CHAPTER-III:

CHILD WELFARE IN INDIA: A HUMAN RIGHTS AUDIT OF STATE INTERVENTION AND VOLUNTARY ACTION.

I Epistemological Aspects

Taking rights seriously means taking suffering and dignity seriously. Link word ‘and’ is important here. To an extent suffering can be reduced through charity, crisis-management aid or spurts of voluntary compassion here and there, but it requires a very high degree of self-awareness among individuals and institutions to realise that the duties ‘they’ perform on helpless men, women and children are basically claims owed to the ‘sovereign’ citizens of their democratic countries and are necessitated primarily because sovereign-will has not been generated sufficiently to correct institutional alignments on the principles of justice (ranging from families to the State). In the previous chapter we noted the role of “suffering” (Bentham¹), “dignity” (Feinberg²) and “sovereign

will-generation" (Habermas\(^3\)) in human rights epistemology. Combined vision of these scholars can be utilized to examine social facts of twentieth century India in the child welfare sector.

Mahatma Gandhi, a perceptive observer of the Indian social context, justified rights in terms of failure of the members of a society to perform duties to others. "If everyone performs one's duties, everyone's rights would be taken care of", he is reported to

\[\text{2. } "\text{Rights are indispensably valuable possessions. A world without them, no matter how full of benevolence and devotion to duty, would suffer an immense moral impoverishment... Rights... are not mere gifts or favours... for which gratitude is the sole fitting response. A right in something which a man can stand on, something that can be demanded or insisted upon without embarrassment or shame... A world with claim-rights is one in which all persons, as actual or potential claimants, are dignified objects of respect... No amount of love or compassion, or obedience to higher authority or noblesse oblige, can substitute for those values." Feinberg, G.: 'Duties, Rights and Claims. American Philosophical Quarterly. Vo1.73(3) (1966) , p.137.}\]

\[\text{3. } "\text{We can distinguish between communicatively generated power and administratively employed power. In the political sphere, then two contrary processes encounter and cut across each other (p.483)... How these two processes—the spontaneous forming of opinion in autonomous public spheres and the organised extraction of mass loyalty-interpenetrate, and which overpowers which, are empirical questions... (p.483)\}

... One can think of how existing parliamentary bodies might be supplemented by institutions that would allow affected clients and the legal public sphere to exert a stronger pressure for legitimation on the executive and judicial branches. The more difficult problem, however, is how to ensure the autonomy of the opinion—and will—formation that has already been institutionalised. After all, these generate communicative power only to the extent that majority decisions satisfy' (p.484).

have said⁴.

Gandhi understood social imperfections too well⁵, but, in the ultimate analysis, wanted to give first call to the consciousness of duty⁶, treating rights a subsidiary alternative mechanism of social safety. Analysts have quoted Indian classical texts to show existence of desirable moral precepts in them for holders of social and political power and implied pre-dominant consciousness of duty-based moralities in Indian society, while others have offered illustrations to discern notions fundamentally consonant with

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5. "A non-violent system of Government is clearly an impossibility so long as the wide gulf between the rich and hungry millions persists. The contrast between the palaces of New Delhi and the miserable hovels of the poor labouring class nearby, cannot last one day in a free India in which the poor will enjoy the same power as the richest in the land" M.K. Gandhi in *Young India*, dated 15th November, 1928.

6. As a leader of the multi-class anti-colonial movement, Gandhi's demands for human rights were limited to rights of free—speech and free-association:

"Civil liberty consistent with the observance of non-violence is the first step towards Swaraj. It is the breath of political and social life. It is the foundation of freedom. There is no room there for dilution or compromise. It is the water of life." M. K. Gandhi : *Collected Works* (Vol.69) p.356.

human rights\textsuperscript{8}. Classical textual extracts require contextual reading to unfold meaning\textsuperscript{9}, which ultimately means entering the domain of social history and studying popular human rights consciousness during specific historical situations. Put differently, historiography of human rights has to explore and, if necessary expose, politics of cultural representation\textsuperscript{10} – i.e., who claimed to represent 'a culture' and who was silenced by such claims\textsuperscript{11}.

Status of a right is ultimately determined by its instrumental value, because rights are means to realise human dignity\textsuperscript{12}.

\begin{itemize}
\item \textsuperscript{10} (a) O. Hutton (Ed.): Historical Change & Human Rights. Oxford Amnesty Lectures 1994 (New York, 1995).
\item \textsuperscript{11} Burden of tradition in this context is described by Swami Vivekananda: "Our aristocratic ancestors went on treading the common masses of our country under foot, till they became helpless, till under this torment the poor people nearly forgot that they were human beings. They have been compelled to be merely hewers of wood and drawers of water for centuries, so much so, that they were made to believe that they were born as slaves. (The Complete Works of Swami Vivekananda Vol.3 1963)"
\end{itemize}
Therefore, socio-historical search can be focussed on the demand and realization of rights-system rather than professed intentions in legal-philosophical texts. Sociologist Bryan Turner has taken this argument further. "Sociology" he says, "has neglected the empirical issue of human rights and has not developed any general theory of social rights as institutions" (Emphasis added). Outlining a theory of human rights, Turner argues that sociology can ground the analysis of human rights in a concept of human frailty (e.g. malnutrition, physical deformity, disease, mental illness, unborn children, children, elderly and universal question of their rights), idea of the precariousness of social institutions (e.g. in Althusserian terms: subordination of democratic participation to the requirement of the governments, families at risk and condition of social care institutions) and in a theory of moral sympathy (Max Scheler's phenomenology of sympathy capable of explaining collective sympathy and struggles for rights). He views rights as "social claims for institutionalised protection", and argues that sociology should study rights as claims of social groups struggling for survival, dignity and institutionalised protection.

15. Ibid: p.501
It is true that human frailty is a universal feature of human existence, but it is also true that, within a given category, degree of suffering differs. Children are vulnerable as a category, but there are children from poor families, abandoned children or abandoned infants with deformity. Social perception about the individuals further complicates problem of status of individuals in need. An aesthetically pleasing child is perceived differently than a child with mental retardation. Other examples would be: a girl child, an uncontrollable child, son of a devdasi, an unborn child and children of same parents with different birth order. Therefore, while attempting sociological exploration of children’s rights, status and perceptions, both, have been taken up for study. In day-to-day existence, deprivation, stigma and exclusion, all are important to know human rights status of a person or a group.

II Status of Children in Family Law:

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In the history of rights, family law is important for children for two reasons: first it is a primary potential site of conflict between the interests of children and parental power and secondly, because legal historians have linked emergence of children’s rights” with changed perceptions of ‘parental power’ in family law judgements.
Under Roman law a father had complete power over all the aspects of his child's life. He also had the power to decide whether the child should live at all. Under the English common law, fathers had rights to the custody, labour and services of their children and in some instances were enforceable regardless of the best interests of the child. Legal historians have shown that perceptions of 'parental powers' changed in family law judgements during the past twenty-five decades or so: slowly during the eighteenth and nineteenth centuries and radically in the twentieth century. An expressive example of the changed moods is a 1839 judgement of U.S. on the parental role in educating children:

"It is to be remembered that the public has a paramount interest in the virtue and knowledge of its members, and that, of strict right, the business of education belongs to it. That parents are ordinarily entrusted with it, is because it can seldom be put into better hands; but where they are incompetent or corrupt, what is there to prevent the public from withdrawing their faculties, held, as they obviously are, at its sufferance. The right of parental control is natural but not an unalienable one.\(^\text{16}\)"

Another development was in U.K. where State emerged as a surrogate parent under 'parents patriae' concept. John Seymour has shown (1994\(^\text{17}\)) how an ancient doctrine slowly crept into

\(^{16}\) Ex parte Crouse, 4 Whart. 9.11(1839). Judgement of the Supreme Court of Pennsylvania, U.S.A.

guardianship case-laws to widen *parents patriae* jurisdiction around the mid-eighteenth century. By 1790, it was possible for the court to override the views of a father in favour of a child needing social protection\(^{18}\) and appoint a guardian for her. Guardianship laws first accepted the claims of the mother (in U.K.) in 1839\(^{19}\) and in 1893 a court ruled that welfare of the child was “the dominant matter for consideration of the [Chancery] Court\(^{20}\).”

*‘Parents Patriae’* and paramountcy of child’s welfare emerged as important legal principles of the U.K. quite early. Importance of these principles laid not so much in their widespread application across classes or

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18. Seymour says: “The assertion of jurisdiction over a testamentary guardian paved the way for judicial control over a father’s exercise of his powers was a major change. It was one thing for the Court to take action to fill the gap when the natural parent was dead, it was quite another for it to override (5(a)) the views of a father, whose rights over his children had long been considered inviolable. This step was taken in the eighteenth century; when faced with a child who needed protection against the improper conduct of his father, Lord Thurlow felt able to rule that this court had arms long enough to reach such a case.” Ibid: p.175.

19. The mother’s rights were given limited legislative recognition in guardian cases in U.K. in 1839.

20. In *In re McGrath (Infant) (1893) 1 Ch 143* at p.148, Judgement of Justice L. Lindley. This interpretation was adopted by the legislature in Section 1 of the Guardianship of Infants Act, 1925.
parental behaviour\textsuperscript{21}, but as it happens with all human rights, declaration of these principles by a respected objective authority (i.e. courts) acted as legitimate instruments of counter-hegemonic struggles\textsuperscript{22} for children rights during the 20\textsuperscript{th} Century. Its instrumental value in creating children’s rights now seems as great as the web of pro-child institutions woven by the holders state-power during the twentieth century all over the world\textsuperscript{23}. Anchors of discourse were created, as presumptions, for pro-child rights

\begin{itemize}
\item \textsuperscript{21} Following remarks of John Eekelaar in The Emergence of Children’s Rights, Oxford Journal of Legal Studies, Vol. 6(2) (1896), Pp.161-182 may be seen: (i) “Early law viewed children primarily as agents for the devolution of property within an organised family selling... If children owned no land, the law was uninterested.” (ii) The way it (the welfare principle of Chancery Courts) was applied during the nineteenth century did not greatly differ from the approach, which characterized other areas of law. Unless he seriously threatened the child’s well-being, the father’s rights were paramount.” (p.168).
\item \textsuperscript{22} On the concept of rights (different from litigation-tools) as significant component of counter-hegemonic strategies Alan Hunt’s essay Rights and Social Movements: Counterhegemonic Strategies in Explorations in Law and Society (New York: Routledge, 1993), Pp. 227-248, may be seen. His conclusions are convincing: “It is important not to overstate the ramifications of litigation. ... Rights are neither perfect nor exclusive vehicles for emancipation. They can only be operative as constituents of a strategy of social transformation as they become part of an emergent “common sense” and are articulated within social practices. Rights-in-action involve an articulation and mobilization of forms of collective identities... (p.247). We are more likely to arrive at a positive evaluation of rights strategies if we see them as part of the wider field of hegemonic political practices. While rights-in-isolation may be of limited utility, rights as a significant component of counter hegemonic strategies provide a potentially fruitful approach to the prosecution of transformatory political practice.” (p.248).
\item \textsuperscript{23} To be discussed in part-III of this chapter.
\end{itemize}
Both the concepts entered India later: primarily through the Guardians and Wards Act (1890) which encoded a legal principle that in appointing or deciding guardian of a minor, courts shall be guided by “the welfare of the minor” (Section-17). It was a clause of high instrumental value and potential significance in protecting children and their civil interests, but as a piece of colonial legislation, the Act (1890) had a variety of compromising provisos & ambiguities filling the space created for the child welfare presumption. The presumption was strengthened through subsequent judicial creativity and post-independent legislation.

Facts are as follows.

(A) **Considerations of Personal Laws:** Full text of Section-17 (1) says that in appointing or declaring the guardian of a minor, courts “shall be guided” by “what consistently with the law to which the minor is subject, appears in the circumstances to be for the welfare of the minor”. Court judgements clarified the ambiguities of colonial legislation. In a 1942 judgement the Calcutta high court declared that provision regarding application of

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25. Under the entire colonial judiciary system in India, European British subjects enjoyed special privileges. Though substantive law and appellate authority were
personal law cannot fetter the power of the court in appointing even a stranger if the welfare of the child so required. 1942-judgement\textsuperscript{26} was a trendsetter because a 1932-judgement of the Allahabad high court had taken a view saying that the consideration of welfare of the child cannot dominate over the personal law\textsuperscript{25} and a 1939 judgement of the same court had also taken an identical stand\textsuperscript{27}.

