment Act, 1976. Thus, the Court restored the

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\(^8\) Article 37.
position as it existed on the basis of the Constitution (Twenty Fifth) Amendment Act, 1971 read with the pronouncement of Keshvananda’s Bharti’s case.

4.5 PROGRESS IN IMPLEMENTATION OF MEASURES FOR PROTECTIVE DISCRIMINATION IN FAVOUR OF CHILD

In free India much attention has been paid to children and the personal interest of late Jawaharlal Nehru in children played a significantly role in giving a new prestige to child welfare. Number of statutory provisions have been enacted for the protection of children which are as follows.

A. Protection under Labour Laws

It is quite evident from the constitutional mandate that there must be suitable legislative to protect the interest of the child labour. Number of laws have been enacted to safeguard the interests of children. As labour welfare and vocational and technical training of labour are in the concurrent list of the Constitution, therefore, both the centre and states have the jurisdiction to enact laws on child welfare and central law to override State laws in case of conflict. The Central enactments generally deal with child labour whereas states have enacted in the area of non-individual occupations such as shops and establishments.

The aspects which have been covered under labour legislations are:

(i) Requirement of the minimum age for the employment of the Children;

(ii) Working hours for children;

(iii) Right work;
(iv) Annual leave with wages;
(v) Medical examination of children before employment and their medical check up at regular intervals during the course of their employment.

(i) **Requirement of the minimum age for the employment of the Children**

The factories Act, 1948 prohibits the employment of the children in any factory who have not completed fourteen years of age.\(^{10}\) The Mines Act, 1952 provides that no child shall be allowed to work in any part of a mine unless he has completed fifteen years of age.\(^{11}\) Under the Plantation Labour Act, 1951, a child who has completed the age of twelve years can only be employed to work in any plantation.\(^{12}\) Under the Motor Transport Worker's Act, 1961, employment of children in motor transport undertaking in any capability is absolutely prohibited\(^{13}\) and adolescent can only be employed if a certificate of fitness is granted to him to work as a worker in motor transport undertaking.\(^{14}\) The shops and establishments of various states provide different minimum age limits between twelve and fourteen. The employment of the Children Act, 1938 imposes prohibition on the employment of children below 16 years of age in any occupation connected with transport of passengers, goods or mails by railways or with a port authority within limits of any port. Under Beedi and Cigar workers (Conditions of Employment) Act, 1966, no child who has not completed the age of 14 years shall be required or allowed to work in any industrial premises, where any manufacturing process

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\(^{10}\) Section 67 of the factories Act, 1948.
\(^{11}\) Section 2 (1) (e) of the Mines Act, 1952.
\(^{12}\) Section 24 of the Plantation Labour Act, 1951.
\(^{13}\) Section 21 of the Motor Transport Worker's Act, 1961.
\(^{14}\) Section 22 of the Motor Transport Workers Act, 1961.
connected with the making of Beedi or Cigar is carried on irrespective of the number of persons employed.\textsuperscript{15} Radiation protection Rules 1971 prohibits employment of children below 18 years of age at places where radiation takes place.

(ii) Working Hours for Children

Section 71 of the Factories Act provides following conditions of work for children and adolescents:

a. maximum hours of work 4½ hours a day;

b. the period of work to be limited to two shifts only;

c. the shifts not to overlap;

d. the spread over not to exceed 5 hours;

e. each child is to be employed only in one relay;

f. the spread over not to change except once in 30 days;

g. no exemption shall be granted from the provisions of weekly holidays;

h. there should not be double employment.\textsuperscript{16}

The Mines Act, 1952 prohibits the employment of adolescents for more than 4½ hours in a day and their employment between 6 p.m. to 6 a.m. and on work below ground\textsuperscript{17} and the period of work of all such adolescent employed in a mine shall be limited to two shifts which shall not spread over more than five hours such and there shall not be change of shift except once in thirty days and prior permission of the Chief Inspector must be obtained for making such change.\textsuperscript{18} Under Plantation Labour Act, 1951 50 hours week is prescribed for children and adolescents.\textsuperscript{19}

\textsuperscript{15} The Beedi and Cigar Workers (Conditions of Employment) Act, 1966.

\textsuperscript{16} Section 71 of Factories Act, 1948.

\textsuperscript{17} Section 44 of the Mines Act, 1952.

\textsuperscript{18} Ibid.

\textsuperscript{19} Section 19 of the Plantation labour Act, 1951.
The shops and establishments of various states prescribed 6 to 7 hours a day for children under state laws.\(^{20}\)

(iii) **Night Work**

The Factories Act, 1948 prohibits employment of children in a factory during night. The Plantation Labour Act, 1951 prohibits the employment of children in any plantation for hours other than between 6 a.m. and 7 p.m. unless the State government permits it.\(^{21}\)

(iv) **Annual Leave with Wages**

The Factories Act, 1948 lays down that every child worker who has worked for a period of 240 days or more in a factory during a calendar year must be allowed during the subsequent calendar years leave with wages for a number of days calculated at the rate of one day for every fifteen days of work performed by him during the previous calendar year.\(^{22}\) But the total number of days of leave that may be carried forward to a succeeding year shall not exceed forty in the case of a child.\(^{23}\)

Under the Plantation Labour Act, 1951 section 30(b) prescribes for child leave with wages for number of days calculated at the rate of one day for every fifteen days of work performed by him.\(^{24}\)

\(^{20}\) Section 6, Punjab Shops and Commercial Establishments Act prescribes 5 hours in one day (30 hours in one week).

\(^{21}\) Section 25 of the Plantation Labour Act, 1951. However, this section is not applicable to midwives and nurses employed as such in any plantation.

\(^{22}\) Section 79 of the Factories Act, 1948.

\(^{23}\) Ibid.

\(^{24}\) Section 50 of the Plantation Labour Act, 1951.
(v) Medical Examination of Children

A child who has not completed his fourteen year or an adolescent not be required or allowed to work in a factory unless he obtains a certificate of fitness from a certifying surgeon, which is to be kept in the custody of the manager of the factory and children should carry while at work a token giving reference to the certificate of fitness so that it can be checked at any time by the Inspector without any inconvenience. For obtaining such a certificate any young person or his parent or guardian is required to make an application along with a document signed by the manager of the factory that the young person shall be employed in the factory if he is declared fit to work. The certifying surgeon shall declare fit a person to work as an adult if he is satisfied that the young person has attained the age of fifteen years and is otherwise fit to work for full day in the factory. A certificate of fitness shall be valid for a period of twelve months and can be renewed on re-examination of the young person before the expiry of the above mentioned twelve months period. This certificate can be revoked if the young person is no longer found fit to hold that certificate. In case of refusal to grant fitness certificate the certifying surgeon has to state reasons in writing on the request of person concerned. If a conditional fitness is granted, the young person shall be permitted to work in accordance the prescribed conditions.

Similar provisions are there under the Mines Act and the Plantation Labour Act for granting a certificate of fitness. Section 42 of Mines Act lays down that if a certificate of fitness is granted to an adolescent to work as an adult under section 40 of the Act, he

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25 Section 50 of the Factories Act, 1948.
26 Section 69 of the Factories Act, 1948.
27 Section 41 of the Mines Act, 1952.
28 Section 27 of the Plantation Labour Act, 1951.
shall be deemed to be an adult for the purpose of this Act. A similar provision is made for the certificate of fitness in the Motor Transport Workers Act, 1961.²⁹

As already discussed, it is the duty of the states under the Constitution to protect children against exploitation.³⁰ And inspite of the States best efforts to enact laws for the protection of child labour in pursuance of International Conventions already ratified by India still child labour is being exploited. The existing legislation is confined to the organised sector. There is no effective enactments for regulating the employment of children in hotels, restaurants and construction work etc. in these establishments children of very young age are employed. Since the unorganized sector constitute 93% of the child labour force a legislative to this effect is the need of the hour. Moreover, there is no uniformity regarding minimum age of child for employment. It is very essential to have uniformity about the minimum age of children who can be employed under different Acts and must have direct nexus to the degree of risk involved in a particular occupation.

The punishments provided as penalties for violation of statutes is very meager and must be enhanced. In India the child labour is a socio-economic problem and must be looked into its true perspective.

(vi) The Child Labour (Prohibition and Regulation) Bill, 1986

The Child Labour (Prohibition and Regulation) Bill, 1986 which has been passed by Rajya Sabha on November 5, 1986³¹ is now with the Lok Sabha.

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²⁹ Section 23 of the Motor Transport Workers Act, 1961.
³⁰ Article 39 of the Constitution of India.
³¹ The Hindustan Times (New Delhi) November 17, 1986, p. 17.
The present Bill intends to:

a. Ban employment of children i.e., those who have not completed their 14 years, in the specified occupations and processes.

b. Lay down a procedure to decide modification to the schedule of banned occupations or processes.

c. Regulate the conditions of work of children in employment where they are not prohibited from working.

d. Lay down enhanced penalties for employment of children in violation of the provisions of this act and other Acts which forbid the employment of children.

e. To obtain uniformity in the definition of “child” in the related laws.\(^{32}\)

The main drawback of this Bill is that it has not provided for opening or rehabilitation centre.\(^{33}\) This Bill instead of penning child labour, it went to “approve their presence”. The Bill is similar in many ways to the Bill proposed by the concerned for working children (C.W.C.) Bill of 1985. This Bill proposed the protection to children in labour force by limiting their hours at work and prohibiting their employment in hazardous industries and even providing for their unionisation.

The Child Labour (Prohibition and Regulation) Bill, 1986 has taken certain positive steps some of them are as under:

1. No child who has completed his 12 years and not adolescent shall be required or allowed to work in any plantation unless (a) a certificate of fitness with reference to him under sec. 27 is in custody of the employer, and (b) such child or

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\(^{32}\) Ibid.

\(^{33}\) Ibid.
adolescent with him while he is at work a token giving a reference to such certificate.

2. No child shall be required or permitted to work in an establishment in excess of such number of hours and no child shall work more than three hours before he has had an interval for rest for at least one hour.

3. The period of work on each day shall be fixed that no period shall exceed three hours and that no child shall work more than three hours before he has had an interval for rest for at least one hour.

4. The period of child labour should be so arranged that inclusive of his interval for rest under sub-section (2) it shall not spread over more than six hours including the time spent in waiting for work on that day.

5. No child should be permitted to work between 7 p.m. and 6 a.m.

6. No child shall be required or permitted to work overtime, etc.

In the present Bill a provision has been made for the:

a. Appointment of Child Labour Technical Advisory Committee.

b. Appointment of Inspectors for the purpose of securing compliance with the provisions of this Bill.\(^{34}\)

B. Protection under Criminal Law

The child has been protected under various penal laws. The Indian Penal Code, the Code of Criminal procedure, Children Act, Probation of Offenders Act prescribe a different approach to children.

\(^{34}\) Ibid.
According to D.C. Pande, the survey of laws having bearing on the rights and privileges of children reveals a following four fold classification:\(^{35}\)

(i) Crimes committed by children,
(ii) Crimes committed by others in relation to children,
(iii) Implementation of social policy through criminal sanctions,
(iv) Variation of procedure in case of child offenders.

(i) **Crime Committed by Children**

The Indian Penal Code deals children in a different way from that of an adult section 82 of the Code declares:

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\text{Nothing is an offence which is done by a child under seven years of age.}
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Regarding liability of child above seven years section 83 further provides:

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\text{Nothing is an offence which is done by a child above seven years of age and under twelve, who has not attained sufficient maturity of understanding to judge of the nature and consequence of his conduct on that occasion.}
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Thus, where the accused is a child above seven and below twelve years of age, the incapacity to commit an offence only arises when the child has not attained sufficient maturity of understanding to judge the nature and consequences of his conduct. Such non-attainment must be specifically pleaded and proved.

(ii) Crimes Committed by Others in Relation to Children

The Indian Penal Code has protected children from the offence committed by others against them. Section 299 explanation 3 even protects the unborn child by providing that it may amount to culpable homicide to cause the death of a living child, if any part of that child has been completely born. The Penal Code prevents infanticide and prohibits secret burial or otherwise disposal of dead body of a child who dies before or after or during its birth. Section 318 reads:

Whoever, by secretly burying or otherwise disposing of the dead body of a child whether such child die before or after or during its birth, intentionally conceals or endeavours to conceal the birth of such child, shall be punished with imprisonment of either description for a term which may extend to two years, or with five, or with both.

The Code also takes care of the youngsters who are above twelve years of age and deals with them as children. A youngster who is under the control of a guardian is put under the category of the child. Section 361 of the Penal Code given legal protection to minor under sixteen years of age and female under eighteen years is to protect children of tender age from being abducted or seduced for improper purpose and it is taken as an offence against the guardian\(^{36}\) and consent of the minor is of no consequence.

In order to do away with the evil of kidnapping of children for begging, Indian Penal Code was amended in 1959\(^ {37}\) and a new

\(^{36}\) See generally Ss. 359-374.

\(^{37}\) Act III of 1959.
section 363A was inserted. The statement of objects and reasons said:

“To put down effectively the evil of kidnapping of children for exploiting them for begging, the provisions existing in the Indian Penal Code are not quite adequate. There is also no special provision for deterrent punishment for the greater evil of maiming of children so as to make them objects of pity.”

Section 363A reads:

(i) Whoever kidnaps any mirror or, not being the lawful guardian of a minor, obtains the custody of the minor, in order that such minor may be employed or sued for purpose of begging shall be punished with imprisonment of wither description for a term which may extend to ten years, and shall be liable to fine.

(ii) Whoever maims any minor in order that such minor may be employed or used for the purposes of begging shall be punishable with imprisonment for life and shall also be liable to fine.

(iii) Where any person, not being the lawful guardian of a minor, employs or uses such minor for the purposes of begging, it shall be presumed, unless the contrary is proved, that he kidnapped or otherwise obtained the custody of that minor in order that the minor might be employed or used for the purposes of begging.

(iv) In this section “begging” means:

a. soliciting or receiving aims in a public place, whether under the pretence of singing, dancing, fortune – letting, performing tricks or selling articles or otherwise;

38 Ibid.
b. entering on any private premises for the purpose of soliciting or receiving alms;

c. exposing or exhibiting, with the object of obtaining or extorting alms, any sore, wound, injury, deformity or disease, whether of himself or any other person or of animal;

d. using a minor as an exhibit for the purpose of soliciting or receiving alms.

This section makes kidnapping or obtaining custody of a minor and the maiming of a minor for employing him for begging, specific offences and provides for deterrent punishment. The provision will become more meaningful if sanction is applied against lawful guardian also for employing their children or maiming them for the purpose of begging.

The Indian Penal Code also prohibits selling of children for the purpose of prostitution or unlawful and immoral purpose.39

The section 372 of the code provides:

Whoever sells, lets to hire, or otherwise disposes of any person under the age of eighteen years with the intention that such person shall at any age be employed or used for the purpose of prostitution or illicit intercourse with any person or for any unlawful and immoral purpose, or knowing it to be likely that such person will at any age be employed or used for any such purpose, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

39 Section 372, the Indian Penal Code.
The above section protects the minor from being procured for immoral purposes, or their sale purchase, hiring is severally punished under the Penal Code. The idea of this section is to provide children legal protection from being an object of sale or purpose. The giver as well as the receiver of a person under eighteen years for immoral purpose is made punishable.\textsuperscript{40} Even a sexual intercourse with lawfully wedded wife if she is below fifteen year of age amounts to an offence of rape.\textsuperscript{41} The Indian Penal Code also provide that a person having sexual intercourse with a girl of sixteen years of age with or without her consent shall be guilty of rape.\textsuperscript{42}

So from the survey of the above mentioned provisions of the Indian Penal Code it is very much clear that children have been accorded special treatment because of their immaturity.

