CHAPTER-V
RIGHTS OF CHILD IN INDIA

5.1. RIGHTS OF THE CHILD UNDER INDIAN CONSTITUTION

Prohibition of child labour and provision for compulsory universal, primary education for all children up to the age of fourteen have been advocated long before Independence. In 1906, Gopal Krishna Gokhale, the then President of the Indian National Congress, unsuccessfully urged the British Government to establish free and compulsory elementary education. The movement continued. With the setting up of the Constituent Assembly in 1949, it was resolved that the future Constitution of India would provide for abolishing child labour and ensure compulsory education to children. The reference was made to Article 23 para 2 of the Yugoslavian Constitution in this regard which prohibits the employment of children in mines, factories or other hazardous jobs. The matter was discussed in the Constituent Assembly with all concern. Significantly, the draft constitution prepared by the Drafting Committee contained provisions for prohibition of child labour and for free and compulsory education for children.

Article 18 of the Draft Constitution provided ban on the employment of children below 14 years of age in any factory or mine or engaged in any other hazardous employment. It reads as:

No child below the age of 14 years shall be employed in any factory or mine or engaged in other hazardous activities.

Sh. Damodar Swarup Seth while expressing his views with regard to affording protection to children of minor age also suggested an addition to the

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2 Corresponding to Article 24 of the enacted Constitution.
3 See Supra note 1.
said article for prohibiting employment of women workers at night in order to protect their health.4

Prof. Shibban Lal Saksena also advocated the amendment proposed by Sh. Damodar Swarup Seth. He said that he was very glad that this article has been placed among fundamental rights. Infact, one of the complaints against this charter of liberty is that it does not provide for sufficient economic rights. If we examine the fundamental rights in the Constitutions of other countries, we will find that many of them are concerned with economic rights. In Russia, particularly, the right to work alongwith, the right to rest and leisure, the right to maintenance in old age and sickness etc., are guaranteed. We have provided these rights in our Directive Principles, although it was thought, that they should be incorporated in this chapter. Even then, this article 18 is an economic right that no child below the age of fourteen shall be employed in any factory. He further suggested that the age should be raised to sixteen. In other countries, also the age is higher, and they also want that in our country this age should be increased particularly on account of our climate, children are weak at this age and the age should be raised.5

Article 366 in the Draft Constitution provided free and compulsory education to all children below 14 years of age. Pandit Lakshmi Kanta Maitra moved an amendment that in Article 36, the words “Every citizen is entitled to free primary education” be deleted. It was proposed that after amendment Article 36 would be read as follows.

That state shall endeavor 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.

4 Shri Damodar Swarup Seth moved an amendment in this article. He wanted to add the following at the end of Article 18: ‘Nor shall women be employed at night, in mines or in industries detrimental to their health’. Constituent Assembly Debates, Volume-VII, p.814.
5 Ibid.
6 Corresponding to Article 45 of the enacted Constitution.
The purpose for amendment was that the Article 36 is a Directive Principle of State policy but the words "Every citizen is entitled to ............etc" is not into line with the preceding and subsequent articles. This article resembles Fundamental Rights in its wording. This cannot be fit with others directive principles of State policy. Another reason is that, the education should not be confined to the primary but it may go upto the secondary stage, so long as the person is up to the age of 14.\textsuperscript{7}

Dr. B.R. Ambedkar accepted the proposed amendment that every child shall be kept in an educational institution under training until the child is of 14 years. Dr. B.R. Ambedkar supported this amendment with the view of Mr. Naziruddin Ahmed who has given the objective behind this article and referred to Article 18, which forms part of the fundamental rights, it would have been noticed that a provision is made in Article 18 to forbid any child being employed below the age of 14 obviously, if the child is not to be employed below the age of 14, the child must be kept occupied in some educational institution that was object of Article 36, and that is why the word ‘primary’ is quite in appropriate in the particular clause.\textsuperscript{8}

The Fundamental Rights enacted in Part-III operate as limitations on the powers of the State and impose negative obligations on the State not to encroach on individual liberty and they are enforceable not only against State. But there are certain Fundamental Rights conferred by the Constitution which are enforceable against the whole world and they are found inter-alia in Article 17, 23 and 24.\textsuperscript{9} Article 23 was incorporated in the Constitution to prohibit traffic in human beings and begar and other similar forms of forced labour. The reason for enacting this provision in the chapter of Fundamental Rights is to be found in the

\textsuperscript{7} See Supra note 4.
\textsuperscript{8} See Supra note 4.
socio-economic conditions of the people at the time of enactment of the Constitution.

The Constitution makers, when they set out to frame the Constitution, found that they had the enormous task before them of changing the socio-economic structure of the country and bringing about socio-economic regeneration with a view of reaching social and economic justice to the common man. Large masses of people, lived two centuries of white foreign rule, were living in abject poverty and destitution with ignorance and illiteracy accentuating their helplessness and despair. The society had degenerated into status-oriented hierarchical society with little respect for the dignity of the individual who was in the lower rungs of the social ladder or in an economically impoverishment condition. The political revolution was completed and it had succeeded in bringing freedom to the country but freedom was not an end, the end being the raising of the people to higher levels of achievement and bringing about their total advancement and welfare. Political freedom has no meaning unless it was accompanied by social and economic freedom and it was, therefore, necessary to carry forward the social and economic revolution with a view to create socio-economic conditions in which every one would be able to enjoy basic human rights and participate in the fruits of freedom and liberty in an egalitarian social and economic framework. It was with this end view, that the framers of the Constitution enacted the Directive Principles of State policy in Part-IV of the Constitution, setting out the constitutional goal of a new socio-economic order.¹⁰

Article 39(f) enjoins that the State shall direct its policy towards securing that children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and the childhood and youth are protected against exploitation and against moral and material abandonment.¹¹

¹⁰ Ibid.
¹¹ Article 31(v) of the Draft Constitution enjoined that the State shall direct its policy towards securing the health and strength of workers; men and women; and the children of tender age will not be abused; the citizens should not be forced to enter avocations unsuited to their age and
This article was incorporated with the background that the economic system of our country at the time of independence was such that women might be forced by sheer necessity to take occupation which may not be suitable to the conditions imposed on them by nature. To avoid these complications the members of Drafting Committee has incorporated this Article.¹²

Prof. Shibban Lal Saxsena also advocated a socialist system in our country. He said that we have here magnificent and sparkling words i.e. social justice, political justice and economic justice, which are very splendid words but they appear very far away from the toiling millions. Why not state here, not today, not tomorrow, but in the distant future that the community will owe, what belongs to the community by the gift of nature and, by gift of God. He also stated that though he did not belong to the Socialist party yet he appealed to Dr. B.R. Ambedkar who claims to represent the downtrodden untouchables of the country not to wash away this hope from their hearts that in the future years the natural resources of the community may belong not to the privileged few but to the poor people of the country, for the good and benefit of all.¹³

Although the Directive Principles are not enforceable or justifiable in this way, they were nevertheless viewed as being fundamental to the governance of the country. Their significance was lucidly and forcefully enunciated by Dr. B.R. Ambedkar in a statement made in the Constituent Assembly.¹⁴

In enacting this part of the Constitution, the Constituent Assembly is giving certain directions to the future legislatures and the future executives to show in what manner they are to exercise the legislative and the executive power they will have. Surely, it is not the intention to introduce in this part these principles as mere pious declarations. It is the intention of the Assembly that in future both the legislature and the executive should not merely pay lip service of these principles as mere pious declaration.

¹² See Supra note 4.
¹³ Ibid.
Instead they should be the basis of all legislative and executive action that they may be taking hereafter in the matter of governance of the country.

The same spirit was reflected in yet another statement\textsuperscript{15} by Pandit Jawahar Lal Nehru.

\begin{quote}
The service of India means the service of the millions who suffer. It means the ending of poverty and ignorance and disease and inequality of opportunity. The ambition of the greatest man of our generation has been to wipe every tear from every eye. That may be beyond us but as long as there are tears and suffering so long our work will not be over.
\end{quote}

It is well-known that work, unless it is creative, interesting and challenging can be extremely harmful to the young children. That is not to undermine the dignity of manual labour, but merely to point out that there are strict limitations on the forms, content and extent of work that young children can safely undertake. How can children afflicted with malnutrition and other crippling disabilities be expected to cope up with stress and exhaustion of work and at the same time grapple with the rigors of non-formal education. It is necessary to ponder over the questions and what is likely to lead to before making a policy decision and implementing it. The legislature in its wisdom very aptly appreciated that mere release of the child labourers without making appropriate arrangements for his rehabilitation will serve no useful purpose and, may even create a very real problem as to livelihood of the labourers so set free and, accordingly the legislation made suitable provision for the rehabilitation of child labourers.

This was the first step of independent India to provide a social and economic freedom to all Indians. It is quite clear, that mere passing of welfare legislation for the upliftment of the down trodden, the meek and weak is by itself not sufficient, though undoubtedly the legislation is the first step in right direction and this step is taken by our constitution makers in 1948. But the real and most important thing which is required is that every law enacted, particularly welfare legislation for the benefit of the weaker section of the people, must be

\textsuperscript{15} ibid.
implemented in the proper spirit for achieving the noble object for which legislation is passed. Implementing, the law has, necessarily to be effected through human agencies. Unfortunately, frailties of human nature and degeneration of human character often add to existing problem, instead of solving them.\footnote{Ibid.}

The Constitution as was finally adopted on 29th November, 1949 contained provisions for the protection of children. The Constitution guarantees special protection to children. The relevant provisions in this regard are discussed below:

Article 15(3) provides that "\textit{Nothing in this Article shall prevent the State from making any special provision for women and children}". This clause is an exception to the rule against discrimination embodied in clause (1) as well as clause (2) of the above referred Article.\footnote{Article 15(1) provides: "The State shall not discriminate against any citizen on grounds only of religion race, caste, sex, place of birth or any of them" Article 15(2) provides: "No citizen shall, on grounds of religion, race, sex, place of birth or any of them, be subjected to any disability, liability, restriction or condition with regard to-\begin{itemize}
\item \textit{a)} access of shops, public restaurants, hotels and places of public entertainments; or
\item \textit{b)} the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of general public."
\end{itemize}} Clause (3) enables the State to confer special rights upon children. Thus, law regarding separate accommodation for children at places of public resort, restricting hours of labour for children is not prohibited. In the same way laws prohibiting employment of children below a particular age, employment of children in hazardous or injurious work are also saved. These laws are passed taking into consideration the physical structure of the child.

Article 24 provides that "\textit{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}". It must be noted that this Article does not create an absolute ban to the employment of child labour. In the first place, this Article
applies only to children below the age of 14 years. Secondly even in case of the children below 14 years, this Article only prohibits the employment of children in a factory or mine or in any other hazardous employment.

The Supreme Court has interpreted this clause to provide protection and security to the children. In the case of *labourers working on Salal Hydro Project v. State of Jammu and Kashmir*,18 the apex Court said that the construction work was a hazardous employment and hence no child below the age of 14 years could be allowed to be employed in the construction work.

The child labourers are firstly children and then labourers. As such they should also not be treated cruelly and in humanly. In *Bandhua Mukti Morcha v. Union of India*,19 Justice P.N. Bhagwati interpreted Articles 21 and 24 of the Constitution and held;

"It is the Fundamental right to every one in this country assured under the interpretation given to Article 21.... To live with human dignity..... It must include the tender age of children against abuse, opportunities and facilities for children to develop in a health manner and in condition of freedom and dignity, educational relief. These are the minimum requirements which must exist in order to enable a person to live with human dignity and neither the Central Government nor State Government has, the right to take any action which will deprive a person of the enjoyment of these basic essentials which go to make up a life of human dignity".

However, it remains a bitter truth that in most of the cases the little workers are not provided adequate medical care, rehabilitation and educational facilities, good food service, payment of normal subsistence allowance and so on.

18 AIR 1984 SC 177, Apex Court has also re-iterated the same principle in *P.U.D.R. v. U.O.I*. AIR 1982 SC 1473 that construction work is hazardous and State Government should take immediate steps for inclusion of construction in the schedule of Employment of Children Act, 1938.
19 AIR 1984 SC 802, Bandhua Mukti Morcha is an organization dedicated to the cause of release of bonded labourers, informed the Supreme Court through a letter that they have conducted a survey of the stone-quarries situated at Faridabad of the State of Haryana and found that there were a large number of labours working in these stone quarries under "inhuman and intolerable conditions." The Court treated a letter a writ petition, p.811.
The another step to prohibit child labour was taken in *M.C. Mehta v. State of Tamil Nadu and others* 20 where Supreme Court in order to tackle the problem of child labour issued directions to the State Governments to fulfill the legislative intention behind the Constitutional provision. The Court while taking guidance from Child Labour (Prohibition and Regulation) Act, 1986 further directed that the offending employer must be asked to pay compensation for every child employed in contravention of the provisions of the Act a sum of Rs.20,000/- and the inspectors, whose appointment is visualized by Section 17 to secure compliance with the provision the Act, should do this job. The inspectors appointed under Section 17 would see that each child employed in violation of the provisions of the Act, the concerned employer pays Rs.20,000/- which sum could be deposited in a fund to be known as Child Labour Rehabilitation-cum-Welfare fund. The liability of the employer would not cease even if he would desire to disengage the child presently employed. It would perhaps be appropriate to have such a fund district wise or area wise. The fund so generated shall from corpus whose income shall be used only for the concerned child. The quantum could be the income earned on the corpus deposited qua the child. To generate greater income, fund can be deposited in high yielding scheme of any nationalized bank or other public body. In the end, the Hon'ble Ld. Judges of Supreme Court said that they part with the hope that the closing years of the twentieth century would see us keeping the promise made to our children by our constitution about a half-century ago. 21

Further Article 45 22 expressed that “the *State shall endeavor to provide within a period of 10 years from the commencement of the Constitution free and compulsory education for all children until they complete the age of fourteen years.*”

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20 AIR 1997 SC 699.
21 The copies of this judgment is to be sent to Chief Secretaries of all the State Governments and Union Territories so also to the Secretary, Ministry of Labour, Government of India for their information and doing the needful.
22 Before the enforcement of the Constitution (Eighty-Sixth Amendment) Act, 2002.
This directive should have been implemented by the end of January 1960. But the State could not keep the time limit for its implementation, as during the year 1960-61 only 62.40% of the children of 6-11 age group and 22.5% of the 11-14 age group were going to a school. Thus it is evident that time limit has not been considered by the State to be the essence of the mandate of Article 45. The total literacy rate in India in 2001 is 65.38 percent consisting of 75.85 percent men and 54.16 percent women. There are, however, wide variations across regions, states, castes, classes and sexes. Realizing the delayed tactics the Supreme Court in **Unni Krishan v. State of Andhra Pradesh** held that the right of education up to the age of 14 years is a fundamental right within the meaning of Article 21 of the Constitution. The rights to education flows directly from the right to life. It further stated that it is noteworthy that among the several Articles in Part-IV, only Article 45 speaks of time limit, no other Article does. Has it got some significance? Is it a mere pious wish, even after 44 years of the Constitution? Neera Burra, renowned social workers has also felt that if there is at all a blueprint for tackling the problem of child labourer, it is education.

The Constitution (Ninety Third Amendment) Bill, 2001 provided to make free and compulsory education to all citizens of the age group of 6-14 years, a fundamental right, by inserting Article 21A in the Constitution. Further, under Article 51 A of the Constitution, after clause (J) the following clause was suggested to be added namely clause (k) to provide opportunities for education to a child between the age of six and fourteen years of whom such citizen is a parent or guardian.

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24. UNICEF in India 1999-2002 – Challenges and Opportunities UNICEF.
25. 1993(1) SC 645. The petitioner running Medical and Engineering Colleges in State of Andhra Pradesh, Karnataka, Maharashtra and Tamil Nadu contended that if Mohini Jain decision is correct and followed by their respective State Government they will have to close down their colleges.
26. See *Supra* note 20, p.709.
27. The Constitution (Eighty-Sixth Amendment), Act, 2002.
• The amendment makes education as a fundamental right for children in the age group of 6-14 years.  
• The State shall endeavor to provide early childhood care and education for all children until they complete the age of six years. 
• It shall be the fundamental duty of the parents and guardians to provide opportunities for education to their children or, as the case may be, words between the age six and fourteen years.

The Government has failed to establish a Common School System (CSS) despite recommendations by the Kothari Commission (1964-66) and adoption of the same in National Policy on Education (NPE) 1968, 1986 and 1992. Now after the insertion of Article 21 A which made Right to education a fundamental right, the government drafted a Bill titled “Free and Compulsory Education for Children, 2003”. The object of the Bill is to provide free and compulsory education for all children from the age of six years up to fourteen years.

The Bill defines compulsory education which means and implies an obligation on appropriate Government to take all steps to ensure that every child is enrolled and retained till the prescribed level of education is received by such child in a school imparting the prescribed courses of study and steps taken

28 A new Article has been inserted, namely: Article 21A provides: “The State shall provide free and compulsory education to all children of the age of six to fourteen years in such a manner as the State may by law, determine.”
29 Article 45 has been substituted. Now Article 45 provides: “The State shall endeavor to provide early childhood care and education for all children until they complete the age of six years.”
30 In Article 51A of the Constitution a new clause has been added, namely Article 51 A(k) “who is parent or guardian to provide opportunities for education to his child or as the case may be, words between the age of six and fourteen years”.
32 Section 2(g), The Free and Compulsory Education for Children Bill, 2003.
33 Section 2(g), Ibid.
34 Section 2(b) “Appropriate government” mean the Government in case of States mentioned in Part I the First Schedule to the Constitution; Union Territory Administration in case of Union Territory of Part II of the First Schedule to the Constitution which have their own legislature; the Central Government in case of Union Territory mentioned in Part II of the First Schedule to the Constitution which do not have their own legislature.
in this behalf. The Bill further differentiates between recognized substantially aided School and Special School.

The Bill also provides the appointment of Basic Education Authority in each State and Union Territory for the implementation. This authority is under an obligation to submit a plan three months prior to the beginning of the year to general body or local authority detailing the steps to be taken in the year and the strategies to be followed to get all children to the School.

The Bill, 2003 further states that the education shall be free and compulsory for every child of school age. The appropriate government shall ensure the availability of the school in accordance with the norms notified by the appropriate Government. The attendance authority shall ensure free education to a child in a school unless such child is receiving education in a recognized but not substantially aided school. But this Bill will not entitle a parent to claim reimbursement of any expenses incurred voluntarily in respect of education of a child in a recognized School which is not substantially aided by the Government.

The Attendance Authority shall also prepare a list of all children of the School going age, including a list of out of school children three months before the start of every academic year. It shall be duty of the parent or guardian of every child to cause the child to attend an approved School unless there is a reasonable excuse for his or her non-attendance in a school. In case of children

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35 Recognized School means a School recognized by the competent authority or any State Elementary Education Board or All India Council of Secondary Education or National Institute of Open Schooling or any other body or verified for public education by the competent authority.
36 Substantially aided School means a School which meets at least 75% of its annual expenditure through funds received as a loans or grant within individually from Central Government or State Government or Local Authority or collectively from all of them.
37 Special School means an institution imparting education for children suffering from any disability.
39 Attendance authority means the local authority concerned or any other authority.
who are with parents or guardian, the local authority within whose jurisdiction the child ordinarily resides shall be deemed to be guardian for the purpose of the Bill.  

