Chapter 4

Responses of the State to the Issue of Street Children
The previous chapter highlighted the aspiration of street children to have a body of rights. These rights, as drawn by participatory engagements of street children of Kashmir Gate, New Delhi Railway Station, Jama Masjid, Fathepuri and other areas, include right to protection (from police abuse, bad work, exploitation, violence and prostitution), right to home and shelter, right to family care, right to good work, right to education and recreation, right to healthcare, among others. But it is also pertinent to ask: Is the expression of these rights just a yearning by them or they are aware of the content these rights? Are all children capable of expressing their choice of rights? Do they have any rights at all or the state and society has a mere obligation to ensure certain things for children. This philosophical debate on the rights of children in the first section is followed by a section on evolution of child rights i.e. how child rights or the obligations of states have evolved/expanded in the last century. The last component examines these changes in the state policies and analyses the extent to which they have been implemented to ensure development of street children in general and street girls in particular.

4.1. Children's Rights: Theoretical Postulates

The idea of children as rights holders has been subject to various kinds of philosophical enquiries. One school has it that children enjoy rights as adults do, and the only question worth of examination is whether children possess only those rights which adults possess. However, others are sceptical. They believe that given the nature of both rights and children it is wrong to think of children as right-holders. One background worry against which such scepticism may be set is an oft-expressed concern at the proliferation of rights. Rights are, it is alleged, promiscuously ascribed in two ways. First, the list of right-holders has been extensively lengthened. Second, many more demands are expressed as rights claims. This concern is properly understood as one that the prodigality of rights attributions is damaging to the cause of rights. If you give away too many rights they may cease to have the value and the significance they ought to have. A favoured metaphor in this context is monetary: an inflation of rights talk devalues the currency of rights (Sumner, 1987: 15; Steiner, 1998:
That currency is indeed precious for it is almost universally accepted that rights, insofar as they exist, are things whose possession is of very great advantage to their owners.

4.2. Basis of Rights

There are two competing theories on the basis of rights. While one camp espouses the will or choice theory (Hart 1973; Sumner 1987; Steiner 1994), the other has the welfare or interest theory (MacCormick 1982; Raz 1984; Kramer 1998). The first theory sees a right as the protected exercise of choice. In particular, to have a right is to have the power to enforce or waive the duty of which the right is a correlative. The second theory sees a right as the protection of an interest of sufficient importance, to impose on others certain duties whose discharge allows the right-holder to enjoy the interest in question. The will theory fits rights actively to do things (to speak, to associate with others) whereas the interest theory fits rights passively to enjoy or not to suffer things (to receive health care, not to be tortured).

4.2.1. Critics of Children's Rights

Should children at all enjoy rights? There are those who claim that children should have all the rights that adults have. These are called ‘liberationists’ and include Holt, Farson and Cohen (Farson, 1974; Holt, 1975; Cohen, 1980). One can distinguish real from rhetorical liberationists. The latter demand equal rights for children as a means of both drawing attention to the discrimination they suffer in their treatment and for improving their conditions. A rhetorical liberationist does not believe that children should be at par with adults insofar as their rights are concerned. Rather claiming as much is the best way of advancing their interests, they believe.

On the other side is the view that children are not as qualified as adults to have rights. The ascription of rights to children is inappropriate because it displays a misunderstanding of what childhood is, what children are like, or what relationships they have vis-à-vis adults. The third perspective is that, notwithstanding lack of rights, children can be assured of adequate moral protection by other means.

The question of qualification is the question of whether children have the requisite capacity for rights. On the ‘will theories’ of rights, the capacity to exercise choice is a necessary condition of having a right. If children lack such a capacity they cannot possess rights. But there is this vexed issue of the capacity of children to be bestowed with rights.
This follows from the fact that rights have content. That is each right is a right to do, to be or to have something. Arguably, only those rights can be possessed whose content can be appropriately attributed to their owners. A right to free speech cannot be properly possessed by an entity incapable of speech. One conventional way to think of rights in terms of their content is to distinguish between liberty rights (rights to choose, such as to vote, practise a religion, and to associate) and welfare rights (rights that protect important interests such as health).

Children in general lack certain cognitive skills and an absence of this would seem to disqualify them from having liberty rights. Someone incapable of choosing cannot have a right whose content is a fundamental choice. If, as some maintain, all human rights are best interpreted as protecting human agency and its preconditions, then it would follow that those incapable of agency, such as young children, should not be accorded human rights (Griffin, 2002). On the other hand, it could be maintained that whilst children lack agency they certainly have fundamental interests that merit protection and thus at least have welfare rights (Brighouse, 2002). Moreover, it is important to recognise that children being capable of making choices, rights may be attributed to them in recognition of this gradual development (Brennan, 2002).

Ascription of rights to children is inappropriate because it displays a misunderstanding of what childhood is, of what children are like, or of what relationships they should have with adults. This claim comes in various forms. There are perfect obligations that are either owed to all children or to some specified set of children. They are perfect in that it is completely specified whom they are owed to and what is owed to them. We are obliged not to maltreat any child and parents have a particular duty to care for their children. But then there are imperfect obligations, which are those of caring for children to whom we do not, for instance, as parents have specific obligations. All adults owe these but they are not owed to all children (how could they possibly be?) nor are they specified what precisely is owed to them (this will depend on circumstances).

While perfect obligations correlate with rights, imperfect obligations do not. Which means that anyone who starts and finishes thinking about what is morally owed to children in terms of their rights is unable to capture what imperfect obligations express. Yet, this might miss a critical point about the way in which we stand in relation to children. For, the
fulfilment of these imperfect duties of care and concern is what centrally protects and promotes the lives of children. Thinking ethically about children's lives in terms of their putative rights is to misperceive what is of central importance and value in their lives.