Since 1942 the interpretation of Section 17 (1) vis-à-vis personal laws, is pro-child welfare. The stand was strengthened in 1958, 1963 and 1978. In 1958 the Calcutta High Court held that for the welfare of the child the courts could appoint even a relative who has lost his right under the personal law\textsuperscript{28}. In 1963 the Jammu and Kashmir High Court concluded that personal law is subordinate to the paramount consideration of the welfare of the child and in consideration of the welfare principle, the court gave guardianship to a ‘stranger’\textsuperscript{29}. In 1978 the Patna High Court sharpened the distinction explicitly by saying that in situations of a conflict between the personal law and the consideration of welfare of the minor, the latter must prevail\textsuperscript{30}.

\textsuperscript{26} the same for all subjects, for the purposes of commitment and trial, they were amenable to different courts. Even the Government of India Act, 1935, prohibited the Federal Legislature and the provisional legislatures from dealing with the legislature proposals affecting the procedure for criminal proceeding in which
**Right of Guardianship**: By way of a rider to the child welfare principle of Section 17(1), Section 19(b) of the *Guardians and Wards Act (1890)* inserted father's right of guardianship. It legislated that courts cannot appoint guardian of "a minor whose father is living and is not unfit to be guardian of the person of the minor." However, fitness criteria were left to the domain of judicial interpretation.

Here again judicial creativity strengthened the child welfare principle but the process took time. The Allahabad High Court in 1944 took the view that courts have been given wider discretion under Section-17 and whenever they are of the opinion that the welfare of the minor deserves appointment of a guardian, jurisdiction in this respect can be exercised. In 1956 independent India settled all doubts by legislating that in the "appointment or declaration of any person as guardian of a Hindu minor by a court, the welfare of the minor shall be the paramount consideration"

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the European British subjects were concerned without the previous sanction of the Governor-General.


[Section 13 (1) of the Hindu Minority & Guardianship Act, 1956]. On this consideration mother of an 11-year-old child was allowed guardianship and custody in 1968\textsuperscript{32}. In 1969, the Rajasthan High Court interpreted that Section 19 (b) of the Guardians and Wards Act (1890) is subject to the provisions of Section 13(1) of the Hindu Minority and Guardianship Act (1956)\textsuperscript{33}. In 1997 Supreme Court of India extended child welfare principle to Section 19 (b) and gave a ruling that in all situations where the father is not in actual charge of the affairs of a minor [because of (i) indifference (ii) incapacity or (iii) agreement between the parents] the mother can act as the natural guardian of the minor\textsuperscript{34}. Prior to the judgement, mothers right of her child’s custody was limited to the child being an illegitimate boy or an illegitimate unmarried girl or legitimate children of less than five years\textsuperscript{35}. In other cases father was considered natural guardian of his children and mother was denied such right during the lifetime of her husband not declared unfit.

\textsuperscript{32} Narain Singh vs. Suparna Kuer (A.I.R. 1968 pat 318).
\textsuperscript{33} Laltu Prasad vs. Ganga Sahai (A.I.R. 1973 Raj 93).
\textsuperscript{34} Dhanwanti Joshi vs Madhav Unde. Judgements Today, 1997 (8) SC 720.
\textsuperscript{35} Section 6 of the Hindu Minority and Guardianship Act, 1956.
(C) **Choice of the Minor:** Section 17(3) allows participation of children in guardianship proceedings to some extent: "If is the minor is old enough to form an intelligent preference the court may consider that preference" are the exact words of legislation (1890). When do children become old enough to form an intelligent preference? What are the methods of determining such competence of an individual child? Courts have been confronted with these questions, but there has been no systematic comprehension to replace ad hoc local wisdom of the presiding officer of the court. Savitri Goonesekere surveys participation of children in guardianship cases in South Asia:

"Subjective approaches are adopted... The Sri Lankan Courts have not, in general, utilized their flexible jurisdiction, preferring to be guided solely by the age of discretion concept of English law... Even when the courts would like to exercise their jurisdiction and consult child's wishes, there is basically no appropriate procedure for doing so.... Sri Lanka experimented with establishing separate family courts in 1978, which incorporated mandatory family counselling and a non-adversarial environment for dispute settlement. This experiment was a failure because of the absence of the necessary infrastructure and supporting professional counselling services"36.

Even in U.K. where infrastructure and support systems are better, there are attitudinal problems in accepting choice of children in guardianship cases. A leading authority on the subject writes:

"Judges have often discounted views of quite mature children. Children's views have been considered unreliable because of brainwashing or bribery by one parent or a fear that children may be unable to express a preference... They are frequently seen as poor decision makers who are likely to be over influenced by material considerations or short-term gains which are not for their long-term welfare"37.

On 16.2.2000, the Supreme Court of India in Sarita Sharma vs. Sushil Sharma38 agreed with the wishes of the children to stay with their mother and ruled that the decree of divorce cannot over-ride the welfare of the children.

(D). **Attitude towards Children's Property:** Attitudes towards property interests of the minors and mechanisms of protection under law in potentially complex situations reflect a society's vision of justice to the child. Pre-19th century legal history shows rigid patriarchal overtones\(^{39(a)}\), but it also shows occasional variations within the broad framework\(^{39(b)}\). For example, when more than a century ago P. N. Sen compared ancient Indian legal texts with ancient Roman Laws, he found that a son's right to hold separate property during the lifetime of his father was a little stronger in ancient India and was recognised earlier\(^{40}\). Although Manu had declared that a son could have no independent wealth\(^{41}\), later texts allowed exclusive property to sons. *Pitriprasada* (affectionate presents given by father), *Bharyadhanam* (property of the wife), *Vidyadhanam* (gains of learning) and *Shauryadhanam* (gains of war) were some examples\(^{41}\). Manu (VIII.27\(^{42}\)) expected king to protect the inherited property of the minor, while the *Arthashastra*

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desired that the property of minors should be held in trust and looked after by the village elders. Concept of family property, too, differed: in the Dayabhaya system a son could, not in the lifetime of his father, obtain a partition of the ancestral property without father's consent, while in Mitaksara system, the son had a right to demand partition of the ancestral property even against his father's will. Jimutavahana (Dayabhaga: I.44 and II.5) went to the extent of arguing that partition of the ancestral property should not take place until the death of the mother (in case of her survival after the father’s death). Both the systems, as Robert Lingat has convincingly shown\textsuperscript{44}, co-existed in India and corresponded to two types of families: the one resembling a patriarchal family in which the father was considered the sole master of the estate, the other a joint family where assets were held to be the collective property of the members.


\textsuperscript{45} “A Mitakshara family is a special feature of Hindu law. A minor who is a member of an undivided Mitaleshara family has no individual property at all. Consequently no guardian can be appointed under this Act to the property of such minor, unless he is possessed of any separate property.” B.B. Mitra: Guardians and Wards Act (Calcutta, Eastern Law House: 1995 Edu.) p.47.
Differing concepts of family property had their impact on the nature of intervention under the Guardians and Ward Act. Section 7(1) empowered courts to make order of guardianship property only when they were satisfied that a minor had “his” property. Thus, two classes of minors were created: (i) minors of undivided Mitakshara family (unless they had no adult members in the family or had some other property in their name) for whom property-guardian was not considered necessary

45 and (ii) minors of the joint Dayabhaga family where intervention of appointing property-guardian was possible in suitable cases

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III

Like guardianship laws, the welfare of the minor is a consideration in the Indian matrimonial statutes. In matrimonial proceedings, courts are expected to take “just and proper” decisions on children’s custody, maintenance and education. Expressions range from “may deem just and proper” [Section (4) of the Parsi Marriage and Divorce Act, 1936] to “it deems proper” [Sections 41 and 43 of the Divorce Act, 1869]. Section 26 of the Hindu Marriage Act 1955


and Section 38 of Special Marriage Act 1954 use the words "it may deem just and proper". None of these Acts, says that "welfare of the minor shall be the paramount consideration". (As provided under a subsequent legislation of 1956 on guardianship i.e., Section-13 of the Hindu Minority and Guardianship Act). However, the Madras High Court settled the issues and clarified in 1961 the following:

"Whenever a question arises before the court pertaining to the custody of a minor child, the matter is to be decided not on considerations of legal rights of the parties but on the sole and predominant criteria of what would best serve the interest welfare of the minor."  

Similarly, it has been held that access is not a right of the parent. Whenever the India courts have found that access of the parent is not in the interest of the child, they have denied access to the parent.

To what extent has an Indian child right to financial support from parents in cases of their matrimonial breakdown? The extent is extremely limited because the statutory provisions on this issue


are conceptually outdated and procedurally imprecise to incorporate child welfare principles adequately. We can begin with the assessment of Paras Diwan and go on to explain reforms in U.K. during seventies and eighties. Paras Diwan writes:

"The Hindu Marriage Act, Special Marriage Act and the Parsi marriage and Divorce Act (even after the amendment of 1988) do not go beyond the law as laid down in the Matrimonial causes Act 1950 (U.K.). The Indian Divorce Act 1869 is based on the late nineteenth century English law, and has been not reformed since then"^^

"The provisions of law in respect of aftermath divorce problems of children... have not gone beyond the Matrimonial Causes Act 1950. Under all our matrimonial statutes, the children are still treated as part of ancillary proceedings.. not as independent parties to the disputes between their parents. Further, once their interest is before the court, the court should continue to have jurisdiction to adjudicate all matters pertaining to them, irrespective of the fact whether the petition in the matrimonial cause is withdrawn, succeeds or fails."^^

There is no such problem in the laws of the United Kingdom, a country that has carried out a series of reforms in Family Law during seventies and eighties. Section 23 of the Matrimonial Causes Act, 1973 [U.K.] allows courts to pass appropriate financial provision orders for children in matrimonial proceedings

independent of the outcome of the proceedings between the parents. Such orders take minute care of the welfare of each child of the family — a concept defined under Section-52 of the Act to include children of both the parties seeking divorce: "legitimate", "legitimated" "adopted" or "illegitimate". The Children Act, 1989 requires both the parents to assume parental responsibility (Section-2) and provides for a statement of proposed arrangements for the children from them to accompany the divorce petition. Courts implement child welfare principle by passing (i) financial provision orders and (ii) property adjustment orders (Section-24 of the 1973 Act) under the parameters set under Section-3 of the Domestic Proceedings and Magistrates' Courts Act, 1978 [U.K.]. Child welfare gets the "first consideration" under Section 3(1) of the 1978 Act in deciding financial provision and property-adjustment orders. The Children Act 1989 took care of patriarchy and its privileges: Section-2 abolished "the rule of law that a father is the natural guardian of his legitimate child" (Sub-Section 4) and prescribed that more than one person can have parental responsibility "for the same child at the same time" (Sub-Section 6).
Basic legislative changes are required in India provide adequate justice to its children in matrimonial proceedings.

IV

Like guardianship and matrimonial statutes, adoption laws are also instruments of justice to children through family law. Adoption of children has been going on in India since at least two thousand years. There are not only references to the practice, but also sophisticated theorization of practice: we can refer to Chapter 15 of the Dharama-Sutra of Vasistha (which Kane places between 300 and 100 B.C\textsuperscript{51}) to Dattaka-Chandrika\textsuperscript{52} and Dattaka-Mimamsa\textsuperscript{53} (treatises on adoption written in the early seventeenth century).


\textsuperscript{52} By Kubera and translated by Sutherland (Calcutta, 1821), Edited by Y. Bhattacharya (Calcutta, 1885)

\textsuperscript{53} By Nanda Pandita and translated by Sutherland (Calcutta, 1821). Edited by Y. Bhattacharya (Calcutta, 1885).


Adult concerns and preferences seem to dominate these texts and welfare of the adopted child is left to the good conscience of the master of the new household. Manusmrti’s definition of an adopted son (9: 168) highlights three facts of reality:

"The son whom the mother or father gives away in extremity, with libations of water, is to be known as the adopted son, if he is affectionate towards and like (the adopting father)." (Emphasis added).