(ii) Implementation of Social Policy Through Criminal Sections

Social legislations are enacted with the object to meet the challenges of various anti-social practices and this practice is invogue these days. For enforcing these social legislations recourse has been taken to criminal sanctions. The important social legislations enacted for the benefits of children are:-

a. The Child Marriage Restraint Act, 1929

b. The Young Persons Harmful Publications Act, 1956

c. The Suppression of Immoral Traffic in Women and Girls Act, 1956

\textsuperscript{40} Ss. 372 and 373 of Indian Penal Code conjointly.
\textsuperscript{41} Exception to Section 375.
\textsuperscript{42} Section 375 (6).

**a. The Child Marriage Restraint Act, 1929**

The Child Marriage Restraint Act, 1929 was enacted with a view to prevent marriage, namely, a marriage to which either of the contracting parties is under a specified age. Originally the age limit for male was eighteen years and for a female fourteen years. The age limit was subsequently raised in the case of females from fourteen to fifteen years, by the Amending Act 41 of 1949. Violation of the provisions of the Act is made punishable. The object of the Act was to eliminate the severe dangers to life and health of a female child because of obligations arising out of married life which was hardly sufficient to beat the stresses and strains of early motherhood which had resulted in early death of the minors:

This object was sought to be achieved by this piece of social legislation in which the violation of the provisions was made punishable.

The “child” under the Act means a person who if male, has not completed twenty one years of age and if a female, has not completed eighteen years of age.\(^{43}\)

Union the Act a male above eighteen years of age and below twenty-one if contracts a child marriage, shall be punished with simple imprisonment which may extend to fifteen days, or with fine which may extend to one thousand rupees, or with both.\(^ {44}\) Further, a male above twenty one years of age if contracts a child marriage,

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\(^{43}\) Section 2 (a) (substituted by the Child Marriage Restraint (Amendment) Act, 1978).

\(^{44}\) Section 3.
be shall be punishable with simple imprisonment which may extend to three months and shall also be liable to fine.\textsuperscript{45}

Section 5 lays down that whoever performs, conducts or directs any child marriage shall be punishable with simple imprisonment which may extend to three months and shall also be liable to fine, unless he proves that he had reason to believe that the marriage was not a child marriage. The prosecution to succeed in persuading the court to issue summons against the accused person, who according to the prosecution had committed an offence punishable under Sections 5 and 6 must prima facie establish that the marriage had been duly performed in accordance with essential religious rites.

These persons are punishable as abettors rather than direct responsibility for the offence. The parent or guardian in charge of a minor who does an act to promote the marriage permits to be solemnized is negligently fails to prevent from being solemnized are liable to punishment which may extend to three months simple imprisonment and fine also. There are two limitations on the actions to be taken under this Act. First, court can not take cognizance of any offence under this Act after the expiry of one year from the date of commission of the Act.\textsuperscript{46}

Secondly, the Act empowers the court to issue injunction prohibiting marriage in contravention of this Act but such injunction shall not be issued against any person unless the court has previously given notice to such person against whom injunction is to be issued and has afforded him an opportunity to show cause

\textsuperscript{45} Section 4.
\textsuperscript{46} Section 9.
against the issue of such injunction. Such requirement of law may defeat the purpose of social justice in cases where there is an imperative necessity of judicial intervention by way of injunction to save the welfare and interests of child which are being jeopardized by the parents and other concerned parties. The Court should made use of ad interim injunction in a criminal proceedings to restrain the parties from committing breaches of law and it should be expressly provided by law and the opportunity to reply to the allegation made in the complaint can be done after the ad interim injunction has been issued. This is not going to cause much inconvenience to the concerned parties. Moreover, the procedure should be made so that the complaint is required to make a solemn declaration on oath and if the complaint is found to be false, he is proceeded against under the law. In order to fulfil the object of the Act above mentioned amendment should be made.

b. Young Persons harmful Publications Act, 1956

The Young Persons harmful Publications Act, 1956 has been enacted with a view to prevent young persons below the age of twelve years from effects of harmful publications. The legislation was enacted because it was found that pictorial and other publications curtaining stories of the glorification of crime, violeave and vice, known as “horror comics” era being circulated in India is in large quantities. The dissimilation of such stories in history to encourage antisocial tendencies among children and more a harmful influence on young persons.

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47 Section 12.
48 Dinesh C. Pande, op.cit, supra note 35 at 90.
49 Ibid.
Under the Act the young person is one who is under twelve years of age. The Act makes the distribution or selling of harmful publications to young persons an offence and a person who area that is liable to imprisonment upto six months or fine or both. The government is empowered to forfeit, seize and destroy harmful publications. The law enforcing agencies are empowered to search and seizure of harmful publications and destroy them. Section 293 of the Indian Penal Code specially prohibits sale, hire, distribution exhibits or circulation of obscene objects to children.

c. The Suppression of Immoral traffic Act, 1956

The Suppression of Immoral Traffic in Women and Girls Act, 1956 has been enacted to suppress immoral traffic in women and girls, to secure fallen women and girls and to prevent deterioration of public morale. The vice of prostitution is rampant in several parts of India and it requires for its control. The primary aim of the Act is to abolish the commercialized vice of prostitution for the purpose of organised means of living and profiting by inducing young women and girls to prostitution. Later the Act, the prostitution has not bee prohibited as such and a girl or women who engages herself in prostitution is not penalised except where prostitution is carried on in premises which are within the distance of two hundred yards of any place of public religious workshop, education institution, hotel, hospital, nursing home or such other public place of any kind as may be notified in this behalf by the commissioner of police or district magistrate. The prostitute can also be punished where the makes a positive attempt to seduce or solicit person for the purpose of prostitution in any public place or within sight of a public place or

51 Section 5, the Young Persons harmful Publication Act, 1956.
52 Ibid.
53 Hereinafter referred to as SITA.
54 Section 7, SITA.
in such manner as to be seen or heard from a public place.\textsuperscript{55} The Act makes it punishable to keep brothel or allowing premises to be used as brothel.\textsuperscript{56} Person over eighteen years of age who knowingly lives wholly or in part, on the earning of the prostitution of a woman or girl is liable to punishment.\textsuperscript{57} Any person who procures, or attempts to procure a girl with or without her consent for the purpose of prostitution or induces a girl to go from any place to a brothel or takes or attempts to take a girl from one place to another with a view to her carrying on or being brought upon prostitution or causes or induces a girl to carry on prostitution, is punishable.\textsuperscript{58} Any person who detains any girl with or without her consent in any brothel or in any premises with intention that she may have sexual intercourse with any man other than her lawful husband is liable to punishment.\textsuperscript{59}

The Act has empowered the State Government to establish protective homes for the purpose of rehabilitating fallen girls and women.\textsuperscript{60} Under the Act the special police officer is empowered on his having reasonable grounds to believe that an offence in respect of a girl is being committed and a search with warrant will cause undue delay to search the premises may search without warrant in the presence of two or more respectable persons of the locality of whom one at least is to be woman, and remove the girl and produce her forthwith before the magistrate.\textsuperscript{61} A magistrate may also empower the special police officer to rescue a girl from prostitution.\textsuperscript{62}

\textsuperscript{55} Id. Section 8.
\textsuperscript{56} Id. Section 3.
\textsuperscript{57} Id. Section 4.
\textsuperscript{58} Id. Section 5.
\textsuperscript{59} Id. Section 6.
\textsuperscript{60} Id. Section 21 (1).
\textsuperscript{61} Id. Section 15.
\textsuperscript{62} Id. Section 16.
From the survey of the above sections of SITA it is very clear that its object is two fold; one to prevent commercialization of prostitution and the other to prevent girls below 21 years of age from indulging in prostitution and rescuing them from the life of prostitution.

The scope of SITA is different from the Children Act. The Central Children Act deals with neglected children. As per the definition given in the Act neglected child includes a girl living in a brothel or with a prostitute etc. though she may not herself actually indulge in prostitution. A girl prostitution upto the age of eighteen years will come under the Children Act because a girl under this Act is usually a person who has not attained the age of eighteen years. Whereas under the SITA a girl is a person she is below twenty-one years. Thus a child prostitution upto the age of eighteen will be dealt with under provisions of the Central children Act or any State relating to treatment of Child Offenders and a prostitute above eighteen but below twenty one will be dealt under SITA because Section 24 of SITA lays down that the Act will not be construed in derogation of the provisions of the Reformatory Schools Act which is succeeded by the Central Children Act, or any other Act enacted in modification of the said Act or otherwise relating to juvenile offenders.

d. The Children Act, 1960

Children are the most vulnerable group in any population and thus require greatest social care. They can easily be exploited, illtreated by antisocial element in the community. It, therefore, becomes the duty of the State to accord proper care and protection to them for on their physical and mental well being the future of the nation depends. Since 1920 various States in India passed
Children Acts\textsuperscript{63} in order to deal with the problems of care, protection, maintenance, training, education and rehabilitation of the neglected children. The Indian Parliament has also passed the Children Act, 1960 on the pattern of the Children Acts of different States.

Child under the Children Act, 1960 means a boy who has not attained the age of sixteen years or a girl who has not attained the age of eighteen years.\textsuperscript{64} The Act has classified children into three classes:

(i) Neglected Children
(ii) Delinquent Children
(iii) Uncontrollable Children

A neglected child is one who is found begging; or who does not have a settled place of abode or ostensible means of subsistence, or is found destitute, whether orphan or not, or whose parents or guardian does not exercise proper care and control over him; or who lives in a brothel or with a prostitute or is found to associate with any person who leads an immoral, drunken or deprived life.\textsuperscript{65}

The Act makes a provision for the constitution of Child Welfare Boards by the administrator for exercising the powers and discharging the duties conferred or imposed on such board in relation to neglected children.\textsuperscript{66} The Administrator may establish

\textsuperscript{64}Under Section 2 (e) Children Act, 1960.
\textsuperscript{65}S. (2) (1), The Children Act, 1960.
\textsuperscript{66}S.4, The Children Act, 1960. A Board shall consist of a Chairman and such that members as the administrator thinks fit to appoint, of whom not less than one shall be a women; and such members shall be vested with the powers of a magistrate under the Code of Criminal Procedure, 1973.
and maintain children’s homes as may be necessary for the reception of neglected children under this Act.\(^\text{67}\) Such children’s homes shall provide the child with accommodation, maintenance, facilities of education, facilities for development of his character and abilities and necessary training for protecting himself against moral danger or exploitation and shall also perform such functions as may be prescribed to ensure all round growth and development of his personality.\(^\text{68}\)

Delinquent Child under the Act means a child who has been found to have committed an offence.\(^\text{69}\) It provides for the Constitution of Children Courts, for exercising the powers and discharging the duties conferred or imposed on such court in relation to delinquent child.\(^\text{70}\) The Act provides for bail and custody of such children.\(^\text{71}\) Thus there are separate institutions for dealing with delinquents and non delinquents.

In case of uncontrollable children a parent or guardian is unable to exercise proper care and control over the child and complaints to the Board about the same and if Board is satisfied on inquiry that the proceedings under this Act should be instituted regarding the Child, it may send the child to an observation home or a place of safety and make such enquiries as it may deem fit.\(^\text{72}\)

The Children Act, 1960 also deals with special offences in respect of children and provides for punishment for cruelty to children,\(^\text{73}\) employment of children for begging,\(^\text{74}\) giving intoxicating

\(^{67}\) S. 9 (1). The Children Act, 1960.
\(^{68}\) S. 9 (3), Id.
\(^{69}\) S. 2(j), Id.
\(^{70}\) S. 5, id.
\(^{71}\) S. 18, id.
\(^{72}\) S. 17, id.
\(^{73}\) S. 41, id.
\(^{74}\) S. 42, id.
liquor or dangerous drug to a child\textsuperscript{75} and exploitation of child employees.\textsuperscript{76} The term cruelty under the Act comprehends that any person who is having the actual charge or control of the child, assaults abandons, exposes or willfully neglects the child or causes or procures him to be assaulted, abandoned, exposed or neglected is a manner likely to cause such child unnecessary mental and physical suffering shall be punished with imprisonment for a term which may extend to six months, or with fine or both. Thus, the protection given to children under the Act against cruelty is very real and substantial. But there are some short-comings of the Act. The penal sanction is enforced only when acts of cruelty are inflicted upon the child. The omission to act in a reasonable manner to avoid the situation of neglect or abandonment, though very much within the ambit of the Act are not taken cognizance of.\textsuperscript{77} Further, the Act is enforced through the over-worked and over burdened enforcement agency of police which thus retards the justifiably fulfillment of the objectives of the Act.\textsuperscript{78} The administrator under the Act may authorise the persons outside the agency of police to initiate the process of action. The implementation of the law requires well trained and skilled social workers who can appreciate the problems relating to children and getting resolved them under the Act. However, lack of such social workers may make the achievement of the objectives of the Act difficult.

The Children Act, 1960 which is said to be the Model Act and applicable to all Union Territories but from the Table-1 (given below) it is very much clear that it has been fully implemented in 3

\textsuperscript{75} S. 43, id.
\textsuperscript{76} S. 44, id.
\textsuperscript{77} Dinesh C. Pande, \textit{op.cit. supra note} 35 at 93.
\textsuperscript{78} Ibid.
Union Territories and partially in one U.T. It means that out of 9 Union Territories 5 have not implemented it yet.

Table – 1
Showing the Union Territories where Children Act, 1960 has not been implemented

<table>
<thead>
<tr>
<th>Sr. No.</th>
<th>Name of U.T.</th>
<th>Legislation Children Act, 1960</th>
<th>Number of Distt. Total-covered</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.</td>
<td>Arunanchal Pradesh</td>
<td>Children Act, 1960</td>
<td>Not enforced</td>
</tr>
<tr>
<td>2.</td>
<td>Chandigarh</td>
<td>Children Act, 1960</td>
<td>Not enforced</td>
</tr>
<tr>
<td>3.</td>
<td>Dadar &amp; Nagar Naveli</td>
<td>Children Act, 1960</td>
<td>Not enforced</td>
</tr>
<tr>
<td>4.</td>
<td>Lakshadep</td>
<td>Children Act, 1960</td>
<td>Not enforced</td>
</tr>
<tr>
<td>5.</td>
<td>Misoram</td>
<td>Children Act, 1960</td>
<td>Not enforced</td>
</tr>
<tr>
<td>6.</td>
<td>Pondicherry</td>
<td>Children Act, 1960</td>
<td>4 – 1</td>
</tr>
</tbody>
</table>

(iv) Variation of Procedure in case of Child Offenders

After the criminal process is set in motion in cases where the children are involved different procedure has been prescribed for their trial adjudication and punishment. The procedure is governed by Section 27 of the Code of Criminal Procedure, 1973. The Section provides:

Any offence not punishable with death or imprisonment for life, committed by any person who at the date when he appears or is brought before the court is under the

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79 NISD Social Defence, Vol. XVII, No. 65, July 1981 (Figure relate upto Dec. 1980).
Court of Chief Judicial Magistrate, or by any Court specially empowered under the Children Act, 1960 (60 of 1960) or any other law for the time being in force providing for the treatment, training and rehabilitation of youthful offenders.

This section corresponds to section 29B of the Code of Criminal Procedure 18908 with the following changes:

a. Under this section age limit is ‘under sixteen years’ while under the old section it was fifteen years:

b. Under the old Code, apart from the District Magistrate, the Chief Presidency Magistrate was also mentioned. The new section mentions only the mentioned. The new section mentions only the Chief Judicial Magistrate and omits the corresponding court of Chief Metropolitan Magistrate. This omission does not make any material change because under section 29 (4) of the Code of 1973, the Court of a Chief Metropolitan Magistrate shall have all powers of the Court of a Chief Judicial Magistrate.

c. Reference to the Reformatory School Act, 1897 has been substituted by a reference to Children Act, 1960. Section 5 of the latter provides for the Constitution of a Children’s Court. In the absence of such court having been constituted in any particular area, the power of such court shall be exercised by the District Magistrate, sub-Divisional Magistrate or a magistrate of First Class.