The Bill also further provides reasonable excuses for the non-attendance of a child:

i) that there is no approved School within the prescribed distance from his or her residence.

ii) that the child is receiving education in a recognized school.

iii) that the child suffers from any disability which prevents him from attending a school.

iv) that such a child is exempt from attendance on such other grounds as may be prescribed.

A First draft of the legislation envisaged in the above sections i.e. Free and Compulsory Education for Children Bill, 2003 was prepared and posted on this website in October, 2003 inviting comments and suggestions from the public at large. Subsequently, taking into account the suggestions received on this draft, a revised draft of the Bill entitled Free and Compulsory Education Bill, 2004, was prepared and posted on this website. The matter of the proposed legislation came up for discussion in the Central Advisory Board of Education (CABE) constituted vide order dated 08.09.2004 of the Ministry of Human Resource Development with the following terms of reference:

a) to suggest a draft of legislation envisaged in Article 21-A of the Constitution.

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b) to examine other issues related to elementary education for achieving the objective of free and compulsory basic education.

The Committee has total five meetings and revised draft prepared was submitted in June, 2005 and it was renamed as “Right to Education Bill, 2005”. The Bill has a clear objective to provide free and compulsory education to all children in the age group of six to fourteen years. The key features of the Act are.\textsuperscript{46}

Rights of Every Child

- Every child between the age group of 6-14 years has the right to full-time free and compulsory education in a neighborhood School.\textsuperscript{47}
- Non-enrolled children of age group 7-9 years have the right to be admitted in an appropriate grade within one year of the commencement of the Act,\textsuperscript{48} and of age group 9-14 years have the right to be provided special programme that will enable them to attend age appropriate grade within three years.\textsuperscript{49}
- Children with severe and profound disability, who are unable to attend a neighbourhood School, have the right to be provided education in an appropriate environment.\textsuperscript{50}
- A child cannot be held back in any grade or expelled from a school till VIII. Any expulsion requires an order of the School Management Committee (SMC),\textsuperscript{51} which will be given only after all other corrective measures have been exhausted, and parents/guardians have been heard. The local

\textsuperscript{46} <http://www.indianngos.com/issue/education/resources/legislative/%20brief%20-%20%20Right%20to%20Education%20Bill%202005.pdf> accessed on 1\textsuperscript{st} June, 2006.
\textsuperscript{48} Section 3(2), ibid.
\textsuperscript{49} Section 3(3), ibid.
\textsuperscript{50} Section 22(1), ibid.
\textsuperscript{51} Section 22(1), ibid – A school Management Committee shall be constituted for every State School and aided school with such representation of parents, teachers, community representatives of the local authority as may be prescribed.
authority will take such steps to enroll such a child in another neighborhood school.52

Responsibilities of the State

- The State shall ensure availability of a neighborhood school for every child within three years. In case of non-availability, free-transport or free-residential facilities shall provided. The State/UT Government shall determine every year the requirement of schools, facilities and their locations.53

- The State shall develop a mechanism to monitor enrolment, participation, attainment status of every child, and take corrective steps wherever required. Information in this regard will be made available in public domain, including on one line basis.54

School Admission

- State Schools55 and fully aided schools56 shall provide free education to all admitted children partly aided schools shall provide free education to at least such proportion of admitted children to the extent that government funds its annual expenses, subject to a minimum of 25%. Unaided schools57 and special category schools58 shall provide free education to at least 25% students; the government shall reimburse the school to the extent of the per child expenditures in government schools or the school fee, whichever is lower.59

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52 Section 3(5), ibid.
53 Section 5(1), ibid.
54 Section 5(iii), ibid.
55 Section 2(oo), ibid, State School means a School run by an appropriate government or a local authority.
56 Section 2(s), ibid. Full-aided school means a school, which receives grants from a government or local authority to meet its fully recurring expenses, or such part, being not less than 90% of the recurring expenses as may be prescribed.
57 Section 2(qq), ibid, Unaided school means a school which is neither a State School nor an aided school.
58 Section 2(nn), ibid, special category schools include Kendriya Vidyalayas, Navodaya Vidyalayas, Sainik Schools, etc.
59 Section 14, ibid.
• No school shall conduct any screening procedure of any child or parents at the time of admission. Children will be selected for admissions in random manner capitation fees are prohibited.60

School Management

• All State and aided schools are required to form School Management Committees (SMCs) with at least 75% of the members being parents/guardians, and the other members representing teachers, the community and the local authority. SMCs will manage the school, including the sanction of leave and disbursal of salary of teachers. The SMC/Local authority shall also have the power to assess teacher’s performance and impose minor punishment.61

• Teachers of State Schools will be appointed to a specific school, and teachers already serving will be assigned to a specific School within two years. They will not be transferred from the school so assigned.62

• The Teacher has the duty to transact and complete the curriculum, regularly assess the learning level of each child, provide supplementary instruction if required, and apprise every parent/guardian about the progress of learning and development of the child.63

• Teachers are prohibited from giving private tuitions.64 Teachers shall not be deployed for any non-educational purpose other than census, election and disaster relief duties.65

Other Important Provisions:

• No person shall prevent a child from participating in elementary schools. No person shall employ or otherwise engage a child in a manner that renders her a working child.66

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60 Section 15, ibid.
61 Section 22, ibid.
62 Section 23, ibid.
63 Section 26, ibid.
64 Section 21, ibid.
65 Section 20, ibid.
66 Section 48, ibid.
It is the responsibility of every parent/guardian to enroll his child/ward who has attained the age of 6 years and above in a school and facilitate her completion of elementary education. If a parent/guardian persistently defaults in discharging this responsibility, the SMC may direct him to perform compulsory community service by way of child care in the school.\(^{67}\)

Any person who has a grievance about the establishment, provisioning and management of a school may submit a written representation to the SMC/local authority, which shall take appropriate action and inform the applicant within 90 days. If the applicant is unsatisfied with such action, she may submit a representation to such authority as prescribed by the State/UT/Central Government, which shall take an appropriate action and inform the applicant within 90 days.\(^{68}\)

The Bill specifies the penalties for persons and Schools contravening the provisions regarding capitation fees, screening tests, recognition and preventing children from participating in elementary education.\(^{69}\)

This would be the first Central Legislation, if enacted, on School education and, therefore, requires to be comprehensive. Despite all this it can be said to be a revolutionary step for the first time in our country to ensure education to children.

5.2. RIGHTS OF THE CHILD UNDER THE LABOUR LAWS

The dawn of Industrial Revolution in Europe witnessed the growing awakening against the systematic exploitation of children, various protective legislation providing for non-employment of children below a certain age and providing for a guaranteed minimum wage were the end products towards the fulfillment of this awakening. In India the gravity of the problem came to light with the various commissions and committees, which had been set up to look into

\(^{67}\) Section 50, ibid.
\(^{68}\) Section 46, ibid.
\(^{69}\) Section 51, ibid.
various facets of labour problems. The earliest full scale exercise in this regard was the work done by Whitely Commission (Royal Commission on Labour), in 1931. Labour Investigation Committee (1944-46) also made useful contribution in this regard. Then in this chain is the Report of National Commission on Labour (1969) and the latest one in this regard was Report of Second National Labour Commission (2001).

Royal Commission on Labour in 1931 was a milestone in the area of the Child Rights. The Commission stated:70

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

It accordingly recommended legislation to fix the minimum age of employment of children at a level higher than that prevailing in the industries. Another development in area of employment of child labour was reached with the appointment of labour Investigation Committee in 1944. Set up by the Government of India, the Committee was asked to investigate, interalia, questions relating to employment of children. It observed.71

"The important fact that has emerged from investigations is that in various industries, mainly smaller industries, the prohibition of employment of children is disregarded quite openly, and owing to the inadequacy of the inspection staff it has become difficult to enforce the relevant provisions of the law".

The National Commission on labour (1969) found the poverty responsible for the employment of children at the cost of their education.72

71 Labour Investigation Committee Investigation Committee, Main Report, 1944, p.35.
During the course of our observational visits, we found prevalence of child labour in handloom and power loom units usually a weaver has as it his mate a child of the school going age. The education of the mate is no concern of weaver nor of the person who engages the weaver. Children are not direct employees, but they help the weaver and collect whatever money they can get from him. In due course they learn the trade. If the education of a child is a casualty in the process it is the poverty of the parents which is to be blamed. Brocade work is another intricate operation where child labour is quite common. In the units we inspected, the proprietor assured us that though the boys who were working there looked between 8-10 years of age or even younger, they were all above 14, the age at which adolescents were permitted to be engaged under the local rules. In several cases, we were told, the payment to the child was the responsibility of the adult worker whom the child helped. When the former himself gets a low wage, he could be parting with but little of it for his helper. The whole arrangement appeared to be exploitative when seen in relation to the fact such operations were carried on so near the factory premises. A similar arrangement prevails in carpet weaving, but in the case the relative share of wages of the child workers is better. The low earnings of the artisan are compensated by the income of his mate, if the latter belongs to the same house. But this is at the cost of education of the junior operative. An artisan cannot afford to educate his wards though education is free. From him an uneducated child is an asset, desire to be educated becomes double liability because of (a) loss of earnings of the child did not work and (b) expenditure on education howsoever small.

In 1978, the Government of India set up a 16-member Committee to examine existing laws, their inadequacies and implementation and also to suggest welfare measures, training and other facilities for the benefits of the children in employment. The Committee, submitted the report suggested, inter alia, for raising the minimum age for employment to 15 years.73

The Second National Commission on Labour was constituted after three decades in a different backdrop of liberalization, Privatisation and Globalisation (LPG). The Commission was headed by Mr. Ravindra Verma. The Government of India announced the appointment of Commission with twin tasks before them:

73 First Commission on labour was headed by P.B. Gajendragadkar was formed in 1966 to make labour laws consistent with the then dominant discourse of mixed economy. The Commission declared the focus was on improving the living conditions of workers, providing legal protection to the work force, etc.
i) to suggest rationalization of existing laws relating to labour in organised sector.

ii) to suggest an umbrella legislation for ensuring a minimum level of protection to the workers in the unorganised sector.74

Initially, when the deliberations on the issue of social security was started, one view was that Commission should confine itself strictly to the matters of security of workers. Consequently, it was realised that the terms of reference is to study and recommend measures for assuring protection and welfare to workers. It has been asked to review the legislation for workers in the organised sector (this includes laws on social security for workers in the organized sector) and also to recommend umbrella legislation that assures protection and welfare of to workers in the unorganised or informal sector.75 The Commission released its report in the year 2001, which runs upto 1700 pages.

The report discusses in detail plight of children at work place. It further quotes the report on Human Development in South Asia for 1997 which describes the plight of children in South Asian Countries as Follows:76

“To be a child in South Asia is to suffer a life of constant denial. Children are often born without their mothers being attended by trained health personnel. Infact, nearly 70% of the mothers struggle alone, surrounded by untrained though anxious relatives at the time of their greatest need. In their survival and development, these children face even more formidable hardies that those they face at birth. Half of the world’s malnourished children (83 million) are to be found in just three countries Bangladesh, Pakistan and India. About 85 million children in South Asia have never seen the inside of School. Only half of the total number of school-age children enroll in schools. Of these 42% drop out before reaching Grade 5. While many children are forced to leave school due to family circumstances and the compulsion to provide economic support to the household at a tender age, one of the main reasons for the high rates school dropout in South Asia is that both parents and children realise the poor quality of education they receive. Dramatic improvements are required in teachers training and supervision in learning material and

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75 Ibid.
76 Ibid.
school facilities. Many children have to work over fifteen hours a day and are after physically abused. Rape and beatings are frequent."

The plights of children, the existing legislation and the schemes of the Government of India has been discussed in detail in the report under a separate chapter on 'woman and child labour'. The report lays down that there are two perceptions of what constitutes child labour. The first perception identifies Child Labour as work done by children outside their home/family for a minimal wage. According to this perception child labour is synonymous with the exploitation of poor and young child working outside their families. The I.L.O. further supports this view when it says, it is "not concerned with children helping in family farms and doing household chores. "It defines child labour to "include children leading permanently adult lives, working long hours for low wages under conditions damaging to their health and physical and mental development, some times separated from their families, frequently devoid of meaningful educational and training opportunities that could open up a better future to them."

The second definition of child labour put forward by groups critical of the conventional definition argues that all forms of work are bad for children.77 Besides this, the report also lays down that children work in factories and workshops, a number of children are also found in home based work, helping their parents and children work in agricultural sector as well.

The approach of the study group on women and child labour has been that the child, the child's welfare and child's future should be made central in all programmes and in laws also. Every child should have the opportunity to develop his or her skills and potential, to participate both as a citizen and as a worker. The Commission endorses this approach.78 The entire strategy would have to be based on promoting the norm that no child should work, and all children should be in schools. The Commission observed that the Child Labour (Prohibition & Regulation) Act, 1986 is limited in scope. It does not cover all occupations and

77 Ibid.
78 Ibid.
processes where children are working. The Act covers only some hazardous occupation and processes. It includes children working in family based enterprises. The report further emphasized on the issue that the law does not say what should happen to the child labourer once the employer is prosecuted. The report also highlighted for points that the implementation of the Act depends entirely on the State’s bureaucratic machinery. It assumes that the bureaucracy, poorly staffed and ill-equipped as it is today, will be able to ensure that children does not work in hazardous processes and occupations, and conditions of work in non-hazardous setting will be upgraded. Education is referred to in three different types of laws. Instead of enabling and empowering parents to send children to school, the report further recommended that the government incorporates the suggestions contained in various judicial pronouncements under relevant laws or guidelines. The Commission also proposed an indicative law on Child Labour, which would replace the existing Child Labour (Regulations and Prohibition) Act, 1986. They have emphasized that a national scheme is to be designed for the payment of children’s allowance on universal basis subject to a mean test, to persons below the poverty line. This would be one way of integrating social security schemes with poverty alleviation programmes. Special measures should be taken to prevent sickness and promote the overall well being of children especially the girl child.

The legislative activity revolving around child in this country is more than a century old. But the burden of early legislation was in the area of health, marriage, crime, personal status and to a very minor extent to the employment of the child. With the introduction of factory system in the country, the legislations in the field of regulation of child employment began. The power to legislate in the field of labour relations, labour welfare and vocational and technical training belongs both to the Centre and the States. As such both the Centre and the State legislatures have enacted laws in the field of employment of child labour.

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79 Ibid.
However, the State legislations were passed predominantly in the field of non-industrial occupations i.e. shops and commercial establishments.

In the field of Industrial establishment, the predominant legislative activity has been in the areas of prohibition and regulation of working hours of child labour in certain spheres. The important legislations are Employment of Children Act 1938, Factories Act 1948, Motor Transport Workers Act 1961, Plantation Labour Act 1951, Mines Act 1952, Merchant Shipping Act 1958, Beedi and Cigar Workers (Conditions of Employment) Act, 1966, Child Labour (Prohibition and Regulation) Act, 1986. The key features of briefly different legislation has been discussed.

5.2.1. Inland Steam Vessels Act, 1917
- Provides provision regulating the employment of children.
- Applies to steam ships ordinarily playing on inland waters.
- Lot of omission due to an old enactment.

5.2.2. The Children (Pledging of Labour) Act, 1933
The Act was enacted during pre-independence era but remains in force.
- Object of the Act is eradicate the evils rising from pledging the labour of young children.
- An agreement to pledge the labour of children below 15 years by a parent or guardian of a child in return for any payment or benefit is void.\(^80\)
- Act penalize both parent or guardian and employer in case of pledge of labour of the child. Employer is liable for a fine of Rs.200/- \(^81\) and parent or guardian is liable for fine upto Rs.50/- \(^82\)

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\(^80\) Section 3, The Children (Pledging of Labour) Act, 1933.
\(^81\) Section 6, ibid.
\(^82\) Section 4, ibid.
5.2.3. The Employment of Children Act, 1938:83

This is the earliest unrepealed legislation on the statute book controlling the employment of underaged persons in certain types of occupation. It provides:

- No child who has not completed 15 years of age can be employed in any occupation connected with transport of passengers, goods or mail by railways, or a port authority within the limit of a port.84
- Limited protection to the children who are within 15-17 years of age. This protection is not applicable to children who are employed as either apprentices or are receiving vocational training.85
- Prohibits the employment of children below the age of 14 in workshops connected with bidi-making, carpet weaving, cement manufacturing, cloth printing, dyeing and weaving, manufacturing of matches, explosives and fire works, mica cutting and splitting, shellac manufacture, soap manufacture, tanning and wool cleaning.
- The State Governments are empowered to extend the scope of this provision to any other employment.86 In exercise of this power Government of Madras has extended the Act to children working as cleaners in workshops attached to motor companies. The Government of Uttar Pradesh has extended the provisions of the Act to brass ware and glass bangle industries.
- The penalty for the breach of the Act is imprisonment upto one month or fine upto Rs.500/- or both.87

It is however imperative to mention here that this Act has been repealed to the extent it is inconsistent with the Child Labour (Prohibition and Regulation) Act, 1986.88

83 The Employment of Children Act, 1938, Act No.XXVI of 1938.
84 Section 3(3), ibid.
85 Section 3(2), ibid.
86 Section 3-A, ibid.
87 Section 4, ibid.
88 For the provisions of the Child Labour (Prohibition and Regulation) Act, 1966 see infra 5.2.13.
5.2.4. The Factories Act, 1948:

The first Welfare Legislation passed by the Britishers was Factories Act, 1881. The implementation of the Act was restricted:

- It only applies to those establishments where one hundred or more persons are employed.
- Minimum age was seven years.
- Successive employment on the same day was prohibited.
- Duration of employment i.e. working hours was not to exceed nine hours a day and at least four holidays in a month.

The Act was amended in 1891 to increase the minimum age upto nine years.

The Act was again amended in 1948 and the key features are as follows:\textsuperscript{89}

- Prohibits the employment of children below 14 years of age in factory.\textsuperscript{90}
- Factory covers the establishment, which employs 10 or more workers with the aid of power or 20 or more workers without the aid of power.\textsuperscript{91}
- Persons who are between the 14 and 15 years, they can be employed under following restrictions provided under Section 68, 69 and 71 of the Act:
  - Such persons should have certificate of fitness issued by a Surgeon and should carry a token giving a reference to such certificate.\textsuperscript{92}
  - The certifying Surgeon should follow the procedure laid down in Section 69.
  - They should not work at night i.e. 12 consecutive hours including the period from 10 PM to 6 AM.\textsuperscript{93}

\textsuperscript{89} Act No. 39 of 1948.
\textsuperscript{90} Section 67, The Factories Act, 1948.
\textsuperscript{91} Section 2(m), ibid.
\textsuperscript{92} Section 68, ibid.
\textsuperscript{93} Section 68, ibid.
• They should not work for more than four and half hours a day.\textsuperscript{94}
• The period of work should be limited to two shifts.\textsuperscript{95}
• The shift should not overlap.\textsuperscript{96}
• Spread over should not to exceed five hours and should also not change except once in 30 days.\textsuperscript{97}
• Prohibits successive employment on the same day.\textsuperscript{98}
• Employer should display a notice regarding the periods of work for such children.\textsuperscript{99}
• Manager should mention register in respect of such child-workers.\textsuperscript{100}
• No child is to be employed except in accordance with the notice of periods of work displayed.\textsuperscript{101}
• State Government is empowered to make rules prescribing the physical standards to be attained by children and adolescents working in factories.\textsuperscript{102}

5.2.5. The Plantation Labour Act, 1951\textsuperscript{103}

• Covers all tea, coffee, rubber and cinchona plantation admeasuring 5 hectares or where 15 persons or more are employed on any days of the preceding 12 months.\textsuperscript{104}
• State Government is empowered to extend the provisions of the Act to any land measuring less than 5 hectares or the person employed is less than 15.