Extremity of the situation, new father’s interpretation of child’s affection towards him and child’s eligibility in terms of caste equivalence are significant pointers of child’s status vis-à-vis his selector’s privilege based on property and social power. Heirship entitlement and social status prescriptions for adopted children in Ancient Indian texts also varied: Arthashastra (3.7.4-19) asserts limitation of their entitlement to adopted father’s self acquired property. Gautam Dharmasutra (XXVIII.32) places adopted son in the third rank as heir, whereas Vasistha Dharmasutra (XVII.28) placed him in the eighth position and denied him the status of a heir.

Modern law of adoption (the Hindu Adoptions and Maintenance Act, 1956) rightly removed the effect of any ancient text of Hindu law on
adoption (Section – 4) and laid down criteria of (i) child welfare, (ii) wishes of the child and (iii) scrutiny of profit-making in adoption for court’s decision [Section – 9 (5)]. It also expanded by permitting adoption of girls and adoption scope of non-material children (Section-2) and empowered women to take a child in adoption (Section – 8). However, compared to the efforts in many other countries, legislative intervention through the Act (1956) seems inadequate in coverage and content.

To illustrate the deficiency of content we can compare Section-9 (5) of *Hindu Adoptions and Maintenance Act, 1956* with the pro-child concerns of *the German Civil Code, 1977* (Articles 1741, 1745, 1746 and 1754).

(A) Section-9(5) of the Hindu Adoptions and Maintenance Act, 1956:

“Before granting permission to a guardian under Sub-Section (4), the court shall be satisfied that the adoption will be for the welfare of the child, due consideration being for the purpose given to the wishes of the child having regard to the age and understanding of the child and that the applicant for permission has not received or agreed to receive and that no person has made or given or agreed
to make or give to the applicant any payment or reward in consideration of the adoption except such as the court may sanction.”

(B) German Civil Code, 1977

Article-1741: “The adoption of a child is permissible when it serves the welfare of the child and when it can be expected that a parent child relationship between the child and the adoptive parents will develop.”

Article-1745: “The adoption shall not be pronounced when it is contrary to the interest of the adoptive parent(s) or the interest of the adoptee or when there is reason to believe that interests of adoptee will be endangered by the children of the adoptive parent(s). Financial interest shall not be a decisive factor”.

Article-1746:
1. “The consent of the child is necessary for the adoption. In the case of a child who is incapable of acting in law or who has not attained the age of fourteen years, this consent can only be given by statutory representative of the child. In other cases, this consent can only be given by the child himself, the argument of the child’s statutory representative to this consent is not necessary”.
5. Provided the child has attained the age of fourteen years and is capable of acting in law, he/she can revoke the consent before the guardianship court until the time the pronouncement of adoption becomes effective”.

6. If a guardian or administer refuses to give the consent without reasonable grounds, the guardianship court can consent in-lieu thereof”.

Article – 1754:

(i) “If a married couple adopt a child or a husband or wife adopts a child of the other spouse, the child obtains therewith the legal status of a mutual legitimate child of the spouses”.

(ii) “In other cases, the adoption obtains the legal status of a legitimate child of the adoptive parent.

Deficiency of coverage is obvious and has been questioned by large number of people. The only adoption law India – The Hindu Adoption and Maintenance Act, 1956- is applicable to Hindus, Jains and Sikhs. Till today there is no law of adoption for Muslims, Christians or Parsis in India. The Guardians and Wards Act, 1890 that confers neither permanent custody nor inheritance rights to
children, governs them. Why has there been no legislative intervention?

Demand for an all India adoption law (covering children of all castes, creed and communal affliction) was first raised at the Delhi session of the Indian Conference of Social Work in October 1961. Family Welfare Agency at its Bombay meeting even prepared a draft Bill on this principle. In 1965 a Private Member Bill was introduced in the Lok Sabha, but was withdrawn by the member when the government assured to do the task itself with adequate preparation and consultation. (1965 was also the year when Hague conference on Private international law gave serious thought on adoption and declared it a subject of multilateral international convention.) Following assurance in parliament, the government asked India Council of Social Welfare to put up a draft Adoption Bill.

After due scrutiny, the government introduced Adoption of Children Bill, 1967. It later withdrew the Bill. Adoption of Children Bill 1970 was identical and had the same fate. Third attempt was in 1972 (through Adoption of Children Bill 1972.) The Bill was
referred by the parliament to its Joint Select Committee for scrutiny and report. The Joint Select Committee gave its report on 20th August, 1976 recommending (with some modifications) *Adoption of Children Bill 1972* to be passed by the Parliament. The Joint Select Committee of Parliament had forty-five members. Forty-two members were in favour of the Report, but three members (Shri. M.A. Khan; Shri. Md. Jamiliurrahman and Shri. Shafaquat Jung) gave note of dissent. They desired to add a clause to the Bill, providing for exclusion of "persons governed by the Muslim law". The Joint Select Committee rejected their proposal on four counts:

(i) The Committee felt that the Bill was in the greater interests of the children and thought that welfare of the children should transcend religious or communal barriers.

(ii) The Committee pointed out that the Bill was an enabling Bill. It was voluntary in character. It did not compel members of the Muslim community to adopt.

(iii) If Committee was of the opinion that the Bill was not against the Quranic injunction.

57. Adoption of Children Bill, 1965 by Jayshree Raijee.

58. Minutes of Dissent – a part of the Report of Joint Committee of the Houses on the Bill to Provide for the Adoption of Children' The Gazette of India (Extraordinary) dated 20.8.1976, p.1136
(iv) The Bill, Committee said, was a step towards implementing Article-44 of the Constitution, which directs the State to endeavour to secure for the citizens a uniform civil code throughout the territory of India.

Dissenting members had four counter-arguments:

(i) They quoted a verse from the Holy Quran (Chapter 33:4), which reads as follows:

"...nor hath He made your adopted sons your real sons. This is only your saying by you mouths, whereas Allah sayeth the truth and guideth the way."

The dissenting member felt that the verse was “directed against Prophet Muhammad who had adopted Hazrath Zjaid as his son” and was Quranic injunction to prevail over any principle for the members of the Muslim society.

(ii) On the issue of child welfare they thought that orphanages and foster-care arrangements were adequate to deal with the problems of abandoned children. The dissenting note of the three members opposed adoption with the following remarks:

*What is the evil that the Bill wants to remove from the Muslim society? ..* 
*Apart from the general conditions of poverty in which the Muslim society exists, it is to be noted that a destitute child is not left in the state of negligence... Evidence*
bears it that Muslims boys and girls are taken by their relatives in their tender age, looked after as if they are their own children and later on given in marriage with sizable dowries. But they do not become sons and daughters of their foster-parents. Nor they inherit their properties60.

(iii) The voluntary and enabling character of the Bill was not denied by the dissenting members, but they agreed that for the Muslim families exercising the option of adoption "shares of other kith and kin entitled to succession would get affected and new framework of prohibited degrees of marriage would emerge around the personality of the adopted child61".

(iv) The dissenting members believed that the proposed legislation would not bring a desirable change in the social structure of the Muslims. The dissenting note said:

"Muslim will have a feeling that in spite of the representation of their reputed ulamas and religious personalities their voice was not heard and their personal law has been interfered with. The result is obvious. On the social front our gains will be negligible and on the political front our losses will be colossal62".

59. Ibid. p. 1154
60. Ibid: p.1138
61. Ibid: p.1137
Dissenting-Note has been quoted in detail because it reflects a state of mind and sums up the best opponents of common adoption law in India have so far said. Perception is fundamentalist and different from the Constitutional directive under Article-44. Supreme Court of India, which later went through the texts the aborted Bills (in *Lakshmikant Pandey vs Union of India*), made a judicious remark on counter-agreements. Justice P. N. Bhagwati said the following:

"It is a little difficult to appreciate why the Muslims should have opposed this Bill (1972) which merely empowered a Muslim to adopt if he so wished... It was merely an enabling legislation and if a Muslim felt that it was contrary to his religion to adopt, he was free not to adopt. But in view of the rather strange sentiments expressed by the members of the Muslim Community and with a view not to offend their religious susceptibilities, the Adoption of Children Bill 1980 which was introduced in the parliament eight years later (on 16 December 1980) contained an express provision that it shall not be applicable to Muslims."  

Not only was the 1972 Bill withdrawn in 1978, the Adoption of Children Bill 1980, too, was withdrawn on an argument from a section of the Parsi community that person not born a Parsi could never become a "full" Parsi. The fiasco of 1980 almost ended the

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63. D. P. Chowdhary: *Inter-Country Adoption* (New Delhi, ICCW: 1988), 9.63
matter. Till the end of the twentieth century status quo created by the Hindu Adoption and Maintenance Act 1956 has remained as it is.

III. Protection of Children Through Criminal Law:

Conceptualisation of criminal justice system for child welfare in India is a topic deserving research attention. Like most countries, India has a penal code, a criminal procedure code, a country-wide children's act and special laws to tackle emergent problems of children. What do these statutes tell us about the nature and function of law in protecting children? What have they meant, so far, in children's lives? Is there a scope of enhancing human rights of children in criminal law?

Parameters of evaluation of these concerns are not difficult to see. They would include principle, procedure and performance elements. We would attempt an evaluation of principle first and then go on to the other two sequentially.
I

Age of Criminal Responsibility: Compared to children of U.S.A., U.K. and many other countries, an Indian child assumes criminal responsibility early. Sections 82 and 83 of the Indian Penal Code 1860 protect children on the principles of 'doli incapax' (Latin: meaning incapable of crime). Minimum age of criminal responsibility in India is seven years, while in U.S.A. and U.K. this limit is ten years. Children between ages seven and twelve years are presumed to be persons of immature understanding (unless it is shown by the prosecution that the child had knowledge or malice) During 1988-97, on an average, 3845 children of 7-12 age group were apprehended under the India Penal Code and Special Local Laws in Indian per year. In countries like U.K. and U.S.A. presumption of immaturity is given to children of age group 10-14. In these countries a child becomes 'doli capax' at the age of 14, while in India a child is held accountable as 'doli capax' at the age of twelve.

Till 1933, U.K. laws had provisions identical to Section 82 and 83 of the Indian Penal Code 1860. They were modified in 1933 and 1963 to enhance ceiling-limits: minimum age of criminal responsibility was raised to eight years in U.K. in 1933 and to ten
years in 1963. In contrast, Section 82 and 83 of the Indian Penal Code remained unreformed since 1860. There is a need to amend these sections by allowing 10 years for Section 82 and 10-14 year for Section-83. It is difficult to argue that the level of innocence of children of age group 7-10 in India is lower nor it is possible to deduce from delinquency-statistics of India crime-rate among 12-13-age group more alarming that it is in U.S. or U.K. In any case, a serious review of ground facts are called for on the pattern of Ingleby Report of U.K. (1956-60)65.


65. Called Report of the Committee on Children and Young Persons (Chairman: Viscount Ingleby), Published in 1960, the Report was a major influence in raising the age of criminal responsibility to ten vide Section 2 of The Children and Young Persons Act, 1963 laying down that children under ten could only be dealt with as in need of care or control.

Details show that the Committee had recommended raising the age of criminal responsibility from eight to twelve. The government was at first unwilling to take action on the recommendation, but ultimately agreed under pressure – notably from Baroness Wootton – to raise the age of criminal responsibility to ten.
Eligibility of Protection Under Juvenile Justice:

‘Juvenile justice’ is a concept. It seeks to protect children (actually or potentially exposed to crime) and maintain social peace (from juvenile delinquency) through a series of balancing acts. We can refer to Rule 1.4 of *United Nation Standard Minimum Rules for the Administration of Juvenile Justice, 1985*, which is a formulation of world-wide consensus:

"Juvenile justice shall be conceived as an integral part of the national development process of each country, within a comprehensive framework of social justice to all juveniles, thus, at the same time, contributing to the protection of the young and the maintenance of a peaceful order in society".

As a concept ‘juvenile justice’ intends to cover "all juveniles" within its framework of protection, care, development, treatment and rehabilitation, but eligibility of protection under juvenile justice is not uniform.