Thus, the Code of Criminal Procedure, 1973 has improved upon the earlier code by increasing the age of juveniles for differential treatment form fifteen to sixteen years. By substituting

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80 These changes were recommended by the Joint Committee on Bill of (Com. 1-5), P. VIII (on Cl. 27).
the Children Act, 1960, instead of directing the juvenile convict to be admitted to a reformatory, it speaks of measures of correction, treatment and rehabilitation of the juvenile convict. However, from the use of words “may be tried” in section 27 has made it permissive. It means that when a juvenile offender is charged with the offence punishable with say sentence other than death or imprisonment for life, it may be tried either under the ordinary law or by the Magistrate under present section. But it would be more appropriate in case of a juvenile offender to invoke this section. This would be inconsonance with the policy of keeping away the juveniles from the atmosphere of criminal courts.

As noted above, section 27 of the Code of Criminal Procedure, 1973 prescribe that juvenile offender be dealt with under special laws enacted on the subject. The sections speaks of the Children Act, 1960. This Act in its Chapter IV has laid down the procedure for delinquent children regarding ball and custody of children\(^81\) information to parent or guardian or probation officer,\(^82\) inquiry by the children’s court\(^83\) and order that may be passed\(^84\) or not passed regarding delinquent children.\(^85\)

The Code of Criminal Procedure, 1973 makes young offenders used the age of twenty one years entitled to a lenient treatment as compared to an adult offender whose guilt is proved. If a person under twenty one years of age is convicted of an offence and it is not punishable with death or imprisonment for life and he has not been previously convicted, the court may on account of the age, character or antecedents of offender release him on probation

\(^{81}\) S. 16.  
\(^{82}\) S. 19.  
\(^{83}\) S. 20.  
\(^{84}\) S. 21.  
\(^{85}\) S. 22.
of good conduct.\(^{86}\) This is an enabling provision and does not make it obligatory upon the court to release the offender on probation. However, the section further lays down that “Nothing in this section shall affect the provisions of the Probation of Offenders Act, 1958 or the Children Act, 1960 or any other law for the time being in force for treatment, training or rehabilitation of youthful offenders.\(^{87}\)

(v) **Probation of Offenders Act, 1958**

The Probation of Offenders Act, 1958 was enacted by parliament to provide for release of offenders on probation after due admonition and for matters connected therein. The Act shifts emphasis from deterrence to reformation and from crime to criminal in accordance with the modern outlook on the punishment. The word probation comes from Latin word “probation” meaning testy on approval. It indicates socialized way of individualizing the delinquent and treating him in relation to his needs and problems scientifically diagnosed. Probation is a form of criminal sanction imposed by a court upon an offender nearly after the verdict of quality but without the prior imposition of a term of imprisonment.

Section 6 of the Probation of Offenders Act accords special treatment to juvenile offenders and imposes restrictions on imprisonment. It lays down as under:

> When any person under twenty one years of age is found quality of having committed an offence punishable with imprisonment (but not with imprisonment for life), the Court by which the person is found quality, shall not sentence him to imprisonment unless it is satisfied that, having regard to the circumstances of the

\(^{87}\) S. 360 (10). _Id._
case including the nature of the offence and the character of the offender, it would not be desirable to deal with him under Section 3 or Section 4, and if the court passes any sentence of imprisonment on the offender, it shall record its reasons for doing so.\(^{88}\)

According to the section when a person below 21 years of age, is found guilty of commission of an offence except the one punishable with death or imprisonment for life, the court so holding the person guilty must not sentence him to imprisonment unless, it is satisfied, taking note of the circumstances of the case including the nature of the offence and character of the offender, that it is not in fitness of things to accord the accused the benefit of section 3\(^{89}\) or section 4.\(^{90}\) The court while passing the sentence is required to record its reasons for it. Such conclusion must be drawn from the report of Probation Officer. Section 6 is mandatory in nature and whenever the benefit of this section can be given it must be given. Regarding young offenders instead of sentencing them the court has other options such as to send the child offender to reformatory borstal or approved school as per the law in the State concerned. Under the Probation of Offenders Act, 1958, the release can be either absolute or conditional. In absolute release the court administers admonition to the offender.\(^{91}\) The conditional release on the other hand is made in cases where the accused is found guilty of commission of an offence not punishable with death or imprisonment for life and is deemed fit for release on probation of

\(^{88}\) S. 6 (1), The Probation of Offenders Act, 1958.
\(^{89}\) S. 3 related to the power of the Court to release certain offenders after admonition.
\(^{90}\) S. 4 relates to the power of the court to release certain offenders on probation of good conduct.
\(^{91}\) Under S. 3 of the Probation of Offenders Act, 1958, admonition can be administered only in case of theft, dishonest misappropriation, cheating or any other offence for which punishment is not more than two years or fine or both. Also no previous conviction is proved against the convict.
good evident on furnishing bond, with or without sureties and is required to appear and receive sentence when called upon during such period not excluding three years, as the court may direct and in the meanwhile to keep the peace and be of good behaviour.\textsuperscript{92}

Probation programme introduced through probation of offenders Act, 1958 has not been uniformly implemented. From Table No. 2, it is clear that States of Jammu & Kashmir, Nagaland, and Sikkim and Union Territories of Andaman and Nikobar Islands, Arunanchal Pradesh, Dadar and Nagar Haveli have not implemented the Probation of Offenders Act. Moreover, in Madhya Pradesh only 31 out of 45 districts are covered while in Uttar Pradesh 41 out of 55 districts are covered under the said Act.

\textbf{Table – 2}

\textbf{Showing the States and Union Territory where the P.O. Act has not been implemented}\textsuperscript{93}

<table>
<thead>
<tr>
<th>Sr. No.</th>
<th>State/U/T.</th>
<th>Legislation (P./O. Act, 1958)</th>
<th>Total No. of Districts</th>
<th>District covered</th>
</tr>
</thead>
<tbody>
<tr>
<td>2.</td>
<td>Nagaland</td>
<td>P.O. Act, 1958</td>
<td>3</td>
<td>–</td>
</tr>
<tr>
<td>3.</td>
<td>Sikkim</td>
<td>P.O. Act, 1958</td>
<td>4</td>
<td>–</td>
</tr>
<tr>
<td>4.</td>
<td>Madhya Pradesh</td>
<td>P.O. Act, 1958</td>
<td>45</td>
<td>31</td>
</tr>
<tr>
<td>5.</td>
<td>Uttar Pradesh</td>
<td>P.O. Act, 1958</td>
<td>55</td>
<td>41</td>
</tr>
<tr>
<td>6.</td>
<td>Union Territories</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>a.</td>
<td>Anadaman Islands</td>
<td>P.O. Act, 1958</td>
<td>1</td>
<td>–</td>
</tr>
<tr>
<td>b.</td>
<td>Arunanchal Pradesh</td>
<td>P.O. Act, 1958</td>
<td>5</td>
<td>–</td>
</tr>
<tr>
<td>c.</td>
<td>Dadar &amp; Nagar Haveli</td>
<td>P.O. Act, 1958</td>
<td>1</td>
<td>–</td>
</tr>
</tbody>
</table>

\textsuperscript{92} S. 4 (1), The Court before making the order under S. 4 (1) shall take into consideration the report, if any of the Probation Officer concerned in relation to the case.

c. Protection under Law of Contract

The Indian Law of Contract is largely an imitation of English Law of Contract with few changes introduces to meet the local conditions. One of the requirements of a valid contract is that the parties should be competent to contract.94 “Every person is competent to contract who is of the age of majority according to the law to which he is subject, and who is of sound mind, and is not disqualified from contracting by any law to which he is subject.”95 According to the Indian Majority Act, 1875 a person is deemed to have attained majority when he complete eighteen years. In case a guardian has been appointed of a minor or where minor is under the guardianship of the court of wards, the person continues to be minor until he completes his age of twenty one years.96 The law of contract does not distinguish between minors of different ages. It applies equally to babies and young men or women of seventeen. Thus, it can be said that a ‘child’ under the law of contract means a person who has not attained the age of majority i.e., eighteen years or twenty one years, as the case may be.97

The rules governing contractual capacity of a child have been made with the object of protecting the child for his own inexperience and at the same time not allowing him to reap benefit from this privilege at the cost of adults.

(f) Child’s Agreement

Under the Common law an infant’s contract is generally not void but voidable at his option and if it appears to the court that it is

95 S. 11, Id.
96 S. 3, The Indian Majority Act, 1875.
97 However, in England formerly the age of majority was twenty one years. But, now under the Family Reforms Act, 1969, a minor is a person under eighteen years of age.
beneficial to him, it may be binding and especially if the contract is for necessaries.\textsuperscript{98} Section 11 of the Indian Contract Act does not make it clear as to whether a child’s agreement is void or voidable at his option or wholly void. The controversy was resolved in 1903 by the Judicial Committee of the Privy Council in the leading case of \textit{Mohori Bibee v. Dhurmodas Bhose},\textsuperscript{99} where it was held that all contracts entered into by a child were void \textit{ab initio}. The Court declared that the mortgage made by the minor as coil and the mortgager who had advanced the money to the minor on the security of a mortgage was not entitled to repayment under Sections 64 and 65 of the Act as mortgage was invalid. This view of the Privy Council is based on the ground that a child is incapable of making promise and it is for the law to protect him. Sir Ford North, while delivering the judgment observed:\textsuperscript{100}

Looking at these sections, their Lordships are satisfied that all the contracting parties should be competent to contract, and expressly provides that a person who by reason of infancy is incompetent to contract cannot make a contract within the meaning of the Act … The question whether a contract is void or voidable presupposes the existence of a contract within the meaning of the Act and cannot arise in case of an infant.

But in the present day set up it is not practicable to stick to principle laid down in the above case. A child during his daily routine generally deals with general merchants, booksellers, transporters, tailors, drycleaners, employers etc. and if the above principles is strictly applied then he will not be able to perform his routine functions, keeping in view the said difficulty the Privy

\textsuperscript{98} Pollock and Mulla, \textit{Indian Contract & Specific Relief Act}, 104 (9\textsuperscript{th} ed.).
\textsuperscript{99} (1903) 30 I.A. 114.
\textsuperscript{100} Id. at 124.
Council, therefore, modified its earlier decision and held that a contract entered into on behalf of a minor, by his guardian or by a manager of his estate can specifically be enforced against the minor if the contract is one which is within the competence of the guardian to enter into on his behalf and further, it is for the benefit of the minor.  

(iii) Implications of Child’s Agreements

The legal implications of child’s agreements are as under:

a. Retification

The child agreement being void \textit{ab initio}, it cannot be ratified on attaining majority. A new contract must be made on attaining majority and it will also require a fresh consideration. For a valid ratification there must be three requisites:  

(a) attainment of majority, (b) full knowledge of nature and affect of the transaction to be ratified, (c) a clear promise or act indicative of intentional acknowledgement of the liability. In \textit{Indian Ramaswamy v. Anthappa Chettiar}, a minor borrowed a sum of money during his minority and executed a simple bond for it. After attaining majority he executed a second bond in respect of criminal loan plus interest. It was held by the Madras High Court that the suit on the second bond was not maintainable because it was without consideration. Most of other High Courts are also of the same view. 

\begin{itemize}
\item Shri Ram v. Mohan Lal, AIR 1935 Nag. 127.
\item (106) 16 M.L.J. 224, See also, Arumgan v. Duraising (1914) 37 ILR Med. 38; Tukaram Ramji v. Madhorao Manji (1948) A.I.R. Nag. 293; and Narendra Lal v. Hrishikesh Mukherjee, A.I.R. 1919, Cal. 675.
\end{itemize}
In *Kundan Bibi v. Sree Narayan*, Sree Narayan executed a bond after attaining majority, promising to pay within a year Rs. 7,000 being the price of goods supplied to him during minority and also to repay Rs. 76 advanced to him for necessaries. The obligee sued S on the bond and it was held that S was liable. According to the court the contract on which the suit was brought was by a defendant of full age and the contract was a new one and he had made an advance of Rs. 76. Thus there was a new consideration for the promise. The decision in this case has been criticized by D.F. Mulla. According to him, “the decree so far as it awarded to the plaintiff the price of the goods sold was erroneous in law.” Some High Courts have approved this view.

b. **Restitution From Minor**

A minor being a person of tender age, is protected by law. As he is not in a position to form a rational judgment about the effects of various transactions he is protected by law. But this protection is not a privilege and he cannot go about cheating people.

If an infant obtains property or goods by misrepresenting his age, he can be compelled to restore but only so long as the same is traceable in his possession. But where he has sold the goods or converted them, the doctrine of restitution cannot be invoked because if the infant is made to repay the value of goods then it would amount to enforcing avoid contract.

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105 (1906) 11 C.W.N. 135.
106 See, Pollock and Mulla, supra note 90 at 114.
Section 65 of the Contract Act lays down:

When an agreement is discovered to be void, or a contract becomes void, any person who has received any advantage under such an agreement or contract is bound to restore it, or to make compensation for it, to the person from whom he received it.

However, in Mohri Bibee v. Dhurmodar Ghose, Privy Council held that above section was not applicable in case of agreement with minors. The Court did recognize the section 41 of the specific Relief Act, 1877, as giving a discretion to the court to grant compensation which justice may require to another party by a person at whose instance an instrument has been cancelled. But the Court saw no reason to extend this equitable relief to the respondent who had advanced money with full knowledge of infant. The leading English case on fraudulent representation by a minor is R. Leslie Ltd. v. Sheill, and the principle laid down was stated by Lord Summer as follows:

When an infant obtained an advantage by falsely stating himself to be of full age, equity required him to restore his illgotten gains or to release the party deceived from obligations or acts in law induced by fraud, but scrupulously stop short of enforcing against him a contractual obligation entered into while, he was an infant.

The Privy Council followed the above ruling in Mohammad Syad v. Yerah Ori Gark, followed in Ajodhia Prasad v. Chandan

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110 Supra note 99.
111 (1914) 3 K.B. 607. Here the defendant, a minor represented falsely to plaintiff as of full age and induced him to lend him two sums of $ 200 each. When plaintiff brought an action for recovery of amount, the plea of infancy was raised successfully as a defence.
112 Id. at 618.
Shadi Lal,\textsuperscript{114} decided by Full Bench of Allahabad High Court where suit of plaintiff for sale of mortgaged properties was dismissed as the executant defendants were minors. His Lordship the C.J., observed:\textsuperscript{115}

Where a contract of transfer of property is void and such property can be traced the property belongs to the promise and can be followed. There is very equity in his favour for restoring the property to him. But where the property is not traceable and the only way to grant compensation would be by granting money decree against the minor, decreeing the claim would be almost tantamount to enforce the minor’s pecuniary liability under the contract, which is void.

So the decision in the above case means that where the minor is defendant the restoration is limited to the specific property. However, in Khan Gul v. Lakha Singh,\textsuperscript{116} where the plaintiff vendee sued the defendant minor for possession of land sold by the minor or in the alternative for the sale price of Rs. 17,500 taken by minor, it was held by Full Bench of Lahore High Court (Harison, J., dissenting) that where a minor falsely represents that he is a major and enters into a contract he cannot refuse to perform it and at the same time claim to retain the benefits derived thereunder. According to Shadi Lal, C.O., by ordering compensation the court should not be construed as giving effect to a void contract but putting parties to \textit{status quo} from which one of them was induced by the minor’s fraud to depart. Thus according to the judgment the minor is not only to restore the specific property in his hand but also the money benefit received under the contract. The Law

\textsuperscript{114} A.I.R. 1937 All 610.
\textsuperscript{115} Id. at 617.
\textsuperscript{116} A.I.R. 1928 Lah. 609.
Commission of India preferred the view of Shadi Lal, C.J., and the controversy has now been set at rest by section 33(2) of the Specific Relief Act, 1963 which lays down that where the minor has been sued under a void contract, the Court may, if he has received any benefit under the agreement from the other party require him “to restore so far as may be, such benefit to that party, to the extent to which he or his estate has been benefited thereby”.