\textsuperscript{94} Section 71(1)(a), \textit{ibid.}  
\textsuperscript{95} Section 72, \textit{ibid.}  
\textsuperscript{96} \textit{Ibid.}  
\textsuperscript{97} \textit{Ibid.}  
\textsuperscript{98} Section 71(4), \textit{ibid.}  
\textsuperscript{99} Section 72, \textit{ibid.}  
\textsuperscript{100} Section 73, \textit{ibid.}  
\textsuperscript{101} Section 74, \textit{ibid.}  
\textsuperscript{102} Section 76(b), \textit{ibid.}  
\textsuperscript{103} Act No 69 of 1951.  
\textsuperscript{104} Section 4(a), \textit{ibid.}
• No child and no adolescent shall be employed for work unless he is certified fit for work by a Surgeon.\\textsuperscript{105}
• Certificate is valid only for one year.\\textsuperscript{106}
• Use of false certificate is punishable by imprisonment which may extend to one month or with fine or both.\\textsuperscript{107}

Act is comprehensive as it is the only Act which makes the provisions for education as a responsibility of employer and so is for the housing, medical and recreational facilities.\\textsuperscript{108}

5.2.6. The Mines Act, 1952\\textsuperscript{109}

The scope of Mines Act is limited.
• Applies to excavation where operation for the purpose of searching for or obtaining minerals has been or is carried out.\\textsuperscript{110}
• Not only prohibits the employment of any ‘child’\\textsuperscript{111} but even presence of a child in any part of mine which is below ground or in any open cast working in which mining operation is carried on.\\textsuperscript{112}
• Adolescent who has completed the age of sixteen years is allowed to work only if he has a medical certificate of fitness for work.\\textsuperscript{113}
• Certificate is valid for 12 months only.\\textsuperscript{114}

5.2.7. The Merchant Shipping Act, 1958
• Prohibits the employment of children in any capacity, who are below 15 years of age on sea going except:\textsuperscript{115}

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\\textsuperscript{105} Section 25, \textit{ibid.}
\\textsuperscript{106} Section 27(2), \textit{ibid.}
\\textsuperscript{107} Section 34, \textit{ibid.}
\\textsuperscript{108} Section 5, 6 7, \textit{ibid.}
\\textsuperscript{109} Act No 35 of 1952.
\\textsuperscript{110} Section 2(j), \textit{ibid.}
\\textsuperscript{111} Child means a person who has not completed 15 years.
\\textsuperscript{112} Section 45(i), \textit{ibid.}
\\textsuperscript{113} Section 40(i), \textit{ibid.}
\\textsuperscript{114} Section 41(i), \textit{ibid.}
\\textsuperscript{115} Section 109, The Merchant Shipping Act, 1958.
a) in a school ship or training ship; or
b) in a ship in which all persons employed are members of one family; or
c) in a home made ship of less than two hundred tons gross; or
d) where such person is employed on nominal wages and will be in charge of his father or other adult near male relative

- Act applies only to ships registered in India.116
- Government is empowered to make rules regarding the employment of young persons.117

5.2.8. The Apprentice Act, 1961
- Object of the Act is to provide for the regulation and control of training of apprentices in trade and for matters connected therewith.118
- ‘Apprentice’ is a person who is going apprenticeship training in a designated trade in pursuance of contract of apprenticeship.119
- No person is qualified for being engaged as an apprentice to undergo training unless he has completed the age of 14 years and satisfies the others standards of physical fitness and education as may be prescribed.120
- If the apprentice is minor his guardian is required to enter into a contract of apprenticeship with the employer and it shall be registered with Apprenticeship Advisor.121

5.2.9. The Motor Transport Workers Act, 1961122
- Covers every motor transport undertaking employing 5 or more transport workers.123

116 Section 2, ibid.
117 Ibid.
118 The Apprentices Act, 1961, Preamble.
119 Section 2(aa), ibid.
120 Ibid.
121 Ibid.
122 Act No.27 of 1961.
• State Government is empowered to extend the provisions of the Act to any motor transport undertakings employing less than 5 workers.124
• Prohibits the employment of children below the age of 15 years in the motor transport undertaking.125
• Adolescents are prohibited to work unless certified by a Surgeon.126
• Certificate is valid for 12 months only.127

5.2.10. The Beedi and Cigar Works (Conditions of Employment) Act, 1966

Though the Factories Act, 1948 apply to workers engaged in beedi manufacturing yet there had been a tendency on the part of the employers to split the concern into smaller units to escape the provisions of the Act.

• No child below the age of 14 years is allowed to work in any industrial premises.128
• Employment of young persons between 14 to 18 years is prohibited between 7 PM to 6 AM.129
• Penalties for the breach of provision is imprisonment upto three months or fine upto Rs.500/- or both.130
• Provisions for Canteen,131 First aid132 cleaning133 and ventilation134 are also made under the Act.

124 Section 1(4), ibid.
125 Section 21, ibid.
126 Section 22, ibid.
127 Section 23(2), ibid.
128 Beedi and Cigar Works (Conditions of Employment) Act, 1966, Section 24(b).
129 Section 25, ibid.
130 Section 32, ibid.
131 Section 16, ibid.
132 Section 15, ibid.
133 Section 8, ibid.
134 Section 9, ibid.
5.2.11 The Shops and Commercial Establishment Act, 1969.

Provisions relating to minimum age also exist in different state shops and commercial establishment Act.

- Applies to shops, commercial establishment, restaurants and hotels and place of amusement and notified areas to which Factories Act does not apply.
- State Government is empowered to extend the coverage of the Act in any establishment.
- Minimum age of employment is 12 years in Bihar, Gujarat, J&K, Madhya Pradesh, Karnataka, Orissa, Rajasthan, Tripura, Uttar Pradesh, West Bengal, Goa, Daman & Diu and Manipur.\(^{135}\)
- Age is 14 years in Andhra Pradesh, Assam, Haryana, Himachal Pradesh, Kerala, Tamil Nadu, Punjab, Delhi, Chandigarh, Pondicherry and Meghalaya.\(^{136}\)
- Minimum age of employment is 15 years in Maharashtra.\(^{137}\)
- No separate Act in Andaman Nicobar, Arunachal Pradesh, Dadra and Nagar Haveli, Lakshdweep, Nagaland and Sikkim.\(^{138}\)

5.2.12. Radiation Protection Rules, 1971

- Children below 18 years are not to be employed where radiation exists.

5.2.13 The Child Labour (Prohibition and Regulation) Act, 1986

The Act is an outcome of various recommendations made by a series of Committees.\(^{139}\) There was a constant demand in favour of a uniform comprehensive legislation to prohibit the engagement of children in certain other employments to achieve this goal, parliament enacted the Child Labour

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\(^{137}\) *Ibid.*


The Child Labour (Prohibition and Regulation) Act, 1986 (CLPRA) which came into force on 23 December 1986. The objectives of Child Labour (Prohibition and Regulation) Act, 1986 are:

- Banning the employment of children i.e. those who have not completed their fourteenth year, in specified occupation and processes.
- Laying down procedures to decide modifications to the schedule of banned occupation or processes.
- Regulating the conditions of work of children in employment where they are not prohibited from working.
- Laying down enhanced penalties for employment of children in violation of the provisions of this Act and other Acts which forbid the employment of children.

**The significant provisions of the Act are as under:**

- Prohibits the employment of any person who has not completed his fourteenth year of age in occupations and processes set forth in Part-A and Part-B of the schedule of the Act.
- Act classifies the establishments in two categories i.e. first one is where the child labour is prohibited and second one is where the working conditions of child shall be regulated.
- Central Government has power to amend the schedule.
- Child Labour Technical Advisory Committee is constituted for the purpose of addition of occupations and processes of the schedule.

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140 Section 3 provide 'No Child shall be employed or permitted to work in any occupations set forth in Part A of the Schedule or in any workshop wherein, any of the processes set forth in Part B of the Schedule is carried on'.
141 Part-A of the Schedule of the Act specifies 13 Occupation in which employment of children is not allowed.
142 Part-B of the schedule of Act specifies 54 processes in which employment of children is allowed where the process is carried out by the occupier with the aid of his family or to any school established by or receiving assistance or recognition from Government.
144 Section 4, ibid.
145 Section 5, ibid.
• Prohibition of employment is not applicable where process is carried on by an occupier with the aid of his family or school established by or recognized or receiving assistance from Government.\textsuperscript{146}

• Provides provisions for regulation of conditions of work of children in establishment which are not referred in schedule.\textsuperscript{147}

• Appropriate Government is empowered to make rules for the health and safety of the children employed.\textsuperscript{148}

• In case of dispute as to the age of a child the certificate granted by a prescribed medical authority is conclusive evidence.\textsuperscript{149}

• Any person, Police Officer or Inspector may file a complaint of the commission of an offence under the Act.\textsuperscript{150}

• No Court inferior to that of Metropolitan Magistrate or a Magistrate of the first class shall try any offence under this Act.\textsuperscript{151}

• Penalties are stringent, any person who employs any child in any hazardous employment shall be punishable with imprisonment for a term not less than 3 months but which may extends to one year or with fine not less than Rs.10,000/- but which may extend to Rs.20,000/- or with both.\textsuperscript{152}

• For a repeated offence, the imprisonment for a term which shall not be less than six months but which may extend to two years.\textsuperscript{153}

• For violation of any other provisions under the Act or rules, the punishment is imprisonment which may extend to one month, or with fine which may extend to Rs.10,000/- rupees or both.\textsuperscript{154}

\textsuperscript{146} Proviso to Section 3, \textit{ibid.}
\textsuperscript{147} Section 7, \textit{ibid.}
\textsuperscript{148} Section 13, \textit{ibid.}
\textsuperscript{149} Section 10, \textit{ibid.}
\textsuperscript{150} Section 16(1), \textit{ibid.}
\textsuperscript{151} Section 16(3), \textit{ibid.}
\textsuperscript{152} ibid.
\textsuperscript{153} Section 14(2), \textit{ibid.}
\textsuperscript{154} Section 14(3), \textit{ibid.}
The Act provides both for imprisonment and fine but in practice, there are few instances where the employer is prosecuted, he is generally fined. The CLPRA 1986 increases and makes more stringent penalties for employing child labour in violation in comparison to Factories, Mines, Merchant Shipping and Motor Transport Acts. It empowers the Union Government to bring into force provisions that regulate conditions of work of children in non-hazardous occupations. It provides the machinery i.e. child Labour Technical Advisory Committee for adding to the list of occupations and processes in which employment of child is prohibited. The ban has been imposed by the Labour Ministry on the employment of children as domestic servants or servants or in dhabas, restaurants, motels, tea shops, resorts, spas or in other recreational centres. The decision has been taken on the recommendation of Child Labour Technical Advisory Committee and will be effective from 10th October, 2006.\footnote{<http://www.newkerala.com/news4php?action=fullnew&id=170> accessed on 2nd August, 2006.}

The Committee while recommending a ban said that these children are at times even subject to sexual abuse. The incidents of these kids either go unnoticed and unreported as they take place in close confines of the household or dhabas or restaurant. This measure is expected to go a long way in ameliorating the conditions of hapless working children.\footnote{Ibid.}

But still the Act needs amendment for better implementation and enforcement. According to Neera Burra,\footnote{Quoted in M.C. Mehta v. State of Tamil Nadu AIR 1997 SC 699.} there are number of loopholes in the Act. She has further also tried to show how unpracticable and unrealistic it is to draw a distinction between hazardous and non-hazardous processes in a particular industry.\footnote{Ibid, p.708} One of the prominent loophole is that child can continue to work if they are a part of family of labour. It covers only 10 percent of total working children, which are working in organized Sector. Moreover, the agricultural sector, which constitutes more than 75 percent of the child employment, is not covered under the Act. The risk is more in case of...
agricultural Sector because of pesticide exposure. The organs of the children are still developing, they are less able than adults to expel toxins from their body. Their breathing rate is much higher than adults and they have more skin surface per unit of body weight than adults, allowing them to both breathe in and absorb higher concentrations of toxins.\textsuperscript{159} In fact, there should be prohibition on all forms of child labour since all occupations are hazardous and affect development of child if the child is denied primary, elementary education because of the need to work, it is a hazard in itself.\textsuperscript{160}

The problem of child labour can hardly be solved by raising the minimum age of child to 15 as suggested by Committee on Child Welfare. It is submitted, that unless basic needs are provided to all people which, includes food, shelter, clothing, educational facilities, the root cause cannot be eradicated only by prohibiting the employment of children and raising the minimum age of employment. There is no uniformity in the labour holidays, leave, safety and welfare of child labour. In view of this, it is suggested that a comprehensive legislation on child labour be enacted which should apply to children employed in industrial establishment. This would bring uniformity of standards in all industries in the sphere of employment of children. There is no labour legislation which seeks to regulate working hours, holiday, leave, health and welfare in domestic services, unorganized sectors and to casual labour. The circumstances suggested that there should be comprehensive legislation for child labour employed in rural and unorganized sectors. However, in making such legislation it is necessary to keep in mind the practical difficulties and problems of enforcement.

\textsuperscript{159} For details see Chapter III.
\textsuperscript{160} Ossie Fernandes Towards Amendments/Restricting of the Child Labour Prohibition & Regulation Act, 1986, a draft note prepared on behalf of the Legal Working Group Campaign Against Child Labour (CACL)
5.3. RIGHTS OF THE CHILD UNDER THE COMMERCIAL LAWS

The Indian Law of Contract is largely an imitation of English Law of Contract with only few changes introduced to meet the local conditions. The requirement of valid contract is that the parties should have capacity to contract. The principle is that everybody has this capacity, but there are number of exceptions, most important is concerning the age of majority.

See 11 (2) of Indian Contract Act\(^\text{161}\) deal with capacity to enter into contract. This section rests on three fundamentals:

a) The contracting party should be major.

b) He should be of sound mind.

c) No law to which he is subject should disqualify him.

The laws fail to distinguish between minors of different ages, rules apply equally to babies in the arms and young men and women of seventeen. In reality cases involving child of tender age rarely occur or if they do they are settled by the common sense of the parents rather than by litigation. The object of rules governing the contractual capacity of minor, seems to be based on the principle that child should be protected for his own experience, while at the same time, he should not be allowed to benefit from the privilege at the expenses of adult. But still harsh reality is that though Indian Courts have laboured hard to overcome these shortcomings, but they have not succeeded in formulating the clear cut rules to govern all forms of contractual relations effecting child.

The party must be in a position to comprehend the nature of transaction since the minor is immature, lacks the experience and is incapable of forming an independent and accurate judgment. Thus in matters of contract, competency is the rule and in competency is an exception. In India\(^\text{162}\) the minor becomes major

\(^{161}\) Section 11(2) of Indian Contract Act.

\(^{162}\) Section 3 of Indian Majority Act, 1875.
when he is 18 years except when he is a ward of a court in that event the age of
majority is 21 years. However, in respect of marriage, dower, divorce and
adoption person, the minor below 18 or 21 can enter into contract,
notwithstanding the provisions of Section 11 if he is major according to law to
which he is subject. The competency inserted in Section 11(2) of Indian
Contract Act, 1872 is so imperative for the validity of contract that if the minor
does not take the plea of minority, it is the duty of the court to protect him and
give effect to the statutory prohibitions. The contract being void ab-initio the
minor need not set aside the contract.

Section 11 of the Indian Contract Act, 1872 does not make it clear as to
whether a child’s agreement is voidable at his option or altogether void.
Contractual obligation may be construed as obligation arising from contracts. If
there is no contract, there is no obligation. The incompetency of a child leads to
no contract, and hence, no contractual obligation. However, it is not feasible to
abolish child agreements, may be for services or necessities of life. The
controversy as to the nature of child’s agreement was resolved in 1903 by
Judicial Committee of the Privy Council in the leading case of Mohori Bibee v.
Dharmodas Ghose holding that all contracts entered by a child are void ab-
initio. It was held that mortgage entered by the minor was void and the mortgage
who has advanced the money to the minor on the security of a mortgage was not
entitled to repayment of money under Section 64 and 65 of the Indian Contract
Act, 1872 as mortgage is invalid. Sir Ford North while delivering the judgment
observed:

“....... Looking at these Sections, their Lordships are satisfied that the Act
makes it essential that all 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.”

163 Hindu Law – Age of majority 16, Muslims 15, others 18 & 21.
164 Hawahar v Manma 124 IC 436.
165 (1903) 30 IA 114.
Similarly, in the *Mir Sarwayan v. Fakruddin Mahommed Chowdhuri*\(^{166}\) a contract to purchase certain immovable property had been made by a guardian on behalf of a minor, and the minor sued the other party for a decree of specific performance to recover possession. The Court observed that it was not within the competence of the guardian to bind the minor or his estate by a contract for the purchase of immovable property. The suit was dismissed.

In the modern set up of society, it is not practicable to adhere to the categorical declaration that child’s contract is always void ab-initio. The children now-a-days, deal, more frequently than ever before the book-sellers, general merchants, transporters, tailors, clothiers, drycleaners, barbers and employees etc. The Courts, therefore, started modifying their earlier decisions. In *Sri Kakulam Subrahmanyam v. Kurra Subba Rao*,\(^{167}\) the Court held that where a contract is entered into on behalf of a minor, by his guardian or by a manager of his estate, it can be enforced specifically by or against the minor if the contract is one which it is within the competence of the guardian to enter into on his behalf so as to bind him by it, and, further, if it is for the benefit of the minor. There are certain legal implications of child agreements given below:

### 5.3.1. Ratification

An agreement by a minor is totally void and unenforceable. In such circumstances there can be no ratification of what is void. It is necessary that a fresh contract should be made on attaining majority and a new contract will also require fresh consideration. In *Shri Ram v. Mohan Lal*\(^{168}\) it has been laid down that for a valid ratification there must be three requisites - (a) attainment of majority (b) full knowledge of the nature and effect of transaction to be ratified and (c) a clear promise or an act inductive of intentional acknowledgement of the

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\(^{166}\) (1912) 39 Cal 232.
\(^{167}\) (1948) AIR Nag 293.
\(^{168}\) AIR 1935 Nag 127.
liability. In a similar case, *I. Ramaswamy v. A Cheetiar*,\(^{169}\) a minor borrowed a sum of money and executed a simple bond for it. After attaining majority he executed a second bond in respect of original loan plus interest. The Apex Court held that the suit on second bond was not maintainable as it was without consideration.