The imperfect obligations are fundamental ones. They are not supererogatory, that is beyond duty (Coady, 1992). Adults must show consideration and kindness to children in general. So why cannot children claim such kindness and consideration from adults as their rights? Imperfect obligations are institutionalised when, for instance, there are laws and institutions specifying who should act and how to detect and prevent child abuse. A parent can have positive duties that are legally recognised and sanctioned towards his child. He may, for instance, have no choice but to send his child to school. Yet his perfect obligations to his children are not exhaustively specified by what the law requires of him.

It is not the content of obligations that the adults may owe to children. Rather it is about the structure of our moral reasoning in respect of children, and the priority that is given to rights. As an argument, it thus bears some comparison with the view that expresses general scepticism about rights in the context of adult-child relations and which emphasises the particular character of the family (Schrag, 1980, Schoeman, 1980). This view draws attention to the quality and the nature of relationships within a family that are marked by a special intimacy and deep, unconditional love between its members. One can grant that many families do not conform to this ideal and yet acknowledge that when the family does conform to this it is a distinctive, and distinctively valuable form of human association. To claim rights for the children is to subvert and ultimately destroy what constitutes the family as the distinctive form of human association. Appeal is being made here to a familiar and oft-drawn distinction between two ways in which individuals engaged in a common enterprise or bound together in some enduring association, can be assured of their beneficent or minimally good treatment of one another. One way is by the recognition – in law or custom or shared morality – of rights that all individuals can claim, or by rules of justice – similarly and generally recognised – which provide an assurance of fair treatment.

A distinct allegation is that not only is there no need for any such claims, but that allowing them to be made will erode, and in due course destroy the dispositions and attitudes that rendered the need for rights and rules of justice unnecessary in the first place.
This further claim is an influential one in the general critique of communitariansim makes of what is characterised as a rights-based and individualistic liberalism (Sandel, 1982: 32-5). In the context of the family, the claim is that granting its members rights will subvert and bring about the end of love between them that made rights superfluous.

Another line of argument considers what would actually follow from granting rights to children (Purdy, 1992). As adults, we need certain traits of character if we are to be able to pursue our goals and lead a valuable life. To acquire these traits it is essential that we should not be allowed as children to make our own choices. Granting children the liberty to exercise rights is destructive of the preconditions for the possibility of having consummate adult lives. The central and empirical premise in this argument is that children do not spontaneously and naturally grow into adults. They need to be nurtured, supported, and more particularly, subjected to control and discipline. Without that context, rights are bad for the children. It is also bad for the adults that they will turn into, and for the society we share as adults and children.

One can thus maintain that rights do not exhaust the moral domain. There are things we ought to do that do not correspond to the obligations of rights. As adults we should protect and promote the welfare of children. It need not follow that they have rights against us. To repeat, humans should not maltreat animals for no good reason but we can insist on this without bestowing animals with a set of rights.

But talks on the rights of children nevertheless serve a political or rhetorical function by reminding us of what must be done for them? Is not it that such talks also serve as a critique of the extent to which we, as adults, may maintain children in an artificial condition of dependence and vulnerability denying them the opportunity to make their own choices? Are not children one of the last social groups to be emancipated as others – women, blacks. And is not the language of rights an appropriate mode in which to campaign for that emancipation?

The answer (O'Neill, 1988, 459- 463) to this is that such talk about rights misses what is distinctively different about children as a group. This is that childhood is not a permanently maintained status associated with oppression or discrimination. It is rather a stage of human development which everybody goes through. Moreover, the adults who deny
that children have rights may nevertheless believe that it is their duty to ensure that children for whom they have care do pass from childhood into adulthood.

4.2.2 Liberationism: Children have Rights

The first claim in the defence of the denial of rights to children is that children are disqualified due to their inability to have rights. However, liberationists dispute this. They can allow that the key to the appropriateness of giving or not giving rights to children turns on capacity (Cohen, 1980). They will argue, however, that children are not disqualified from having rights by virtue of their lack of a capacity that adults do have. There are two respects in which this liberationist case might be modified or qualified. The first is in its scope. The liberationist might claim that all children are qualified to have rights, or he might claim only that some children are so qualified. The latter is the more plausible position in view of the fact that the very young infant is evidently incapacitated. Indeed some liberationists seem to recognise as much even whilst they insist that every child should have rights (Farson, 1974: 31). If the scope of the liberationist claim is limited it does not amount to the view that no line should be drawn dividing human rights holders from humans who lack rights. However, such a line has been drawn in a wrong place.

A second possible qualification of the liberationist view is that giving rights to children will play an important part in acquiring the qualifying capacity. Nevertheless it is not argued that children are capable now and are illegitimately denied their rights. They will only – or at least will more readily at an earlier stage - acquire that capacity if given their rights. The denial of rights to children is, on this account, one significant element in a culture that serves artificially to maintain children in their childlike state of dependence, vulnerability, and immaturity. Again the qualification can concede that children of a very young age are not capable enough to have rights, and will not acquire that capacity even if they are given their rights. Yet, it insists that the denial of rights to children of a certain age on account of their alleged incapacity is simply self-confirming. They cannot have rights not because they are incapable but they are incapable only because they do not have these rights. Note that this seems most plausible when rights are legal. Children should be allowed by law to behave in ways that encourage their development into mature rights-holders.

One plausible version of the claim refers to the facts of experience. Children, or at least children of a certain age, may not differ markedly from adults in respect of their
cognitive and volitional capacities. They may be as capable as older humans of making up their own minds on what to do and be as independent in their resolution to act on their choices. But they may simply not have had as much experience of the world as their adult counterparts have. Being thus naïve and inexperienced in the ways of the world they will not be as able, that is as qualified, as older (and wiser) humans are to make sensible choices. Granted that such a lack of experience can be attributed to a lack of opportunities to exercise choices. If such a lack of opportunity is in turn attributable not simply to not having been around for as long but to a denial of the freedom to make their own choices, then there is a powerful case for liberty rights being extended, even if cautiously, to these young people.