(iii) **Contract for Necessaries**

A minor being incapable of entering into a contract, then how is he to sustain himself? Law comes to his rescue and protects only contracts for necessaries. At common law, a contract entered into by minor for supply of necessaries is binding upon him.

Section 68 of the Indian Contract Act, provides for liability in respect of necessaries supplied to person incapable of entering into a contract. It reads:

> If a person incapable of entering into a contract, or any one whom he is legally bound to support, is supplied by another person with necessaries suited to his condition in life, the person who has furnished such supplies is entitled to be reimbursed from the property of such incapable person.

A person who supplied necessaries to the minor is entitled to be reimbursed from the property of such minor and it does not create any personal responsibility of the minor. In order to render

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117 The term necessaries has not been defined in this Act. According to Pollock and Mulla, “Necessaries must be things which the minor actually needs; therefore it is not enough that they be of a kind which a person of his condition may reasonably want for ordinary use they will not be necessary if he is already sufficiently supplied with things of that kind, and it is immaterial whether the other party knows this or not.” *Indian Contract and Specific Relief Act*, 116 (1972).
property of minor liable for necessaries following two conditions must be satisfied;

(1) the contract must be for goods reasonably necessary for his support in his station in life; and

(2) he must not have already a sufficient supplies of these necessaries.\(^{118}\)

(iv) Contracts beneficial to the Minor

The incapacity of minor arises when it comes to impose obligations. “What is meant by the proposition that an infant is incompetent to contract or that his contract is void is that the law will not enforce any contractual obligation of an infant.”\(^{119}\) Incapacity of the minor to bind himself by contract was enacted in order to protest him. But law does not regard minor incapable of accepting a benefit.\(^{120}\)

In Raghava Chariar v. Srinivasa\(^{121}\) where a mortgage was executed money the Full Bench of Madras High Court held that the mortgage was enforceable by the minor of any other person on his behalf. Similarly, a minor is capable of purchasing immovable property, and he may sue to recover the possession of the property purchased upon tender of the purchase money.\(^{122}\)

\(^{118}\) Nash v. Inaan (1908) 2 K.B. 1 at 12 cited in Avtar Singh, op.cit. supra note 108 at 114-115.


\(^{120}\) (1916) 40 Mad. 308.


\(^{122}\) Thakur Dass v. Mt. Puli, AIR 1924 Lah. 611.
A minor may enforce a promissory note executed ion his favour.\textsuperscript{123} However, a lease to minor has been held void.\textsuperscript{124}

The cases discussed above are based on the principle that minor has already given the full consideration to be supplied by him and nothing remains to be done by him under the contract. He is now a mere promises and prays the court for recovering the benefit stipulated.\textsuperscript{125}

On the other hand, a contract where consideration is still to be supplied, the principle of Mohori Bibee,\textsuperscript{126} has been applied and declared not enforceable. The leading case on the point is Raj Rani v. Prem Adib,\textsuperscript{127} where father of a minor girl Raj Rani entered into a contract of service on behalf of his daughter with Prem Adib, a film producer. Under the contract the girl was to act as film actress in a particular film of the defendant far a period of one year, for a sum of Rs. 9,500 top be paid in twelve equal instalments. The defendant subsequently terminated the contract. There was breach of contract, and the minor girl sued through her next friend, the father.

The Court held that neither she nor her father could have sued on the promise. If it was a contract with plaintiff, it father; it was void because she was a minor. If it was a contract with her father; it was without consideration and this void because what was furnished as consideration was minor’s promise to act which is invalid in law as totally void. In short it was held that the contract of service entered into by the father on behalf of the minor was not enforceable and was void for want of valid consideration.

\textsuperscript{124} Jaykantv. V. Durhashankar, AIR 1970 Guj. 106.
\textsuperscript{125} Avtar Singh, supra note 99 at 135.
\textsuperscript{126} Mohori Bibee v. Dharmodas Ghose (1903) 30 IA 114.
\textsuperscript{127} A.I.R. 1949 Bom. 215.
Contracts of apprenticeship are also contracts for the benefits of the minors. In England minor may enter into a contract of apprenticeship but he cannot be sued thereon. But in India contracts of apprenticeship but he cannot be sued therein. But in India contracts of apprenticeship are binding on minors.\textsuperscript{128}

A minor has the option to retire from the contract of beneficial nature on attaining majority provided he uses his option within a reasonable time.\textsuperscript{129} It is submitted that service contracts be treated at par with apprenticeship contracts so that minors are able to support themselves in life.

(v) Estoppel against Minor

If a minor falsely represents himself to another that he is major, and enters into a contract with him, can he be estopped from pleading his minority as defence when other party enforces the contract? This question was involved in \textit{Sadiq Ali Khan v. Jai Kishore},\textsuperscript{130} where it was held by Privy Council that there can be no estoppel against a statute. In \textit{Gadigeppa Bhimappa Mets v. Balamgowda Bhimamgowda}\textsuperscript{131} Beaumont, C.J., of the Bombay High Court after reviewing all authorities on the point concluded:\textsuperscript{132}

Where an infant represents fraudulently or otherwise that he is of age and thereby induces another to enter into a contract with him then in an action founded on the contract the infant is not estopped from setting up infancy.

\textsuperscript{128} \textit{Indian Apprentice Act, 1850.}
\textsuperscript{129} \textit{Edward v. Carter,} (1893) AC 360.
\textsuperscript{130} A.I.R. 1928 P.C. 152-156.
\textsuperscript{131} A.I.R. 1931 Bom. 561.
\textsuperscript{132} \textit{Id.} at 569.
A thorough examination of law relating to Child Contracts leads to the conclusion that it is not entirely satisfactory. The Indian Contract Act was enacted more than a hundred years ago and no significant change has been made since then. For the betterment of existing law the following recommendations are made:

1. As the law stands today, the age of majority is not uniform. It is generally eighteen years but when a guardian of a minor’s person or property is appointed by the court, it is twenty one. It is suggested to fix a uniform age of majority, i.e. eighteen years and section 3 of the Indian Majority Act, 1875 should be amended accordingly.

2. The expression “necessary suited to minor’s condition in life” in section 68 is vague and requires reconsideration.

3. Section 11 should be amended to exclude from its purview contracts which are beneficial for the minor.

4. The contracts of service, apprenticeship which are for the benefit of the minor must be treated in the same way in which contracts for necessaries.

5. The law of restitution in cases where minor is plaintiff must be clarified.

D. Protection Under Law of Torts

(i) Duty of Care towards Children:

It is the duty of every person to take care. Absence of due care on the part of defendant, makes him liable to negligence. If the plaintiff is a child greater care has to be taken towards him because of his immaturity. In the word of Lord Summer, in Glasgow
Corporation v. Tylor,\(^{133}\) a measure of care, appropriate to the liability or disability of those who are immature or feable in mind or body is due from others who know of, or ought to anticipate the presence of such persons within the scope and hazard of their own operation.

In Hughes v. Lord Advocate,\(^{134}\) some employees of the Post Office opened a manhole ion the street to repair a cable and in the evening left the open manhole covered by a canvas shelter, trettended and surrounded by four fit red paraffin lamps. The appellant Hughes, an eight years old child was tempted to of near the lamp. He picked up a lamp, went into the tent, the lamp fell into the manhole resulting in an explosion, whereby the appellant suffered service burn injuries. The House of Lords unanimously said the defendants liable and observed that the injuries caused to the plaintiff were mainly by burns and such injuries were forseeable by the defendants. The tent, the open cavernous and the red paraffin lamps were allurements to the inquisitive or mischievous boys and it could be forseen that by mishandling the lamps the children were likely to sustain burn injuries. The plea of contributory negligence was also turned down for the reason that children of tender age could not be blamed for meddling with allurements on the roadside having no watchman to guard them and no fence to keep them away.

In Veeran v. T.V. Krishanaomoorthy,\(^{135}\) the defendant was driving a motor lorry on a road which was straight at the place of accident by about a furlong distance and 30 feet wide. Some boys from the nearby school were waiting to cross the road. They waited

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\(^{133}\) (1922) 1 A.C. 44 at 67.
\(^{134}\) (1964) A.C. 837.
\(^{135}\) A.I.R. 1966 Kerala 172.
for a bus coming from the south to pass by. The defendants lorry was 75 to 100 yards behind the bus at a speed of twenty five of thirty miles per hour. As soon as the bus passed, the boys started running to cross the road and the plaintiff, a boy of six years who was following the other boys was hit by the lorry driven by the defendant on that road. It was held by the Kerala High Court that defendant was liable for negligent driving because he could observe from a distance of seventy to hundred yards that boys were crossing the road. As regards the duty of care, the High Court observed, “A special care is called for where pedestrians are likely to cross the road and a much greater care if the pedestrians assembled on the road for crossing are school boys of young age.”

(ii) **Children as Visitors**

Under the Occupier’s Liability Act, 1957 an occupier owes a duty of care to all his visitors. An occupier owes the same “common duty of care” to all his visitors who would at common law be treated as either invitees or licensees. The Act provides: An occupier must be prepared for the children to be less careful than adults. He is required to take care to protect the child though no such care is required in case of adult visitors.

In *Glasgow Corporation v. Taylor*, poisonous barries were grow in a public park frequented by children and no precautions were taken to warn the children of danger of eating them. A child of 7 years, who happened to visit the part was tempted by attractive

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136 Id. at 177.
137 Section 2 (3) (a), The Occupier’s Liability Act, 1957. See *Refell v. Survey, Country Council* (1964) 1 All ER 743.
138 (1922) 1 A. C. 44.
but poisonous fruit like barries grown there. He ate the fruit and died.

The plaintiff brought, an section against the defendants, the corporation of Glasgow, for damages for death of his son. It was held by the Mouse of Lords, that the defendants were liable for negligence, for they owed a ‘special duty’ to take every precaution to make the park reasonably safe for children as distinguished from adults.

In cases of trespass there can be no difference in case of children and adults because if there is no duty to take care, that cannot vary according to the trespasser. But if the premises provides an allurement to the children, then the children visiting such a premises may not be considered to be a trespasser and the occupier of such premises would be held liable for harm likely to cause to such children. In Cooke v. Midland Great Western Railway of Ireland, the respondents, a railway company had kept a turntable on their premises and it was accessible to the children through a gap in the fence. The children used to play with it and this fact was in the knowledge of defendants. A child, of four years was injured while playing with it.

The Court held that the turntable was an allurement. Similarly, it had been recognized that railway generally, vehicle and heaps of rubble are “allurement”, to children in the sense that they both fascinate them and also inherently dangerous in ways which children cannot be expected to appreciate. However,

140 (1909) AC 229.
141 Creed v. John McGeoch & Bons Ltd, 91955) 3 All ER 123.
142 Southern Portland Cement Ltd. V. Cooper (1974) 1 All ER 87.
what is, or is not, an allurement or trap to children is a question\(^{143}\) of facts to be decided by the court.

If a child trespasses a premises and his presence at the place of risk is not known and also could not be anticipated, the occupier cannot be made liable for the injury caused.\(^ {144}\)

(iii) Child’s Capacity to Sue

In tort, a person may sue for damages irrespective of his age, but a minor as a procedural requirement, has to sue by his next friend.

Under Fatal Accidents Act, 1855 a child can sue for damages for causing death of his parent by wrongful act, neglect or default. Such action can be brought by and in the name of the executor, administrator or representative of the deceased. Such a suit is allowed for the benefit of only the wife, husband, parent or the child.\(^ {145}\)

(iv) Action for pre-natal Injuries

Whether a person can bring an action for injuries suffered by him in mother’s Womb is uncertain. In an Irish case,\(^ {146}\) the plaintiff action failed. But the Supreme Court of Canada has allowed claim to a child\(^ {147}\) where he was born with club feet after two months from

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\(^{143}\) Lethem v. R Johnson and Nephew Ltd. (1913) 1 KB 398 at 416.
\(^{144}\) Robert Addie & Sons (Collieries) Ltd. v. Dumbreck, (1929) A.C. 358. Here a child of 4 years was crushed to death while playing in the proximity of a wheel forming part of the haulage apparatus at defendant’s colliery which was set in motion. The defendants employees who set the wheel in motion were not aware of child’s presence at that place-held not liable.
\(^{145}\) Section 1A, the Fatal Accident Act, 1855.
\(^{146}\) Walker v. G.N. Ry. Co. of Ireland, (1891) L.R. IR 69. Here the child who was born crippled and deformed brought action against railway company for injuries suffered by him while in his mother’s womb.
the accident due to the negligence of the defendants resulting in injuries to his mother. In India no such case has come before the courts. Many authorities on the subject are of the opinion that child should be allowed to sue for damages.\textsuperscript{148} The Law Commission in England has also recommended legislation creating liability for injuries to an unborn child.\textsuperscript{149}

\textbf{(v) Contributory Negligence of Children}

The doctrine of contributory negligence does not apply to children with the same force as in case of adults. It is more difficult to make out the defence of contributory negligence against a child than against an adult because a child being immature cannot be expected to be as careful as a grown up person. Allowance must be made for his inexperience and infirmity of judgment.\textsuperscript{150} The House of Lords in \textit{Glasgow Corporation v. Taylor},\textsuperscript{151} has observed:

\begin{quote}
The presence in a frequented place of some object of attraction tempting a child to meddle where he ought to abstain, may well constitute a ‘trap’ and in the case of a child too young to be capable of contributory negligence it may impose full liability on the owner or occupier, if he ought as a reasonable man, to have anticipated the presence of the child and attractiveness of the peril of the object.
\end{quote}

\begin{footnotes}
\footnote{For detail see, R.K. Bangia, “Child and the Civil Law of Negligence” a paper read in the seminar on \textit{Child and the Law} organised by Department of Laws, Panjab Univ., Chandigarh from 28-30 March, 1980.}
\footnote{\textit{Lynch v. Nurdin} (1841) 1 QB 29.}
\footnote{\textit{1 AC 44.}}
\end{footnotes}
The plea of contributing negligence on the part of child was rejected in Yachuk v. Oliver Blais Co. Ltd.\textsuperscript{152} and Lynch v. Nurdin.\textsuperscript{153} But in a situation where danger is obvious to the understanding of the child, he may be held guilty of contributory negligence. In MM. & S.M. Railway Company Ltd. V. Jayammal,\textsuperscript{154} a girl of seven years, who was knocked down by engine while crossing the railway line was held guilty of contributing negligence.

**(vi) Child in Custody of Adults**

At one time, doctrine of identification was applied where an infant, who was incapable of taking care of himself and was in custody of an adult, suffered injury due to the negligence of third party as well as the contributing negligence of the custodian.\textsuperscript{155} But the doctrine was overruled in Oliver v. Birmingham & Midland Omnibus Co.\textsuperscript{156} in this case four year old boy was crossing a road with his grand father who was holding his hand. They had reached the middle of the road when grandfather was startled by the approach of omnibus belonging to defendants and released the child’s hand and jumped aside to a place of safety. The child was struck by the bus and was injured. It was held that there was no contributory negligence on the part of the child and was thus entitled to damages. The court did not identify the child with his grandfather.