A minor need not pay debt incurred by him on attainment of majority. But if he pays it he cannot later sue for refund on the footing that the debt was itself void. It must be deemed that what he paid was a gift and as such cannot reclaimed.\(^{170}\) In *S. Shanmugan Pillai v. K. Shanmugan Pillai*\(^{171}\) dealing with the case of persons who were minors at the time the transaction was entered up to, Subha Rao, C.J, in the course of judgment observed that the ‘mere act of succession to the father may not amount to satisfaction as the son’s enjoyment is consistent with his right of inheritance to the father. But he can either expressly or by necessary implication ratify the transaction entered into by the father. But if the original transaction conferring the benefit was in favour of the minor, different consideration would arise. His enjoyment of the benefit after attaining majority may itself be a sufficient act of ratification’.

A minor can always plead his minority. He is not estopped from setting up the defence of his infancy. The law protects minor from contractual liability. The intention of the legislature on a perusal of statutory provisions seems to protect, on the one hand the child against the improper designs of those advanced in years, and not to cause, on the other hand unnecessary hardships to those who deal with the child. The principle of estoppel does not apply in case of a minor.\(^{172}\)

169 (1906) 16 M.L.J. 422; see also Suraj Narain v. Sukhu Atris (1928).
170 Anant Rai v. Bhagwan Rai AIR 1940 All 12.
171 (1923) 2 SCC 312, at p.320.
172 Brahmo Dutt v. Dharamdas Ghose (1899) 20 ICR Cal 381; JN Singh v. Lalta Prasad (1908) 31 ICR 21.
minority as there cannot be any estoppel against the statute.173 Beaumont, C.J. in Gadigeppa Bhimoppa Mets v. Balangowde Bhimangowda,174 reviewed the earlier authorities and concluded by saying:

"......... The Court is of opinion that 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...."

Thus, the law of estoppel cannot be invoked in order to validate that which is void ab initio.

5.3.2. Restitution

Where a minor misrepresents his age and takes a loan or any other goods not covered by the necessaries, the action at common law against the minor will not succeed. Equity however will not sit idle and will, in certain circumstances intervene in order to prevent infant from taking advantage of his own deceit. Lord Chancellor Hard Wicke175 said the "minors are not allowed to take advantage of infancy to support a fraud." Equity thus developed a principle, which requires benefits to disgarded, if they are in possession of fraudulent minor. It is also obvious that infants are no more entitled than adults to gain benefits to them by fraud. For instance, if a minor misrepresents his age gets motorcycle on credit, the motorcycle can be recovered if it is still in possession. If he has sold it, he can be restrained from parting with money or if he has purchased any other thing with that money, the dealer can follow that thing. But if he has spent the amount, nothing can be recovered by him. In any case there is no personal liability of minor. Restitution stops when repayment begins. There are three type of situation in which it is relevant.

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174 AIR 1931 Bom. 511.
175 Earl of Burkinghamshire v. Drury (1760) 2 ed. 60 & 71.
a) Infant who obtains property by means of misrepresentation of full age can be compelled to restore the property to the person deceived.176

b) Secondly, it is doubtful where an infant disposed of actual thing got by fraud can be made to restore its proceeds. The doctrine of restitution can be invoked in this case, because if infant will be liable to restore the goods or repay it back, it will amount to enforcing a contract declared void by statute. Thus in Leslie (R) Ltd. v. Sheill177 Lord Summer stated that "where there is no question of tracing or no possibility of restoring a thing got by fraud, then if he will be compelled to compensate, it will amount to an enforcing a void contract.

c) Thirdly, the essence of the loan of money is that borrower shall repay the equivalent amount but it is not necessary that the borrower shall restore the identical benefits.178

In India if the contract is void on the grounds of minority the other party is entitled to return the money so advanced. In Mohori bibi's179 case court held that Section 64 and 65 of contract Act have no application, as both sections presume agreement between competent parties, hence minor cannot be ordered for restitution under these provisions.

But in case of an agreement where promise is made to compensates wholly or in part, a person who has already voluntarily done something for the promisor, or something which the promisor is legally compellable to do, is enforceable by law.180 It is necessary to attract this exception that the service should be rendered voluntarily.181 Similarly, in Karam Chand v. Basant Ram182

176 Clarke v. Cibley (1789) CEC 173, Lempriere v. Lange (1879) 12 Ch D 675.
177 (1914) 3 KB 601.
178 Ibid.
179 See Supra note 165.
180 Section 25(2), Indian Contract Act, 1872.
181 Ahmedabad Jubilee S & M Co. v. Chottu Lal Changan Lal (1908) 10 Bom LR 141.
a promise made by a minor after attaining majority to pay goods supplied to the
promisor during minority has been held to be within the exceptions. Rattigan J
observed that it is now settled law that a promise by an infant is in law a mere
nullity and void, but we fail to see how an agreement made by a person of full
age to compensate a promisee, who has already done something for the
promisor even at a time when the promisor was a minor does not fall within the
purview of Section 25(2) of the Indian Contract Act. As at the time when the thing
was done the minor was unable to contract the person who did it for the minor
must, in law, be taken to have done it voluntarily. But he has in fact done
something for the minor, and if words mean anything at all. Surely his case must
be deemed to come within the scope of the Act. The inference is that a promise
by a minor after attaining his majority to compensate the services rendered to
him voluntarily by the promise falls within the scope of Section 25(2) of the Act.

5.3.3. Service Contracts

A contract of service is binding on an infant, if viewed as a whole, if the
contract is not beneficial then it will be void. Thus in *Clements v. L & N.W. Ry
Co.* 183 an infant party has agreed to join insurance scheme, to which his
employees contributed, and to give up any claim for personal injury under
Employees Liability Act, 1880. His rights under the scheme were more beneficial
than these rights under the Act. But the compensation was smaller than the
amount recoverable under the Act. It was held that contract was on the whole
beneficial and Court will not allow the infant to sue under the Act. On the other
hand a clause which simply limits or includes the liability of an employer without
giving the infant any right to return is unlikely to be upheld. 184 In deciding whether
a service contract is on the whole beneficial the Court is entitled to look at
surrounding circumstances. Where a service contract is in restraint of trade, 185
contract will be void even though beneficial to infant. Similarly, in *Doyle v. White*

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182 (1911) Punjab Records No.31, 91.
183 (1894) 2 Q B 482.
184 Osen v. Corry Graiesent Ltd. (1936) & All ER 241.
185 Section 27 of Indian Contract Act is violated.
City Stadium Ltd\textsuperscript{186} an infant, a professional boxer, was engaged to fight for £3000, win, draw or loose subject to the rules of the British Boxing Board of Control. Under these rules, a boxer who was disqualified could not file his claim. Doyle lost and was disqualified for hitting below the belt. It was held infant was bound by the rules and hence cannot recover. Contract was on the whole beneficial to the boxer.

In India, it is not possible for a minor to succeed in suit for a suit for damages for the breach of contract of services entered by minor himself. A minor is allowed to enforce a contract which is of some benefit to him and under which he is required to bear no obligation. In contracts by guardian of a minor on his behalf, measure of damages must be based on damage suffered by guardian and not on the damage suffered by the minor.\textsuperscript{187}

In England minor may enter into a contract of apprenticeship but he cannot be sued there on. While in India such contracts of apprenticeships are binding on minor.\textsuperscript{188} The predominant consideration for enforcement of contract of service and apprenticeship is the benefit to the minor. If they are detrimental to the minor they are void.\textsuperscript{189} So while service contracts are deemed to be void the apprentice contracts are not.\textsuperscript{190}

5.3.4. Child's Liability in Tort

The general rule is that infants are liable in tort in the same way as adults, except, in case, where cause of action arisen out of or in connection with a contract which does not bind the infant. In Jennings v. Rundall\textsuperscript{191} an infant hired a horse to be moderately ridden. It was held that he was not liable for wrongfully and injuriously riding her. To allow such a claim would certainly undermine the

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\textsuperscript{186} (1939) 1 KB 118.
\textsuperscript{187} A. Razak v. Md. Hussain AIR (1917) Bom. 61.
\textsuperscript{188} Indian Apprentices Act, 1850.
\textsuperscript{189} Raj Rani v. Prem Adib (1916) Mad 308.
\textsuperscript{191} (1799) 87 R 335.
whole policy of protecting the child. This, however, is limited in its approach because it applies only where breach consists of wrongfully doing an act authorized by the contract. In the subsequent case\textsuperscript{192} infant hired a horse for riding, the contract, expressly for bad jumping. He was held liable in tort, when the horse was killed through being jumped. If we compare above two cases, it can be safely said that there is no logical reason why child be sued in tort and protected in contract. Infact, distinction on two line is based on conflicting desires to protect the child without causing unnecessary hardship to the adults who deal with them. The practical effort of such a law simply undermines the protection which the law gives to infant. Similarly minor cannot be sued in tort for a fraud, if he has induced other party to enter into a contract with him by means of fraud.

5.3.5. Minor and Contract of Agency

A minor is incapable of entering into a contract because an agreement by a minor is void. What a minor cannot do himself, he is not capable of doing the same through an agent. Section 183 of Indian Contract Act lays down that any person who is of the age of majority, according to the law, to which he is subject and who is of sound mind, may employ an agent. There is a bar to a minor becoming an agent. An agent is merely a connecting link between his principal and the third persons, and it is they who should be competent to contract. Section 184\textsuperscript{193} provides that as between the principal and the third person any person (even a minor) may become an agent. Even if a contract has been created through an agency of a minor, the principal and the third person would be bound to each other. It has to be noted that a minor is capable of becoming an agent for the purpose of binding the third person and his principal. So far as minor’s own liability towards the principal is concerned, that will not be there because of his minority.

\textsuperscript{192} Burnard v. Haggis.
\textsuperscript{193} Section 184 of Indian Contract Act, 1872 “No person who is not of the age of majority and of sound mind can become an agent, so as to responsible to his principal according to the provisions in that behalf herein contained.”
5.3.6. Claim for Necessaries Supplied

The necessaries supplied and delivered to an infant or to a person who is incapable of entering into a contract, must be paid for at a reasonable rate, if they are wholly benefited the recipient. The word ‘necessaries’ has since the earliest days of English Law do not give a clear definition. As early as in 1844,\(^{194}\) the court used the term to denote all those things which are essential for maintenance of the life of an infant and extends from giving food, lodging, to provide education, intellectual, moral and religious information.\(^{195}\) However, the luxuries articles may also be allowed if they constitute infants necessaries.\(^{196}\) This view was approved in various cases. In 1893 the Section 3 of the Sale of Goods Act gave the definition of the term:

Necessaries mean good suitable to the conditions in life of such infants or minors or other persons and to this actual requirement at the time of sale of delivery.

In 1908 the Court proceeded to interpret the word ‘necessaries’ in \textit{Nash v. Inmen}.\(^{197}\) A historic judgment was delivered by Flecher Moulton LJ which declared that infant being incapable of entering into contract, if the man satisfies infant needs, law will imply an obligation on infants part to repay him for his services rendered. The Court laid down the text that:

a) goods supplied to infants are suitable to the condition in life of an infant.

b) that they are suitable to his actual requirement at the time of sale and delivery.

\(^{194}\) Chapple v. Cooper (1844) M&W 252.
\(^{195}\) Ryder v. Wombell (1866) LR 4 Ex. Ch.32.
\(^{196}\) Johnstone v. Marks (1887) 19 QB 575.
\(^{197}\) (1908) All ER Rep 317 KB.
Section 68 of Indian Contract Act provides that if a person, incapable of entering into a contract or anyone whom he is legally bound to support, is supplied by another person with necessaries suited to his conditions in life, the person who has furnished such supply is entitled to be re-imbursed from the property of such incapable person. The section carried the following two illustration:

1. A supplies B, a minor, with necessaries suitable to his condition in life. A is entitled to be re-imbursed from B’s property.
2. A supplies the wife and children of B, a minor with necessaries suitable to their conditions in life. A is entitled to be re-imbursed from B’s property.

Section 68, is based on a laudable principle that persons who are incapable of entering into contract shall be sufficiently protected, be not allowed to suffer for want of necessaries in life. What is necessary is a relative fact, to be determined with reference to the fortune and circumstances of infant. Thus articles supplied to an infant for his wedding, money needed for the defence of a minor in a case, money needed for the marriages of minor’s sister whether minor is Hindu or Muslim, money paid in respect of lawful debt, and fees paid to the doctor who attends the child are deemed to be necessaries. But the things like money supplied on expensive clothes, money borrowed for male minor’s wedding and money paid for tobacco expenses etc will not come under the definition of necessaries.

Though Indian Law relating to Necessaries seems to be wide and clear, but even in this area, in certain circumstances law is inadequate and needs a

198 Nilkanth v. Chander Ban AIR (1922), Nag. 247.
200 Nandan Prasad v. Ajudhia (1910) 32 All 325.
203 Nanda Mathur v. Gijan Bhai.
change. For instance, if the necessaries are supplies to the wife of a minor or to the children of a lunatic such minor or lunatic is liable to re-imburse the supplier. In *Sadhu v. Sadhu*\(^{204}\) wife sued her husband for recovery of expenses incurred on the marriage of their minor daughters. The Court refused to grant her decree on the ground that marriage of a minor daughter was the duty of the father and not of the mother and that mother's act was purely voluntary. In this case, the court should have taken a view in favour of wife as she had done what was the duty of the father to do. Another controversy is with regard to that whether minor girls property is liable for the necessaries supplied to her impecunious husband. Under English Law the answer is affirmative as (husband and wife) are deemed to be one person in the eye of law, hence minor girls estate will be liable for necessaries supplied to her husband Muslim women (wife) is not bound to maintain her husband. The Hindu wife seems to be bound to maintain her husband. But it seems to be unfair that minor girls shall be liable.\(^{205}\) Thus even this area seems to be clouded with inadequacies and controversies.

5.3.7. Child and Business Associations

The law relating to the position of child i.e. minor in business association like firms cannot be read in isolation. It has to be read with the general principles of the law of contract. In determining minor's capacity and position Section 11 of Indian Contract Act, 1872 play a pivotal role. The agreement entered into by a minor is not only voidable but void and unenforceable and does not bind the parties.\(^{206}\) Since partnership is the result of contract and not status and the minor has been rendered incompetent to contract, he cannot become partner in a firm. A person can be a partner only by act of consent on the part of himself and others partners and of such an act, a minor is incapable in law. However, Section 30 entitles the minor to be admitted to the benefits of partnership. This section was not only intended but is also presumed to confer benefits on the minor and

\(^{204}\) (1936) All 20.
\(^{206}\) The position has been made clear by Privy Council in *Mohri Bibi v. Dharmdas Gosh* supra note 165.
safeguard his interest. The minor cannot claim his admission to the benefits of partnership as a matter of right. His admission is dependent on the consent of adult members of the firm. He may or may not be admitted to the benefits of partnership. This however does not make minor’s position any different than that of an adult member so far as admission to a firm is concerned, because an outsider also can be admitted as a partner only with the consent of all the existing partners. Once he is admitted to the firm the benefit that is purportedly conferred on the minor is in the shape of a right to share profits.

Similarly, it is provided that unlike adult partners the minor shall not be personally liable for the debts of the firm. His share in the profits and property of the firm shall, however, be liable for the debts of the firm. The share of the minor shall not be spared when the question of satisfaction of the debts of the firm comes. Thus, the minor is in no better position than any of the adult parties of the firm except that if the assets of the firm are less than its liabilities, the minor unlike adult partners, shall not be liable to contribute to make good the deficit. This again is a gesture devoid of any extra advantage for the minor in comparison to adult member. Since minor would not participate in the affair of the partnership business nor would be permitted to conduct the firm’s business it is but a natural consequence that the minor has been irresponsible. The English Law is more conscious and provides sufficient protection to the minor. This was well appreciated by the Special Committee on Partnership Act. The Special Committee’s note of appreciation can be found in its report when it said, “under English Law, there is nothing to preclude an infant from entering into a contract of partnership, though speaking generally, while he is an infant, he incur no liability and is not responsible for the debts of the firm, when he comes of age or even before, he may disaffirm past transaction.”

207 Section 31, The Indian Partnership Act, 1932.
208 Notes of Special Committee on clause 30 as reproduced in O.P. Aggarwala, The Indian Partnership Act, 1932, (7th Ed.) p.363.
Again, the minor cannot successfully claim his share in the profits and the property of the firm and also continue as a beneficiary in the firm. Sub Section 4 of Section 30 provides:

“Such minor may not sue the partners for an account or payment of his share of the property or profits of the firm, save when severing his connection with firm…….”

Sub-section 2 of the said provision gives to the minor a right of access, inspection and of copying the accounts of the firm but only to enable him to know the share of profits that has been apportioned to his account by the adult partners of the firm. The minor, however, cannot dispute the genuineness of accounts, as sub-section 4 virtually disables him from doing so.

On attaining the majority, the minor beneficiary has been given an option either to become a full-fledged partner. This right of election is granted under sub-section 5 of Section 30. It has been made obligatory for the beneficiary to communicate his decision, either expressly or by doing some act within six months after attaining the age of majority or after obtaining knowledge that he had been admitted to the benefits of partnership whichever date is later. As per the proviso, failure on the part of the minor to give the requisite notice on attaining majority shall result in an implied assent on his part of joining the firm. This is backed by the principle of holding out. The result of such express or implied election or even the imputed election is that the minor not only becomes personally liable for the acts of the firm after election but his personal liability extends back to the date when he was admitted to the benefits of partnership.209

The law describing the position of a minor is more than a century old. A look into its working as attempted in the foregoing discussion shows that it has neither benefited the minor nor extended a safeguard to his interest as is purported to have been its functions. Moreover, the society during the period that has elapsed since the enactment of Indian Partnership Act, 1872 has passed

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209 Sub-Section 7 of Section 30 Indian Partnership Act, 1932.
through numerous changes. It has passed through many phases of development, sometimes adhering to the concept of status and at other times shifting to contract. The law of partnership vis-a-viz minor needs be reviewed and revised, more so in view of disparity between our law and the law of Britain, where the minor is put in a comparatively advantageous position. It would be advisable to reform Section 30 of Indian Partnership Act with suitable changes so that the minor’s position is bettered in relation to adult partners of the firm.

5.3.8. Child and Income Tax Law

Section 4 of the Income Tax Act, 1961 is the charging Section which inter alia provides that tax is to be charged on the income of the previous year of every person. The term ‘person’ includes an individual, a Hindu undivided family, a company, a firm, an association of persons or body of individuals, a local authority, artificial, juridical person etc. A child is an individual and even though he has not attained the age of majority his income would be chargeable to Income-tax under this section of the Act. For instance where minor child is employed and he has salary income, which is chargeable to tax under the Act, in such a case, even if a guardian of that minor were to be appointed, the guardian would not become entitled to receive the salary from the employees of his ward nor would he be in actual receipt of that income, so the provisions of Section 160(i)(ii) of the Income Tax Act, 1961\(^\text{210}\) would not apply. In such cases, it is clear that the income will be and should be taxable in the hands of the person earning the income even though he may not have attained majority under the Indian Majority Act, 1875.\(^\text{211}\) Similarly, if there be a Hindu undivided family consisting of several male members none of whom has attained the age of majority, the income of Hindu undivided family would still be liable to be charged to income tax

\(^{210}\) Section 160 (4)(ii) of Income Tax Act, 1961

\(^{211}\) Section 3 of Indian Majority Act, 1875.
under Section 4 of the Income Tax Act, 1961. So in the case of a firm where minors are admitted to the benefit of partnership the firm will be charged to tax under the provisions of Income Tax Act. The associability of an association of persons is not affected by the fact that some of members are minors.