Eligibility of protection under juvenile justice has been an issue in India since 1919. *Indian Jails Committee* (which initiated several issues of juvenile justice in India) had a specific question on eligibility. Question Number XXVIII sought evidence on the following:
"Do you advocate the introduction in India the system of children's courts, as worked in England and the U.S. and of the methods of dealing with children brought before those courts, e.g. binding over, probation, committal to industrial and reformatory schools, etc. What should be the minimum age under which a young person should be regarded as a child?"

In the year 1920 the Committee started recording evidence. A few of them are reproduced below to reflect the state of mind of important decision makers on the issue:


"Chairman: Do you think that any conditions exist in which it is desirable to sentence a child under 14 to be imprisoned?

P.C. Dutt: There are different kinds of children, i.e., all children are not brought up the same way, all children of the same age are not exactly of the same temperament and development, and in some cases it may be desirable to send them to jail. It is so especially as regards the lower classes of people.

Chairman: We might perhaps rule that he shall not be sent to jail. Would you approve that?

P.C. Dutt: I would say that he should be sent to some sort of industrial school where he should be under reformatory influence.

Chairman: Would you approve of the general principle that no child under 14 should be sent to prison?

P.C. Dutt: If the influence of a reformatory school is different enough, I think children must be sent there. But is an absolute rule like the above necessary to bind the hands of magistrates?

Chairman: It is accepted principle in England\textsuperscript{67a}

\textit{Evidence of T.A. Kulkarni (Secretary, Social Services League, Bombay)}

Member: You say that children who do not give any hope of reform owing to their criminal tendencies may be given indeterminate punishment. What do you mean by that?

Kulkarni: We shall have to find out whether they are really dangerous or whether they are likely to lead a good life, because in case of some children it is hopeless and such children may be kept separate.

Member: You say "indeterminate punishment" What do you mean by this?

Kulkarni: They will have to be kept separate. That is, they would be given punishment and would not be let out.

Member: Do you mean to say that they will be confined till they reform?

Kulkarni: Yes, until we know for certain that they have improved.

Member: What kind of children would these be? Mentally defective or ignorant children or children of normal mentality?

Kulkarni: Children who are brought up in very bad localities and who believe in crime as profession.

\textsuperscript{68} Ibid p. 119.
Member: What is a child – a child can hardly be held responsible?

Kulkarni: Not young children, I mean.

Member: If they are mentally defective you will confine them?

Kulkarni: Yes68.

The two instances quoted above are among the very many recorded in 1679-page report of the Indian Jails Committee. They reveal perception of the opinion makers on the poor delinquent children at that point of time. Perceptions on mental illness also come up incidentally.

Indian Jails Committee recommended creation of children's courts and adoption of the English system of release on license for adolescents, but did not recommend juvenile justice coverage to children belonging to "criminal" tribes. Immediate impact of the Report was passing of a series of children's acts by the provincial legislatures. Children Acts of the Bombay State (1948), U.P. (1951) and East Punjab (1949) covered children upto sixteen years, while acts of Saurashtra (1954 ) and West Bengal (1951) upto eighteen

years. *The Madras Children Act (1920)* covered up to eighteenth years, but distinguished between 'children' (persons below the age of fourteen) and 'young persons' (between the age of fourteen and eighteen years).

After the unification of children's acts in 1986, juvenile justice protection was decided to be given to boys till attaining the age of sixteen years and girls till attaining eighteen years age [Section-2 (h) of *the Juvenile Justice Act, 1986*]. Sex-based differential definition in the realms of juvenile justice in India was introduced by *the Children Act of 1960* [Section-2(l)]. Under the *Indian Penal Code* (1860), Section 361 (kidnapping from lawful guardianship) and 363-A (Kidnapping or maiming a minor for purposes of begging) protect boys till they reach the age of sixteen and girls till attainment of eighteen years of age. Section 361 of the *Indian Penal Code* was amended in 1949 and Section 363(A) was added to the I.P.C. in 1960. Unlike in the U.S.A. (where sex-age discriminatory definition of the child was held to be violative of the equal protection clause of its constitution69), sex-based differential definition are protected by Article-15(3) of *the Indian Constitution* which consciously permits legislation favouring women and children. State, thus, has power to extend longer
protection to girls under law, a stand taken by the Government in Parliament at the time of seeking support on legislation\textsuperscript{70}. There is a view that Section-2 (h) of the \textit{Juvenile Justice Act, 1986} has created problems for girls\textsuperscript{71}, but there is no justification given anywhere for not extending juvenile justice protection to boys of the age-group 16-17 years.

Why have boys of the age group 16-17 years been not given juvenile justice protection in India? Decision-makers have offered no rationale nor there is any public questioning on these issues in a country, which has ratified \textit{United Nations Convention on the Rights of the Child} (in December, 1992) and its very first Article defines child a human being below the age of eighteen years.

\textbf{70.} Lamb, a boy of seventeen years, was found to have committed burglary and was dealt with under the ordinary criminal law. He challenged the definition of 'child' in Oklahoma State law as unconstitutional because it allowed females the benefit of juvenile court proceedings under the age of eighteen years while limiting those benefits to males under the age of 16 years upholding the challenge, Oklahoma Court observed in \textit{Lamb vs. Brown [456F 2d 18 at 20 (1972)]} that "no logical constitutional justification for discrimination existed".

\textbf{71.} "By our experience in Bombay and other places we have found that girls normally require protection for a longer period. Though they attain puberty and maturity earlier due to our social conditions, they require protection for a longer period" \textit{Raiya Sabha Debates (15.2,1960): Col.762}.

A fundamental problem in Indian criminology is epistemological: statistical aid is highly inadequate. 'In-use' data from the police stations (collected by the National Crime Records Bureau since 1953) are the only source. The government on a sustained all-India basis rarely funds self-report studies, victim studies, special surveys, and policy-impact studies. Formats of crime in India are kept to the inelastic bare minimum level: we have no way to know options in policy-formulation. eg., crime by 7-9 or 16-17 years group to construct a time-series or work out gender-ratios. We would do well to appreciate that the documents of criminal law and statistics are also documents of discourse to analyse dominant conceptions of crime and criminal justice in spheres outside government72.

III

Treatment of Juvenile Offenders:

Investigation, prosecution, case-disposition, custody and rehabilitation acquire different meaning in treating juvenile offenders. The aim here is not determining criminal guilt and

sentence-setting, but problem-solving in the best interest of the child (neglected enough to come in conflict with law). They are operational tools of juvenile justice, with a lot of in-built discretion in favour of children charged of crossing the limits of law. During 1968-97 police in India apprehended 31.65 lakh juveniles (17,796, in 1997\textsuperscript{73}). What has been the experience of these children with the juvenile justice system in India in terms of procedural justice and utility of treatment methods?

There has been a near-total silence on this question so far. Scholars seem to be more interested in explaining the welfare-rationale in creating and expanding the web of bureaucracy and strengthening it through better service-conditions and training\textsuperscript{74}. It is important to expand juvenile justice institutions and correctional services in uncovered areas of the country\textsuperscript{75}, but is equally important to examine human rights status of delinquent children passing through juvenile justice institutions in existence. Quantitative pressure of cases on juvenile justice institutions in India today is less. Due to several reasons\textsuperscript{76}, police-stations now have lesser number of juvenile delinquency cases: 2.49 lakh juvenile were apprehended during 1988-97 in India, while during
the previous decade (1978-87) the number was 17.40 lakhs (nearly seven times\textsuperscript{77}). Therefore, qualitative aspects procedural justice and upto-date treatment methods assume justifiable expectation of efficiency.

74. \textbf{Source: Volumes of Crime in India published by the National Crime Bureau, New Delhi.} (Juvenile Apprehended) Under I.P.C. and Spl. & Local Laws

<table>
<thead>
<tr>
<th>Year</th>
<th>Number</th>
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<tbody>
<tr>
<td>1968-77</td>
<td>11.76 Lakhs</td>
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<tr>
<td>1978-87</td>
<td>17.40 Lakhs</td>
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<tr>
<td>1988-97</td>
<td>2.49 Lakhs</td>
</tr>
<tr>
<td>Total</td>
<td>31.65 Lakhs</td>
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</tbody>
</table>


(ii) Jyotsana Shah: \textit{Studies in Criminology and Probation Services in India} (Bombay: Tripathi, 1973)

(iii) S. K. Mukherjee: \textit{Administration of Juvenile Correctional Institutions} (New Delhi: Sterling, 1974).


Juvenile apprehension-figure of 1978\textsuperscript{78} and 1997\textsuperscript{79} (the two ends of twenty years) show a difference in the attitude of the India police towards children:

<table>
<thead>
<tr>
<th>Table No. 3.1</th>
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<tr>
<td><strong>Ranking of Charges Against Juveniles (Descending Order):</strong></td>
</tr>
<tr>
<td><strong>India</strong></td>
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<td>Rank</td>
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</table>

Prohibition-violation apprehensions are down from 5526 to 206. Charges of violating motor vehicle, gambling and railways acts are out of the top-ten list. Apprehensions under the excise act are at 1978-level. The figures above indicate comparatively lesser victimization of children over time in an area of police power where
there is very wide administrative discretion and scope of harassment. It is difficult to say whether the improvement is due to the pro-child sensitisation of the police or due to the strictness shown by the courts or an account of a general climate of pro-child human rights consciousness in India society during the last twenty-years. Perhaps, it is a combination of all these factors. Undue harassment of children by the police in India is not as easy now as it was twenty-years back. There is almost parallel media reporting and vigilance by the pro-child groups in the country.

Property has always been the mother of crime: more so in India where distribution of property is inequitous and its social display a matter of pride and strength. Latest figures of juvenile delinquency show (1997) that out of 17,796 juvenile apprehended by the police in India, only 319 had monthly family income above Rs. 3,000/-. It does not mean that children of Rs. 3,000/- plus per month income-bracket are apostles of good conduct and normative behaviour. Property is the mother of crime because it provides motive for soulless acquisitiveness and competitive profiteering at any cost. It mesmerizes all classes and ages, but can overwhelm persons with youthful energy and daring. Crux of the matter,
therefore, is to analyse the sociological concept of 'delinquent drift' among juvenile offenders, i.e. process of "neutralizing normative restraints by persons" [David Matza: Delinquency and Drift (New York: Wiley, 1964)]. In other words, focus on 'delinquent drift' means a change in the treatment method and growing out of the shadow of traditional positivist-determinist explanations of crime and methods of correction. Theft and burglary occupied second and third positions in 1978; in 1997 they held first and second positions respectively.

Property offences are perpetual problems, but juvenile crime-statistics on human body offences reveal extremely disturbing trends. The table above reports that the number of juveniles apprehended for murder increased from 121 (1978) to 389 (1997), for attempt of murder from 12 (1978) to 227 (1997) & for rape 27 (1978) to 180(1997). Figures of entries on Hurt (1997: 1647) and under Section 498-A of the Indian Penal Code (cruelty on women relatives: 1997 : 262 apprehensions) are equally distressing. Here we cannot sidetrack seriousness of the issue by quoting Anthony Giddens ["Statistics about crime and delinquency are probably the least reliable of all officially published figures on social issues80"].
Inadequacies of official crime-data are too well-known to be repeated here. Reporting crime involves a series of decisions by individuals; from victim (who may weigh pros and cons of reporting in terms of stigma, cost, time, reprisals and probability of a just outcome) to the policeman entrusted with the task of immediately recording proper and full facts). Even then, increase in serious aggressive juvenile violence is a marked trend of the figures above. What, then, is required to be done?

Conceptual clarity in juvenile justice policy is necessary: 'juvenile' and 'justice' both are equally important. It may appear axiomatic, but involves a lot of intricate decisions in policy-making and sophisticated inter-disciplinary academic input. Juvenile justice is not only justice to the child, but also justice to the victim and her family. Future protection of the society and preservation of values are no less important. They also come in the zone of consideration. In fact, as we have seen, 'juvenile offender' is as amorphous terms: 'drifts' of delinquency have different targets, from stealing a bread to mass-murder of schoolmates. Treatment

challenge is to evolve special modules appropriate to the nature and trend of the drifts at a given time. This is not happening. Binary impulse of 'release/commitment-slotting' does not end juvenile justice work; it only determines spheres of accountability in social work. Actual reformatory work of institutional or non-institutional care begins thereafter.