There are different ways in which the liberationists claim about capacity – whether qualified or not – can be made. One is by defending a ‘thin’ definition of capacity. For example it may be said that children can make choices if what this means is expressing preferences. A child who says she wants X thereby chooses X. Of course the response is that the ability to choose, thus minimally defined, is indeed possessed by children (even fairly young children) but it is not a capacity sufficient to qualify for rights ownership. What is needed for that is more than simply the ability to express or communicate a desire; what is needed is an ability to understand and appreciate the significance of the options facing one, together with independence of choice. After all the animal who moves from one feeding bowl to another may be said thereby to ‘choose’ the food in the latter bowl. But the animal does not have a general capacity of choice sufficient to qualify it as a holder of liberty rights.

4.2.3. Arbitrariness of Age and Capacity

Liberationists might move in the other direction and argue that capacity which qualifies adults to have a set of rights is in fact not a capacity that most, or perhaps any, adults actually possess. It will be argued that no adult fully understands the nature of the choices that he faces; nor is he consistent in his beliefs and desires; nor is he really independent of the influences of his environment and peers. Whether the liberationist urges a ‘thin’ definition of capacity – which the child satisfies as much as the adult – or argues that on a ‘thick’ definition of capacity neither an adult nor a child qualifies as capable, the point is the same. The point is that the alleged differences between children and adults in respect of a
qualifying capacity are not sufficient to warrant the ascription of rights to the latter and their denial to the former.

This is one way in which the charge that 'any line which uses age to distinguish people with rights from people without rights can be shown to be arbitrary' (Cohen 1980: 48) can be made. This line is arbitrary because, as a matter of fact, it does not mark a real division between capacities. To have 18 years 16 years as the dividing line between children and adult is not only unfounded but is completely arbitrary and is more of an ordering line.

First, there is nothing wrong with the idea that different rights should be acquired at different ages. Second, if there is to be an ordered acquisition of rights it should display consistency. If children are assumed to display the competence required for one kind of rights, they should not be refused another kind of right, which presupposes the same or even a lesser degree of ability.

The liberationist, however, can suggest that children should be permitted 'to borrow the capacities of others to secure whatever it is we are entitled to' (Cohen 1980: 56). Child agents would advise their clients with a view to ensuring that the child's right is properly exercised. Third, is the child still free to act and not on the advice given? If the child is not so free then the role of an adviser is a strictly paternalist one. The 'adviser' is simply in a position to supplant the child's choice as to what is best for herself with his own choices as his adviser. If on the other hand the child is free to reject the adviser's suggestion then the child is free to do what he wants anyway. This is so even though it has been conceded that he is not competent to recognise what is in his best interest.

One needs to only 'borrow' what one does not have. Not using what could be borrowed leaves one with the lack of rights – and their consequences – that made the borrowing necessary. On the other hand if a child can distinguish between good and bad advice then borrowing is unnecessary. The child can give as good advice to herself as would be given to him by an adviser. Then no adviser is needed and this is precisely what Cohen denies.

**4.3. Children's Rights and Adults' Rights**

If children can have at least some rights, what rights should they have? One important reason for giving a satisfactory answer to this question is a concern that the child's moral status should be adequately secured and protected. Some, like Onora O'Neill, believe that
this is assured by discharging our obligations as adults to children. However, the consensus is that children as human beings ought to have basic rights that humans have.

As human beings, children should have rights like adults who enjoy many of the roles-dependent rights – those rights associated with particular roles, and possession of the relevant right is dependent on an ability to play the role. Central to these rights is the right of self-determination, that is the right to make choices in respect of one's own life.

Most believe that the fact that adults have rights, which children do not have, makes the cut between liberty and welfare rights. Feinberg distinguishes between rights that belong only to adults (A-rights), rights that are common to both adults and children (A-C-rights), and rights that children alone possess (C-rights) (Feinberg 1980). Thus a common position is that A-rights include liberty rights, and A-C-rights include welfare rights. To repeat, liberty rights are rights of choice (how and whether to vote, what to say publicly, whether to practise a religion and which one and so on) whereas welfare rights protect important interests (such as health, bodily integrity, and privacy).

What might be included under C-rights? Feinberg distinguishes between two sub-classes of C-rights. There are those rights that children possess by virtue of their childishness. Although Feinberg does not go on to divide the first sub-class of C-rights this can be done. There are rights like children have to receive certain goods that they are incapable of securing by themselves because of their dependence on adults. These goods might include food and shelter. Then, there are rights to be protected against harms which befall children because of their childlike vulnerability and whose particular harmfulness is a function of a fact that they befall children. These harms might include abuse and neglect. Finally, there are goods that children should arguably receive just because they are children. The most central, and contentious, example is a child's right to be loved. This is not an A-C-right but it is arguably a C-right, and indeed is cited by many as a C-right (MacCormick, 1976: 305). Various declarations of children's rights include such a right and a respectable case can be made to meet various objections normally raised against its attribution (Liao, 2000).

These C-rights can be termed 'protection' rights since in general they seek to provide protection for children. Further they do so because the state or the condition of childhood calls forth and requires this protection. We should be careful to distinguish protection from
welfare rights. Children, along with adults, have welfare rights but the content of these will differ between children and adults. It will do so because of the particular form that children's needs and circumstances take. Granted that both children and adults have a welfare right to health care. But this is no different in its significance from the fact that amongst different adults the proper form of health care should vary in line with their various disabilities, diseases, and circumstances.