\textsuperscript{152} (1949) Ac 386. In this case the defendant’s servant gave gasoline a highly influence liquid to two boys aged seven and nine years. They played with it and one of them got serious burns injuries. The defendant was held liable.

\textsuperscript{153} (1941) 1 Q3 29. The defendant in this case left his cart and horse unattended in a streak where some boys were playing. The plaintiff, a boy of seven, climbed on the cart while another boy led the horse on and plaintiff was thrown down and hurt. The defendant was held liable.

\textsuperscript{154} (1924) 48 Mad. 417.

\textsuperscript{155} Waite v. N.E. Ry (1859) E.B. & E. 719 at 728. In this case a little boy of five who was knocked down while crossing the line with his grandmother. It was held that little boy was so identified with his grandmother that her negligence was his and so disentitled from recovering damages because of contributory negligence.

\textsuperscript{156} (1933) 1 K.B. 35.
(vii) Liability of Children

The children are liable as adults for their tortuous acts except where the maturity of a person may be a factor to determine the liability. If the basis for the action is malice or some special intent, the fact that the wrong doer is extremely young and has not attained sufficient maturity, therefore, tends to disapprove the existence of such malice or special intent.\(^{157}\)

In *Walmsley v. Humenic*,\(^ {158}\) an action for negligence was brought by plaintiff aged five and a half against the defendant aged five, for striking in the eye by an arrow while playing. The court held that the “defendant was not liable for he had not reached that stage of mental development where it could be said that he should be found legally responsible for his negligent acts.” However, in *Gorely v. Codd*,\(^ {159}\) a boy of sixteen and a half was held liable for negligence when he accidently shot the plaintiff with an air-rifle.

Sometimes same act may amount to a tort as well as breach of contract. In such a case the courts have held that if the recognizing of the action in tort amounts to indirect enforcement of the contract, the law will not permit even the action under law of torts. This principle was laid down in *Johnson v. Pye*,\(^ {160}\) where as minor aged over twenty years obtained loan from the plaintiff by stating that he was major. The court while rejecting section against minor for deceit held that if the minors were made liable on their contract by means of actions in tort, “all the infants in England will be ruined”. According to Salmond a distinction is made “between acts which were merely wrongful modes of performing the contract

\(^{157}\) Winfield, Tort 722 (Eighth ed. 1967).
\(^{158}\) (1954) 2 D.L.R. 232.
\(^{159}\) (1967) 1 W.L.R. 19.
\(^{160}\) (1965) 1 Sd. 258 also see *Jennings v. Rundall* (1799) 8 T.R. 335. In this case a minor who took a mare on hire and injured in by overriding, he was not held liable.
and acts which were outside the contract altogether.”\textsuperscript{161} It is illustrated by Burnard v. Heggis,\textsuperscript{162} where defendant, a minor hired from the plaintiff a mare for riding on the express stipulation that she was not to be used for ‘jumping or larking’. He lent the mare to a friend, who injured it by making it to jump over a fence. The defendant was held liable for trespass because using the mare for a purpose, expressly forbidden by contract amounted to use it without authorization. Thus the tort in the instant case was declared by court as independent of the breach of contract.

As far as the child is concerned his rights have been sufficiently protected under the law and due weightage has been given to his immaturity of understanding as compared to a matured adult person. A person is required to take more care while dealing with children, than what he is expected in case of an adult.

With regard to damages for pre-natal injuries there is not such case law on the subject. That may be due to the difficulties in finding our whether an injury is due to a particular accident or nor. With the advent of new techniques is medical science this problem may be solved. A legislation creating liability for pre-natal injuries, as suggested by law commission in its report in England should be enacted in India.

In India there is no act like the Occupiers’ Liability Act, 1957 enacted in England. This Act requires greater care towards child visitor. An Act on the same lines should be enacted in India.

Under Fatal Accidents Act, 1855 a child can claim damages for causing death of his parent by wrongful Act. But there is no provision for claiming damages by the child on account of injury

\textsuperscript{162} (1863) 14 C.B. (N.S.) 45.
caused to his parent which affects his capacity to look after his child. Such right of the child should be recognized by the courts.

In tort as a general rule a child is liable for his tortuous act. However, he may be exempted from liability by the court if it comes to the conclusion that he has not attained enough maturity to have the wrongful intention of committing a particular offence. In order to have uniformity, the age should be fixed as to when a child is said to have sufficient maturity as in case of Criminal Law and Law of Contract. Moreover, the law does not properly protect the tort victim against the wrongful act committed by the child in certain cases. It has been observed in number of cases that if the recognizing of the action in tort amounts to indirect enforcement of the contract, the law will not permit action even under law of torts. This condones fraudulent act of a child. The law concerning this aspect should be looked into.

i. Protection under Family Law

The major communities in India are the Hindus (this term includes Buddhists, Sikhs and Jains), Muslims, Christians and Parsis. All these communities have their respective personal laws, whereas the family laws of Hindus, Christians and Parsis are codified the Muslim personal law is still uncodified and it is primarily the traditional law which is applicable to them. However, the child Marriage Restraint Act, 1929 applied to all communities.

The family law deals with such matters as marriage, legitimacy, guardianship adoption and maintenance.
(j) **Marriage**

The laws of all communities discourage child marriage. In India no male can marry below the age of 21 years and no female below the age of 18 years. The Child Marriage Restraint Act, 1929 as amended in 1978, lays down that on the pain of penal consequence, no girl below 18 and no boy below 21 years of age should be married. The Act applies to all persons, to whatever community, religion or nationality they may belong. However, marriage solemnized in contravention of provisions of the Child Marriage Restraint Act (the Sharda Act) is not invalid. Under the Hindu Marriage Act, 1955, such a marriage is neither void nor voidable. Under Muslim Law it is voidable at the option of the girl, under Parsi Marriage and Divorce Act, 1936 it is invalid unless the consent of the guardian has been obtained. It is only under the Special Marriage Act, 1954 that a child marriage is void.\(^{163}\) The minimum age presented for marriage is 18 years for a girl and 21 years for a boy. The provisions of this Act apply to all persons who marry in India and any one who contravenes its provisions is liable to penal consequence under the Act. Under the Hindu Marriage Act, 1955\(^{164}\) the Special Marriage Act, 1954\(^{165}\) and Christian Marriage Act, 1872\(^{166}\) for native Christian, minimum age of marriage for boys is 21 years and for girls 18 years.

(ii) **Legitimacy**

The question of legitimacy of a child is determined under Section 112 of the Indian Evidence Act, 1872\(^{167}\) which provides that an child shall be presumed to be legitimate if was born during the

\(^{163}\) Section 24 (1).
\(^{164}\) Section 5 (iii).
\(^{165}\) Section 4 (i).
\(^{166}\) Section 6.
\(^{167}\) Act 1 of 1872.
lawful wedlock between his mother and any man (or within two hundred and eighty days after its dissolution, the mother remaining unmarried). This raises a conclusive presumption of law which can be displayed on the proof on non-access to each other at any time when the child could have been conceived. According to the section the criterion for legitimacy is not conception but birth during marriage. It is immaterial whether the mother was married or not at the time of conception.\textsuperscript{168} This section applies only in those cases where the marriage is a valid one. It is considered undesirable to make an enquiry into the paternity of the child whose parents have access to each other.\textsuperscript{169} The legitimacy of a child of invalid marriage is determined by his personal law.

Section 16 (91) of the Hindu Marriage Act, 1955 confers the status of legitimacy on the children not only of unnullled viiodable marriage but also of void marriage. Same is the position under the special Marriage Act. Under the Muslim Law, such children are regarded as illegitimate except where the marriage is irregular. The Parsi and the Christian laws are silent on the subject.

Though section 16 (1) and (2) grants the status of legitimacy yet it restricts their right of inheritance only to their parents.\textsuperscript{170} Under Hindu and Muslim Laws an illegitimate child can inherit his mother’s property but not father’s. The Indian Succession Act, 1925 which applied to Christians and Jews and to the property of persons governed by special Marriage Act, 1954 an illegitimate child has no right of inheritance from his parents.\textsuperscript{171} The Hindu Adoptions &

\textsuperscript{168} Palani v. Sethu (1924) I.L.R. 47 Mad. 706.
\textsuperscript{169} Rattanlal's Law of Evidence, 236 (13th ed.).
\textsuperscript{170} Sec. 16 (3) The Hindu Marriage Act, 1955.
\textsuperscript{171} S.N. Jain, “Law and the Child in India”.
Maintenance Act, 1956, make it imperative upon both parents to maintain their illegitimate children.\textsuperscript{172}

(iii) Guardianship

In order to protect the interest or minor laws, have been enacted for appointment of guardian of minor and his property. The law relating to guardianship of minors is to be found in Guardian and Wards Act, 1890 and different personal laws have application to various religious communities in India. This Act is in addition to provisions of various personal laws relating to guardianship of children but at the time of conflict the Act prevails over personal law. Under the Act an application can be made to the court for appointment of a guardian.

Where the court is satisfied that an order should be made appointing a guardian of minor or his property or both or declaring a person to be such a guardian, the court may pass an order accordingly.\textsuperscript{173} The basic consideration is that of the welfare of the child.\textsuperscript{174} The “Welfare” of the minor is to be determined with reference to (a) age of the child; (b) sex of child; (c) his or her religion; (d) character and capacity of the proposed guardian; (e) his nearness in relation to the child; (f) wishes of the deceased parents of the child; (g) existing or previous relations of the proposed guardian with child or his property; (h) child’s own preference if he is old enough to give it. Under the Act a guardian is charged with custody, support, education and health of the ward and such other duties as the personal law of the minor might impose.\textsuperscript{175}

\textsuperscript{172} Section 20.
\textsuperscript{173} Section 7, The Guardian and Wards Act, 1890.
\textsuperscript{175} Section 24, the Guardian and Wards Act, 1890.
The law of guardianship and minority applicable to Hindus, Sikhs, Buddhists and Jains is contained in Hindu Minority and Guardianship Act, 1956.

There are no separate laws relating to guardianship of children for Christians and Parsis. The matrimonial enactments applicable to them contain reference to minority and guardianship in regard to marriage and divorce only.

In India under Muslim Law, the minors between the age of 15 and 18 years can act freely and without any guardian in matters of marriage; dower and divorce. The Indian Majority Act, 1875, fixes the age of majority at 18. The Act applies to all matters except marriage, dower and divorce. Under Muslim Law father alone is the natural guardian of a minor.176

(iv) Adoption

Adoption is of great help to the children. Of the ancient systems of law only the Hindu law and Roman law provided for the institution of adoption. In India, only the Hindu community has a law of adoption. The other communities such as Muslims, Parsis and Christians have no law of adoption of their own.

In Hindus the basis of adoption is ingrained in their religion. The ancient Hindu Law emphasized the spiritual aspect of adoption. Adoption conferred spiritual benefit on the adopter.177 The statute which governs adoptions is the Hindu Adoption and Maintenance Act, 1956. It has been enacted for the parents wishing to adopt a child and not for the interest of abandoned or destitute child. Thus it is religion and parent based.

177 See, Mayne, Hindu Law & Usage, 184-188 (11th ed.).
Under the Hindu Adoption and Maintenance Act, 1956, every Hindu, a male and female has capacity to make an adoption provided he or she has attained the age of majority and is of sound mind.\(^{178}\) A married Hindu male can adopt only with consent of his wife.\(^{179}\) A bachelor, widower, virgin or widow can make an adoption. But a married woman cannot adopt even with the consent of the husband.\(^{180}\) An adoption of male child can be made only when the adopter has no Hindu son, son’s son, or son’s son’s son, and adoption of a female child can be made only when there is no Hindu daughter or son’s daughter.\(^{181}\) When the child of opposite sex is adopted the adopter must be senior by at least twenty one years to the child.\(^{182}\)

Under the Act, the father, if alive has the right to give a child in adoption,\(^{183}\) and the consent of child’s mother should be obtained except when she has become sanyasi, non-Hindu or insane. If the father is dead or has become anon-Hindu, Sanyasi, insane, the mother can give a child in adoption.\(^{184}\) Where both parents of a child are dead or have become insane or sanyasi or have abandoned it, his guardian can, with the permission of the court give the child in adoption and the court can grant such permission. While granting such permission regard must be had to the child’s welfare, his own wishes keeping in view his age and understanding.\(^{185}\)

\(^{178}\) Ss. 8 (1), 8 (b) and S. 7.
\(^{179}\) Proviso to S. 7.
\(^{180}\) Section 8 (c).
\(^{181}\) Section 11 Clauses (i) & (ii).
\(^{182}\) Section 11 Clauses (iii) & (iv).
\(^{183}\) Section 9.
\(^{184}\) Section 9.
\(^{185}\) Ibid.
Under the Act of 1956 only a Hindu child can be adopted.\(^{186}\) Normally a child above the age of 15 or a married child cannot be adopted but the provision is subject to the force of contrary custom.\(^{187}\) After option the adoptee deems to be the natural child of the adopter.\(^{188}\) The Act further provides that the child’s prohibited degree in his family of birth shall not be disturbed but to them will be added new prohibited degrees in his adoptive family.\(^{189}\) The property already vested in an adopted child before adoption shall be retained by him and the adopted child himself will not divest anybody in the new family of the property vested in him or her before his adoption.\(^{190}\)

In absence of any personal or statutory law of adoption governing Christians, Parsis, the custom will thus be applicable. In case of Muslims in absence of a legally recognized custom of adoption, the courts will, thus apply Muslim law on the basis of justice equity and good conscience.\(^{191}\)

An attempt to have a modern and secular law of adoption for all communities was made in 1972 when a Bill\(^{192}\) called Adoption of Children Bill was introduced in Parliament. This Bill was child based as against the Hindu Adoption and Maintenance Act, 1956 which was parent based. But due to the opposition of Bill by various communities, particularly the Muslim the Bill was withdrawn after six years in July, 1978.

\(^{186}\) Section 10.
\(^{187}\) Ibid.
\(^{188}\) Section 12.
\(^{189}\) Ibid.
\(^{190}\) Section 12.
\(^{192}\) Bill No. XVIII of 1972.
Very lately the foreigners has shows their readiness to adopt abandoned or destitute Indian Children. The Hindu Adoption and Maintenance Act, 1956 does not help such foreigners. The Adoption Bill of 1972 had provided for such a situation.\textsuperscript{193} The withdrawal of the Bill has thus dealt a severe blow to the interest of such children.

(v) **Maintenance and Custody**

In India there is a secular law of maintenance and also personal laws of various religions communities dealing with maintenance.

Section 125 of the Code of Criminal Procedure, 1973 provides \textit{inter alia}, that if any person having sufficient means neglects or refuses to maintain his legitimate or illegitimate child (whether married or unmarried) unable to maintain itself, a magistrate of first class may upon proof of such neglect of refusal, order such person to make a monthly allowance of its maintenance at a rate not exceeding Rs. 500 in the whole. The child under this section may be of any sex. This section provides a sanction against a person who is liable to maintain his child.

The Hindu Adoption & Maintenance Act, 1956 which applies to Hindus, Jains, Buddhists and Sikhs contains provisions for children’s maintenance. Under the Act every Hindu whether father or mother is bound to maintain his minor children whether legitimate or illegitimate.\textsuperscript{194} The child for being entitled to maintenance must be below 18 years.\textsuperscript{195}

\textsuperscript{193} Ss. 22-23 of Adoption Bill 1972.
\textsuperscript{194} Section 20, The Hindu Adoption and Maintain Act, 1956.
\textsuperscript{195} S. 3 (c), The Hindu Adoption and Maintenance Act, 1956.
The claimant is entitled to maintenance only if he or she has no means to maintain himself or herself. The Act does not provide any limit as to the amount of maintenance. The Court while awarding maintenance is to take into account the wants of the claimant, his position etc. and the position and status of the person liable to provide maintenance. The Hindu Marriage Act, 1955 empowers the courts to pass suitable orders for maintenance, custody, education of children while granting various matrimonial reliefs and such order have to be in consonance with the wishes of the children. There are not specific statutes on the lines of the Hindu Marriage Act, 1956 for Indian Parsis and Christians. The Hindu Marriage Act, 1954, the Parsis Marriage and Divorce Act, 1936 and Indian Divorce Act, 1869 contain somewhat similar provisions to that of the Hindu Marriage Act, 1955. For reliefs other than matrimonial relief the Parsis and Christians are governed by the Criminal Procedure Code.