There is evidence in our country to suggest that even 'release/commitment slotting' is not done properly, despite legislative clarity and excellent clarificatory judgements by the higher judiciary in India on the subject. Perusal of High Court judgements (1990-97) on the Juvenile Justice Act 1986 reveals plight of children on this count. A few extracts show tips of icebergs:

➢ **Implementation of Section –27(3):**

"By order dated 30-3-1989, we called for a list of cases from all the District judges of Bihar... It appears that not only in some cases investigations are pending but trials are going on for a period extending upto five years and in large number of cases juveniles are still in prisons. This state of affairs indicates a pathetic indifference." Patna High Court (8th September, 1990).
Implementation of Section –22(1):

"As the Director of Social Defence felt that the juvenile cannot to directed to suffer imprisonment in the jail and that they cannot be detained beyond the respective age in the approved schools, she had written to the High Court... and these matters have come before us... This Court also had the occasion to consider this question after the commencement of the Juvenile Justice Act of 1986 in Rajan alias Thiruvengada Karthigeyan vs State 1993 MLJ(Cri) 257... In view of this ratio, the sentence imposed by the learned Additional Sessions Judge... is certainly illegal." Madras High Court (21st August, 1996).

Implementation of Section –24:

"In the case at hand, the finding of the learned sessions Judge being that age of the appellant was below 16 years on the date of occurrence and in view of the clear prohibition contained in Section-24 of the Act, trial of the appellant is without jurisdiction. I have, therefore, no hesitation to hold that the entire trial of the appellant is without jurisdiction and the conviction and sentence of the appellant are set aside." Orissa High Court (13th January, 1995).

Implementation of Section –18(1):

"As seen above, the offence was quite petty in nature. The learned Sessions Judge has not mentioned as to what were the considerations on which he was inclined to refuse bail to the applicant... The use of words 'be released on bail' makes it mandatory requiring the courts to grant bail... There is no indication from the material placed in this court that the police officer, who took the applicant in his custody had cared to enquire about his age. If there was
reason to believe that the boy was below sixteen years then the procedures laid down in the Act should have been followed... The applicant was entitled to bail." Allahabad High Court (8th February, 1990).}

➢ Implementation of Section -32(1):

"It is really unfortunate that the appellant in his statement under Section 313, Cr. P.C. recorded on 4.1.1979, had indicated his age to be 16 years but the learned sessions judge did not think it fit or proper to get him medically examined. Even after taking a lenient view in the matter of award of sentence, the learned Sessions judge observed that undoubtedly he was minor at the time of the commission of offence, but he failed to give any benefit under Children Act to the appellant. It was also the bounden duty of the prosecution to have rebutted the claim of the appellant. It would be pertinent to mention that the occurrence took place in the instant case on 26.1.1974 and the appellant was convicted and sentenced on 30.1.1979. This appeal was filed in the year 1979 which has come up for disposal in the year 1994. The appellant by this time must have attained the age of 32 to 35 years." Allahabad High Court (5th August, 1994).
The court-system in districts is in crisis: decisions over-ruled by the High Courts (quoted above) are, therefore, reflections of a mind-set constrained by excessive workload, tradition of egoistic impulses and deeply ingrained custody-complex. On spot articulate prosecution seems to have overpowered legislative provisions in favour of mute juvenile offenders.

In 1974, National Council of Juvenile Court Judges (U.S) recommended a number of personal attributes for juvenile and family court judges. "Awareness of modern psychiatry, psychology and social work" and "ability to make dispositions uninfluenced by own personal concept of child care" were two important points suggested for recruitment and training\(^8\). Further expectations have come from superior courts, which see juvenile courts as protectors of children's right to adequate treatment and rehabilitation. In *Morales vs. Turman* (1974\(^8\)) the issue of incarcerated juveniles' right to treatment as an extension of due process was addressed and it was held that it is insufficient for a

legislature to declare a rehabilitative purpose if the staff and other resources available in juvenile correction facilities are so insufficient that the consequence is a penal setting. Contradictions between the demands of justice and paternalistic residual welfare are, thus, being recognized in the form of children as holders of right even in the worst situation of stigmatization and emotional disturbance. In concrete terms, the recognition means (i) a wider incorporation of social work skills to the juvenile justice system, (ii) compulsory adequate funding on staff necessary to provide for care, treatment and supervision, (iii) procedural justice, (iv) increase in the use of sentencing options available to courts, (v) great reliance on experts and (vi) humanitarian consensus-building on the ends of correction as a social policy.

IV

Justice to the Child Victims

An important function of criminal law is to discipline and punish persons responsible for wilful abuse and criminal neglect of minors. Cross-cultural research shows that maltreatment of children at the hands of parents or caretakers have a long history, but for centuries such acts were shielded by a system of laws that
gave children few, if any, rights\textsuperscript{90}. Due to weakness, dependence, vulnerability and innocence, children have been sacrificed, tortured, abandoned, mutilated, prostituted, excessively disciplined, sold into slavery, killed at birth and forced to engage in degrading, demanding and dirty work. Even in day-to-day lives of children today, there is a lot of physical violence, sexual abuse, emotional torture and criminal neglect than formally admitted in the adult world. Forms of cruelty are another dimension of the problem. We can refer to an urban child-abuse study by Mehta\textsuperscript{91} (which reported spectrum of abuse and injuries. (i.e. new born babies with intact placenta, strangling marks on the throat, multiple bruises, bleeding from the umbilicus evidence of

87. (i) L. Mause (Ed.): \textit{The History of Childhood} (New York: Psychohistory Press, 1974).


infection, rat-bite marks and fractures) and a rural report of one thousand cases of abused children taking medical treatment in the hospitals of Durg district for burns, loss of eye, deafness, mental retardation, hemiplegics, chronic infections of uro-genital tract, sexually transmitted diseases, etc.

Durg-study found 81% cases of physical abuse, 9.3% of sexual abuse, 7% of physical neglect and 2.7% of emotional abuse. Social context, quality of parenting, cultural condonation of maltreatment, pathology within the families neighbourhood profile, inter-generational transmission of violence, monetary consequences of poverty & unemployment, and personality disorders – some of the perpetuating factors of child abuse studied by the scholars of U.S.A–Europe–have not been studied to link causative factors with incidence of abuse reported.


Drug-study is one example showing limitations of merely reporting hospital-statistics without sociological analysis of the phenomenon of child abuse and neglect. A review of the research-trend in India shows common deficiency of mere statistics reporting on child abuse94.

The Government, too, has merely reported statistics on crimes against children (police-station figures) – from 1993 onwards. There are no published all-India figures prior to the calendar year 1993. Given below are the tabulated figures of ten highest registered crimes against children in 199795.

---|---|---|---|---|---|---
1. | Rape of Children Below Sixteen Years of Age | 3393 | 3986 | 4067 | 4083 | 4414
2. | Kidnapping and Abduction | 485 | 864 | 726 | 571 | 620
3. | Exposure and Abandonment | Not Compiled | 491 | 570 | 554 | 582
4. | Infanticide | „ | 131 | 139 | 113 | 107
5. | Procuration of Minor girls | „ | 206 | 107 | 94 | 87
6. | Child Marriage and Restraint Act Cases | „ | 53 | 57 | 89 | 78
7. | Foeticide | „ | 45 | 38 | 39 | 57
8. | Abetment of Suicide | „ | 7 | 9 | 11 | 13
10. | Selling Girls for Prostitution | „ | 34 | 17 | 6 | 9


In the absence of any crime-survey, case-disposal rate or reporting on victims at all-India level to expand meaning of these figures, the Table above remains the sole report card of our welfare state in enforcing child protection through criminal law. Unfortunately, omissions get more prominently highlighted than wilful performance of law-enforcement duty:

(i) In 1997, the police in India registered 5980 cases of crime against children. Per month rate comes to registration of 498 cases, i.e. less than one case per district per month on an average. People closer to the ground reality know that the actual situation is not as good as it appears from the figures in the table. There is gross under-reporting to the police stations and the police, too, have taken very little cognisance of child abuse and neglect.

(ii) All along the five years no case has been registered under the Juvenile Justice Act 1986 or the Child Labour (Prohibition and Regulation) Act 1986. Juvenile Justice Act legislates punishments for cruelty to juvenile (Section-41), employment of juveniles for begging (Section-42), giving liquor, narcotic drugs or psychotropic substance to juveniles (Section-43)
and exploitation of juvenile employees (Section-44). There are penalties for violating Section-3 of the Child Labour (Prohibition and Regulation Act), which prohibits employment of children hazardous industries and occupations notified under the schedule of the Act. Does it mean that no offence was committed by anybody in India during 1993-97 in these areas of child protection?

(iii) During 1994-97, the police registered on an average 123,14 and 16 cases per year under Sections-366A (procurement of a minor girl for illicit intercourse), 372 (selling a minor for immoral purpose) and 373 (buying a minor for immoral purpose) of the Indian Penal Code, 1860 respectively. Statutory provisions under these sections could be extremely effective in tackling the racket of child-prostitution in India. The magnitude of the problem is too big and significant to match the figures of police action reported.

(iv) During 1994-97, on an average, only 69 cases were registered per year in India under the Child Marriage Restraint Act, 1929. The Act does not make child marriage
void (though Dr. Har Bilas Sarda had moved the Bill with such provision), but provides for limited punishment: (a) simple imprisonment upto 15 days or fine upto Rs.1000/- or both for a male adult marrying a minor and (b) simple imprisonment upto 3 months and a fine for a male adult above 21 years of age marrying a child, persons solemnising child marriage or father or male guardian involved in child marriage. Marriage of minor girls (i.e. below 18 years of age) is banned since 1978 (the minimum age of marriage for girls was enacted at 14 years in 1929 and amended in 1949 at 15 years).

(v) Prohibition of infanticide has an early history: Regulation VI of 1802 declared it wilful murder, punishable with death. The language of the Indian Penal Code 1860 is milder: punishment upto 10 years or with fine or both (section-315). During 1994-97 on an average, 122 cases per year of Infanticide were registered in India. Forty-two percent infanticide cases registered in India in 1997 came from Madhya Pradesh, which does not mean proportionate prevalence in Madhya Pradesh but comparative inaction of
administration elsewhere\(^{96}\). Infanticide has been multifaceted: considerations have been ritualistic, gender-motivated, illegitimacy, disability and population control in some cases, sheer frustration of the parent-powerful. It has a world-wide history, but in India female infanticide is a prevalent practice in certain pockets even today. Methods of female infanticide in India have been identified in social surveys\(^{97}\): (a) giving the ‘milk’ of yellow oleander shrub or the paste of oleander berries to the new-born female child, (b) giving ‘milk’ of plant \textit{calotropis}, (c) giving the new-born child boiled water with a few grains of paddy, (d) feeding tobacco paste or pesticides, (e) making the new-born child suffocate to death through various means, (f) exposure in winter in the open space etc. Article-21 of our Constitution guarantees ‘right to life’ but this right does not seem to be available a large number of new-born girls because the community condones heartless parental acts of infanticide and does not

\(^{96}\) Other examples which merit same conclusion are:

- Highest percentage (37.2\%) of child marriage cases in India in 1997 was registered in Gujarat.
- Highest percentage (36.8\%) of foeticide cases in India in 1997 was registered in Madhya Pradesh.
- Highest percentage (92.3\%) of Section 373 Cases (buying minors for the purpose of prostitution etc.) in India in 1997 was registered in West Bengal.
report to the police.

(vi) During 1994-97, on an average, 45 cases of foeticide per year were registered in India. Condemnation of the act of foeticide is evident through the punishments prescribed under law. Section-314 of the Indian Penal Code prescribes life-imprisonment for death caused by an intentional act of miscarriage without women’s consent and imprisonment for ten years and fine if done with mother’s consent. Severe punishments are prescribed under other four sections (Section-312, 313, 315 and 316) of the Code (1980) and under Section-3 of Medical Termination of Pregnancy Act 1971, which declares abortion after twenty weeks of pregnancy illegal⁹⁸.