4.3.1. Children's Right to Grow Up

The second sub-class of C-rights are those which Feinberg characterises as 'rights-in-trust' and which he thinks can resume under the single title of a 'right to an open future'. These are the rights given to a child when he becomes an adult. They are the rights whose protection ensures that, as an adult he will be in a position to exercise his A- and A-C-rights to the maximal or at least to a very significant degree. They keep his future open. Such rights impose limits on the rights of parents, and also impose duties on the part of the state to protect these rights.

These rights in trusts, Feinberg refers, are 'anticipatory autonomy rights', which might suggest that they are only A-rights-in-trust. But he also speaks of rights-in-trust of class C as protecting those future interests a child will have as an adult. This implies that they are also anticipatory welfare rights (Feinberg, 1980: 126-7). Hence this sub-class of C-rights ensures that the adult can later exercise both her A-rights (liberty) and her A-C-rights (welfare).

Secondly, there is this question of how open a child's future should be. Some interpret the demand for an education for an 'open future' as requiring individuals to acquire 'to the greatest possible extent' the capacity to choose between 'the widest possible variety of ways of life' (Arneson and Shapiro, 1996: 388). Feinberg does talk only of the harms of closing off significant life choices. Yet he does also on occasion employ the language of maximisation. '[Education] should send [the child] out into the adult world with as many open opportunities as possible, thus maximising his chances for self-fulfilment'. However, it seems much more plausible to suggest that a child should have enough autonomy to be able to make reasonable life choices. The preconditions of autonomy are both internal (a capacity to think for oneself, to acquire and appreciate relevant information, and a volitional ability to
act independently) and external (the provision of a range of feasible and valuable options). In respect of both conditions it is perfectly possible to have a good sense of what counts as adequate autonomy, even if there is no clear bright line marking the point of sufficiency.

Closely related to Feinberg's idea of 'rights-in-trust' is Eekelaar's idea of a child's 'developmental' rights (Eekelaar, 1986). These are the rights of a child to develop his potential so that he enters adulthood without disadvantage. Whereas Feinberg attributes the rights to the child's adult-self, the child holding them only in 'anticipatory' form, Eekelaar attributes the rights to the adult's child-self.

4.3.2. Best Interests

If children are not thought to have A-rights and do not have the liberty rights to choose for themselves how to conduct their lives, they are nevertheless not morally abandoned to their own devices. In the first place, it is a standard principle of a child welfare law and policy that the 'best interests' of a child should be promoted. Article 3.1 of the United Nations Convention on the Rights of Children states that 'In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration' (United Nations, 1989).

Second, Article 12.1 of the Convention asserts that, 'States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child' (United Nations, 1989).

Section 8 discusses the right to be heard. The BIP (Best Interest Principles) has been given different explicit formulations. It should be noted that the principle's possible definitions vary in at least two important dimensions: what is being given weight, and how much weight is being given. Thus we may speak of a child's 'best interests' or simply a child's 'interests' or 'welfare'.

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There are at least four possible weightings given to the best interests: (a) the paramount; (b) a paramount; (c) the primary; (d) a primary. A fifth is that a child's (best) interests should merely be 'a consideration'.

Some consideration should obviously be given to a child's interests. However, the question arises how much. The distinction between 'paramount' and 'primary' is that paramount consideration outranks all other considerations while a primary consideration is first in rank among several. Although no considerations outrank a primary consideration there may be other considerations of equal, first rank. Furthermore, a leading consideration does not trump even if it outranks all other considerations. A primary consideration is not the only consideration determinative of an outcome.

So it should be evident that (a) and (b) are equivalent, and that the real contrast is between a paramount consideration that trumps all others and a primary one. In effect, the interesting choice is between (a) and (d). That is one between a child's (best) interests being the only consideration and their being an important but not the sole consideration. A debate indeed took place as to which of these two versions should be included within the UN Convention on Rights of the Child with the weaker formulation being eventually adopted (Alston 1994:12).

We might consider how any policy or action has implications – even if very indirect and attenuated – for all children. However, it is plausible to construe a use of 'children' within a formulation of the BIP as it requires us to attend to the impact of a policy, practice, or activity upon those young persons most obviously and directly affected. The BIP’s origins are to be found in custody disputes where the law had to make a determination in respect of a couple's children. Even if there were several children the court had to decide in respect of each individual child what was the most appropriate course of action. The provenance of the BIP shows itself in the continued use of the singular term ‘child’.

Further, there comes a question on how we should understand the scope of the best-interests principle. The BIP has operated in at least two important domains (Kopelman 1997a). One is in the medical context when determining which option should be selected for an ill or diseased child. The second is in custody disputes following the separation or divorce of the child’s guardians. Here, where there is an unresolved argument as to who should now raise the child, the court must decide. However, beyond these two specified
domains, the BIP has also been given broader application in respect of all policies and laws affecting children. This is certainly what the UN Convention Article 3.1 appears to require.

In some contexts where the BIP operates there appears to be a determinate number of options, and perhaps even only a pair of options. This seems to be the case in custody disputes and medical decision-making. Where each divorced parent lays claim to exclusive custody of the child, no other party has any claim, and no compromise is possible, there are only two possibilities. In this context the better option is the best. The same is true when the decision is simply whether or not to pursue or to abstain from a course of medical treatment.

By contrast, in the area of general policy affecting children there seems to be very many different possibilities. Yet even with custody and medical decisions we can expand the range of possible options. Thus what might be best for the child is not that he is cared for by either of the parents claiming custody, but that he is adopted by someone else entirely. Again, what might be best for the child is not that he receives the medical treatment on offer. What is best is that he is treated by the most skilled medical personnel within the finest medical facility with no expenses spared, and so on.

One problem of the BIP is that it does not take into account the interests of others. In the first place one might be able to improve the situation of child A but only at the cost of worsening that of child B. It is natural to think that the interests of all children should be weighed equally. Hence the BIP ought to be read as requiring us impartially to promote the best interests of each and every child. Of course the BIP directs courts, social workers or medical practitioners in some cases to promote the interests of a particular child. But this should not be done by treating the interests of any other child who might be affected as having no value or a lesser value than those of a particular child. It would not be reasonable to expect that parents should view the interests of their own children as having the same weight as that of other children. It is reasonable to ask policy makers and care professionals to do so.