A father under Muslim law is bound to maintain his son till he attains puberty and a girl till she gets married. The child is entitled to maintenance even though he is in the custody of his mother or in her absence in the custody of female relative. In case the father is poor and not in a position to maintain his children then it is the obligation of the mother to maintain her children. Regarding illegitimate child, father has no obligation to maintain him. But under Hanafi law a mother is under an obligation to maintain her minor illegitimate children.

From the above discussion it is clear that Hindu Law and Muslim Law in contrast to laws applicable to Christians and Parsis,

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196 Section 20 (1) Hindu Adoption and maintenance Act, 1956.
197 Hindu Marriage Act, 1955, Section 26.
198 For detail, See Fyzee, Oithines of Muhammedan Law, 214-215.
contain detailed provisions concerning maintenance of children. It is desirable to have a uniform law of maintenance applicable to all religious communities in India.

f. **Testimony of Child under Evident Act**

Section 118 of the Evidence Act, 1872 declares all person to be competent to testify unless they are in the opinion of the court unable to understand the questions put to them or to give rational answers to those questions. A child can be a competent witness unless he is prevented from understanding the questions put to him or from giving rational answers to those questions because of his tender age. Under the Act no age is fixed for a competent child witness. The competency of child witness is regulated not by the age but by the degree of understanding he appears to possess.\(^\text{199}\)

A child’s evidence is not inadmissible because no oath is administered to him. According to section 13 of the Oaths Act, 1873 omission to take oath or to make affirmation or any irregularity does not invalidate any proceeding or render the evidence inadmissible. As regards the credibility to be attached to the evidence given by a child witness and its corroboration the Privy Council in *Mohammed Sugal Esc. v. The King*,\(^\text{200}\) said that law does not require corroboration of the testimony of a child. The credibility of the evidence depends on factors such as “how consistent the story is with itself, how it stands the test of cross-examination, how fat it fits in with the rest of evidence and the circumstances of the case.”\(^\text{201}\) In *Prem Shankar Sachhar v. State*,\(^\text{202}\) the Delhi High Court relied upon the testimony of the four years old girl. The child’s testimony

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\(^{201}\) Bhojraj *v.* Sitaram, A.I.R. 1936 P.C. 60.

\(^{202}\) 1981 Cr. L.J. 163 (Delhi).
has been relief upon in number of cases such as Inder Singh v. State of Pepsu, S.C. Mohite v. Maharastra, Mst. Dato v. State.

However, there are other set of cases where no credibility was attached by the courts to the testimony of a child. These cases include Darpan Potdarin v. Emperor, Ghasi Ram Behra v. State.

So from the above discussion it is clear that the Indian Evidence Act does not ipso facto render a child testimony to be inadmissible. It admits almost every witness to testify from whom even a grain of truth can be gleaned. The only test of competency to testify is the general intelligence of the witness irrespective of his age.

VI. CHILD EDUCATION

Article 45 of the Constitution of India directs the States to endeavour to provide within ten years from the commencement of the Constitution for free and compulsory education for all children upto the age of fourteen years.,

Although this direction should have been implemented upto January 1960 but it could not be done. During the year 1960-61, only 62.4 per cent of the children of 6-11 age group and 22.5% of the 11-14 age group, were going to school.

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205 A.I.R. 1955 NUC (Punj) 1048.
206 A.I.R. 1938 Pat 153.
207 (1962) I.L.S. Cut. 505.
208 S.N. Jain, op.cit., supra note 191 at 150.
On the date of commencement of the Constitution, States of Bihar, Orissa, Bombay and Tamil Nadu (the Madras) were already having legal provisions for free and compulsory primary education under the following Acts:209

(i) The Bihar and Orissa Education Act, 1919.
(ii) The Tamil Nadu Elementary Education Act, 1920 and

In pursuance of this directive number of States have enacted legislations making provisions for free and compulsory primary education. These are:210

(iii) The Delhi Primary Education Act, 1960.
(xi) The Orissa Education Act, 1969.
(xiii) The Himachal Pradesh Compulsory Primary Education Act, 1953.

209 See, India 1971-72, 64 – Table 26, Column 4 (1971).
210 This list is not exhaustive – For detail see, supra note 208 at 66-67.
Keeping in view administrative convenience the age group visualized in Article 45 was classified into 6-11 and 11-14 age groups. At the end of 1974 the position of school – going children was:  

<table>
<thead>
<tr>
<th>Age group</th>
<th>Class I-V</th>
<th>84 per cent</th>
</tr>
</thead>
<tbody>
<tr>
<td>Age group 6-11</td>
<td>Class I-V</td>
<td>84 per cent</td>
</tr>
<tr>
<td>Age group 11-14</td>
<td>Class VI-VIII</td>
<td>36 per cent</td>
</tr>
</tbody>
</table>

The Sixth Five Year Plan after its completion visualized the percentage of school going children as 110 per cent and 57 per cent respectively.  

The primary education is now free in the following States:  

(i) For Boys and Girls in 13 States viz. Andhra Pradesh, Gujarat, Haryana, Madhya Pradesh, Punjab, Kerala, Tamil Nadu, Rajasthan, Nagaland, Karnataka, Maharashtra, Jammu & Kashmir.  

(ii) For Girls only in another 4 States viz. Bihar, Orissa, Uttar Pradesh, West Bengal.  

From the above survey regarding progress in implementation of the directive under Article 45 of the Constitution, a lot has been done by the States and it is a welcome development.  

A. Child and National Policy on Education  

For child the National Policy on Education 1986 has stipulated reorganisaiton of education at different stages. These stages are: (i) Early Childhood Care and Education; (ii) Elementary  

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212 Draft Sixth Five Year Plan (1978, 83) p. 220.  
Education; (iii) Secondary Education; (iv) Vocationalisation. Under first stage the National Policy on Children emphasizes investment in the development of the young child,\textsuperscript{214} reorganizing the holistic nature of child development viz., nutrition, health and social, mental, physical, moral and emotional development. Early childhood care and education is to be given high priority.\textsuperscript{215} The programmes of early child care and education will be child oriented.\textsuperscript{216} A full integration of child care and pre-primary education will be brought about.\textsuperscript{217} Under the second stage, the new thrust in elementary education will emphasis two aspects: (a) universal enrolment and universal intention of children upto 14 years of age and (ii) a substantial improvement in the quality of education.\textsuperscript{218} Under the third stage, secondary education begins to expose students to the differentiated roles of science, the humanities and social sciences.\textsuperscript{219} Under the last stage introduction of systematic, well-planned and rigorously implemented programme of vocational education is crucial in the proposed educational reorganization. “These elements are meant to enhance individual employability, to reduce the mis-match between demand and supply of skilled man power, and to provide an alternative for those pursing high education without particular interest or purpose.”\textsuperscript{220}

\textbf{VII. PROTECTIVE DISCRIMINATION IN FAVOUR OF WOMEN}

In almost all the societies of the world the women have been treated inferior in status to men. They have been regarded no better than ordinary chattels or slaves. The traditional system has denoted

\textsuperscript{214} Clause 5.1 of National Policy on Education 1986.
\textsuperscript{215} Clause 5.2, \textit{ibid}.
\textsuperscript{216} Clause 5.3, \textit{ibid}.
\textsuperscript{217} Clause 5.4, \textit{ibid}.
\textsuperscript{218} Clause 5.5, \textit{ibid}.
\textsuperscript{219} Clause 5.13, \textit{ibid}.
\textsuperscript{220} Clause 5.16, \textit{ibid}. 
them equality in every respect. They were condemned to perpetual subjugation to their fathers, husbands and guardians. The women in India have had a long history of suffering and even exploitation. According to Manu, the women were not “fit to be independent.”

Under the Shastric Hindu Law, the inferior social status and discrimination suffered by women are well known.

However, the emergence and spread of ideals of liberty, equality and fraternity have brought about a social awareness throughout the world. Today, no country can afford to ignore the position of women in its national life. Rather conscious efforts are constantly being made in every country for their upliftment and liberation so that they may be brought at par with men in every possible respect.

Lord Denning has emphasized this in following words:

A woman feels as keenly, thinks as clearly as a man. She in her sphere does work as useful as man does in his. She has a much right to her freedom – as a man. When she marries she does not become the husband’s servant but his equal partner. If his work is more important in the life of the community, hers is more important in the life of the family. Neither can do without the other. Neither is above the other or under the other. They are all equal.\(^\text{222}\)

It can be said that it is only in recent times that the equality of genders has been realized or being realized. The General

\(^{221}\) Manu says, “A Woman is under the subjugation of her father when a child, when married under that of her husband, after her husband under her sons, and if she has no sons then to her agnatic relations because there is no women whatsoever who is fit to be independent.”

Assembly of the United Nations has also recognized this under Article 1 of the Declaration on the Elimination of Discrimination Against Women. It proclaims:

Discrimination against women, denying or limiting as it does equality of rights with men, it fundamentally unjust and constitutes an offence against human dignity.223

For bringing women at par with men preferential treatment for them is a prerequisite. Now protective discrimination is practised in almost whole of the world. For example, in the American Constitution there is no express provision to that effect,224 yet the judiciary has protected the interest of women by preferential treatment. The pithy observations of Brewer, J., of the U.S. Supreme Court in Muller v. Oregon,225 appears to be of universal application:

That woman’s physical structure and the performance of material functions place her at a disadvantage in the struggle for subsistence is obvious. This is specially true when the burdens of motherhood are upon her. As healthy mothers are essential to vigorous offspring, the physical well being of women becomes an object of public interest and care in order to preserve the strength and vigour of the race.226

The U.S.S.R. Constitution provides for special labour and health protection measures for women including paid leaves and

223 Proclaimed on November, 7, 1967.
224 The Twenty Seventh Amendment of the American Constitution rules out any discrimination on the ground of sex.
225 52 L.Ed. 551, In this case the Supreme Court of U.S.A. upheld the regulation of working hours for women employees even though such regulation was not necessary for men.
226 Id. at 556.
other benefits for expectant mothers and gradual reduction of working time for mothers with small children.\textsuperscript{227} The refusal to major or dismissal of a woman on the grounds of her being pregnant or nursing a baby is punishable by corrective labour for a term of upto one year or by dismissal from office.\textsuperscript{228}

The emergence of independent India marks a watershed in the attainment of equality for women. The framers of the Indian Constitution were aware of the magnitude of the problem of inequality of women. They enacted several provisions to deal with the said problem.

\textbf{VIII CONSTITUTIONAL PROVISIONS}

The Constitution of India assures equality between men and women in all spheres of life. It secures to all the citizens of Indian equality of status and dignity of the individual.\textsuperscript{229} It guarantees the right to equality before law and equal protection of the laws to all men and women against the state.\textsuperscript{230} It prohibits discrimination on ground only of … sex and proclaims that a citizen on the ground of sex only shall not be subject to any disability, liability, restriction or conditions with regard to access to shops, public restaurants, hotels and places of public entertainments or use of wells, tanks, bathing ghats, roads and places of public resort maintained for the use of the general public.\textsuperscript{231} It prohibits discrimination in matters of public equipment on the ground of sex only.\textsuperscript{232} It also prohibits traffic in women for immoral purposes.\textsuperscript{233} It commands the State to see that

\begin{itemize}
  \item Article 35, \textit{Constitution (Fundamental Law) of the Union of Soviet Sociality Republic adopted on Oct 7. 1977.}
  \item Preamble, the Constitution of India.
  \item Article 14.
  \item Article 15.
  \item Article 16.
  \item Article 23.
\end{itemize}
the citizens, men and women equally have the right to adequate means of livelihood,\textsuperscript{234} and that there is equal pay for equal work for both men and women,\textsuperscript{235} and that health and strength of workers – men and women – are not abused.\textsuperscript{236} The State is directed to secure the right to education\textsuperscript{237} and to make provision for securing maternity relief.\textsuperscript{238} Article 51A (e) of the Constitutions enjoins every person to “renounce practices derogatory to the dignity of women.” Not only this, the Constitution further arms the State under Article 15 (3) to make any special provision for women.

A. Interpretation of Article 15 (3) of the Constitution

The protective discrimination in favour of women as provided for under Article 15 (3) of the Constitution involves three fundamental issues:

1. Whether there be preferential treatment in favour of women solely on the ground of sex, if it is not based on any peculiar disability connected with women as a class.

2. What peculiar features are required by women as a class to entitle them to preferential treatment.

3. Whether Article 15 (3) which speaks of special provisions for women refer to discrimination in favour of women or against them.

As regards the first issue, it is more than clear now that the concept of protective discrimination is an exception to the general
rule of equality. Preferential treatment in favour of women merely on the ground that they are women is violative of Article 15 (1)/ The protective discrimination should be allowed only if, because of certain peculiar disabilities from which they suffer, requires special protection. The peculiar disabilities should be because of certain social, economic, political, physical and other reasons from which they suffer as a class and thus have not been able to exercise their right in that sphere effectively and on an equal footing with men. The courts in India have adopted this approach. The Madras High Court in Srinivasan v. Padmasini Ammel,. 239 Disallowed a rule which exempted litigants from payment of coats simply on sex consideration. The court rightly pointed out that the special treatment to some feature or disability which is peculiar to women so as to differentiate them from men as a class. 240 Similarly, Allahabad High Court in Savitri v. K.K. Bose, 241 disallowed the decision of exercise authorities to prefer woman applicants to men applicants for granting licence for opening liquor shop and held it to be discriminatory and violative of Article 15 (1). 242 Thus, the courts have tried to balance the claims of women for preferential treatment and the interest of the society in general by giving rational interpretation to the concept of protective discrimination.