⁹⁸. There are certain exceptions to the rule. Under Section-3 of the 1971 Act abortion may be allowed to save the life or injury to the health of the mother or to prevent child being born handicapped.
Another act – the Pre-natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1993 – also shows legislature’s intention to prevent foeticide, though there are serious doubts expressed about the adequacy of the Acts of 1971 and 1993 to prevent foeticide\textsuperscript{99}. Basic issues, as we have already argued in Chapter-II, are to recognize the right of the foetus and make crime-detection procedure more accountable to a very basic human right of the girl child.

(vii) Cases of exposure and abandonment of children are also linked with the status and perception of children’s rights. On an average, 549 such cases per year were registered during 1994-97 in India. We have till now figures, but no analysis of exposure and abandonment of children in our country by their parents. Social historians of Europe have, however, filled the gap to an extent. We can refer to a major study by Boswell on abandonment of children in Western Europe from


late antiquity to the renaissance (1988\textsuperscript{100}), analysis of exposure of girls in ancient Athens by Golden (1981\textsuperscript{101}) and researches of Ransel on child abandonment in Russia (1988\textsuperscript{102}) – all very important in understanding parental decisions of abandonment and attitudes to exposure of their children. Details show that origins of abandonment lay in the right of the father to expose an excess baby prior to the naming ceremony. Later, abandonment (which was an unquestioned right) came under humanitarian screening and was seen in post-Renaissance Europe an act of shame or survival. Children have not appeared precious when they competed with their parents for limited food or resources or were evidence of their mothers' "immoral" behaviour.


iv Impact of Directive Principles on Children:

As is well-known, sociological study of law requires a parallel examination of the impact of law on society, because, as a social phenomenon, law is both a product of social life and a force making itself felt is society. Therefore, sociological study of law goes beyond the analysis of legal norms in existence and determines the social milieu from which the law was born and in which it exists as a living law. Seen thus, we find that the net impact of Directive Principles of State Policy (Part-IV of the Indian Constitution) and judicial activism on children has not been adequate enough to ensure basic minimum needs to them.

Indian children have special protection under fundamental right [Articles 15(3) and 24], but developmental issues like health [Article-47 r/w Article 39(f)], education [Article-45], sickness and disablement [Article-41], moral and material abandonment [Article-39(f)], opportunities to secure justice [Article-39(A)] and Uniform Civil Code [Article-44] are put under the Directive Principles of State Policy under the belief that the State, in a vibrant democracy, would work as a conscience – keeper of the Constitution and do its
best to implement Part-IV [Directive Principles of State Policy, also called the "conscience of the constitution"] as constitutional duty. The founding fathers of Indian Constitution prioritized public-policy agenda on human development and expected the State (legislature, judiciary and the executive) to match legitimate constitutional priorities with laws, resources and institutional support. Idea was to implement human development agenda through collective-action and sovereign-will determination.  

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103. (i) Dr Ambedkar observed in the Constituent Assembly: "If any government ignores them, they will have to answer for them before the electorate at the election time." Constituent Assembly Debates (Vol. II) p. 41.

(ii) Dr D. D. Basu writes:

"If the common origin of the two parts-III and IV of the Constitution be borne in mind it would be clear that their objective also is the same, namely, to ensure the goal of welfare society envisaged by the constitution. While the fundamental rights seek to achieve that goal by guaranteeing certain minimal rights to the individual as against State action, the Directives enjoin the State to ensure the welfare of the people collectively".

The proposition of achieving child welfare through the Directive Principles of State Policy does not seem to hold good in view of exceptionally poor implementation record of past fifty years on some very basic issues of children’s survival and their existence as worthwhile human entities. Our failure to run child welfare as a sincere constitutional duty has now been adequately exposed. Therefore, doubting intentions of the Indian State, scholars are recommending rights-based approaches to children’s well-being on most items covered as State-duty under the constitution. The chart below enlists crisis areas:

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<tr>
<th>Sr. No.</th>
<th>Directive Principles of State Policy: Achievement of Objectives for Children</th>
<th>Studied Response to the Problem</th>
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<tbody>
<tr>
<td>1 (a)</td>
<td>Article: 45: Free and compulsory education to all children until they complete the age of fourteen years (Target Year: 1960)</td>
<td>In Unnikrishnanan vs. State of Andra Pradesh (1993) the Constitution Bench of the Supreme Court said: “A time limit was prescribed under this Article. Such a time limit is found only here. If, therefore, endeavour has not been made till now to make this Article reverberate with life and</td>
</tr>
</tbody>
</table>
(b) Illiterates include ‘marginal’ human beings:
70.4% STs, 60.7% women and 60.5% SC Persons (Census: 1991)

(c) Against a requirement of around 4% G.D.P. investment per year, 1994-95 expenditure was 1.2% of the G.D.P. on primary education\(^{104}\).

| 2. | Article-39(f): Duty of the State to secure developmental opportunities and facilities for children r/w Article-47 | “India’s resources for alleviating malnutrition could be used more effectively and efficiently if they were articulate with meaning, we should think the court should step in... Can a State flout the said direction even after 44 years on the ground that the Article merely calls upon it to endeavour to provide the same and on the further ground that the said Article is not enforceable by virtue of the declaration in Article 37. Does not the passage of 44 years – more than four times the period stipulated in Article 45 – convert the obligation created by the Article into an enforceable right\(^{105}\)?... It is declared that every child in India has a right to “free education” until he completes the age of fourteen years\(^{106}\)... Thereafter his right to education is subject to the limits of the economic capacity and development of the State”\(^{107}\). |
(improving levels of nutrition and public health.)

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Percentages of Indian children (0-5 years) suffering from (i) severe under-weight (21%), (ii) wasting (18%) and (iii) stunting (52%) are respectively (i) the highest, (ii) third highest and (iii) seventh highest in the world today (1990-97).

No country, except Bangladesh (1990-97), has higher percentage of (i) low birth weight of infants and (ii) under weight under-five children\textsuperscript{108}.

| 3. Article-41: Within the limit of economic capacity and development, duty of the State to secure right to public assistance in cases of sickness and disablement. The most important health target (1990-2000), accepted by India, is reduction of child (0-5 years) mortality rate from organized in a goal-directed programme based on clear nutrition rights. The Convention on the Rights of the Child and other international human rights instruments in themselves establish only soft right. They can be transformed into hard rights which are clearly articulated in the law and are accompanied by effective implementation and accountability mechanisms... Clearly established rights empower the weak, levelling the playing field a bit so that the weak are not so disadvantaged” (George Kent: 1994) |
| Low investments in public health in India could be seen in the context of private sector developments in health in India – against 1.3% GDP investment in public health, 4.7% GDP investment in profit-making private sector (to service the rich and employer-supported upper middle class |
131/1000 live births (1990) to 70 (2000 AD\textsuperscript{109}).

With a rate of reduction of 2.8% p.a. during 1990-97 (Norway 11.6%, Singapore 9.9% and Malaysia 9.2%) and achievement at 108/1000 live birth-level, India is surely not going to achieve 2000 AD target\textsuperscript{110}.

Maximum numbers of children (0-5 years) die in India each year (26.34 lakh). In child mortality performance India ranks 148\textsuperscript{th} out of a list of 193 countries\textsuperscript{112}.

4. Article-39 (f) State protection of children against moral and material abandonment
(a) Moral and material abandonment of children has

| 1) Abandonment is punishable under the Indian Penal Code, but this does not solve the existential problems of children born (i) unwanted, | with quality health care) and (b) hegemony of pharmaceutical and medical instrumentation industry, (controlling now, three quarters of our country's total health expenditure). With such powerful market development, the stakes of the worldlywise elite are no more there in reforming public health through pro-poor low-cost preventive policies India needs\textsuperscript{111}. Like public health, low investment in social security in India (0.5% GDP) is marked by inequitous social-spread of access and benefits. Availability of contingent social security in India is heavily weighted in favour of public employees and organised private sector who constitute only 10% of the workforce\textsuperscript{113}. |
criminal and civil law dimensions. The first all-India data of police cognisance of crime against children (1994) shows inadequacy of state response: only 5813 crimes recorded in India. 'Domestic violence' seems to have been, incorrectly, taken as private domain of the father and has not been included in the list.

Civil law dimension of moral and material abandonment of children reflects in the status of (i) "illegitimate" children and (ii) girls in succession and maintenance laws of a country. The status of such children in Indian laws various as per their personal laws.

5. Duty of the State to protect children from (i) abuse (Article 39e) and (ii) exploitation (Article (ii) different, (iii) pre-mature (iv) sick or (v) disabled (vulnerable targets of parental violence) nor, does it solve problems of 'illegitimate' children. Models of reform are Articles 6,8 & 9 of the European Constitution on the Legal Status of Children Born Out of Wedlock (1975) and Children Act (1989) of U.K. which has been drafted on the presumption that parental rights are "derived from parental duty and exist so long as they are needed for the protection of the person and the property of the child" (Gillick vs. West Norfolk, 1986).

Child sexual abuse is predominantly a male crime perpetrated by fixated offenders in neighbourhood, but contribution of prolonged abuse through incest is no less significant.
Through these Directive Principles, State was expected to move beyond fundamental rights by abolishing (i) forced labour (Article 23) and (ii) child labour in hazardous employment (Article 24) in 1950. Even fifty years later, Indian state has not emerged from a mindset of conceptualizing children of the rich and the poor differently.

education compulsory and free and (ii) laying down a minimum age for admission to employment (Article 28(1)(a) & 32(2) of the U. N. Convention on the Rights of the Child). India has absolved itself by excluding Article 32(2)(a) – the main solution to the problem – form its ratification of the Convention dated 11th December 1992.

The importance of education in curbing the practice of child labour cannot be underestimated, but depending solely on it may not be the ultimate solution to the problem. Proposal to make education a fundamental right has to be supplemented by a consensus that no one has authority to use, sell or pledge the labour of children. Seen thus, there is no law in India institutionalising parental responsibility in ensuring that the abuse for economic gain nor any social security package
to rescue poor households withdrawing children from the workforce within a short duration. As Lipton (1995) has argued "it may even make short term poverty worse if nothing further is done to enable the poorest households to live without child income, and to permit them to have fewer children in the confidence that a larger proportion will survive healthy, educated and employ adulthood".

Implementing children's survival, development and protection rights are difficult because they can only be realized in an integrated manner.

<table>
<thead>
<tr>
<th>Article –39 (a): Duty of the State</th>
<th>(1) “One result of the non-registration of crime by the police to avoid criticism of its increase in the legislature, is that we never become aware of any problem till we find that it has gone out of control and</th>
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<td>to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities.</td>
<td>(a) Denial of juvenile justice to delinquent children is a major</td>
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6 Article –39 (a): Duty of the State to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities. (1) “One result of the non-registration of crime by the police to avoid criticism of its increase in the legislature, is that we never become aware of any problem till we find that it has gone out of control and
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<td>problem. Out of 17796 children apprehended under I.P.C. and Special and Local laws in India in 1997, 15.4% were 7-12 years old, primarily because of fixation of a low (7 years) 'age of criminal responsibility' (three years less than U.K.'s.)</td>
<td>overwhelmed us. An excellent example of that is juvenile delinquency&quot; (Rustamji (1979\textsuperscript{117}))</td>
</tr>
<tr>
<td>(b) 60% of India's districts do not have juvenile courts.</td>
<td>(2) &quot;The minimum age of criminal responsibility differs widely owing to history and culture. The modern approach would be to consider whether a child can live up to the moral and psychological components of criminal responsibility.&quot; (Beijing Rules (U.N. 1985) Commentary)</td>
</tr>
<tr>
<td>A large number of institutional abuse cases (Rohit's case at page-2 is one example).</td>
<td>(3) Research findings by Bhattacharya (1962\textsuperscript{118}) and Mukherjee (1974\textsuperscript{119}) on juvenile custodial institutions are still relevant. Bhattacharya found that 'custody complex' was the 'ruling feature' and vocational efficiency was sacrificed in favour on literacy without any corresponding gain. Mukherjee's study of Delhi &amp; Maharashtra highlights</td>
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<td>Absence of inputs in juvenile justice to 'treat' juvenile delinquency and to 'rehabilitate' on the basis of worthwhile after-care plans of social integration.</td>
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<td>Failure of probation services to support juvenile system and ineffective use of section 360 Cr.P.C., 1973 despite requirements of section 361 Cr. P.C.</td>
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the tendency in 'total institutions' for excess authority over those in custody.