In the second place the best interests of a child cannot be put over and above, and without regard to the interests of any relevant adult. It might be in the best interests of a child that his guardian give up every waking minute to his care. But no adult should have to sacrifice his own welfare for that of his child. The BIP should be so interpreted as to give at
least equal consideration to the interests to the well-being of any adults affected by policies and actions promoting the child's welfare.

The second set of difficulties surrounding the BIP concerns the interpretation of 'best interests'. One way to understand this phrase is by reference to what a child would choose for herself under specified hypothetical circumstances. We could call this a 'hypothetical choice' interpretation of the BIP. The other way to understand 'best interests' is by way of offering an account of what is, as a matter of fact, best for the child, an account which is distinct from and independent of the child's desires, actual or hypothetical. Let us call this the 'objectivist' interpretation of the BIP. Each interpretation will now be examined in turn.

The 'objectivist' interpretation of the BIP is beset by a number of difficulties. Some urge that what is best for any child is necessarily indeterminate. This is not true. For we must attach values to the options and their outcomes in respect of any choice of action towards a child. However, it will be said that independent of questions of value we cannot, with certainty, determine what is best for a child. We cannot in practice make complete and accurate assessments of what will be the outcome of each and every policy option that we might adopt in respect of a child (Mnookin, 1979). How can we know with certainty whether this child will flourish if raised by this set of parents rather than by some others in an alternative setting?

Moreover, as moral pluralists will hold, it is not possible to rank as better or worse different kinds of life. They will say that it is not possible, in principle, to compare the lives of the fearless adventurer, contemplative scholar, and creative artist. Each realises its own distinctive but strictly incommensurable set of human excellence. How then can we say that there is a best life for a child to grow into, rather than a range of equally possible yet incomparable lives? The fact of extensive disagreement about what is best for children, or for a child, is often set in the context of broader cultural disagreements about morality in general. It is said that the BIP is subverted, or at least rendered deeply problematic, by the existence of these deep and pervasive cultural disagreements (Alston 1994). Care is needed. The statement 'what is best for a child is different in different cultures' is ambiguous. In the first place, the phrase 'in different cultures' may be interpreted as meaning something like 'in different circumstances'. Most moral philosophers will acknowledge that a universal moral principle that all are agreed upon can nevertheless have differential application in
differently specified circumstances. Here we do not dispute what in general terms is best for a child. But we do recognise that what is best to do for any individual child will depend on the particular conditions in which that child finds itself.

On the other hand what is meant by the statement ‘what is best for a child is different in different cultures’ may be that there is no general agreement across cultures about what is best for a child. Each culture has its own understanding of what is in a child's best interests. There is a BIP specific to each culture. Even within single cultures sharing a broad understanding of what is in a child's best of interests there will nevertheless be some measure of disagreement. For instance, in Western societies there are continuing disputes about whether it is morally proper to smack a child.

4.3.3. Right to be Heard

Article 12.1 of the United Nations' Convention on the Rights of the Child not only accords the right on a child to freely express its views on matters affecting it. It also gives the child an assurance that these views will be given 'due weight in accordance with the age and maturity of the child'. What might that mean? The celebrated British legal judgement in the Gillick case (Gillick [1986]) provides a useful guide. A key issue in this regard is the proper relationship between the child’s right to decide for itself and the parent’s right to decide for the child.

In deciding in favour of the health authority one of the Law Lords, Lord Scarman, made a statement crucial to his finding and one that has subsequently been much cited. It is worth reproducing:

The underlying principle of the law ... is that parental right yields to the child's right to make his own decisions when he reaches a sufficient understanding and intelligence to be capable of making up his own mind on the matter requiring decision. I would hold that as a matter of law the parental right to determine whether or not their minor child below the age of 16 will have medical treatment terminates if and when the child achieves a sufficient understanding and intelligence to enable him to understand fully what is proposed. (Gillick [1986] 186, 188-9).

\[1\] The Gillick judgement arose from the dissatisfaction of a mother (Mrs. Gillick) with the failure of her local health authority to withdraw an advisory circular to the area's doctors. This advised doctors that they could counsel and inform young girls under the age of 16 about sexual matters as well as provide them with contraception, and that they could do this without the consent of the child's parents. The mother, Victoria Gillick, went to court to have the circular declared unlawful. The final judgement by the British House of Lords was that the circular was not unlawful.
In the light of the above discussion it is clear that the child possesses some rights, which other human beings enjoy. However, the crucial parameter for claiming these rights is the capacities of the rights to know about the content. But the incapacity does not mean that he or she has no right. It is a perfect obligation of some to ensure these rights but there are other imperfect obligations which are not the concerns of others. It is generally assumed that child’s best interest must be protected and what is best for him will be decided by him once he has attained maturity. The maturity level can be objectively judged in the context of the particular problems. However, when he does not have the capacity to express his interest it is obviously parents who will decide the best interests. But in many situations as in custody case or medical cases differences arise between the parents. Moreover, the best interests in one culture may not be best interests in other culture or within the same culture as well.

4.4. Evolution of Child Rights in India

The prolonged period of childhood in India (Kakar 1982) was suddenly disrupted by the onset of puberty. Gender roles and behaviours were inculcated before she attains puberty, and patriarchal culture with its preference for boys puts girl children in a disadvantage. But child rights have never been a part of Indian culture. Myron Weiner (1991) pointed out that the guild system and caste-based occupation allowed children to learn the craft from the very beginning as the family was the principal unit of production in ancient times and hence child labour was never considered violation of the best interests of the children. The concept of rights of the child came for the first time in colonial period.