Regarding second issue it can be safely and that the protective discrimination in favour of women is valid provided it is based on criterion related to special features of women as a class. The U.S. Supreme Court in Khan v. Shevin, 243 has explained these special features in terms of “the difference between two saxes in structure of body; in the functions to be performed by such; in the

239 A.I.R. 1957 Mad. 622.
240 Basu, 1 Commentary on the Constitution of India (Fifth ed.) 519.
241 A.I.R. 1972 All. 305.
242 Id. at 308.
amount of physical strength; in the capacity for long continued labour; dependence of women upon men in general, the need for maintenance of the home and proper discharge of the material functions including the rearing and education of children in the future well being of the race; economic disparity between a widow and widower as a class." However, the several features mentioned above are those which women possess or from which they suffer not because of certain social, economic, political reasons but just being women i.e., a particular sex group. The courts in India, on the other hand have taken a broader approach in this regard and have given due consideration to social, economic and political factors for granting preferential treatment to women. In Dattaraya v. State of Bombay,244 the Bombay High Court upheld the separate representation in favour of women in Municipalities and other local bodies, and reliance was placed on Article 15 (3). Similarly, in Ramachandra v. State of Bihar,245 the Patna High Court upheld the validity of section 7 (v) (b) which provided for co-option of female member if no such member had already been taken in the ‘Panchayat Samiti’. The court while concurring the nature of Article 15 (3) as an exception to Article 15 (1) observed:

... so long as clause (3) of Article 15 stands as it is there is no scope for the argument that any special right conferred upon women in the special circumstances prevailing in this country can be struck down as going against clause (1) of Article 15.246

However, in India in political sphere the position of women save changed. They no longer suffer from those disabilities which

244 A.I.R. 1953 Bom. 311.
246 Id. at 216.
were peculiar to them. The election resultants in favour of women candidates during last three decades clearly show that they are under no disability or backwardness.\textsuperscript{247}

Therefore, discrimination in favour of women in political sphere normally should not be allowed except in very rare and exceptional cases and to a very limited extent as for example in Ramchandra's case.\textsuperscript{248}

The field in which protective discriminial is still required for women is that of education. Women and girls have had very limited access to it because of some social reasons. Therefore, reservation of seats in educational institutions and separate educational institutions are very much within protective discrimination and courts have upheld such measures by the State. Another sphere in which women can be given preferential treatment in public employment. The regulations of working hours for women, maternity benefits to them in form of maternity leaves etc. are some of the examples. The question which has raised a controversy is whether there can be a valid discrimination in favour of women by way of reservation of seats in public services. This question has been dealt by Delhi High Court in the case of M.A. Baid v. U.O.I.\textsuperscript{249} In this case, the post of senior nurising tutor in the school of Nursing Irwin Hospital, New Delhi, which was predominantly a female institution was reserved only for females keeping is view the requirements of the job. The court speaking through R.I. Anand, J., declared it to be violative of Article 16 (2), which guarantees absolute equality in matters of employment. He observed:

\textsuperscript{247} Basu, \textit{op.cit.}, supra note 240.
\textsuperscript{248} A.I.R. 1966 Pat. 214.
\textsuperscript{249} A.I.R. 1976 Delhi 302 (Single Bench).
It is difficult to accept the position that discrimination based on sex is never the
less not a discrimination based on sex “alone” because though those other
considerations have their genesis in the sex itself.\footnote{Id. at 306.}

The Court refused to invoke Article 15 (3) in determining the
scope of Article 16 (2)\footnote{Id. at 309.} meaning thereby that Constitutional
directive that State can make any special provision for women’
cannot rescue the reservation made in favour of women under
Article 16. It further observed that the equality of opportunity in the
matters of public employment between sexes and the
Corresponding prohibition against discrimination is absolute in
nature and no exception has been carved out of it in Article 16
unlike in Article 15.

It is submitted that the Court has taken a very narrow view of
Articles 15(3) and 16(2). On the other hand the view taken by
Punjab and Haryana High Court in case of Shamsher Singh v. State of Punjab,\footnote{A.I.R. 1970 P&H 372.} appears to be more sound. Here it was
observed that Article 14, 15, and 16 together constitute a part of the
same constitutional code of guarantees and supplemented each
other. In another case of Smt.Raghubans Saudagar Singh v. State
of Punjab,\footnote{A.I.R. 1972 P&H 117.} Where an order of the Governor of Punjab rendered
women ineligible to posts in men’s jails other than those of Clerks
and matrons. The Punjab and Haryana High Court upheld the
order. It observed that what is forbidden under the Constitution is
discrimination on the ground of sex alone but the peculiarities of
sex added to variety of other factors and considerations form a
reasonable nexus for the object of classification. Thus, the bar
\footnote{Id. at 309.}
under Articles 15 and 16 (2) can not be attracted. The Court in this case went into the problems which a women acting as a warder or other jain officer would have to face while personally ensuring and maintaining discipline over habitual criminals. With regard to the interpretation of Article 16 (2) given by the Delhi High Court in W.A. Baid’s case one may agree with Dr. Mohammad Ghouse when asks; if the learned Judge’s construction of Article is right, how can be government ensure appointment of lady doctors in maternity hospitals and lady teachers in girls school and college when the need for such appointment is self-evident?

The sex prejudice against the Indian Womanhood still persists and the case of Mrs. C.B. Mathuamma v. Union of India is a pointer towards that. Here Rules 8(1) and 18 (4) of the Indian Foreign Service (Recruitment, Cadre Seniority and Promotions) Rules 1961 which requires females employees to get permission before marriage and denial of right to employment to married women were said discriminatory and violative of Article 16 of the Constitution. Motherhood is an immutable and natural feature of a women she must be looked after for a certain period before and after childbirth. The Supreme Court of United States has held a rule which required a pregnant school teacher to stop teaching for a specified time before the anticipated birth without her to show that her physical condition would allow her to continue teaching even after the stated time as bad. The Supreme Court of India followed this case in Air India v. Nargesh Meerza, popularly known as Air Hostesses case. In this case certain in terms and
conditions of Air Hostesses services were contended to be discriminatory and violative of Article 14. They suffered from three disabilities: (i) Their services were terminated on first pregnancy; (ii) They were not allowed to marry within four years from the date of their entry into service and (iii) The age of retirement was 35 years, extendable to 45 years at the option of Managing Director. The Supreme Court condemned the regulation which took a crucial view of pregnancy of a woman by terminating her services on the ground of medical disabilities. The Court concerned that the provision under which the services of an Air Hostess would stand terminated on first pregnancy was most unreasonable and arbitrary provision which shocked the ‘Conscience of the Court’.

The Court went to the extent of saying that “termination of services under such circumstances was not only a callous and cruel act but an open insult to Indian womanhood, the most sacrosanct and cherished institution.”

However, regarding the question of marriage of an Air Hostess within four years, the court held that the provision did not suffer from any constitutional infirmity. The reasons given by the Court for holding the same were:

The Regulation permits an A.H. to marry at the age of 23 if the she has joined the service at the age of 19 which is by all standards a very sound and salutary provision. Apart from improving the health of the employees, it helps a good in the promotion and boosting up of our family planning programmes.

Secondly, if a women marries near about the age of 20 to 23, she becomes fully

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260 Emphasis supplied.
mature and there is every chance of such a marriage proving a success, all things being equal.

Thirdly, it has been rightly point out to us by the corporation that if the bar of marriage within four years of service is removed then the corporation will have to incur huge expenditure in recruiting additional A. Hs either on temporary or ad hoc basis to replace the working A. Hs if they conceive and any period short of four years would be too little a time for corporation to phase out such an ambition plan.262

With due respect, it is submitted that such that such bar on marriage appears to an outrage on the dignity of women and is unreasonable. If bar on marriage of Air Hostesses is going to boost family planning, then why not such a condition be imposed on all the serving women. Similarly, second reason is also not sound. If then why not to amend the provisions of Hindu Marriage Act, 1955 for that purpose.

Regarding Age of Retirement the court was of the view that the Corporation had placed good material to show some justification for keeping the age of retirement at 35 years (extendable upto 45 years) “but the regulation seems to arm the Managing Director with uncanalised and unguided discretion to extend the age of A.Hs at his option which appears to us to suffer from vice of excessive delegation of powers.”263 According to the court no guidelines or principles or norms had been laid down for his guidance and thus power was violative of Article 14.

262 Id. at 480.
263 Id. at 456.
As regards third issue, it did not come before the Supreme Court in general form and thus not answered by it. However, various High Courts have dealt with it. In *Mahadeep Jiew v. B.B. Sen*, the Calcutta High Court observed that the word 'discriminate against' involved a comparison and that one could not 'discrimination against' a person without discriminating in favour of some one else. Article 15 (3) which lays down special provision for women could not interpreted to authorize a discrimination against women because of following reasons:

(i) Article 15 (3) did not use the expression discrimination against but used the expression 'special provisions for';

(ii) The word 'for in the context meant in favour of'. The intention clearly was to protect the interest of women and children which according to the framers of the Constitution required protection.

The above interpretation gives a clear and coherent interpretation to Article 15 (1) and (3) because provision discriminating in favour of women would necessarily discriminate against men and would, therefore, constitute an exception to the prohibition of discrimination one the ground of sex contained in Article 15 (1).

In *Yusuf Abdul Aziz v. State of Bombay*, the validity of section 497 of the Indian Penal Code was challenged in so far as it punishes man for adultery and adultery and exempts the woman from punishment even though she may be equally guilty as an

264 Allahabad, Andhra Pradesh, Bombay, Calcutta.
265 A.I.R. 1951 Cal. 568.
266 Ibid.
abettor. Under the section the husband is empowered to prosecute the lover of his wife if he had sexual intercourse with her without her consent or consent or connivance. The wife cannot be punished as abettor and her consent to sexual relationship is of no importance whilst determining the guilt of the lover. The court held the provision valid since the classification was not based on the ground of sex alone. “The provision complained of is a special provision and it is made for women. Therefore, it is saved by Article 15 (3).” It was argued in the instant case that Article 15 (3) should be confined to provisions which are beneficial to women and cannot be used to give them a licence to commit and abet crimes. This argument was negatived by the court for it found no such restriction under Article 15 (3) nor agreed that provision which prohibits punishment tantamounts to a licence to commit the offence of which punishment has been prohibited. The decision is quite unconvincing. As Article 15 (3) permits only those measures which can to the advantage of women as a class. How the women in India are benefited by provision which does not punish a co-sharer of a crime? The decision has been affirmed in the recent case of Smt. S. Vishnu v. Union of India.268 In this case, a married women challenged the constitutionality of the entire section and not just the exclusionary clause. The Supreme Court still unwilling to accept that a marital women can indulge in extra-marital sex of her own will and accord still continues to protect them.

Section 427 of the Code of Criminal Procedure which corresponds to section 497 of the old code prohibits release of a person accused of a capital offence on bail except a women, a child under 16 or a sick man has been declared valid as malting out a special treatment to woman which is consistent which Article 15

268 1985 (1) SCALE 960.
The provision takes case of woman’s physical condition and saves her from falling into an awkward and hazardous situation which would have put her in inconvenience.

In Anjali Roy v. State of West Bengal, Bose, J., observed that Article 15 (3) really contemplates provisions in favour of women, although grammatically and etymologically ‘for’ may mean ‘concerning’ and although theoretically it is possible to think of reasonable discrimination against women and children such as that they shall not be admitted to certain sections of a public museum or an art gallery where exhibits of a certain kind are to be seen.

IX. PROGRESS IN IMPLEMENTATION OF MEASURES CONCERNING WOMEN

The cases of violence on women due to animal instinct in men have increase alarmingly in the recent times and the demand for the reopening of Mathura case shows the need for making punishment for such offence more stringent. The law on the point has been made very severe now.

A. Protection under Criminal Law

The Criminal Law (First and Second) Amendments Act, 1983 have made vast changes in the law relating to offences against women. The anti-rape law introduced by the Criminal Law (First) Amendment Act, 1983 has substituted sections 375 and 376 for the old sections and added sections 376-A to 376-D. Section 375 inserts a new clause “Fifthly” which reads:

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270 A.I.R. 1952 Cal. 822.
With her consent, when at the time of giving such consent, by reason of unsoundness of mind or intoxication or administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.

Also is clause “Thirdly” the words “or any other person in when she is interested” have been added.

Amended section 376 provides for penalties varying from seven years rigorous imprisonment to life term to those guilty of rape. This section makes sexual intercourse by a person in the position of a custodian of his victim (termed as “custodial rape”) as an offence punishable with imprisonment of at least ten years which may extend to life and also to fine. The section lays down four categories of “custodial rape”.272

1. A police officer committing rape in the local area to which he is appointed or in any police station whether or not situated in such local area, on a woman in his custody or in the custody of a police officer subordinate to him.

2. A public servant taking advantage of his official position and committing rape on a woman in his custody as such public servant or in the custody of a public servant subordinate to him.

3. Any person being on the management or on the staff of jail, remand home or other place of custody or of a women’s or children’s institution, taking advantage of his

272 S. 376 (2) of the Indian Penal Code.
official position and committing rape on any inmate of the institution.

4. Any person concerned with management or being on the staff of a hospital, committing rape on a woman who is receiving treatment in that hospital.

Rape on a woman knowing her to be pregnant and gang rape i.e., where a woman is raped by three or more persons acting in furtherance of a common intention to rape, has been made punishable and treated on par with “custodial rape”.

Sexual intercourse with a wife less than 15 years has also been covered under the definition of rape under section 375. Sexual relation with a woman who is staying separately from her husband under a decree of judicial separation falls within the ambit of the offence under section 376A.

In the custodial rape, it is the accused, rather than the victim who will be required to prove its innocence. The victim’s words for not having consented in a rape would be acceptable as true by the courts. A new section 114A added to the Indian Evidence Act, 1872 by the Criminal Law Amendment Act 1983 lays down that in a prosecution for rape under Cl. (a) or Cl. (b) or Cl. (c) or Cl. (d) or Cl. (e) or Cl. (g) of the sub section 2 of section 376 of the Indian penal Code, where sexual intercourse is proved and the question is whether alleged victim consented to it or not and she states in her evidence before the court that she did not consent, the court shall presume that she did not consent.
The above amendment has changed the law laid down in the famous Mathura case.\textsuperscript{273}

Section 228A added by the Amendment of 1983 seeks to prevent disclosure of identity of the victim of the offence of rape by prohibiting printing or publishing her name.

In order to punish the husband or relative of the husband from inflicting cruelty upon the woman a new chapter XXA comprising of section 498A has been inserted to the Indian Penal Code by the Criminal Law (Second Amendment) Act, 1983. This new section seeks to curb atrocities on woman including those arising out of dowry demands. It lays down that if a husband or the relative of the husband of a woman subjects such woman to cruelty, he shall be liable to punishment for three years and fine. The term “cruelty” under the section signifies any willful conduct driving the women to commit suicide or to cause grave injury or danger to her life or limb or health of the woman, harassment of the woman with a view to coercing her or any person related to her to meet any unlawful demand for any property or valuable security.

\textbf{B. Protection under Dowry Prohibition Act}

Another Act which has failed to serve its purpose is the Dowry Prohibition Act, 1961. Day in any day out we come across reports about harassment of young women because promised dowry has not been paid. They are even being put to death.

The Dowry Prohibition Act came into operation on 1st July, 1961. The Act saves the institution of dower or “mehr” in case of person whom Muslim Personal Law applies.\textsuperscript{274} Giving, taking or

\textsuperscript{273} A.I.R. 1979 S.C. 185.  
\textsuperscript{274} See Section 2 (B).
demanding of dowry has been made an offence under the Act.275 Under the Act dowry means and includes any property or valuable security given or agreed upon to be given between the parties concerned or by any person to any other person at, before or after the marriage as a “consideration for the marriage.”276 However, in Inder Sain v. The State,277 the Delhi High Court took a strange view that the demand of articles made and met after marriage did not constitute dowry. The law laid down in this case is not a good law. It is submitted that the presents and gifts made after marriage on different occasions should also be treated as dowry. The person violating section 2 can only be prosecuted with the prior sanction of the State Government.278 Keeping in view the intensity of the problem, the Act has been amended by the dowry Prohibition (Amendment) Act, 1984.279 By this amendment the original Act of 1961 has been made more stringent and effective against offenders. The penalty for giving or taking or demanding dowry has been enhanced under the amended Act and it might vary from imprisonment for a period of six months to two years and a fine of Rs. 10,000 as against Rs. 5,000 in the original Act. The main instrument for enforcement of the Act is the list of presents given to the bride or to the bridegroom at the time of their marriage. This list is to be maintained in accordance with the rules under the Act notified in the Gazette of India Extra-ordinary dated August 19, 1985. Failure to maintain the list of presents or failure to enter any present in the list would make the giver and receiver liable to punishment for giving or taking dowry. The original Act failed to serve the purpose for want of an efficient enforcement machinery. It

275 See Section 3 and 4.
276 Section 2.
278 See Sections 2 and 8 of the Act.
279 This amendment came into force from October 2, 1985.
is to be seen whether the amendment Act will be successful for fulfilling its purpose.