(4) Jyotsna Shah (1973) in her pioneering study of probation services in India says that resource investment has not been commensurate with the felt needs of meaningful probation programme. She focuses on the inability of probation services to individuate treatment and problems created by judiciary in not paying sufficient attention to the pre-sentence reports.

7. Article -44: Endeavour of the State to secure for the citizens a uniform civil code.

Uniform status and protection of children under (i) marriage, (ii) custody and maintenance, (iii) adoption and (iv) succession laws are the main objectives from children’s point of view. Despite provisions under Article-

(i) Status of Child
Marriage: Under Section 24 of the Special Marriage Act 1954 and under Section 3 of the Parsi Marriage and Divorce Act 1936 (after 1988 Amendment) marriage of child is ab initio void, but under the personal laws of
to 'secure' a uniform civil code, there are different personal laws for Hindus Muslims, Christians, Parsis and Jews in India. Indian Supreme Court has in 1985 (Ahmad vs. Shah Banoo) and 1995 pointed out that Article-44 has so long remained a dead letter and recommended early legislation to implement it. Inaction is despite the fact that all the aspects of family law are in the Concurrent risk.

Hindus, Muslims and Christians in India, child marriages are neither void or voidable. Paras Divan (1996) has pointed out the implications of 'valid' child marriages on the welfare of 'child wives' and 'child widows'.

Children's rights in maintenance & custody proceedings have not been adequately inducted into personal laws in India. Unification or unified amendment in guardianship and divorce laws are required to explicitly provide for (a) paramountcy of child institutionalization of children's participation in custody and maintenance proceedings.

(iii) Opportunity of adoption as alternative family care: Despite India's

8. **Article—40:** State to take steps to organize village panchayats and endow them with such powers and authority as may be necessary to enable them to function units of self-government.

“In the social history of most nations there are periods when factional enrichment and self-interest outweigh collective endeavour. Private extravagance and public parsimony tend to become the
Since 73rd and 74th Constitutional Amendments, Indian children have a major interest in State implementing Schedules XI (entries 24& 26) and XII (entries 3 & 9) of the Constitution. According to these provisions child welfare is primarily Panchayat Raj subject.

ruling principles and begin to threaten the common good”, wrote Peter Townsend (1975122). Further progress of decentralising social administration has been stuck up in India. U.K.’s system of decentralised child care and protection should be examined as a model where state is, since Children Act 1948, implementing its duty as ‘parents patriae’ through local authorities (with a series of progressive reforms.) Responsibilities of the local authorities under Children Act 1989 include: (i) providing day-care (ii) providing accommodation to children in need (iii) working as ‘fit person’ under juvenile justice legislation, (iv) representation of child and her interests in certain proceedings, (v) handling care and supervision orders. (vi) discovery of child abuse and neglect, (vi) emergency protection of children (vii) assistance and quality-control
of voluntary organizations, (ix) arrangement of foster care and (x) adoption service.

105. Ibid p. 733.
106. Ibid p. 765.
107. (a) "Low birth weight is the best single indicator of the risk of malnutrition. It is also emerging, as a major cause of chronic illnesses later in life, as well as a factor in mental retardation. Close to 33 percent of all infants born in India are of low birth weight – a level that has hardly fallen in the last two decades" GOL–UNICEF Master Plan of Operation 1999-2000 p.54.
112. D. Finkelhor et. al. (Eds) : The Dark Side of Families (Sage : 1983).
120. Peter Townsend : Sociology and Social Policy (London : Alen Lane) P.257. First Published in the New Statesmen, 14 April, 1961.
Optimism about the efficacy of the Directive Principles of State Policy as an instrument of child welfare primarily rests on their humane interpretation by the judiciary and the widening scope of the public-interest litigation. Judiciary is a vital part of the State to which people go with their individual or class-complaints as the last resort. Therefore, conscientious courts not only decide and interpret facts, but also perform functions to give legitimacy to the State as a whole: besides routine functions, they are compelled to take stock of the malafide behaviour of the other two organs of the State and extract performance for them. Judicial intervention on children’s interests has been impressive:

<table>
<thead>
<tr>
<th>Year</th>
<th>Cases</th>
<th>Judicial Intervention for Children Issues:</th>
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<tbody>
<tr>
<td>1982</td>
<td>(a) PUDR vs. Union of India\textsuperscript{123} &lt;br&gt; (b) Paharia vs. State of Bihar\textsuperscript{124} &lt;br&gt; (c) Jayendra vs. State of U.P\textsuperscript{125}.</td>
<td>To Declare Construction Work Hazardous &lt;br&gt; Children in Jail for Eight Years Without Trial &lt;br&gt; To Declare Age at the Time of Offence Crucial in Juvenile Justice.</td>
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<tr>
<td>1984</td>
<td>L.K. Pandey vs. Union of India\textsuperscript{126}</td>
<td>Inter-country Adoption: Reforms (I)</td>
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<tr>
<td>1985</td>
<td>Sumitra Devi vs. Bhiken Chaudhary\textsuperscript{127}</td>
<td>Right of the ‘Illegitimate’ child to receive maintenance</td>
</tr>
<tr>
<td>Year</td>
<td>Case</td>
<td>Decision</td>
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<tr>
<td>1986</td>
<td>(a) Sheela Barse vs. Union of India&lt;sup&gt;128&lt;/sup&gt;</td>
<td>Poor enforcement of the children's Acts</td>
</tr>
<tr>
<td></td>
<td>(b) L.K. Pandey vs. Union of India&lt;sup&gt;129&lt;/sup&gt;</td>
<td>Inter-Country Adoption: Reforms (II)</td>
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<td></td>
<td>(c) Elizabeth vs. Arvand Dinshaw&lt;sup&gt;130&lt;/sup&gt;</td>
<td>Court suggested a central law for children</td>
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<td></td>
<td>(d) Sheela Barse vs. Secretary, Children Aid Society&lt;sup&gt;131&lt;/sup&gt;</td>
<td>Protection of children in Jail.</td>
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<td>1987</td>
<td>(a) Dukhtar Jahan vs. Muhammed Faruq&lt;sup&gt;132&lt;/sup&gt;</td>
<td>Maintenance of Child After Divorce</td>
</tr>
<tr>
<td></td>
<td>(b) Sanjay Suri vs. Delhi Administration&lt;sup&gt;133&lt;/sup&gt;</td>
<td>Minor's interest in Custody-Disputes</td>
</tr>
<tr>
<td>1989</td>
<td>Munna vs. State of U.P&lt;sup&gt;134&lt;/sup&gt;, Gaurav Jain vs. Union of India&lt;sup&gt;135&lt;/sup&gt;</td>
<td>Child Sex-abuse in Jails</td>
</tr>
<tr>
<td>1990</td>
<td>(a) Vishaljeet vs. Union of India&lt;sup&gt;136&lt;/sup&gt;</td>
<td>Inadequate Steps Against Child Prostitution Child labour in the Match Factories of Sivakasi (I)</td>
</tr>
<tr>
<td></td>
<td>(b) M.C. Mehta vs. State of Tamilnadu&lt;sup&gt;137&lt;/sup&gt;</td>
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<tr>
<td>1992</td>
<td>(a) L. K. Pandey vs. Union of India&lt;sup&gt;138&lt;/sup&gt;</td>
<td>Inter-country Adoption : Reforms (III)</td>
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<td></td>
<td>(b) Mohini Jain vs. State of Karnataka&lt;sup&gt;139&lt;/sup&gt;</td>
<td>Neglect of Article-45 (Directive Principles on Education) (I)</td>
</tr>
<tr>
<td>1993</td>
<td>Unni Krishnan vs. State of Andra Pradesh&lt;sup&gt;140&lt;/sup&gt;</td>
<td>Decision on Education as a fundamental right (II)</td>
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<tr>
<td>Year</td>
<td>Case Details</td>
<td>Legal Issues</td>
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<td>1996</td>
<td>M.C. Mehta vs. State of Tamil Nadu</td>
<td>Problems of Child labour (II)</td>
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<td>1997</td>
<td>Gaurav Jain vs. Union of India</td>
<td>Children of Prostitutes (II) and Child prostitution (II)</td>
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<tr>
<td>2000</td>
<td>Sarita Sharma vs. Sushil Sharma</td>
<td>Wishes of the Children to stay with their mother (despite the claim of children's custody the father) considered and ruled that the decree of divorce shall not over-ride the welfare of the children.</td>
</tr>
</tbody>
</table>

(b) E. Wilson: *Women and the Welfare State* (London: Tavistock 1977)  

137. AIR (1992) SC 118.
141. AIR (1997) SC 3021.
The table above refers to twenty landmark judgements on children’s interests: (i) status of children in family law, (ii) juvenile justice protection to delinquent children, (iii) impact of prostitution on children (iv) free and compulsory education for children upto fourteen years of age and (v) child labour exploitation. We can analyse perceptions of Indian judiciary through these judgements one by one:

(i) **Status of children in family law:**

For self-introspecting courts interventions in family laws seem tension-free. There are contesting private parties, specific facts and developed international jurisprudence on family law. Prescribing norms for family behaviour is easier than disciplining erring organs of the state such as legislature or government: delicate balancing of competing or conflicting powers amongst the state organs is not required here. Judicial creativity, thus, is easier and fits the traditionally expected role of judiciary intervening in family-life for human rights determination. Therefore, in 1985 *(Sumitra Devi vs. Bhikan Chaudhary)*[144](#) the Supreme Court

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144 AIR (1985) SC 765.
of India interpreted Section-125 of the *Criminal Procedure Code* by including "illegitimate" children's right to maintenance from their father. The judgement took care of cases in which validity of marriage was challenged on one technical ground or the other (to save fathers from the botheration of maintaining their minor children). Two years later, the Supreme Court gave another landmark judgement. *(Dukhtar Jahan vs. Muhammed Farooq)* on the same section of law clarifying that divorce between parents could not free fathers from their duty to maintain minors born in wedlock or within 280 days after its dissolution (Section – 112 of the Evidence Act). In a case of post-divorce child-custody dispute *(Elizabeth Dinshaw vs. Arvand Dinshaw)* the Supreme Court upheld the interest of the minor (1987) and ordered return of the abducted child to his mother from father's custody.

In all the four cases, judgements kept close to the facts.

In contrast, *Lakshmikant Pandey vs. Union of India* (1984, 1986 and 1992) on children under inter-country adoption was a public interest-petition filed on the basis of
newspaper reports in a London paper complaining malpractices by Indian voluntary adoption agencies and objectionable treatment of Indian children by their foreign foster-parents.

The petitioner prayed for a ban on voluntary agencies to send Indian children abroad for adoption. The Supreme Court was confronted by obstacles. Regulation of inter-country adoption was an active U.N. agenda in private international law and the Government of India had not decided to ban it. Legislation on this aspect was not enough to indicate any trend of thought and Adoption Bills of 1972 and 1980 had come and gone in Parliament undiscussed. In the absence of a near total policy-vacuum on the executive and legislative fronts, the Supreme Court of India (in the interest of justice of children in difficult circumstances),

147. AIR (1986) SC 272.
    AIR (1992) SC 118.
framed detailed regulatory guidelines after thorough study and wide discussion with the export-bodies. It was an attempt to legislate where the lawmakers and government policy-planners had failed to arrive at any decision.

(ii) **Juvenile justice protection to delinquent children:**

Juvenile justice legislation in India has a history of eight decades now, but it is only since about 10-12 years that authorities have acquired a mind-set of believing that jails and police lock-ups are not places for children, however abnormal or annoying they may look like. This mind-set is the result of judicial interventions in the first seven years of eighties. It started with social activist Madhu Mehta discovering a boy Munna\textsuperscript{149} who was sexually abused by the Kanpur Central Jail adult prisoners to an extent that he could not sit. Next was a discovery of Vasudha Dhagamwar in a Santhal Pargana sub-jail where, in course of her research, she found Kedra Pahadiya\textsuperscript{150} and three other under-trials languishing in the jails since eight years without trial. They were caught by the local police when they were 9 to 11 years of age and herding goats. In both these cases public interest litigation were filed before the Supreme Court. Later, attention of the Supreme Court was drawn to a
newspaper report on sex-abuse and ill treatment of the minors\textsuperscript{151} in Delhi’s Tihar Jail, which an enquiry by the District Jadge was found to be true. In all the three cases of Supreme Court took humane view and passed strictures on administration.