This is not to say that the tender age of the child was never taken into account. The Arthasastra, Manusmriti among other law-books of ancient India exempts child from punishments for various kinds of crime. Education, tender age and childhood as a period of indulgence were highlighted in the ancient literature of India. This is in contrast to the medieval West where, Phillip Aries argues (1962: 125) there is no concept of childhood. In fact, the first legislation on child -the Indian Factories Act 1881- was passed (the Act

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2 French historian Phillip Aries argues that the concept of childhood emerged in Europe between the fifteen and eighteenth centuries. Making extensive use of medieval icons he argued that, beyond the dependent stage of infancy, children were not depicted. They were there as miniature adults only. However from 15th century onwards children began to emerge as children, reflecting their general removal from the everyday life of adult society. According to Aries this was first fostered through the growth of new attitudes of coddling towards children which their special nature and needs. Second was the emergence of formal education and long period of schooling as a prerequisite for children before they assumed adult responsibilities. See, Aries, 1962).
prohibits employment of children below 14 in hazardous industries) to protect the interests of European company. Similarly, the concept of observatory and reformatory home for children in conflict with laws came only in 1927. Focault (1989) has shown in his provocative book *Discipline and Punishment—The Birth of the Prison* that the emergence of prison was the result of a new ‘technology’ and ontology for the body being developed in the 18th century, the ‘technology’ of discipline, and the ontology of ‘man as machine’

The rights of a child as evolved since colonial times can be classified as positive and negative. While prohibition of child labour, immoral trafficking are negative rights, positive rights are also entitlement rights and help in the expansion of capacities. These rights are right to education, good health and recreation, etc. Both the negative and positive rights evolved due to interplay of several factors such as economic logic of cheap labour, concept of discipline in the modern state system and political evolution of individual rights vis-à-vis state’s responsibilities, powers and gradual international consensus over the rights of the child. The remainder of the chapter deals with these negative and positive rights of children in general and street children in particular. These two categories of rights are dealt under five important aspects of street children’s life. They are prohibition of child labour, child prostitution, immoral trafficking and sexual exploitation, children in conflict with laws (delinquent children), conditions which lead to moral abandonment, such as issues of adoption, rights which arise out of denial of basic entitlements i.e. entitlement rights such as right to education, shelter, recreation, health, etc.

4.5. Prohibition of Child Labour

The Indian Factories Act –1881 was the first important legislation on children after the restriction on child marriage. In this period not only some of the Indian industrialists, particularly the traders who supplied raw materials to the textile mills in England but also the colonial rulers employed children in their business. Thus Indian Factories Act 1881 came into force to set the minimum hours of employment in factories i.e. seven hours and allowed a maximum of nine hours of work per day. Also, the Act explains four holidays in a month and prohibited successive employment of child workers in two factories on the same day (37). Moreover, this Act, redefined in 1891, fixed nine years and seven hours of
working per day. Again, in 1911 the Act passed 15 years of age with six hours of work. But it was very difficult to find out the actual age of a child. For which the Act passed the age of a child to be employed in a factory has to be duly proved by a certificate. This Act was again revised in 1926 and passed penalties for parents and guardians for allowing children below the age to work.

Similar to the Factories Act, Mines Act 1901 specified the prohibition of employment of child as labourers below 12 years, where the conditions were dangerous to their health and safety. This Act restricted child employment in open cast mines with depths of less than 20 feet. Again in 1923, it increased age to 13 years and restricted the weekly hours of work for children to 54 underground and 60 above ground. It broadened the definition of mine to include any excavation irrespective of depth.

Considering child labour as a grave concern, the Royal Commission of Labour in India was established in 1929 to enquire into and report on the existing conditions of labour in industrial undertakings and plantations in British India. The commission was established to recommend on health, efficiency and standard of living of workers and on the relations between employers and employed. The Commission travelled all over British India, visited various industries, interviewed employers, workers and children, looked into the health hazards in different industries, and finalized its report in 1931. The report brought to light many inequalities including the miserable conditions under which the children worked. The Commission’s painstaking empirical labour was important for what they revealed about the situation of children (Burra, 1995: 5).

Similar to Factories and Mines Acts, Indian Ports Act-1931, stipulated 12 years as the minimum age for handling goods in ports. In 1932, the Tea Districts Emigrant Labour Act was passed to check the migration of labourers and provided that no child under 16 be employed or allowed to migrate unless it was accompanies by the parents. In 1933, the Children (pledging of labour) Act prohibited taking advances by parents and guardians in return for bonds, pledging the labour of their children like bonded labour. The Act specified these as bonded labour contract which was void when the labour was under 15 years of age.

Again the Factories Act in 1934 prohibited work in factories for children less than 12 years and employment was restricted to five hours a day for children between 12 and 15 years along with other restrictions for children between 15-17 years of age. In 1935, the
Mines Act was amended to introduce divisions of children according to the age groups. It raised the minimum age to 15 years and required a certificate of physical fitness from a qualified medical practitioner from those between 15 and 17 years of age. It also restricted working time to a maximum of 10 hours a day and 54 hours a week for work above the ground and nine hours a day for work underground. Based on the recommendation of the 23rd Session of International Labour Conference in 1937, India ratified certain categories of employment, the Employment of Children Act 1938 was the first Act, which directly addressed the problem of child labour in India.

In pre-Independence period the British had given emphasis on the Factories Act, Mines Act and Ports Act but certain other sectors were overlooked. For which the Labour Investigation Committee, popularly know as the Rege Committee was established to look after the child labour situation. The committee submitted its report in 1944 and specified that child labour aspect was predominant in the bidi-making, carpet weaving, glass and other small-scale industries.