This point that minor is chargeable to tax was decided long back by the Court of Appeal in England in *Rex v. Commissioner of Tax* for the New Market Division of Suffolk (Ex-parte Huxley) In this case Mr. Huxley received income as jockey. He has not attained majority. The question had arisen whether Huxley who had not attained the of 21 years which was the age of majority in England, could be directly taxed in respect of the income which he was receiving as a jockey. It was contended on behalf of Huxley that he had not the requisite discretion to make the return and defend the proceedings or to appeal under the income tax law in England. Replying his contentions, Cozens Hardy M.R. observed:

"It is to my mind almost absurd to suggest that a jockey making a large income and, I presume, assisted by clerks or other servants, has not the requisite discretion to enable him to deliver, or procure to be delivered, all proper particulars, and, if necessary to instruct legal advisers to protect his rights."

The Court came to this conclusion on the principle that under the charging section of the income tax law where the word used was 'person' that word would include an infant who had not attained the age of 21 years and direct taxation of income in his hands is permissible. Lord Phillipmore while dealing with the question of incapacity of an infant who had not attained the age of 21 years held that the word 'incapacity' may be rightly confined to the case of an infant who does not receive or control his own property and who is, therefore, incapable of making a return Lord Justice expressed his view by saying that an infant who

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214 (1961) 7 Tax Cas. 49.
216 *Ibid*, p.56.
controls and manages his own concern may well be treated as capable of doing what is required under the Income Tax Act.217

In India too, this point has been discussed in quite detail in Shridhar Udaí Narayán v. C.I.T.218 In this case a Hindu undivided family carried on business under the M/s Shridhar Udaí Narain of which Shridhar was karta. He filed a return of the income of the Hindu undivided family for the year 1946-47, and the assessment was completed. After his death, income tax officer had definite information that income of the above mentioned year has escaped assessment and issued notice under Section 34219 of the Income Tax Act, 1922 which was addressed to the Hindu undivided family Shridhar Udaí Narayan. The notice was served on the eldest male member of the family Udaí Narayan Trivedi who was Karta after the death of Shridhar. On the date of service of notice Udaí Narayan was minor. In response to the notice served on him, Udaí Narayan filed a return wherein he described himself as Karta of the assessee family. The question to be decided was whether service of notice on Udaí Narayan was a valid service within the meaning of Section 63220 of the Income Tax Act, 1922.

Section 63(2) of the Income Tax Act 1922 inter-alia provided that any notice or requisition may be addressed incase of Hindu undivided family to the manager or any adult male member of the family.221 In the context of this provision, the court was to decide whether there can be a minor adult. Answering this question in affirmative, the Court observed:222

"It appears to us that if the intention had been that the notice must be addressed to a person who had attainted majority under the Indian Majority Act the Legislature could very conveniently have used the expression 'any male member of the family who has attainted majority', and when the legislature could very conveniently have used the

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217 Ibid, p.57.
218 (1962) 45 ITR 577 (All).
220 Now Section 282(2)(a) of 1961 Act.
221 Now Section 282(2) of the 1961 Act refer to 'any adult member of the family. The word 'male' which was there in 1922 Act has been deleted in the present Act.
222 See Supra note 212, p.581.
expression 'adult member of the family' need it was intended that expression 'adult member of the family need not be construed with reference to the provisions of the Indian Majority Act, 1875. The Indian Majority Act has been passed almost solely with the purpose of declaring when a citizen of India was to attain majority and if there had been the intention of the legislature that in case of a Hindu undivided family the notice must be served only on a member of the family who had attained majority care would have been taken to use the language which would have clarified the position. Instead, the legislature used the word 'adult' and consequently in interpreting the word 'adult' we should not make a reference to the provisions of the Indian Majority Act."

The Court then proceeded to explain the term 'adult'. In the dictionary 'adult' has been defined as connoting a person who has attained the age of discretion.223 The age of discretion is normally considered to be 16 years in case of a male person.224 The word adult is to be interpreted, not with reference to the actual age in years but with reference to the circumstances, whether the person in respect of whom the word 'adult' is being interpreted has or has not attained discretion.225

5.3.9. Minor and Negotiable Instruments

Section 26 of Negotiable Instruments Act, 1881 lays down the provision explaining the capacity to a contract in case of negotiable instruments:

"Every person capable contracting, according to the law to which he is subject may bind himself and be bound by the making, drawing, acceptance, endorsement, delivery and negotiation on a promissory note, bill of exchange or cheque.

A minor may draw, endorse, deliver, negotiate such instrument so as to bind all parties except himself."

It is clear that minor is incapable of doing two things i.e. making of a promissory note and acceptance of bill of exchange. The main obligation in case of a promissory note depends on the promise made by a maker and in case of

223 Ibid.
224 Hari Charan Singh v. Chander Kumar Dey(1908) ILR 35 Cal 286; In re, Desouza 29 AIR 932 All 374.
225 Ibid.
bill of Exchange on the undertaking by the acceptor. If they are incompetent to contract, the whole of instrument becomes inoperative. It is, therefore, necessary that a maker of the promissory note and the acceptor of bill of exchange must be competent to contract. A minor has been authorized to draw, indorse, deliver and negotiate a negotiable instrument. Ordinarily, an endorser incurs liability towards indorse and the subsequent parties under the Act but if the endorser is minor, he will not incur such liability. In such a situation minor binds all parties except himself.

The above study reveals that a minor child can be directly assessed as any other individual, he can be representative alive assessee in respect of income of the deceased, and there can be representative assessee for the income of the minor child. A close examination of Indian law on contract in relation to minor is inadequate. These rules remain fundamentally as they were enunciated by the Act drafted hundred years ago or by judges of nineteenth and early twentieth century. In view of the changes taking place in these fields and also desire on the part of the state to provide people’s welfare and social justice, it seems necessary to introduce drastic changes in the rights and liabilities of the parties to a minor’s contract, so that law will become broad based and reach a level of adequacy.

5.4. RIGHTS OF THE CHILD UNDER THE CRIMINAL LAWS

Different reactions to the offences perpetrated by children and those commuted by adults have been developing for more than a century. While the societal, reaction to the offences of both the groups has been slowly changing from a punitive to a treatment reaction, this change has been much more pronounced incase of juveniles. In 1824 a juvenile reformatory was established in New York State so that children, after conviction, would not be

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confined with adult criminals. To draw a line of distinction between the juvenile Court with the Criminal Court is difficult because of large number of variations in the procedure and organization of each Court. The following comparison refers to the Conventional Criminal Court and juvenile Court in its ideal form.

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<td>Trial characterized by continuousness; two partisan groups in conflict.</td>
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</tr>
<tr>
<td>2.</td>
<td>Purpose of trial is to determine whether defendant committed the crime with which he is charged.</td>
<td>Purpose of hearing to determine whether the child is delinquent and the general condition and character of child.</td>
</tr>
<tr>
<td>3.</td>
<td>Little machinery for securing information regarding the character of accused.</td>
<td>Elaborate machinery for securing information regarding the character of the child.</td>
</tr>
<tr>
<td>4.</td>
<td>Such information, if secured, may not be introduced as a part of evidence.</td>
<td>Such information is the basis on which a decision is made.</td>
</tr>
<tr>
<td>5.</td>
<td>Punishment if convicted.</td>
<td>Protection, guardianship and treatment by the state of the existing conditions show the need.</td>
</tr>
<tr>
<td>6.</td>
<td>Correctional methods in a specific case determined not by the needs of the particular individual but by the legislature, in advance, for all who violate the law in question, with reference primarily to the other actual or potential criminals.</td>
<td>Correctional methods in a specific case determined by the needs of the particular individual without reference to the other actual or potential delinquents.</td>
</tr>
</tbody>
</table>

The expected reaction of the Criminal Court personnel to crime is punitive, as they seek, to implement a punitive reaction to an offence. In contrast the expected reaction of the Juvenile Court personnel is that of treatment, they seek to implement a treatment reaction to the offender. The ideal of Juvenile Court

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227 Ibid.
229 Ibid.
is that the personnel "are not looking outwardly at the act but, scrutinizing it as a symptom, are looking forward to what the child is to become."230

At common law, a century and a half ago, children were tried and punished for violation of law in the same ways as adults, with the exception that a child under seven years of age was regarded as not responsible and, therefore, as incapable of committing crime. While a child between the age of seven and fourteen was regarded as having the possibility of such discernment as would make him responsible, and this was decided in each case of examination. In the course of time the minimum age was raised in some American States from seven to ten years of age but still it happens that children under fourteen years of age are arrested, held in jail, tried in court, and punished in the same ways as adult criminals. In 1956, 6 percent of the persons admitted to the three major Massachusetts prisons were 17 years of age or younger; one was fourteen year old boy convicted of murder.231

5.4.1. Data of Child Delinquents in India

In case of India, there is no separate classification of offences against the children. Generally, the offences committed against children or the crime in which children are victims are considered as crime against children. The Indian Penal Code of this country and the various protective and preventive special laws mention the crimes where in children are known to be victims. Such crimes are construed to be crime against the children. The juvenile who is alleged to have committed an offence is known as 'Juvenile in conflict with law.'232 The share of crime committed by Juvenile to total IPC crimes reported in the country during 1997 to 2000 was same at 0.5 percent. However, in 2001, this share was increased to 0.9 percent and further in marginal increased was there to 1.0 percent each in 2002 but remained static in 2003, 2004 and 2005. This increase

232 This term was used in The Juvenile Justice (Care and Protection of Children) Act, 2000. Earlier to this Act the term used was 'delinquent juvenile' in The Juvenile Justice Act, 1986.
may be partly attributed to the inclusion of delinquent boys from 16 to 18 years as per the new definition of juveniles. Juvenile crime rate was 0.9 percent during 1999 and 2000 where as it has shown mixed trend of varying crime rate at 1.6, 1.8, 1.7, 1.8 and 1.7 respectively during 2001 to 2005. (See Table No.5.1)

### Incidence And Rate Of Juvenile Delinquency Under IPC (1995-2005)

<table>
<thead>
<tr>
<th>Sl. No.</th>
<th>Year</th>
<th>Incidence Of Juvenile Crimes</th>
<th>Total Cognizable Crimes</th>
<th>Percentage Of Juvenile Crimes To Total Crimes</th>
<th>Estimated Mid-Year Population * (In Lakh)</th>
<th>Rate (Incidence Of Crime Per Lakh Of Population)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>1995</td>
<td>9766</td>
<td>1952696</td>
<td>0.6</td>
<td>9160</td>
<td>1.1</td>
</tr>
<tr>
<td>2</td>
<td>1996</td>
<td>10024</td>
<td>1709576</td>
<td>0.6</td>
<td>9319</td>
<td>1.1</td>
</tr>
<tr>
<td>3</td>
<td>1997</td>
<td>7909</td>
<td>1719830</td>
<td>0.5</td>
<td>9552</td>
<td>0.8</td>
</tr>
<tr>
<td>4</td>
<td>1998</td>
<td>9352</td>
<td>1778815</td>
<td>0.5</td>
<td>9709</td>
<td>1.0</td>
</tr>
<tr>
<td>5</td>
<td>1999</td>
<td>8838</td>
<td>1764629</td>
<td>0.5</td>
<td>9866</td>
<td>0.9</td>
</tr>
<tr>
<td>6</td>
<td>2000</td>
<td>9267</td>
<td>1771084</td>
<td>0.5</td>
<td>10021</td>
<td>0.9</td>
</tr>
<tr>
<td>7</td>
<td>2001</td>
<td>16509</td>
<td>1769408</td>
<td>0.9</td>
<td>10270</td>
<td>1.6</td>
</tr>
<tr>
<td>8</td>
<td>2002</td>
<td>18590</td>
<td>1780330</td>
<td>1.0</td>
<td>10606</td>
<td>1.8</td>
</tr>
<tr>
<td>9</td>
<td>2003</td>
<td>17819</td>
<td>1716120</td>
<td>1.0</td>
<td>10862</td>
<td>1.7</td>
</tr>
<tr>
<td>10</td>
<td>2004</td>
<td>19229</td>
<td>1832015</td>
<td>1.0</td>
<td>10856</td>
<td>1.8</td>
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<tr>
<td>11</td>
<td>2005</td>
<td>18949</td>
<td>1828402</td>
<td>1.0</td>
<td>11028</td>
<td>1.7</td>
</tr>
</tbody>
</table>

* Source: The Registrar General Of India.

** Actual Population As Per 2001 Census.

@ As Per Revised Definition Of Juvenile Justice Act The Boys Age Group Of 16-18 Years Has Also Been Considered As Juveniles since 2001 onwards


Further the crime committed by juvenile is divided into two parts. Crime committed under IPC and crime committed under special and local law which include. Immoral Traffic Prevention Act, Child Marriage Restraint Act and Child Labour (Prohibition and Regulation) Act. The Juvenile IPC crime in 2005 has declined by 1.5 percent over 2004 as 19,228 IPC crimes were registered against juveniles in 2004 came down to 18,939 cases during 2005. Juvenile delinquency has declined (in 2005 over 2004) the under following heads:

Criminal breach of trust (30.2%), cheating (28.9%), sexual harassment (26.3%), counter feting (22.2%), attempt to commit murder(15.6%), hurt (7.7%), Riots (4.9%) and Dacoity (0.8%). The increase in the incidence of juvenile crime was observed under some heads e.g. culpable homicide not amounting to murder (205.3%) dowry deaths (100.0%), arson (36.4%) and cruelty by husband and relatives (33.5%)235. The details of may be seen in Table 5.2.236

‘Delinquent’, the term applies to a young person below a certain age, who has done an act which would be crime if it were done by a grown up person.

In adopting the legalistic view of delinquency, we in India have followed the English Law. In India till 1954 there was no statutory definition of delinquency but by common practices the world used to embrace young offenders or youthful offenders under the Children Act. The word ‘delinquent’ was used for first time in the Saurastra Children Act, 1954, which dispels all the doubts that might have been entertained. The definition of ‘juvenile delinquent’ given in the Saurastra Child Act, 1954 237 make it clear that it applied only to a child offender and none else. A Brazilian activist had rightly said. “A juvenile delinquent is nothing more than a poor child caught red handed in the struggle for survival.”238

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235 See Supra note 233
237 See 4 (k), Saurastra Child Act, 1954.
indicate that juvenile delinquency is a result of interaction of individual, contextual and situational factors.239 (See Table No.5.2)


<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
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<tbody>
<tr>
<td>1</td>
<td>MURDER</td>
<td>253</td>
<td>267</td>
<td>331</td>
<td>331</td>
<td>465</td>
<td>472</td>
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<tr>
<td>2</td>
<td>ATTEMPT TO COMMIT MURDER</td>
<td>208</td>
<td>196</td>
<td>449</td>
<td>469</td>
<td>475</td>
<td>443</td>
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<td>3</td>
<td>C.H. NOT AMOUNTING TO MURDER</td>
<td>23</td>
<td>27</td>
<td>34</td>
<td>22</td>
<td>25</td>
<td>19</td>
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<td>4</td>
<td>RAPE</td>
<td>174</td>
<td>198</td>
<td>399</td>
<td>485</td>
<td>466</td>
<td>568</td>
</tr>
<tr>
<td></td>
<td>i) CUSTODIAL RAPE</td>
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<td>*</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td></td>
<td>ii) OTHER RAPE</td>
<td>*</td>
<td>*</td>
<td>399</td>
<td>485</td>
<td>466</td>
<td>568</td>
</tr>
<tr>
<td>5</td>
<td>KIDNAPPING &amp; ABDUCTION</td>
<td>152</td>
<td>83</td>
<td>122</td>
<td>164</td>
<td>202</td>
<td>232</td>
</tr>
<tr>
<td></td>
<td>i) OF WOMEN &amp; GIRLS</td>
<td>06</td>
<td>54</td>
<td>79</td>
<td>109</td>
<td>138</td>
<td>167</td>
</tr>
<tr>
<td></td>
<td>ii) OF OTHERS</td>
<td>86</td>
<td>29</td>
<td>43</td>
<td>55</td>
<td>64</td>
<td>65</td>
</tr>
<tr>
<td>6</td>
<td>DACOITY</td>
<td>56</td>
<td>33</td>
<td>59</td>
<td>63</td>
<td>122</td>
<td>121</td>
</tr>
<tr>
<td>7</td>
<td>PREPARATION &amp; ASSEMBLY FOR DACOITY</td>
<td>3</td>
<td>7</td>
<td>31</td>
<td>46</td>
<td>38</td>
<td>46</td>
</tr>
<tr>
<td>8</td>
<td>ROBBERY</td>
<td>76</td>
<td>79</td>
<td>164</td>
<td>207</td>
<td>208</td>
<td>224</td>
</tr>
<tr>
<td>9</td>
<td>BURGLARY</td>
<td>1285</td>
<td>1241</td>
<td>1687</td>
<td>1723</td>
<td>2134</td>
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<td>10</td>
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<td>2388</td>
<td>3196</td>
<td>3361</td>
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<td>i) AUTO THEFT</td>
<td>*</td>
<td>256</td>
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<td>2132</td>
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<td>2794</td>
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<td>11</td>
<td>RIOTS</td>
<td>935</td>
<td>532</td>
<td>1228</td>
<td>1086</td>
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<td>12</td>
<td>CRIMINAL BREACH OF TRUST</td>
<td>33</td>
<td>24</td>
<td>59</td>
<td>39</td>
<td>56</td>
<td>43</td>
</tr>
<tr>
<td>13</td>
<td>CHEATING</td>
<td>54</td>
<td>37</td>
<td>83</td>
<td>88</td>
<td>104</td>
<td>149</td>
</tr>
<tr>
<td>14</td>
<td>COUNTERFEITING</td>
<td>1</td>
<td>3</td>
<td>4</td>
<td>3</td>
<td>8</td>
<td>0</td>
</tr>
<tr>
<td>15</td>
<td>ARSON</td>
<td>8</td>
<td>29</td>
<td>48</td>
<td>107</td>
<td>34</td>
<td>44</td>
</tr>
<tr>
<td>16</td>
<td>HURT</td>
<td>791</td>
<td>1497</td>
<td>3234</td>
<td>4137</td>
<td>3074</td>
<td>3226</td>
</tr>
<tr>
<td>17</td>
<td>DOWRY DEATH</td>
<td>27</td>
<td>78</td>
<td>50</td>
<td>65</td>
<td>52</td>
<td>51</td>
</tr>
<tr>
<td>18</td>
<td>MOLESTATION</td>
<td>86</td>
<td>151</td>
<td>380</td>
<td>532</td>
<td>522</td>
<td>463</td>
</tr>
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<td>19</td>
<td>SEXUAL HARASSMENT</td>
<td>27</td>
<td>41</td>
<td>105</td>
<td>265</td>
<td>286</td>
<td>186</td>
</tr>
<tr>
<td>20</td>
<td>CRUELTY BY HUSBAND AND RELATIVES</td>
<td>192</td>
<td>334</td>
<td>349</td>
<td>262</td>
<td>202</td>
<td>206</td>
</tr>
<tr>
<td>21</td>
<td>IMPORTATION OF GIRLS</td>
<td>*</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>22</td>
<td>CAUSING DEATH BY NEGLIGENCE</td>
<td>*</td>
<td>*</td>
<td>49</td>
<td>60</td>
<td>78</td>
<td>60</td>
</tr>
<tr>
<td>23</td>
<td>OTHER IPC CRIMES</td>
<td>2527</td>
<td>2022</td>
<td>4228</td>
<td>4875</td>
<td>4558</td>
<td>4996</td>
</tr>
<tr>
<td>24</td>
<td>TOTAL NON-COGNIZABLE CRIMES UNDER IPC</td>
<td>9766</td>
<td>9267</td>
<td>16509</td>
<td>18560</td>
<td>17819</td>
<td>19129</td>
</tr>
</tbody>
</table>

*indicates that the Crime Head was not introduced till that year.