The most important judgement on juvenile justice came in 1986. On 13\textsuperscript{th} August, the Supreme Court of India clarified that no child could be imprisoned and recommended reforms in the juvenile justice system:

a) Replacement of state children’s acts by a uniform central legislation,

b) Keeping delinquent children in remand homes set up by the State,

c) Creating juvenile courts, with specialized cadre of magistrates, in every district,

d) Completion of investigations in three months in cases where a child is involved in any offence punishable with imprisonment upto seven years and

e) Finalization of cases of children within six months of the filing of the chargesheets.
Only recommendations (a) and (b) above, have been implemented by the Government so far! It is, however, a major achievement that no child now is found in the prisons of India.

(iii) **Impact of prostitution on children:**

There cannot be a worse form of abuse of tender age of children than child prostitution. Life here starts with imposed stigma and runs each day through the earnings from ‘rapes’ committed on the girl child (conceptually incapable of giving consent for prostitution). Constitutionally, a fundamental right protected such girls [Article 23 (1)] and a Directive Principle [Article-39 (l)], but the number of such cases as well as the forms of commercial exploitation in Indian prostitution-market is on increase. Prostitution violates all human rights documents relating to girls as human beings but in India nothing has been done except) making punishment stringent and giving calls to the voluntary organizations to rescue and rehabilitate. In *Vishaljeet vs. Union of India* (1990\textsuperscript{153}), the Supreme Court only reminded police of their duties, while after seven years
of suspense in *Gurav Jain vs. Union of India* (1990-97) \(^{154, 139}\) nothing worthwhile came out in favour of the children of the prostitutes as a matter of right. Rehabilitation plans and success of the dedicated non-government organisations were, indeed, discussed. No person, with common prudence, would now go to the court with public-interest litigation on these issues.

(iv) **Free and compulsory education:**

Among the directions of Part-IV of our Constitution, only Article-45 has a time-framed of performance. Stipulations are clear:

> "The State shall endeavour to provide, within a period of ten years from the commencement of this constitution, for free and compulsory education for all children until they compute the age of fourteen years."

Constitutional directions are not for merely primary education, but till the completion of the age of fourteen years. Secondly, it directs not just free education to such children, but free and compulsory education to **all** children of the age group. Thirdly, Article-45 is a direction, which does not have the rider of "economic capacity and
development of the State” which we find in Article-41 (an important direction relating to right to work, to education and to public assistance in certain cases). The framers of the Indian Constitution, while drafting Article-45, thus, were convinced about the feasibility of performing this urgent task within ten years and within the economic and developmental capacity of the Indian State in 1950s through sacrifice and committed pro-poor prioritization of allocation and implementation.

Realizing that the grace-period given under Article-45 of the Constitution had been merrily mis-spent by the controllers of public-finance and educational policy and seeing things not even moving in the requisite direction, the Supreme Court of India in Mohini Jain vs. State of Karnataka (judgement dated July 22, 1992) and Unnikrishnan vs. State of Andra Pradesh (judgement dated February 4, 1993) decided to intervene. More important is the second judgement in which the Constitution Bench reviewed the former.

For the reasons given below, the Supreme Court declared “right to free education upto the age of 14 years a fundamental right”. The rational of intervention was in the
judgement itself. In Para-44 of *Unnikrishnan vs. State of Andhra Pradesh* the Constitutional Bench of the Supreme Court said:

"Ten years, spoken to under the Article, has long ago come to an end. We are in the 43rd year of independence. A time-limit was prescribed under this article. Such a time-limit is found only here. If, therefore, endeavour has not been made till now to make this Article reverberate with life and articulate with meaning, we should think the Court should step in. The State can be obligated to ensure a right to free education of every child up to the age of 14 years".

The judgements referred to above are important and well-meaning reactions to the omissions of India’s self-centered managers of education and public finance whose concerns for children’s education fade beyond the boundaries of their households. They also have jurisprudential value in terms of a harmonious construction of Parts-III and IV of the Constitution and giving legitimacy to the claims of children’s education in society through a linkage between right to education and right to life (Article-21). However, as the post-1993 experience has shown, declaration of the fundamental right of free education to receive education upto the age of fourteen years has not at all changed public management
practices of residual allocation, tolerance to slow access and indifference to the utility and quality of teaching for the children of the poor\textsuperscript{156}. Above all, there is absolute silence on the desirability making primary education compulsory, a part of the constitutional directive under Article-45. The Constitutional Bench in \textit{Unnikrishnan vs. Union of India} only quoted statistics of laws passed by the State/Union Territory Governments making primary education compulsory, but chose not to comment on their instrumental value or efficacy.

\textsuperscript{149.} AIR (1990) SC 292.
\textsuperscript{150.} AIR (1990) SC 1412.
\textsuperscript{151.} AIR (1997) SC 3021.
\textsuperscript{152.} (1993) 1 SCC 684.
\textsuperscript{153.} Ibid Pp. 678-79.

\textsuperscript{154.} "It is not for the Court to convert a directive principles of State Policy into a fundamental right. Moreover, even if it does so, it will merely amount to conversion of a non-enforceable directive principle into a non-enforceable fundamental right."
Phenomenon of child labour:

A proper analysis of compulsory schooling laws must take account of child labour laws since the latter indirectly affects schooling by limiting the employment opportunities of school-age children. Myron Weiner study (The Child and the State in India¹⁵⁷) was therefore, aptly sub-titled - 'Child Labour and Education Policy in Comparative Perspective.' But detailed interdisciplinary studies of European and U.S. history by Landes and Solmon (1972¹⁵⁸), Clark Nardinelli (1980¹⁵⁹), Horrell and Humphries (1995¹⁶⁰), Cunningham and Paolo (1996¹⁶¹) etc. have clarified that child labour laws or compulsory education laws were not the prime-movers for ending exploitation of children in these countries. Entry to schools was facilitated by rising income of parents of such


children and a new technological demand in labour-market for adults with technical skills. Economics of child-labour in contemporary India is quite different, but the historical experience of Europe and U.S.A leads us to an important insight that law or law enforcement there had only a peripheral role in social change in these matters.

VI Protection of Children’s interests the Voluntary Action:
Analysis so far has shown that public sector decision-making has been overpowered by the interests of the entrenched political elite. Organizational universe of child welfare, however, is supposed to be pluralistic and all the three primary institutional sectors of human society—public, private and voluntary --- are expected to fight poverty, ignorance and disease among children. The role of private sector in the welfare of Indian children has been worse than the interventions of public sector: it has been limited to peripheral acts of symbolic social gesture. Private sector investments in schools and hospitals are increasing but only as business-propositions. In such a situation, thus, focus of hope has shifted to voluntary action.
Strong claims are made in favour of voluntary action vis-à-vis centralized and monopolistic State structures in service provision and human rights consciousness. Korten\textsuperscript{162a} identifies its role with a new development vision, which sees N.G.O.s as instruments of voluntary people's action capable of enhancing democracy, social justice, self-reliance, sustainability and elimination of exploitation in development programmes. Another writer Bratton\textsuperscript{162b} says that voluntary action represents the poor in policy-process, reduces economic differentiation and class-conflict and plays an important role in strengthening civil society through empowerment. Efficiency, integrity and innovation are other claimed virtues. These are strong words, founded more on hope than experience. The sources corrupting public, private and voluntary organizations in a society at a given time are common.

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Corruption flows from the overwhelming temptations introduced by the persons holding positions of power over helpless captive welfare clients. Therefore, the capacity of power to corrupt tends to weaken human capabilities for selflessness, leading to a common behavioural pattern of control by institutions\textsuperscript{162c}. However, there are notable exceptions in the history of Indian Child Welfare.

Voluntary action for modern professional care of children India started in 1843 with the efforts of Dr Buist to set up a juvenile reformatory in Bombay. In 1898 society for the protection of children was set up in Calcutta. It was registered as a charitable society in 1926 and was reconstituted in 1935. History of Indian child welfare organizations has not been attempted by any scholar so far, but it is possible to record a credible tradition of value-

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\textsuperscript{162c} Taking a serious view of the fact that around 7,500 crores of rupees granted to the Non-Governmental Organizations by the Union Government not been accounted for, the Delhi High Court has recently directed the Union government against releasing any further grants to them till the receipt of utilizations certificates.

In response to a Public Interest Litigation, the Government of India informed the Delhi High Court that 30,517 utilization certificates involving grants to the tune of Rs.3,735.49 crores had not been submitted to the Union Government till 31.3.1999. Out of these, 22,658 utilization certificates involving Rs. 2,701.79 crores related to the period between 1976 and 1996. The Court was further informed that around 25,000 NGOs are at present receiving grant-in-aid in India. They are estimated to have received nearly Rs. 30 billion in the year 1998-99, two third of the amount coming from the foreign countries and the rest from the Union as well as the State Governments (Reported in The Observer Business and Politics dt. 7.11.2000).
\end{footnotesize}
driven non-profit organizations in Indian surviving through the odds of life and time on account of net strength of dedication, innovativeness of approach and effective teamwork. Early influence was European, but since 1920s we find deep influence of Mahatma Gandhi's vision of social reconstruction and self-help. Religion, philanthropy and nationalist self-introspection have been powerful sources of motivation in voluntary action for children in India, besides inductive influence of personalities like Vivekananda, Tagore, Gandhi and Mother Teresa. There are, thus, moments of considerable pride in the history of voluntary action in India, but a human right audit of community-action views achievements in the perspective of overall human misery in a unit area. It (a) contrasts with concentrated acquisitions of wealth and privileges in society, (b) situates goodwill of a few in the broad canvas of social perception (to understand balance of forces for or against persons in misery) and (c) interprets efficacy of voluntary action in protecting interests of the sufferers as holders of rights.
Seen thus, voluntary child welfare agencies are required to be evaluated on the basis of their combined net strength as human rights movements. Parameters of evaluation then, would be (i) integrity, (ii) organizational efficiency (iii) professionalism (iv) networking as a pressure group and (v) accountability to the rights of children. Indian experience shows that the last two parameters have not been possible to achieve. There are a number of honest, efficient and professional voluntary child welfare organisations in the country today, but – unlike industry or trade – it has not been possible for them to come together on long-term basis and act as a permanent pressure-group on public-policies or launch nation-wide stir against forces of conservatism or status quo. Accountability, too, is perceived more to donors (national or international) than towards other stake-holders, namely (i) their employees or (ii) children seeking benefit. The most important stakeholder – child – is seen not as a holder of rights, but as an object of charity. Realizing the indispensability of voluntary sector in social services and the need to hold it accountable to the rights of children in need of care and protection, a series of reform measures have
been taken the U.K. First move was to fully decentralise social care services at the local self-government level. Second was to hold local governments legally responsible for social care and simultaneously strengthen them administratively and financially through central grant-in-aid and fiscal transfers. Next move was to tighten the role of internal audit in voluntary sector by accepting the recommendations of the U.K. Branch of International Internal Audit Association (1985). Fourth move was to review efficiency and supervision of charities through a national commission (Woodfield Report, 1987). The Final move was to settle rights and duties of the stake-holders in personal social services through a comprehensive children's act by providing adjudication-mechanisms for children's rights and fixing parental responsibilities on families, social care institutions and the local governments.

I have very briefly mentioned social service reforms of U.K. to show that an agenda for reform exists. There is a widespread feeling in India that, like State and market, the Voluntary sector, too has failed to do protect children's
rights in a substantial or integrated manner. While it is true that bureaucratic structures and non-governmental organizations, both, treat welfare-children as captive-crowd and indulge in self-promotion at the cost of public money, I do not believe that roads to reform are closed forever. Elite interests that have clogged democratic channels of sovereign will-determination of the poor and the needy have also clogged channels of right-based welfare in India. A flushing out is required to remedy state of affairs. We will reflect on this issue in the last chapter of the thesis.