4.5.1. Anti-child labour laws in the Post-Independence Times

Article 24 of the Indian Constitution moved further and enshrined Fundamental Right against exploitation. “No child below the age of 14 years shall be employed to work in any factory or mine or engaged in any other hazardous employment (Basu, 2002: 114 and Bakshi, 2003: 62). Article 39 (e) and (f) of the Directive Principles of States Policies in Part IV of the Constitution reinforced the fundamental reading when they obligate the state to ensure that

- The health and strength of workers, men and women and the tender age of children are not abused.
- Citizens are not forced by economic necessity to enter avocations unsuited to their age or strength.
- Children are given opportunities and facilities to grow in a healthy manner and in conditions of dignity and freedom;
- Childhood and youth are protected exploitation and against moral and material abandonment (Bakshi 2003: 86).
The Mines Act 1901 was revised in 1952 and prohibited employment of children less than 15 years in mines. The Act also stipulated conditions for underground work to include completion of 16 years and a certificate of physical fitness from a surgeon. Similarly, the Factories Act in its subsequent amendment (1954) prohibits employment of persons less than 17 years and working hours between 10 pm to 7 pm. In 1958, the Merchant Shipping Act prohibited employment of children under 15 in any ship, except in school ships, where all employees were members of a family, in a home trade ship of less than 200 tons gross.

In the history of the provisions on children, it was first time that the concept of 'juvenile' was added in the Children Act of 1960. The measures have given emphasis upon the effects of juvenile reformation in free India. The Act includes the age of 'a boy who has not attained 16 years or a girl who has not attained 18 years'. However, in other Acts pertaining to children enacted by various States, opinion differed about the child's age to be categorized as a 'delinquent' which was perhaps due to culture specific reasons of the particular region.

It was first time that the Motor Transport Workers Act was passed in 1961 to prohibit employment of children less than 15 years in motor transport undertakings and this Act required adolescent workers to obtain a certificate of fitness. The Merchant Shipping Act and the Motor Transport Workers Act were later amended to define a child as being under 14 years by the Child Labour (prohibition and regulation) Act, 1986. Also, in the same year Apprentices Act was passed which prohibited apprenticeship or training of a child under 14 years and in the case of apprenticeship of minors, it required a contract between the guardian and the employer. The Apprentices Act also puts the maximum weekly hours for an apprenticeship at between 42 and 48 hours in total depending on the number of years spent as an apprentice. No apprentice, other than short term apprenticeship may work between 10 pm and 6 am except with the approval of the apprenticeship advisor. In this respect, first post-Independence enactment came into force through Minimum Wages Act passed in 1948. It stipulated that no children below 14 years, who are employed in agriculture and other small-scale industries in rural and semi-urban areas can be forced to work more than four-and-half hours in agricultural and semi-artisan industries.

In 1962, the Atomic Energy Act prohibited employment of persons under 18 as radiation workers. In continuation of the previous Labour Investigation Committee Report,
the Bidi and Cigar Workers (conditions of employment) Act was passed in 1966. It not only prohibited employment of children under 14 in industrial premises where any process connected with the manufacturing of bidis and cigars takes place, but also employment of young persons who are between 14 and not 18 years of age and between 7 pm and 6 am.

In post-Independence period, the first National Commission of Labour (NCL) was appointed in 1966 and it reported that denial of opportunity to children for their physical development and education is a serious issue keeping in view the larger interests of society. The commission, among other things, recommended minimum age, working hours of children and made arrangements for work with education.

In 1978, the Employment of Children Act was amended to prohibit employment of a child below 15 years in occupations on railway premises such as cinder-picking or clearance of ash pits or building operations, in catering establishments and in any other work which was carried on or in close proximity to or between railway lines.

The Gurupadswamy Committee on child labour was set up in 1979. The report, considered both analytical and comprehensive, dealt at length with questions such as dimensions of child labour and status of schemes for child labour. It emphasised welfare and training of society, including workers, employers, various departments of the government and voluntary organisations on various aspects of child labour. Commenting on the existing child labour legislation and its implementation, the committee reported that jurisdiction of individual inspectors was too extensive for them to keep the required watch on activities within their purview. It also observed that there were practically no prosecutions in most parts of the country of violation of existing child laws pertaining to child labour. The committee noticed that children of very tender age are working in factories in violation of statutory provisions. It was of the view that enactment of a law is only the beginning and what was really important is its enforcement. Further, the committee noted that punishment provided in the existing statues as penalties for violations of the Act were meagre and therefore had no deterrent effect. On the whole, the committee suggested a multiple-policy approach to deal with problems of working children.

The Supreme Court also pronounced from time to time numerous verdicts to protect various rights of the child. In the Bandhua Mukti Morcha vs Union of India (AIR 1985), the apex court held that while exploitation of the child must be progressively banned, alternative
should be evolved for their education, health, food, etc. In the *Lakshmi Kant Vs Union of India* (1997) the Supreme Court enlarged the ambit of a PIL by stating that public interest litigation can be lodged for suitable direction to prevent malpractices or trafficking in Indian children in connection with their adoption by foreigners living abroad. (2 S.C.C. para1, AIR 1991). On December 10, 1996 in Writ Petition (Civil) No.465/1986 the Supreme Court gave certain directions on the issue of elimination of child labour. The main features of the judgment are as under:

- Survey for identification of working children;
- Withdrawal of children working in hazardous industry and ensuring their education in appropriate institutions;
- Contribution @ Rs.20,000/- per child to be paid by the offending employers of children to a welfare fund to be established for this purpose;
- Employment to one adult member of the family of the child so withdrawn from work and if that is not possible a contribution of Rs.5,000/- to the welfare fund to be made by the State Government;
- Financial assistance to the families of the children so withdrawn to be paid out of the interest earnings on the corpus of Rs.20,000/25,000 deposited in the welfare fund as long as the child is actually sent to the schools;
- Regulating hours of work for children working in non-hazardous occupations so that their working hours do not exceed six hours per day and education for at least two hours is ensured. The entire expenditure on education is to be borne by the concerned employer.