C. Protection under Guardianship Law

The Guardianship law in general has not been fair to mothers. Various statutes on the subject including the Hindu Minority and Guardianship Act, 1956 treat father as the natural guardian. The mother becomes the natural guardian only if father is dead or has been disqualified. Under Mohammedan Law the mother of a minor can be guardian only if appointed by the court, in absence of father, the father’s father and executor appointed by them. It has been seen that after divorce, fathers neglect to maintain their children. In such circumstances they should not be treated as natural guardian. In Jijabai v. Pathankhan, where the father was living away from the mother and child for several years without taking any interest in the daughter, the Supreme Court declared that mother could be considered as the natural guardian of minor’s person as well as property and had power to bind the minor by granting lease of her land in proper course of management of the property. The court treated the father as if non-existent. It is submitted that in the light of this case there is need for legislation to intervene to confer the right of guardianship on mothers at par with fathers.

D. Protection under Succession Act

As regards succession, generally speaking, a daughter has now been given a share in the properties of her father and mother. But in some cases the share is not equal to the son. For example

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280 Section 6 (a) the Minority and Guardianship Act, 1956.
281 Id, Section 6.
under the Travancore Christian Succession Act and Cochin Christian Succession Act the daughter’s share is one fourth of the share of son subject to maximum of Rs. 5000/- and one third of the share of the son respectively. Discrimination also prevails under Mohamedan and Parsi Laws.\textsuperscript{283} The Hindu Succession Act, 1956 also contains previsions which are not based on equality of sex. Section 15 of the Act, makes a distinction between property inherited by female from her parents and from her husband and her father-in-law. In absence of her lineal descendents or husband the former devolves on the heirs of her father while latter devolves on her husband’s heir. On the equal basis the property obtained by a male as heir to his wife should in the absence of lineal heirs devolve on his wife’s heirs. But section 8 does not contain such a provision. Section 15 does not mention about properties earned by a female Hindu out of her own exertions or gains of learning and, therefore, devolves on her husband’s heir. Keeping in view equality such property must go to her own blood relations.

In a very recent case of \textit{Pratibha Rani v. Suraj Kumar},\textsuperscript{284} the Supreme Court has declared that a Hindu married women is the absolute owner of her stridhan property and can deal with it in any way she likes. She may spend it to give it away without any reference to her husband. The husband has no right or interest in it although in times of “extreme distress, as ion famine, illness of the like, the husband can utilize it but he is morally bound to restore it or its value when he is able to do so.”\textsuperscript{285} The court criticized the judgment of Punjab and Haryana High Court in \textit{Surinder Mohan} v.

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{284} (1985) 2 SCC 370.
\item \textsuperscript{285} \textit{Id}. at 377.
\end{itemize}
\end{footnotesize}
Kiran Saini\textsuperscript{286} where the High Court was of the opinion that in view of Section 27 of the Hindu Marriage Act and Section 14 of the Hindu Succession Act, the concept of stridhan property was completely abolished.

The above decision of the Supreme Court shall benefit the married women. The Hindus have been benefited from social legislations improving status of women. Polygamy and no right of divorce, which had originally placed the Hindu women in a very inferior position, have been prohibited. New law permits only monogamy and also divorce. Both, husband and wife may divorce on identical grounds. In case of irretrievable marriage there is now provision for divorce by mutual consent.\textsuperscript{287}

There are different Acts concerning marriage and divorce such as, the Indian Divorce Act, 1869, the Hindu Marriage Act, 1955, the Special Marriage Act, 1954, the Muslim Marriage Dissolution Act, the Parsi Marriage & Divorce Act, 1935, dealing with law of divorce. It would be very appropriate if a uniform code as envisaged by the Constitution be enacted.\textsuperscript{288}

This point has been emphasised by Chandrachud, C.J., in \textit{Mohd. Ahmd Khan v. Shah Seno Sequm}\textsuperscript{289} where the learned judge said:

\begin{quote}
It is also a matter of regret that Article 44 of the Constitution has remained a dead letter. It provides that “The State shall endeavour to secure for the citizens a uniform civil code throughout the territory or India.” There is no evidence of any
\end{quote}

\textsuperscript{286} 1977 Chandigarh LR 212 (P&H).
\textsuperscript{287} Section 13-B (Inserted by Marriage Laws (Amendment) Act, 1976), The Hindu Marriage Act, 1955.
\textsuperscript{288} Article 44, The Constitution of India.
\textsuperscript{289} A.I.R. 1985 S.C. 945.
official activity for framing a common civil code for the country.\textsuperscript{290}

In the instant case the court applied section 125 of the Criminal Procedure Code to Muslims and declared that if the divorced wife is able to maintain herself, the husband’s liability to provide maintenance for her ceases with expiration of the period of iddat. But, if she is unable to maintain herself she is entitled to take recourse to section 125 and that there is no conflict between the provisions of section 125 and those of Muslim Personal Law.\textsuperscript{291}

E. Protection under Labour Laws

In the field of labour, legislature has give due recognition to directives under Articles 39 (e)\textsuperscript{292} and 42,\textsuperscript{293} dealing with physical welfare of women. The Factories Act, 1948 the Plantation of Labour Act, 1951 etc. contain provisions regulating the working hours and conditions thereof. The provisions for maternity benefits, crèches have also been made under these Acts. The Constitutional directive of equal pay for equal work for both men and women\textsuperscript{294} has been implemented by the Indian parliament by enacting the Equal Remuneration Act, 1976. This Act calls upon the employer to pay equal remuneration to both men and women for the similar work. However, these provisions are not being enforced strictly. It is generally heard that women are discriminated in matter of wages and other service conditions. But these protective legislations and affirmative actions for the benefit of women workers are proving counter productive because employers not being under compulsion to employ women are employing fewer to them as the so-called

\textsuperscript{290} Id. at 954.
\textsuperscript{291} Id. at 951.
\textsuperscript{292} This Article imposes duty on the State to direct its policy towards securing, health and strength of women etc.
\textsuperscript{293} This Article directs the State to make provisions for maternity benefits.
\textsuperscript{294} Article 39 (d).
These protective legislative legislations were mainly some for them. These protective legislations were mainly directed to fall in line with the directive of the International Labour Organisation rather than to improve the status of women. These legislations benefit only 6 per cent of women in the workforce i.e., those who are in the organised sector. Whereas 81 per cent of women who were agricultural labourers or in allied jobs and 13 per cent of the workforce who were in non-organised and non-agricultural occupations did not get benefit of even these.

I. Women and National Policy on Education - 1986

In order to remove disparities and to equalise educational opportunity for women, the National Policy on Education 1986 has provided as under:

Educational will be used as an agent of basic change in the status of women. In order to neutralize the accumulated distortions of the past, there will be well-conceived edge in favour of women. The National Education System will play a positive, interventionist role in the empowerment of women. It will foster the development of new values through redesigned curricula, textbooks, the training and orientation of teachers, decision-makers and administrators and active involvement of educational institutions. This will be an act of faith and social engineering, women’s studies will be promoted as a part of various courses and educational institutions encouraged to take up active programmes to further women’s development.

296 Id. at 263.
297 2.7% in industry and 3.3% in service and profession.
298 Lotika Sarkar, op. cit. supra note 295.
The removal of women’s illiteracy and obstacles inhibiting their access to and retention in, elementary education will receive overriding priority, through provision of special support services, setting of time targets, and effective monitoring. Major emphasis will be laid on women’s participation in vocational, technical and professional education at different levels. The policy of non-discrimination will be pursued vigorously to eliminate sex stereotyping in vocational and professional courses and to promote women’s participation in non-traditional occupations, as well as in existing and emergent technologies.\textsuperscript{300}

II. APPRAISAL

At national and international level great attention is being given to the matters concerning child welfare. Child, said Francis bacon, is the father of man. What he obviously meant was that the productiveness of an adult depends on the opportunities he has to grow and develop as a child. The significance attached to the proper upbringing of children by Gandhiji found a concrete expression with the independence of India. The Constitution of India contains of Pt. Jawaharlal Nehru in Children resulted in giving a new Phillip to child welfare.\textsuperscript{301} Mrs. Gandhi was no less solicitous about the welfare of children. According to her “Children are a reminder of the fact that man is immortal although men may be mortal. A nation realizes its potentialities through its children, and is judged by what it does for children.”\textsuperscript{302}

The Constitution of India which came into force on 26\textsuperscript{th} January, 1950 contains provisions for the welfare of child. It

\textsuperscript{300} Ibid
\textsuperscript{301} To quote him, “Children are one the world over and they could become a unifying factor in a world that is torn apart by narrow nationalism” quoted in Arvind Bhandari “Children’s Welfare” in The Hindustan Times, 15 November, 1984, p. 9.
\textsuperscript{302} Ibid
provides sufficient powers and direction to both the centre and states to enact legislation for child welfare.

However, when we move the reality the picture is somber. Of the 255 million children below 14, nearly 90 per cent suffer from malnutrition, about one lakh succumbing to it every month. India’s infant mortality rate of 125 per 1,000 is among the highest in the world. Over 30,000 children go blind every year because of vitamin A deficiency. Nine out of every 1,000 school-going children suffer from rheumatic heart diseases as a result of nutritional anemia.\footnote{303}{After adoption of the National Policy of Children in August, 1974 an Integrated Child Development Scheme (ICDS) was launched in 1975 – 76 with 33 projects in which a package of services and non-formal education was to be provided. Now there are 300 projects. The Sixth Plan target increased to 1,000 projects. But this target covers only six million children. Another eight million children are to be fed under the Special Nutrition Programmes as part of Minimum Need Programme.\footnote{304}{These two schemes barely touch the fringe of the problem.}}

Another problem regarding children is their exploitation. India has the dubious distinction of having the largest child labour force for any country in the world. According to the latest estimate of the number of Child Workers based on 32\textsuperscript{nd} round of national Sample Survey (NSS), the number of children employed in country between the age of five and 14 on March 1, 1993 was 17.36 million.\footnote{305}{The actual figure may be much more if one takes into account thousands of children working as “helpers” and “carriers” in mines and factories who never figure in official records because}

\footnote{303}{Ibid.}
\footnote{304}{The Tamil Nadu State has started from July 1, 1982, a Scheme to provide mid-day meals to poor school children in rural areas.}
\footnote{305}{“Bill to ban Child Labour”, \textit{The Hindustan Times, January 24, 1986} p. 8.}
employees have taken care not to include their names in the labour registers open to inspection. These children work for a distance for a long as eight to ten hours. Though the Employment of Children’s Act prohibits the employment of children below 14, violations of it seldom come to light because of lax enforcement inculciness and the collusion of the inspecting staff with the employees.

The problem of exploitation of child through child labour is not only a constitutional or legal problem but it is also a social and economic problem and must be tackled as such. So child labour, child under-trials, child beggars and child adoption are some aspects which require urgent and immediate attention. However, the Government has come forward with the Child Labour (Prohibition and Regulation) Bill 1986 on which the fate of 44 million working children depends\(^\text{306}\) has been passed by Rajya Sabha on November 5, 1986. Not it is before the Lok Sabha. This bill is useless till the Government does not open rehabilitation centres for the exploited children. Ironically instead of banning child labour, the Bill vent to “approve their presence”. The Bill proposes protection to children in the labour force by limiting their hours at work and prohibiting their employment in hazardous industries and even providing for their unionization. After this Bill becomes an Act it will be seen as to what extent an immediate solution to the problem of child exploitation has been provided. This bill is in conformity with International Labour Organisation Standards relating to definition of “child”.

Regarding free and compulsory education for children upto fourteen years of age,\(^\text{307}\) the time limit put by the Constitution was upto January, 1960. But this target still remains to be achieved.

\(^{306}\) The Hindustan Times (New Delhi) November 17, 1986.

\(^{307}\) Article 45, The Constitution of India.
Children are sufficiently protected under the criminal law, the law of Contract, the Law of Torts, Family Law and of Evidence. In order to deal effectively the problems of children, it is suggested that constitution should be emended to place ‘children’ in the concurrent list. It will thus be possible for both the centre and states to cooperate in implementing child welfare programmes. Further, Norway, is the first country in the world to appoint ambudsman for children.\(^{308}\) It is suggested that India should follow the suit.

As regards women, the Constitution of India, contains elaborate provisions for their protection and welfare. The judiciary in her own way has helped in the process of equalization between men and women in independent India. It has acted with open mindedness while dealing with cases where there are chances of injustice against women due to peculiar social asset up.

The Patna High Court annulled the marriage in a case, where it was materialized between a girl age sixteen years and managed sixty years on the ground of fraud.\(^{309}\) The Court found no direct consent by the wife. She had only overheard her father telling his mother that he had fixed her marriage with an affluent husband of about 30 years. The recent cases of Mrs. C.B. Muthuamma v. Union of India,\(^{310}\) Air India v. Nargesh Meerza,\(^{311}\) Smt. S.Vishnu v. Union of India,\(^{312}\) Pratibha Rani v. Suraj Kumar,\(^{313}\) and Mohd. Ahmed Khan v. Shah Sano Begum,\(^{314}\) which have already been dealt with in this chapter are pointers towards the same. However, there are instances where judicial attitude has been ambivalent.

\(^{308}\) The Times of India, 19th February, 1981.
\(^{309}\) Babui Panmto v. Ram Agya, A.I.R. 1968 Pat. 190.
\(^{310}\) A.I.R. 1979 S.C. 1868.
\(^{312}\) 1985 (1) S.C. All 960.
\(^{313}\) (1985) 2 SCC 370.
\(^{314}\) A.I.R. 1985 S.C. 945.
The right to work\textsuperscript{315} although falls under part IV of the Constitution dealing with the directive principles of State policy and not enforceable by the courts, is nevertheless fundamental in the governance of the country. To some judges the right of the husband to determine the location of the matrimonial home has been the deciding factor subordinating all other considerations. To some other judges the wife’s reluctance to join her husband due to exigencies of her service has been regarded as a matrimonial offence entitling husband a decree of restitution of conjugal rights or of judicial separation. In \textit{Gaya Prasad} v. \textit{Bhagwati},\textsuperscript{316} where husband who was a cobbler filed a petition for restitution of conjugal rights because his wife had taken up a job as gram sevika and this job necessitated her living in another village. The Madhya Pradesh High Court allowed the decree of restitution of conjugal rights.

The Madras High Court, on the other hand in \textit{N.R. Radhakrishan} v. \textit{N. Dhanalakshmi},\textsuperscript{317} refused to accept the traditional roles of Hindu Women and their subordinate position in matrimony. In the instant case court refused to grant a decree of restitution of conjugal rights.

The Gujrat High Court has also taken a similar view.\textsuperscript{318} But Dashpende, J., (as he then was) invoked Article 14 in \textit{Swaraj} v. \textit{K.M. Garg}\textsuperscript{319} in support of his view that husband had no exclusive right to decide about he location of matrimonial home. This approach of justice Deshpande is a welcome one and will go a long way in giving respectable status to women in this country.

\textsuperscript{315} Article 41, The Constitution of India.
\textsuperscript{316} A.I.R. 1966 M.P. 212.
\textsuperscript{317} A.I.R. 1975 Mad. 331. In this case the husband was a bus driver. The wife was serving as school teacher in Madras and was augmenting the family income. The husband got her transferred to Krishnagiri and then filed petition for restitution of conjugal rights.
\textsuperscript{319} A.I.R. 1978 Del. 296.
In summing up the attitude of courts towards women, a writer\(^{320}\) has very rightly said that “courts are now” willing to wound discrimination where ameliorative legislations are operative, they are “afraid to kill” discrimination where there is no legislation by a resort to the provisions of the Constitution. In other words, the courts are prepared to be led by the legislature rather than lead them.”

So from above, it can safely be said that after commencement of the Constitution of India, great emphasis has been given to the equality of genders. But it is surprising to note that India is yet to sign the United Nations Convention on Eradication of Discrimination Against Women.\(^{321}\)