239 Rolf Lober, David Forrengton (eds), Serious and Violent Juvenile Offenders, (Sage Publication Inc., 1998).
For the purpose of Criminal Responsibility, a juvenile is a person who knows or understands the difference between right and wrong. Normally mental and physical maturity grows side by side. In some cases the physique outgrows the mind and vice versa. Nevertheless, it is difficult to mark off clearly the various development stages from one another in terms of chronological periods. Law makes three gradations for sake of convenience of administrations and criminal responsibility. These three stages are:

i) The age of no responsibility.

ii) The age of Quasi-responsibility.

iii) The age of full-responsibility.

The first is the infancy stage which is exempted from criminal responsibility. The immunity from criminal responsibility of infancy was recognized under the well established doctrine of 'mensrea' which made a guilty mind as an essential ingredient of responsibility. As the child lacks the mental capacity to entertain an evil design he cannot be made responsible for his acts. He is 'doli incapax'. The law lays down an absolute presumption that he is incapable to committing a crime. This age is governed by Indian Penal Code, 1860, which lays down:

*Nothing is an offence which is done by a child under seven years of age.*

Second stage is the age of quasi-responsibility. This is also known as doubtful age. But the presumption raised in such case is of responsibility, which

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240 The idea of dividing children into three classes was first conceived by the Romans. Under Roman Law a child below 7 years was not responsible from understanding and insight; from 7 to puberty he could be punished if it could be proved that he had some understanding and insight; from puberty to 25 years, chronological age determined punishment. Later this scheme was adopted by the English Common Law.

241 See. 82 Indian Penal Code, 1860.
can however be rebutted by the accused by proving his immaturity. This code lays down:

> Nothing is an offence which is done by a child of above seven years and under twelve, who has not attained sufficient maturity of understanding to judge nature and consequence of his conduct on that occasion.\(^{242}\)

Even though criminal responsibility is ascribed by ordinary law yet protection against heavy punishments, such as death and imprisonment, is provided under special laws. The Reformatory Schools Act, 1877, entered it upto 15 years. After independence many of the States like Uttar Pradesh, Hyderabad, Mysore, West Bengal and Saurashtra also developed their separate Acts in 1969. In the same manner other States like Assam, Madhya Pradesh, Rajasthan, Punjab, Maharashtra, Himachal Pradesh passed it in 1979 and Haryana in 1984. By and large some of the common features of these Acts were.\(^{243}\)

- The Act covered neglected, delinquent and victimized children.
- Initially, there was only one agency to deal with the children, viz., the Juvenile Court. The Central Children Act for the first time introduced a separate agency, namely the Child Welfare Board for handling neglected children and leaving the Juvenile Court to deal with delinquent children.
- Appointment of Separate Probation Officer to deal with the child and proper aftercare services for his/her rehabilitation in the society were provided for in the Acts of all States, though in Practice they were hardly taken care of by the States.
- There was no provision for special qualification, training or knowledge of child psychology for person dealing with juvenile cases.
- There was no uniformity in all these Acts as to the age of the child.
- Different States followed different practice and procedures.

\(^{242}\) Section 83, ibid.
\(^{243}\) See Supra note 242, p.282.
There was a need of uniform legislation for the entire country.

5.4.2. The Juvenile Justice Act, 1986

The Act came into force bringing about a Juvenile Justice System in whole India. The Act is based on twin doctrines of Parens patriae and mensrea. The Preamble of the Juvenile Justice Act, 1986\textsuperscript{244} stated that the Act was to provide for the care, protection, treatment, development and rehabilitation of neglected and delinquent juveniles and adjudication of certain matters relating to disposition of delinquent juveniles.

The objectives of the Juvenile Justice Act, 1986 were the following:

- To lay down a uniform framework for juvenile justice in the country so as to ensure that no child under any circumstances is lodged in jail or police lock-up.
- To provide for a specialized approached towards the prevention and treatment of juvenile delinquency.
- To spell out the machinery and infrastructure required for the care and protection, treatment, development and rehabilitation of the various categories of children coming within the purview of the juvenile justice system.
- To establish norms and standards for the administration of juvenile justice system.
- To develop appropriate linkage and co-ordination between the formal system of juvenile justice and voluntary agencies.
- To constitute special offences in relation to juveniles to bring the operation of the juvenile justice system in conformity with the United Nations Standard Minimum Rules for the administration of juvenile justice.

\textsuperscript{244} Act No.53 of 1986, Published in the Gazette of India, Extra Ordinary, Pt.II, dated 3\textsuperscript{rd} December, 1986.
The Juvenile Justice Act, 1986 classified children into two main categories: Neglected Juvenile and Delinquent Juvenile. Neglected Juvenile is synonymous with "socially handicapped child." It includes a juvenile who is found begging or who has no home and is a destitute or who has unfit parents or who lives in brothel or with a prostitute or who leads immoral lift. A delinquent juvenile means a juvenile who has been found to have committed an offence under law of the land and comes in conflict with law.

5.4.3. Institutions under the Act

The Act provided for the classification and separation of delinquents on the basis of their age, the kind of delinquency and the nature of offences. There were following four types of institutions under the Act:

1. Observation Homes were meant for temporary reception of juveniles during the pendency of any inquiry regarding them under this Act.
2. Juvenile Homes where a neglected juvenile could be sent for accommodation, maintenance and facilities for education, vocational training and rehabilitation.
3. Special Homes for a delinquent juvenile for accommodation, maintenance and facilities for education, vocational training and rehabilitation.
4. After-Care Organization These were provided with the object of taking care of juveniles after they leave juvenile homes or special homes and for the purpose of enabling them to lead an honest and useful life.

Chapter-IV of the Juvenile Justice Act, 1986 provided for punishment in respect of the juvenile.
### Special Offences Punishment

| Section 41 | Cruelty of Juvenile (Assault, abandoning etc) | Imprisonment upto six months or fine or both. |
| Section 42 | Employment of Juvenile for the purpose of begging. | Imprisonment upto three years and fine. |
| Section 43 | Giving intoxicating liquor or narcotic drug or psychotropic substance. | Imprisonment upto three years and fine. |
| Section 44 | Exploitation of Juvenile employees. | Imprisonment upto three years and fine. |
| Section 45 | Alternative punishment under any other Central or State Act for the same act or omission. | Liable for punishment which is greater in degree. |

#### 5.4.4. Implementation of Juvenile Justice Act, 1986

The Juvenile Justice Act, 1986 can be proclaimed the first All India Child Welfare enactment seeking to promote best interests of juveniles. A general review of the working of the Juvenile Justice Act all over the country discussed in the report of the National Consultation on Juvenile Justice revealed that despite the formulation of rules by almost all the States/UTs under Section 62 of the Juvenile Justice Act, there are still few States and UTs which had yet to constitute Juvenile Welfare Boards and Juvenile Courts as required under Section 4 and 5 of the Act.\(^{251}\) The problems in the effective implementation of Juvenile Justice System in India were:

- Lack of timely assistance from the police.

• Section 2(h) – The Juvenile Act, 1986 prescribes cut-off age for boys at 16 years and for girls 18 years, which is unfair as boys over 16 years of age who may have committed an ordinary offence will be treated at par with adult criminals.

• Shortage of homes in different States; though State like Madhya Pradesh, Maharashtra and Bihar have reported high incidence of juvenile crimes under IPC during the year 1996, we find that in Madhya Pradesh there were just two Juvenile Homes, three Special Homes and one after care organization, in comparison to the magnitude of the crimes committed by Juveniles.  

• It cannot be ignored that despite all the goals set by the Juvenile Justice Act, 1986, many States were reported to have pendency level in the disposal of apprehended juveniles. Out of total juvenile apprehended, 23.5 percent were disposed off after advice or admission 12.0 percent were under the care of parents/guardians, 4.2 percent sent off to the institutions, 8.5 percent were sent to special homes, 4.6 percent were dealt with fine and 7.9 percent were either acquitted or otherwise disposed off.

• Lack of special knowledge of child psychology and child welfare among the members of Juvenile Courts and Welfare Boards. Juvenile Welfare Board is the life line of the entire Juvenile Justice System. The members are part-time honorary workers, whereas this is full time job which requires total commitment.

• The juvenile’s apprehension by the police is the first step in the State intervention and further intervention cannot be avoided in the juvenile’s interest if the police take recourse to appropriate diversion, though the present Act does not permit formal diversion by the police. The juvenile police units, wherever established, also vary in terms of organization,

253 Ibid.
structure, and functions, depending on the type of police department and size and the nature of problems persistent in their particular jurisdiction.  

- The Juvenile Justice Act, 1986 supposed to have separate procedures for responding to ‘neglected’ and ‘delinquent’ children, the borders between the two groups become merged, as the inadequacies and discrimination in the system result in children generally being in appropriately dealt with as criminals. There prevails general ignorance about the legal methods and social correctional schemes in processing juvenile delinquents. Though the Juvenile Justice Act speaks an integral approach, there exist many gaps in co-ordinating all the involved machineries. The Police, the Prosecutor, the Defence Counsel, the Probation Officer, the case-worker, the Juvenile Court, the observation homes and Special homes, often seem to function in isolation by simply discharging their individual functions. There are few occasions for a joint appraisal and meeting of all functionaries to reflect on their experience and knowledge to understand what these juvenile go through. Juvenile Justice needs to be seen in a more holistic sense rather than the narrow concept. There is also fragmentation that arises on account of lack of co-ordination between the autonomous sub-system at the input, output and process stage.  

- Lack of training and sensitization judicial Officers, Administrators and Police personnel.

5.4.5. The Juvenile Justice (Care and Protection of Children) Act, 2000

The Juvenile Justice Act, 1986 has been reviewed to bring the provisions in conformity with the provisions of the Convention on Rights of Child. This exercise has resulted in a new Act titled ‘The Juvenile Justice (Care and Protection of Children) Act, 2000’ (hereinafter referred as Act, 2000). The Act came into force with effect from 1st April, 2001 after the notification in the official


256 National Consultation Meet on Juvenile Justice, Better implementation of the Juvenile Justice System, 11-13 February’ 1999 Susan Mathews, pp.31-33.
This is an Act to consolidate and amend the law relating to juveniles in conflict with law and children in need of care and protection by providing for proper care, protection and treatment by catering to their development needs and by adopting a child-friendly approach in the adjudication and disposition of matters in the best interest of children and for their ultimate rehabilitation through various institution established under the enactment. Certain provisions of the Juvenile Justice (Care and Protection of Children) Act, 2000 were challenged before the High Court of Delhi in Public interest litigation (Civil Writ Petition No.3447 of 2001). During the course of hearings, the High Court observed that some of the provision of the Juvenile Justice Act merited re-consideration. Accordingly, the amendment in this regard was introduced in Lok Sabha on 24.7.2003 and, received the assent of President on 22nd August,2006.257 The amended Act calls for adoption of a child-friendly approach in the adjudication and disposition of matters in the best interest of children and for their ultimate rehabilitation through various institutions established under the enactment.

This new Act defines ‘Juvenile’ or ‘Child’ as a person who has completed 18 years of age.258 Whereas, the juvenile who alleged to have committed an offence ‘and has not completed eighteenth year of age as on the date of commission of such offence’259 is known as ‘Juvenile in conflict of law’260 (earlier in 1986 Act he was known as delinquent juvenile). The other category which is included in the definition of ‘child’ is children in need of Care and Protection.261 It means a child –

258 Section 2(k), The Juvenile Justice (Care and Protection of Children) Act, 2000. In the 1986 Act juvenile means a boy who has not attained the age of 16 years or a girl 18 years.
260 Section 2(l), ibid.
261 Section 2(d), ibid.
i) Who is found without home or settled place or abode and without any ostensible means of subsistence.

ia) Who is found begging, or who is either a street child, or a working child.\textsuperscript{262}

ii) Who resides with a person (whether a guardian of the child or not) and such person:-
   a) has threatened to kill or injure the child and there is a reasonable likelihood of the threat being carried out, or
   b) has killed, abused or neglected some other child or children and there is a reasonable likelihood of the child in question being killed, abused or neglect by the person.

iii) Who is mentally or physically challenged or ill-children or children suffering from terminal diseases or incurable diseases having no one to support or look after.

iv) Who has a parent or guardian and such parent or guardian is unfit or incapacitated to exercise control over the child.

v) Who does not have parent and no one is willing to take care of or whose parents have abandoned ‘or surrendered him\textsuperscript{263} or who is missing and run away child and whose parents cannot be found after reasonable inquiry.

vi) Who is being or is likely to be grossly abused, tortured or exploited for the purpose of sexual abuse or illegal Acts.

vii) Who is found vulnerable and is likely to be inducted into drug abuse or trafficking.

viii) Who is being or is likely to be abused for unconscionable gains.

ix) Who is victim of any armed conflict, civil commotion or natural calamity.

\textsuperscript{262} See Supra note 259.

\textsuperscript{263} Ibid.
5.4.6. Juvenile on Conflict with Law

Chapter-11 of Act deals with the Juvenile in conflict with law. The authority constituted for this purpose is Juvenile Justice Board. The State Government is empowered, ‘within a period of one year from the date of the Juvenile Justice (Care and Protection of Children) Amendment Act, 2006, by notification in the official Gazette’\(^{264}\) to constitute for a district Juvenile Justice Boards to deal with juveniles in conflict with law. The Board shall constitute:\(^{265}\)

- Metropolitan Magistrate or Judicial Magistrate of First Class.
- Two Social Workers of atleast one shall be a women.

The Magistrate appointed to the bench has special knowledge of or training in child psychology or child welfare and the social worker appointed to the bench has been actively involved in health, education or welfare activities pertaining to children for at least seven years.\(^{266}\) The Juvenile in conflict with law can be produced before an individual member of the Board. The order made by the Board is not invalid only by the reason that the member on a Board is absent during stage of proceedings.\(^{267}\)

\(^{264}\) See Supra note 259.
\(^{265}\) Section 4, ibid.
\(^{266}\) Section 4(3, ibid.
\(^{267}\) Section 5, ibid.
5.4.7. Procedure with regard to Juvenile Justice Board

As soon as a juvenile in conflict with law is apprehended by the police, he shall be placed under the charge of Special Police Unit\textsuperscript{268} or the designated Police Officer who shall immediately report the matter to a member of the Board\textsuperscript{269} where a juvenile is assisted, the officer Incharge of the Police Officer or the Special Juvenile Police Unit to which the juvenile is brought shall as soon as may be after his arrest inform.

a) The parent or guardian of the juvenile if found and direct him to be present at the Board.

b) Probation Officer\textsuperscript{270} to enable him to obtain information regarding the antecedents and family background of the juvenile.\textsuperscript{271}

When a juvenile is accused of a bailable or non-bailable offence, is arrested or detained or brought before the Board, such person shall be released on bail with or without surety 'or placed under the supervision of a Probation Officer or under the care of any fit institution or fit person\textsuperscript{272} but if there is reasonable grounds to believe that the release is likely to bring him into association with any known criminal or expose him to moral, physical or psychological danger or release would defeat the ends of justice in such case he shall not be release.\textsuperscript{273} In the above mentioned case the juvenile arrested not released on bail can be sent to observation home.\textsuperscript{274}

\textsuperscript{268} Section 2(w), ibid 'Special Juvenile Police Unit' mean a unit of police force of a State designated for handling juveniles or children under Section 63.

\textsuperscript{269} Section 10(1), ibid.

\textsuperscript{270} Section 2(s), ibid, 'Probation Officer' means an officer appointed by the State Government under the Probation of Offenders Act, 1958.

\textsuperscript{271} Section 13, ibid.

\textsuperscript{272} See Supra note 259.

\textsuperscript{273} Section 12(1), ibid.

\textsuperscript{274} Section 12(2), ibid.
5.4.8. Orders that May be Passed Regarding Juveniles

The Board shall obtain social investigation report on juvenile either through Probation Officer or recognized voluntary organization and after taking into account the findings pass an order where board is satisfied on inquiry that a juvenile has committed an offence, it can pass following orders:

a) allow the juvenile to go home after advice or admonition following appropriate enquiry against and counselling to the parent or the guardian and the juvenile;

b) direct the juvenile to participate in group counselling and similar activities;

c) order the juvenile to perform community service;

d) order the parent of the juvenile or the juvenile himself to pay a fine, if he is over fourteen years of age and earns money;

e) direct the juvenile to be released on probation of good conduct and placed under the care of any parent or guardian or other fit person, or such parent, guardian or fit person executing a bond, with or without surety as the Board may require, for the good behavior and well-being of the juvenile for any period not exceeding three years;

f) direct the juvenile to be released on probation of good conduct and placed under care of the institution for the good behavior and well-being of the juvenile for any period not exceeding three years.

g) make an order directing the juvenile to be sent to a special home for a period of 3 years.

i) incase of juvenile, over seventeen years but less than eighteen years of age for a period not less than 2 years.

ii) incase of any other juvenile for the period until he ceases to be juvenile.

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275 Section 15, ibid.
276 Section 15(2), ibid.
277 Section 15(1), ibid.
278 See Supra note 259.
It has been specifically laid down that no juvenile in conflict with law shall be sentenced to death or 'imprisonment for any term which may extend to imprisonment for life'\textsuperscript{279} or committed to prison in default of payment of fine or in default of furnishing security. But if the juvenile has attained the age of sixteen years and has committed an offence of so serious nature and it would not be in his interest or the interest of other juvenile to keep him in special home in that case the case is to be reported to State Government and the juvenile is to be kept in safe custody.\textsuperscript{280}

5.4.9. Home to be established under the above referred Act

State Government may establish either by itself or under an agreement with voluntary organizations, Observation Homes in every district or a group of districts Observations Homes for the temporary reception of Juvenile in conflict with law\textsuperscript{281} and Special homes for reception and rehabilitation of juvenile in conflict with law.\textsuperscript{282} Every juvenile who is not placed under the charge of parent or guardian and is sent to an observation Home kept in reception unit for initial enquiries\textsuperscript{283} Classification for juvenile according to his age-group such as seven to twelve years, twelve to sixteen years and sixteen to eighteen years is to be done after giving to physical and mental status and degree of the offence for further induction into observation home.\textsuperscript{284}

5.4.10 Prohibition of publication of name etc of juvenile involved in any proceeding under the Act

There is also a prohibition on publication of any report in any newspaper, magazine, news sheet or visual media of any inquiry regarding the name, address or school or any particular used for the identification of juvenile in conflict

\textsuperscript{279} See Supra note 259.
\textsuperscript{280} Section 16, \textit{ibid.}
\textsuperscript{281} Section 8, \textit{ibid.}
\textsuperscript{282} Section 9, \textit{ibid.}
\textsuperscript{283} Section 1(4), \textit{ibid.}
\textsuperscript{284} Section 8(4), \textit{ibid.}
with law 'or child in need of care and protection' under this Act unless it is in interest of juvenile and the reasons are recorded in writing. Any police officer may take charge without warrant of a juvenile in conflict with law who has escaped from special home or an observation home or from the care of the person under whom he was placed under the Act. The juvenile shall be sent to special home, observation home or the person under whom he was kept and no proceedings shall be instituted against him for such escape.

5.4.11 Penalties and Punishments under the Act

The special offences punishable under Section 23, 24, 25 and 26 shall be cognizable.

<table>
<thead>
<tr>
<th>Offence</th>
<th>Punishment</th>
</tr>
</thead>
<tbody>
<tr>
<td>Punishment for cruelty to a juvenile child i.e. assault abandonment, willful neglect etc.</td>
<td>Imprisonment for a term which may extend up to six months or fine or with both.</td>
</tr>
<tr>
<td>Employment of children or juvenile for begging.</td>
<td>Imprisonment for a term which may extend up to three years and fine.</td>
</tr>
<tr>
<td>Abetment of above offence by a person who is in actual charge of juvenile.</td>
<td>Imprisonment for a term which may extend up to one year and fine.</td>
</tr>
<tr>
<td>Giving intoxicating liquor narcotic drug or psychotropic substance to juvenile or child.</td>
<td>Imprisonment for a term which may extend up to three years and fine.</td>
</tr>
</tbody>
</table>

285 See Supra note 259.
286 Section 21, ibid.
287 Section 22, ibid.
288 Section 23, ibid.
289 Section 24(1), ibid.
290 Section 24(2), ibid.
291 Section 25, ibid.
Exploitation of juvenile or child employee.\textsuperscript{292}  

:  Imprisonment for a term which may extend upto three years and fine.

It becomes quite clear that there is a significant departure in the present Act firstly, with regard to age secondly, with regard to punishments and penalties where under now abettor is also held responsible.

5.4.12 Child in Need of Care and Protection

Chapter-III deals with the provision in relation of child in need of care and protection. The authority established to deal with child in need of care and protection is Child Welfare Committee. The State Government may, within a period of one year from the date of the Juvenile Justice (Care and Protection of Children) Amendment Act, 2006, by notification in the official Gazette,\textsuperscript{293} constitute for every district a Child Welfare Committee which shall consist of:

- Chairperson
- Four other members, one shall be women.

The Chairperson and members of the Committee are expert on matters concerning children.\textsuperscript{294} Any child in need of care and protection may be produced before the Committee by any one of the following persons:\textsuperscript{295}

i) Any police officer or special juvenile unit or a designated police officer.

ii) Any Public Servant.

\textsuperscript{292} Section 26, ibid.
\textsuperscript{293} See Supra note 259.
\textsuperscript{294} Section 29, ibid.
\textsuperscript{295} Section 32, ibid.
iii) Child line, a registered voluntary organization or by such other voluntary organization or an agency as may be recognized by the State Government.

iv) Any social worker or public spirited citizen authorized by the State Government.

v) By the child himself.

On receipt of report under Section 32, the Committee shall hold an inquiry in the prescribed manner. The state government shall review the pendency of cases of the committee at every six months and direct the committee to increase the frequency of sittings or may cause the constitution of additional committees. If the Committee is of the opinion that the child has no family or ostensible support, it may allow the child to remain in the children’s home or shelter home till suitable rehabilitation is found for him or till he attains the age of eighteen years.

5.4.13 Children Homes and Shelter Homes

State Government is empowered to establish and maintains either by itself or in association with voluntary organizations, children homes in every district or group of districts for the reception of the child in need of care and protection during the pendency of any inquiry and subsequently for their care, treatment, education, training, development and rehabilitation. State Government is further empowered to recognize, reputed and capable voluntary organizations and provide them assistance to set up and administer as many shelter homes for juveniles or children. The shelter homes to be recognized, shall function as drop

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296 'or any Police Officer or special juvenile police unit or the designated police officer' words were deleted by The Juvenile Justice (Care and Protection of Children) Amendment Act, 2006, for details see Supra note 259.

297 Section 33(1), ibid.

298 inserted Section 33(3) by The Juvenile Justice (Care and Protection of Children) Amendment Act, 2006, for details see Supra note 259.

299 Renumbered as Section 33(4) from Section 33(3), The Juvenile Justice (Care and Protection of Children) Amendment Act, 2006, for details see Supra note 259.

300 Section 34, ibid.
in centres for the children in need of urgent support. Restoration of and protection of a child shall be the prime objective of above-discussed homes. The Committee shall take necessary steps to restore the child in need of care and protection to his parent, guardian fit person or fit institution as the case may be. Chapter-IV of the Act deals with the Rehabilitation and Social Regenerations of Children who are in Children Homes or Special Homes. This shall be carried during their stay in homes alternatively by :-

i) Adoption.
ii) Foster Care.
iii) Sponsorship.
iv) Sending the Child to an after-care organization.

Any person aggrieved by an order of competent Authority under this Act may within thirty days from the date of such order prefer an appeal to the Court of Sessions. The High Court has the power to call for any record of any proceeding in which any competent authority or Court of Session has passed an order for the purpose of satisfying itself as to legality or propriety of any such order and may pass such order in relation there to as it thinks fit; provided that the High Court shall not pass an order under the section prejudicial to any person without giving him a reasonable opportunity of being heard. The competent authority while holding an inquiry under any of the provisions of this Act, shall follow such procedure as may be prescribed and shall follow, as far as may be, the procedure laid down in the Code of Criminal Procedure, 1973 for trials in summons Case.
Significant changes have been brought by the Juvenile Justice (Care and Protection of Children) Act, 2000. The objective of Act, 2000 was to develop a child-friendly approach in the adjudication and disposition of matters relating to juvenile in conflict of law and child in need of care and protection.307

- In the old Act, juvenile delinquents were being brought before the juvenile Court. This has been redefined as a Juvenile Justice Board and will remove the stigma associated with appearing in a Court like adult criminals.
- Children will not have to wait for justice indefinitely, as the new enactment provides for the disposal of cases within a limited period of four months by the concerned authorities.
- It has also been made compulsory to set up the Child Welfare Committee under the present Act.
- Every offence against a juvenile is now cognizable. This will enable the police authority to take cognizance to such offence and would also result in appreciable reduction in such offence against children.
- Set up of special juvenile police units under the new Act.
- Special emphasis has been laid down for the rehabilitation and social re-integration of children.
- The new Act empowers the Board to give child in adoption and this adoption is allowed to even single parent and to same sex, irrespective of the number of biological sons or daughters.
- Local authorities including Panchayats, Zilla Parishads, Municipal Committees, Corporations and Cantonment Boards play a role in transfer of juvenile. Previously this power was entrusted only to the State Government.
- Role of voluntary organizations and local authorities has been specified for involving them at various stage for handling and rehabilitating children.

5.4.14 Thrust Area for Future

There has been a slight decrease in the violent or serious offence, it does not make sense to shift from a 'Care Philosophy in India'. Special attention is being given to tackle drug-abuse problems amongst socially and economically vulnerable groups such like street children, commercial sex workers, destitute women etc. A project on reducing risks behavior and HIV/AIDS, STD and drug abuse among street children has been undertaken by the Ministry of Social Justice and Empowerment, United Nations Drug Control Programme, UNICEF, WHO, and NACO.

Another positive step taken by Government of India is providing training/sensitization programmes to juvenile justice personnel such as judges, prosecutors, lawyers, law enforcement officials, immigration officers and social workers on the provision of the convention and other relevant international instruments in the field of juvenile justice, including the Beijing Rules, the Riyadh Guidelines and United Nations Rules for the protection of juveniles deprived of their liberty. The National Institute of Social Defense, a sub-ordinate office of the Ministry of Social Justice and Empowerment, Government of India has allocated a budget of Rs.2.5 million for the year 2000-2001 to publicize the provisions of CRC.

309 HIV/AIDS.
310 STD.
311 United Nations Children's Fund is created in December, 1946 by United Nations to provide food, clothing and health care to them.
312 World Health Organisation is the United Nations Specialised agency for health established on 7 April, 1948.
313 National Aids Control Organization.
5.4.15 Role of Supreme Court

In the last 56 years of the Supreme Court, there have been numerous cases where a child in conflict with the law has been brought forward. In the majority of the cases by the time case comes to Supreme Court, the child no longer remains a child juvenile. So the most formative years are spent by the juvenile in the prison. In *Jayindra v. State of UP* \(^{316}\) the Court came to the conclusion that at the time of offence he was about sixteen years. Therefore, the conviction was upheld but the sentence of imprisonment was quashed. The Court directed the immediate release of the youth. In *Bhoop Singh v. State of UP* \(^{317}\) the Sessions Judge rejected the School Certificate as “it is not unusual that in schools, ages are understated by one or two years for future benefits”. The Supreme Court ordered the immediate release of the convict and held that the school certificate should be taken as valid, as there was no material evidence contradicting the age given in it. The Session Judge went by his surmise that many parents gave false age to gain benefits. The same principle was applied in *Pardeep Kumar v. State of UP* \(^{318}\).

Another important issue relating to juvenile was discussed in *Dharampal & others v. State of UP* \(^{319}\) where in the Apex Court had held that raising plea that the accused was a child for the first time in the Supreme Court cannot be accepted. This was diluted in *Gopinath Gosh v. State of West Bengal* \(^{320}\) when the Court allowed the plea to be raised for the first time in the Supreme Court. But in *Shiv Shankar v. State of UP* \(^{321}\) the Supreme Court re-iterated the position laid down in *Dharampal’s case*. \(^{322}\) There is no clarity as to right time to apply Juvenile Justice Act. There were many judgment which have held that the correct date would be date on which charges were framed but this aspect was dealt in

\(^{316}\) AIR 1982 SC 685.

\(^{317}\) AIR 1987 SC 1329.

\(^{318}\) 1996 Supp (4) SCC 419.

\(^{319}\) 1975 (2) SCC 596.

\(^{320}\) 1984 (Supp) SCC 28.

\(^{321}\) 2001 (10) SCC 472.

\(^{322}\) Supra note 319.
Umesh Chandra v. State of Rajasthan\textsuperscript{323} when the Court held that relevant date for the applicability of the Act was date of the offence and not the date of the trial. This was reaffirmed in Balwant Kaur v. Union Territory of Chandigarh.\textsuperscript{324} But this was overruled again in Arnit Das v. State of Bihar\textsuperscript{325} where it was held that the relevant date for giving the benefit of the Act to the child would not be the date of offence. Since there was a clear conflict in Arnit Das and Umesh Chandra’s case the matter was referred to the Constitution Bench in Pratap Singh v. State of Jharkand & another\textsuperscript{326} where the Court dealt with two main issues:

a) Whether the date of occurrence will be the reckoning date for determining the age of the alleged offenders as juvenile offender or the date when he is produced in the Court of competent authority?

b) Whether the Act of 2000 will be applicable in the case where proceeding has been initiated under 1986 Act and pending when the Act of 2001 was enforced with effect from 1.4.2001?

On the first issue the Court held that with regard to the relevant date for applicability of the Act, is the date on which the offence takes place and not the date on which he is produced before the authority or in the court. It is quite possible that by the time the case comes up for trial, growing in age being an involuntary factor, the child may have ceased to be a child. On the second issue the Act and Rules framed by the Central Government indicates that the intention of the legislature was that the provisions of 2000 Act were to apply to pending cases provided on 1.4.2001 i.e. the date on which the 2000 Act came into force the person was “juvenile” the meaning of the term as defined in the 2000 Act i.e. he/she has not crossed 18 years of age.

\textsuperscript{323} 1982(2) SCC 202.
\textsuperscript{324} 1988(1) SCC 1.
\textsuperscript{325} 2000 (5) SCC 488.
\textsuperscript{326} 2005(3) SCC 551.
The purpose of the Juvenile Justice Legislation is to provide succor to the children who were being incarcerated along with the adults and were subjected to serious abuses. The problem of juvenile is, no doubt, one of the tragic human interest so much so in fact that it is not confined to this country alone but cuts across national boundaries. In 1966 at the Second United Nations Congress on the Prevention of Crime and Treatment of offenders at London, this issue was discussed and several therapeutic recommendations were adopted. In 1985 the United National Standard Minimum Rules for the Administration of Juvenile Justice were laid down which was also known as Beijing Rules. These Rules were guidelines to member states in developing measures to protect the human rights of children in conflict with law.  

- Member States shall seek to further the well being of juveniles and their families and ensure their meaningful lives in the community.
- Juvenile justice shall be an integral part of the national development process of each country.
- Age of criminal responsibility should not be too low.
- Reaction to juvenile offenders should be in proportion to the offender’s age and the offence.
- Scope for discretionary power.
- Rights of juveniles, due process sand right to privacy to be suspected.
- Rules regarding investigation and prosecution.
- Guidance regarding semi-institutional arrangement.

The Beijing Rules recognized that children, "owing to their early stage of human development require particular care and assistance with regard to physical, mental and social development and require legal protection in conditions of peace, freedom of dignity and security". 

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328 Ibid.
India said, in its judgment in the case of *Sheela Barse v. Union of India*\(^{329}\) that “........... Instead of each State having its own children’s Act in other States, it would be desirable if the Central Government initiates Parliamentary Legislation on the subject, so that there is complete uniformity with regard to the various provisions relating to children in the entire territory of the country.”

To bring in conformity with the Beijing Rules and to have a uniform legislation on juvenile justice, the Juvenile Justice Act, 1986 came into existence which after ratification of the Convention of Child Rights in India 1992 and changing social attitude is replaced by the Juvenile Justice (Care and Protection of Children) Act, 2000. Infact, is the Act is based to achieve of welfare of juveniles through twin doctrines of parens patriae and individualized treatment because to metre out justice becomes a serious responsibility in case if person in question is a juvenile.\(^{330}\)

The Juvenile Justice Act specially refers to international law. The relevant provisions of the Rules are incorporated therein. The international treaties, covenants, conventions although may not be the part of municipal law, the same can be referred to and followed by the correct having regard to the fact that India is party to the said treatises.\(^{331}\) Convention of India and juvenile justice legislations must necessarily be understood in the content of present days scenario and having regard to international treaties and conventions. Now the legislations speak not only to the people of India who made it and accepted it but also to the international community as the basic law of Indian National which is a member of that community.\(^{332}\)

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5.5. RIGHTS OF GIRL CHILD

Gender is generally becoming an integral part of all child development policy, planning and programming, monitoring, evaluation and information gathering activities. However, in India, the girl child still occupies an inferior status to a male child. The National Plan of Action, 1995 has a separate chapter on girl child highlighting the importance of this particular area. The objective laid down in the plan was to remove gender bias and to improve the status of girl in society so as to provide her with equal opportunities for her survival and development to her potential. The Platform for Action proposed dual strategy to improve the situation of the girl child. Firstly, measures for mainstreaming sectoral programmes so that they reach and save girls who are systematically discriminated against. Secondly, targeted programme and advocacy initiatives designed and implemented to address specific concerns of girls. The discrimination with the girl child starts from the day she is born or so to say when she is in womb and from home only. The attitude towards girls are reflected in the following social trends.

- **Population growth indicates general discrimination** - During 1981-1991, the female population (21.77 percent) grew at a slower pace than the male population.
- **Sex ratio is unfavorable to women** - From 972:1000 in 1901 it has come down to 933:1000 in 2001. Without discrimination the ratio should be approximately 1050/1000. The 2001 National Census of India has revealed the worst over ratio of females to males in the 0-6 year age group. The overall female-male ratio for all ages rose slightly from 1991 figures of 927/1000 to 933/1000 in 2001. But the juvenile sex ratio in the range fell from 945/1000 in 1991 to 927/1000 in 2001. This is a decline of

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18 points. There was a similar trend in 1981-91, with a decline of 17 points.\footnote{336}<http://www.crin.org/docs/resources/treaties/crc.37/IndiaAllianceForChildRights%20/ACR.pdf> accessed on 26th May, 2006.

- **Girls child marriage** - Despite steady increase in average marriage age in India, child marriage is still common in rural society. Thirty-nine per cent of girls between 15-19 years were married during 1992-93. Early marriage and early pregnancy results in physical wastage, birth complication and low-birth weight babies with poor survival rates.\footnote{337}<http://www.wcd.nic/crtpdf/CRC-3 PDF> p.58 accessed on 26th May, 2006.

- **Early pregnancy and unsafe motherhood**: 17 percent of total births are from mothers in the age group 15-19 years. Early pregnancy damages the health of both the mother and the child and puts both lives at risk. The maternal mortality rate in India high at 437/1,00,000 births. It is estimated that 13 per cent of these deaths occur before the age of 24 years.\footnote{338}{Ibid.}

- **Female mortality** - Although, overall mortality rates have declined, high female mortality persists at every age level up to the age of 35 years. Differential health care, education, nutritional status, and existing cultural beliefs and practices are to blame for higher female mortality.\footnote{339}{Ibid.}

- **Every year 12 million girls are born** - Three million of whom do not survive to see their fifteenth birthday. About one-third of these deaths occur in the first year of life and it is estimated that every sixth female death is directly due to gender discrimination. Son preference results in female foeticides, infanticide and neglect. Foeticide, although largely invisible, is commonly practiced in Maharashtra, Rajasthan, Tamil Nadu, Haryana and Punjab.\footnote{340}{Ibid.}

- **Nutritional status** - The root cause of malnutrition amongst girls is as much poverty and lack of nutritious food, as lack of value attached to girls. Discriminatory feeding practices reveal:\footnote{341}{Ibid.}
Girl's nutritional intake is inferior in quality and quantity.
Boys have access to more nutritious food.
Boys are given first priority with the available food within the family.

The most alarming problem in this case is of Femicide, which means female infanticide, sex-selective abortions. The structure of the family in India is of such a nature that male maintains the continuity of lineage, there is preference of sons is most parts of the country and numerous studies of Indian couples have only re-iterated this. The NFHS-2 survey shows that 36 percent of women want sons more than daughters only two percent want daughters more than sons. Son preference in relatively weak in urban areas among literate women. It is observed to be particularly strong in northern and central India and weaker in southern and western regions. In tribal population discrimination against women is not severe. The negative basis against women has taken an alarming dimension with the utilization of amniocentesis test for detecting the sex of the fetus. Amniocentesis was introduced as a measure to detect foetus genetic abnormalities but this invention has resulted in ‘quickening the pace of death of the female child from the born to the unborn stage.’ But in India it is used for sex-determination test and further for sex-selective abortions Amniocentesis or sex-selective abortions are crime under IPC. The IPC lays down stringent penalties. The Prenatal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994 is aimed at banning selective abortion of females. The Medical Termination of Pregnancy Act, 1971 permits termination of pregnancies before twenty weeks under certain circumstances. The relevant provisions of IPC are as follows:

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342 Ibid, p.65.
343 Anand Grover, 'Amniocentesis or Female Foeticide', The Lawyers, (March 1986), p.3.
344 See Supra note 238, p.387.
<table>
<thead>
<tr>
<th>Section</th>
<th>Offence</th>
<th>Punishment</th>
</tr>
</thead>
<tbody>
<tr>
<td>312</td>
<td>Causing miscarriage voluntarily. If the woman be quick with child (quick with child is not defined under the Act but it can be interpreted to mean a child capable of being born alive).</td>
<td>Imprisonment for three years or fine or both. Imprisonment for seven years and fine.</td>
</tr>
<tr>
<td>313</td>
<td>Causing miscarriage without woman’s consent.</td>
<td>Imprisonment for life or imprisonment for ten years or fine.</td>
</tr>
<tr>
<td>314</td>
<td>Death caused by act done with intent to cause miscarriage. If the act done without the women’s consent.</td>
<td>Imprisonment for ten years and fine. Imprisonment for life or as above.</td>
</tr>
<tr>
<td>315</td>
<td>Act done with intent to prevent a child being born alive or to cause it to die after its birth.</td>
<td>Imprisonment for ten years or fine or both.</td>
</tr>
<tr>
<td>316</td>
<td>Causing death of a quick unborn child by an act amounting to culpable homicide.</td>
<td>Imprisonment for ten years and fine.</td>
</tr>
<tr>
<td>317</td>
<td>Concealment of birth by secret disposal of dead body.</td>
<td>Imprisonment for two years or fine or both.</td>
</tr>
</tbody>
</table>
5.5.1. The Pre-natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994

The Act was enacted to provide for the regulation of the use of pre-natal diagnostic techniques for the purpose of detecting genetic or metabolic disorders or chromosomal abnormalities or certain congenital malformations or sex-linked disorders and for the prevention of the misuse of such techniques for the purpose of prenatal sex-determination leading to female feticide. The Act, inter-alia, provides for -

1. Prohibition of the misuse of prenatal diagnostic techniques for determination of sex of fetus, leading to female feticide;
2. Prohibition of advertisement of pre-natal diagnostic techniques for detection or determination of sex.
3. Permission and regulation of the use of pre-natal diagnostic techniques for the purpose of selection of specific genetic abnormalities or disorders;
4. Punishment for the violation of the provisions of the proposed legislation.

The Act is divided into five main parts.

i) Regulation of genetic counseling centres, genetic laboratories and genetic clinics.
ii) Regulation of prenatal diagnostic techniques.
iii) Constitution of Central Supervisory Board.
iv) Appointment of Appropriate Authority and Advisory Committee.
v) Punishments for the violation of the provisions of this Act.

I Regulation of Genetic Counseling Centres, Genetic Laboratories and Genetic Clinics

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Registration is mandatory if the Genetic Clinic, Genetic Laboratories and Genetic Counseling Centre conduct or help in activities relating to pre-natal diagnostic techniques.  

- The employees in the above referred centres should possess prescribed qualification.
- The pre-natal diagnostic technique is to be carried in place registered under this Act.

II Regulation of Pre-natal Diagnostic Technique:
- Pre-natal diagnostic technique can only be used for detection of following abnormalities, namely:  
  
  (i) Chromosomal abnormalities;
  (ii) Genetic metabolic diseases;
  (iii) Haemoglobinopathies;
  (iv) Sex-lined genetic disease;
  (v) Congenital anomalies;
  (vi) Any other abnormalities or diseases as may be specified by the Central Supervisory Board.

- Pre-natal diagnostic techniques can be conducted only if one of the following conditions is satisfied:  
  
  (i) Age of the pregnant women is above thirty-five years;
  (ii) The Pregnant woman has undergone two or more spontaneous abortions or foetal loss;
  (iii) The Pregnant women had been exposed to potentially teratogenic agents such as drugs, radiation, infection or chemicals;
  (iv) The Pregnant woman has a family history of mental retardation or physical deformities such as spasticity or any other genetic disease.
  (v) Any other condition as may be specified by the Central Supervisory Board.

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347 Section 2(j), ibid. Pre-natal Diagnostic techniques include all pre-natal diagnostic procedures and pre-natal diagnostic tests.
348 Section 4(2), ibid.
349 Section 4(3), ibid.
• The Pre-natal diagnostic procedure can be carried out only after the following conditions are satisfied.350
  (i) He has explained all known side and after effects of such procedures;
  (ii) He has obtained in the prescribed form her written consent to undergo such procedure in the language which she understands;
  (iii) A copy of her written consent is given to the pregnant woman.

No person shall conduct or cause to be conducted any pre-natal diagnostic technique including ultra sonography for the purpose or determining the sex of a foetus.

III Central Supervisory Board:

The Central Government shall constitute a Board to be known as the Central Supervisory Board.351 The Board will advise the Government on policies relating to pre-natal diagnostic techniques, review the implementation of the Act, lay down code of conduct for the people working in Genetic Counseling Centres, laboratories and clinics and create the public awareness against the problem of pre-natal determination of sex and female foeticide.352

IV Appropriate Authority and Provisory Committee:

The main functions of the Appropriate Authority shall be.353
  a) To grant suspend or cancel registration of Genetic Counseling Centre, Genetic Laboratory and Genetic Clinic;
  b) To enforce standards prescribed for the Genetic Counseling Centre, Genetic Laboratory and Genetic Clinic;

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350 Section 5, ibid.
351 Section 7, ibid.
352 Section 16, ibid.
353 Section 17(4), ibid.
c) To investigate complaints of breach of the provisions of this Act or the rules made there under and take immediate action; and
d) To seek and consider the advice of the Advisory Committee on application for registration and on complaints for suspension or cancellation of registration.

V Offences and Penalties

This Act is cognizable, non-bailable, and non-compoundable. The Offences and Penalties under the PNDT Act are:

<table>
<thead>
<tr>
<th>Offences</th>
<th>Penalties</th>
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<tr>
<td>No person, organization, genetic counseling centre, generic laboratory or genetic clinic shall issue or cause to be issued any advertisement regarding facilities of prenatal determination of sex available as such centre, laboratory, or clinic or any other place.</td>
<td>Punishable with imprisonment for a term which may extend to three years and with fine which may extend to ten thousand rupees.</td>
</tr>
<tr>
<td>No person or organization shall publish, distribute or cause to be published or distributed any advertisement regarding facilities for prenatal determination of sex.</td>
<td>Punishable with imprisonment for a term which may extend to three years and with fine which may extend to ten thousand rupees.</td>
</tr>
<tr>
<td>Any medical geneticist, gynecologist, registered medical practitioner, or any person who owns a genetic</td>
<td>Punishable with imprisonment for a term which may extend to three years and with fine which may extend to ten thousand rupees.</td>
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354 Section 27, ibid.
355 See Supra note 238, p.386.
357 Section 22(2), ibid.
counseling centre, laboratory, or clinic or is employed in them and renders his professional or technical services and contravenes the provisions of this Act or rules made thereunder. thousand rupees and on any subsequent conviction with imprisonment which may extend to five years and with fine which may extend to fifty thousand rupees.\(^{358}\) The name of the registered medical practitioner convicted for the above offence can be removed from the State Medical Council for a period of two yeas for the first offence and permanently for the subsequent offence.\(^{359}\)

If a person is compelled to undergo diagnostic techniques for purposes other then those specified in the Act. Punishable with imprisonment for a term which may extend to three years and with fine which may extend to ten thousand rupees and on any subsequent conviction with imprisonment which may extend to five years and with fine which may extend to fifty thousand rupees.\(^{360}\)

Contravening any other provision of the Act or rules. Punishable with imprisonment for a term which may extend to three months or with fine which may extend to one thousand rupees or with both and in the case of continuing contravention with an additional fine which may extend to five hundred rupees for every day during which

\(^{358}\) Section 23(1), ibid.

\(^{359}\) Section 23(2), ibid.

\(^{360}\) Section 23(3), ibid.
such contravention continues after conviction for the first such contravention.\footnote{361}

| When any offence under this Act is committed by a company. | Every person who at the time, the offence was committed was in charge of and was responsible for the conduct of business and was aware of the offence shall be deemed to be guilty and proceeded against and punished accordingly.\footnote{362} |

The Court shall presume that the pregnant woman has been compelled by her husband or relative to undergo prenatal diagnostic technique and such person shall be liable of abetment of offence.\footnote{363}

The Pre-Natal Diagnostic Techniques Act, 1994 came into force in 1996 but still the 2001 census shows that female. Sex ratio i.e. 933 to 1000 in India was the lowest in the world. The situation was even more worst in some of prosperous states with the sex ratio at 733 in Chandigarh, 821 in Delhi, 861 in Haryana and 864 in Punjab.\footnote{364} The net result is that clinics are working in full swing. In many of those clinics doctors who do not have the requisite qualifications are performing these procedures.\footnote{365} In almost all the States appropriate authorities have not been set up at district levels and in some states at the State level. Neither there are hardly any complaints made by the appropriate authorities to the concerned Magistrate for the violation under the act, nor have any proceeding been initiated for cancellation of registration of

\footnote{361}{Section 25, ibid.}
\footnote{362}{Section 26, ibid.}
\footnote{363}{Section 23(3), ibid.}
\footnote{364}{<http://www.wcd.nic.in/crcpdf/CRC.PDF> p.57 accessed on 26\textsuperscript{th} May, 2006.}
\footnote{365}{In a recent incident in the vicinity of a private hospital in Patiala district, a 30 feet deep well yielded 50 dead foetus, all females. The owners of the Sahib hospital in Patran were arrested. <http://www.indiatogether.org/2006/sep/ksh-babies.htm> accessed in 10\textsuperscript{th} October, 2006.}
these Clinics. A writ petition in this regard was filed under Article 32 of the Constitution of India by the Centre for Enquiry into Health and Allied Themes (CEHAT), Mahila Sarvangeen Utkarsh Mandal (MASUM) and Dr. Sabu M. George. According to the petitioners, the problem was the interpretation of this Act by the Ultrasoundogists, the abortionists, the doctors and most importantly the Government. Despite the intent and purpose it was being interpreted to include pre-natal sex-selection. Thereby there was widespread advertisements by various clinics providing pre-natal sex selection. After filing of the petition, the Court issued notices to the concerned parties. It took nearly a year for the various States to file their affidavits in reply/written submissions. The Supreme Court took cognizance of the fact that female infanticide and foeticide still persists in India despite the enactment of the Pre-natal Techniques (Regulation and Prevention of Misuse) Act, 1994. The gist of the order passed by the Court is as follows:

- The Central Government has been directed to create public awareness against the practice of pre-natal determination of sex and female foeticide through appropriate releases/programmes in the electronic media.
- The Central Government has been directed to implement with all vigor and zeal the Act and the rules framed in 1996.
- Meeting of Central Supervisory Board (CSB) to be held at least once in six months.
- The CSB shall review and monitor the implementation of the Act.
- The CSB shall issue directions to the appropriate authorities in all States/Union Territories to furnish quarterly returns to CSB, giving report on the implementation of the Act.
- The CSB will examine the necessity to amend the Act keeping in mind emerging technologies and difficulties encountered in the implementation of the Act and to make recommendation to the Government of India.

• The CSB shall lay down a code of conduct to be observed by persons working in bodies specified therein to ensure its publication so that the public at large can know about it.

• All Governments/Union Territory Administrations are directed to appoint by notification, fully empowered appropriate authorities at district and sub district levels and also advisory committees to aid and advise the appropriate authority in discharge of its functions.

• All Government/Union Territory administrations are directed to create public awareness against the practice of pre-natal determination of sex and female foeticide through advertisement in the point and electronic media.

• Appropriate authorities are directed to take prompt action against any person or body who issue or cause to be issued any advertisement in the violation of the Act.

The CSB and the State Government/Union Territories were directed to report to the Court on or before 30th July 2001. Another landmark in the course of the PIL was hearing held on 11th December, 2001. The Supreme Court called upon the Chief Health Secretaries368 of Punjab, Delhi, Bihar, Rajasthan, Gujarat, Haryana, Uttar Pradesh, Maharashtra and West-Bengal to remain present before the Court on the 29th of January 2002 for non-compliance of orders passed by the same. The Supreme Court also directed companies manufacturing ultrasound machines to provide information about the individuals or groups to whom ultrasound machines have been sold during a period of last 5 years. Furthermore, the Customs & Import Department were directed to supply information on number of ultrasound machines sold to clinics or individuals as the case may be. The Centre was asked to frame rules for ensuring action. Till the time that such rules are framed some companies were directed to supply such details. These companies include Wipro GE, Philips Medical Systems, Siemens,

5.5.2. The Medical Termination of Pregnancy Act, 1971

In India the recommendation of the State Committee to propose legislation for abortion was a historic step in addressing the health rights of women. As abortion was anyway available to women widely despite it being criminalized under the IPC, the State took up the cause pro-actively under its family planning programme. Apart from making abortion legal, the Medical Termination of pregnancy Act created a monopoly for provision of abortion services within the allopathic medical profession, and that too for obstetricians and Gynecologists and other medical doctors who received special training as mandated in the Act and Rules. Under the Medical Termination of Pregnancy Act 1971 (MTP Act 1971), in India all abortions carried out required the consent of the woman and all abortions after twenty weeks are illegal. Pregnancies under the Medical Termination of Pregnancy Act are allowed to be medically terminated. The conditions under which abortions can be conducted are depicted.

条件

- 如果少于十二周
  - 由一位注册的医疗官执行

- 介于十二周和二十周之间
  - 由两位注册的医疗实践者执行

- 超过二十周
  - 无
If any of the above conditions are satisfied, the termination of pregnancy is allowed with the consent of the woman as a health measure, on humanitarian ground and on eugenic grounds. The pregnancies can be terminated only at government hospitals or at other places approved by the government under the following circumstances.

- Pregnancy would involve a risk to life of the pregnant women or cause a grave injury to her physical or mental health.
- If there is substantial risk that the child, if born, would suffer from such physical or mental abnormalities as to seriously handicapped.
- If the pregnancy is alleged to have been caused by rape, the anguish caused by such pregnancy shall be presumed to cause a grave injury to the mental health of the pregnant woman.
- When any pregnancy has occurred as a result of failure of any device or method used by a married women or her husband for the purpose of limiting the number of children, the anguish caused by such unwanted pregnancy may be presumed to constitute a grave injury to the mental health of the pregnancy women.
- In case of minor or below eighteen years or a lunatic the pregnancy shall be terminated with the consent in writing of her guardian.

The Act further states that no suit or other proceedings shall lie against any registered medical practitioner for any damage caused or likely to be caused by anything which is done in good faith or intended to be done under this Act.

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373 Ibid.
376 Section 8, ibid.
The MTP also plays a guilty role by allowing abortions upto twenty weeks policies need to be clearly demarcate the purposes and domains of the Pre-natal Diagnostic Technique Act and Medical Termination of Pregnancy Act. Both the Act does not contradict each other but co-exist. Policies need to ensure that measures for preventing sex-selective abortions does not affect the access to safe abortions for the genuine abortions seeker.

5.5.3. Amendments in the Medical Termination of Pregnancy Act, 1971

The Medical Termination of Pregnancy (Amendment) Bill, 2002 was approved by Parliament of India on December, 2002. The main objective of the amendments is to reduce the rate of unsafe abortions by making legal abortions more widely accessible. The important amendments are:

- Substituting the word ‘Lunatic’ by the words ‘mentally ill person’ in Section 2(a).
- ‘Mentally ill person’ means a person who is in need of treatment by reason of any mental disorder other than mental retardation in Section 2(b).
- Section 4 has been amended with an object of delegating powers to the Government to approve places for medical termination of pregnancy and constitution a district level committee headed by Chief Medical Officer/District Health Officer.
- In Section 5 of the principal Act for Sub-Section (2) and the explanation has been added which prescribes punishment by rigorous imprisonment of not less than two years, extending up to seven years.
  - To clinics which are not authorized to conduct abortions; and
  - To persons who are not registered medical practitioners with requisite experience or training for terminating pregnancy.

378 Section 4, ibid
379 Section 5(2), ibid.
This newly added section imposed a duty on the CEOs/owners of all health care institutions to see that no illegal termination of pregnancies are undertaken in the institutions headed by them. This section does not refer to the CEOs/owners vicarious liability for the acts of their employees or agents. This amendment of 2002 recognized the fact that the CEOs/owners of such hospitals are abettors to this crime of performing an illegal termination of pregnancy and therefore, must not go unpunished for it is only with their patronage that illegal abortions can be performed at their hospitals. Now CEOs/owners need to be extra vigilant to see that illegal termination of pregnancy does not take place at unregistered centres.

5.5.4. Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Amendment Bill, 2002

Pre-Natal Diagnostic Techniques (Regulation & Prevention of Misuse) Act has been enacted to uphold medical ethics and initiate the process of regulation of medical technology in the larger interest of the society. On December 11, the Parliament approved the bill Pre-Natal Diagnostic Techniques (Regulation & Prevention of Misuse) Amendment, 2002. As mentioned earlier the 2001 Census data revealed an alarming data in female sex ratio in India. The proliferation of the technologies mentioned above may, in future, participate a catastrophe in the form of severe unbalance in male-female ratio. The State is also duty bound to intervene in such matters to imply the welfare of the society especially of the woman and children.

The purpose of amendment is to ban the use of both sex selection techniques prior to conception as well as the misuse of pre-natal diagnostic

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380 Prof. Gopinath, Hospital CEOs can be jailed for illegal MTPs, <http://www.expresshealthcaremgmt.com/20040515/legalities01.shtml> accessed on 30th May, 2006.
382 See Supra note 238, p.398.
techniques for sex selective abortions and to regulate such techniques with a view to ensure their scientific use for which they are intended.

- Main impetus to amend existing law has been to broaden the existing ban on sex determination to include the use of pre-conception and pre-implantation genetic diagnosis for sex-selection.383
- Maintenance by doctors of written records of procedures carried out.384
- Vesting the State, district and Sub-district level authorities of powers equivalent to civil Courts.385
- To ensure compliance with the law and to follow up reports on of violation and misconduct.386

Both these amendments, which represent positive steps in an effort to improve women’s health and rights in India, also protect the life and dignity of girl child. At the same time, none of these issues can be solved through legislation alone. The potential of either amendment to provide meaningful changes in reducing the number of either unsafe abortions or sex-selection in India is limited unless the government takes a serious step in addressing social and cultural bias against women and girls and resolving contradictions that arise within the government’s own policies. Real progress will rest much more on a sustained amendment by the government to address the root causes of these problems as it will read to effective implementation of these laws.

384 See Supra note 238, p.398.
385 Ibid.
386 Ibid.