Similarly, the Supreme Court in the *Sheela Barse v Union of India* (AIR 1986 SC1773, para 12) case held that the child offenders are entitled to speedy trial. To check sexual exploitation of children, the apex court gave various rulings. In *Gaurav Jain v. Union of India*, the Supreme Court passed an order directing, inter alia, the constitution of a committee to make an in-depth study of the problem of prostitution, child prostitutes and children of prostitutes, and to evolve suitable schemes for their rescue and rehabilitation. It said "Children of prostitutes should not be permitted to live in the inferno and the undesirable surroundings of prostitute homes" (SCC p. 119, para 1).
The government, in the wake of the judgement of the apex court in the Bandhua Mukti Morcha case in 1985, appointed the Sanat Mehta Committee. The committee submitted its report in 1986 and reiterated the recommendations of the National Commission of Labour and the Gurpadswamy Committee. Also, the committee emphasized the need for a uniform age for children for entry into employment and wanted to combine work with education. The report’s recommendation on the uniform age to enter into employment shows that it was indirectly against the Children Act 1960.

The Child Labour (prohibition and regulation) Act came into force towards the second half of 1986. It listed particular processes in certain industries that were banned for children below 14 years with the provision that such a ban would not apply to those children working as part of family labour or to those working in any state funded or state supported institutions. It is interesting to note that provisions of the 1986 Act were almost identical to those of employment of Children Act of 1938, with reference to the ban referred to above. The only significant difference between the laws of 1938 and 1986 was that the latter envisaged constitution of a child labour technical advisory committee which was to investigate, on a continuing basis, processes in different industries in order to determine whether they were hazardous or otherwise. While debate on the legislation was still continuing, the Government announced a National Child Labour Policy (NCLP). According to this, some industries were identified for priority action to tackle the problem of child labour through non-formal education, employment, and income generation schemes for poor parents of working children (Burra, 1995: 2-3).

Most debates on child labour leave unanswered the specific problems of girl children. A part of the reason is that while boys can be seen working in workshops and factories in some of the most hazardous working conditions, girls, with a few exceptions, work at home and therefore invisible to a casual observer. This invisibility has serious negative consequences in terms of her status within the family which in turn determines her role in the family and society. Girls accompany parents to fields and help with sowing, transplanting, weeding, harvesting and scaring away birds. And in addition to their domestic work, they are also involved in large numbers in unorganized sector. Not only that, girls even work in organised sector industries (Burra 1995: 204). Maitray Choudhury’s study amongst agricultural labour households in a village of Bolapur-Sriniketan Block in Birbhum
district of West Bengal, one of the possible reasons for sex bias in child nutrition may be the traditional belief on the supposed greater economic value of male children (Chaudhuri 1985: 4-5).

The labour of a girl child at home and outside is proportionately high and denies her opportunities for development. Recognition of the girl child’s burden that includes chores like labour and sibling care has resulted in the Government evolving innovative programmes to free the girl child from its traditional fetters. Strategies like raising awareness of parents and society, non-formal education, open school, crèche services, coverage of adolescent girls in ICDS programme and vocational training have contributed to their educational development.

The National Policy on Child Labour (1986) proposes special part time education and vocational courses for children who work. Effective implementation of the provisions of Child Labour (prohibition and regulation) Act 1986, Factories Act, Mines Act, etc. is an important strategy to prevent child labour from exploitative, demanding work and can free them for education and vocational training.

The National Authority for Elimination of Child Labour has been constituted in 1994 to lay down policies and programmes, review their implementation and co-ordinate child related programmes, among other things.

National Child Labour Projects (NCLP) are under implementation in many states. A major activity under the NCLP is the establishment of special schools to provide basic needs like supplementary education, non-formal education, vocational education, etc. to children withdrawn from employment. Voluntary agencies are also being financially assisted to the extent of 75% for taking up welfare projects for working children under a grant-in-aid scheme. (Singh et. al. 2002)

On the Independence Day of 1994, the Prime Minister gave a call to eliminate child labour in hazardous industries completely by 2000 AD largely by activities modelled on the NCLP.

4.6. Children in Conflict with Law

One of the traditional concepts on which punishment hinges is that somebody by free will has committed crime, and therefore he must face punishment for his deviant act. Others
believe that children do not have the capacity to make judgement about their action and therefore crimes committed by them cannot be equated with that of the adult. There are different approaches to the crime and punishment and the following sections deal with them.

4.6.1 Various Criminological Approaches
Criminology is a rich discipline with multifarious approaches. While understanding that no approach stands on its own, and there is a degree of interpenetration between approaches it is still useful to classify approaches at least as ideal types. Cunnen (1995) classifies criminological approaches broadly within the framework outlined below.

Classical theory, positivist approaches, strain theories, social control theories, youth sub culture theories, labelling theories and Marxist theories.

4.6.1. a. Classical Theory
Classical theory is premised on the notion of free will. If an individual commits a crime, it is because he freely choose to do so and has to take responsibility for his action. Since individuals are responsible for their actions this theory advocates that punishment is a way of deterring rational individuals (all individuals are rational) from committing a crime. Classical theory is based on a Benthamite calculus of pleasure and pain and believes that if pain is administered by way of imprisonment then wrong doing would be deterred.

4.6.1. b. Positivist Approaches
Positivist approaches advocate that individuals commit crimes either because of biology, environmental factors or sociological factors. Individuals thus commit crimes for reasons often beyond their control and they should be ‘cured’ of their disposition to commit crimes. Positivist approaches thus recommend an individualized approach where offenders are classified and different kinds of treatments are prescribed. Thus a whole range of expert interventions is recommended to ensure that the individual does not commit the crime again as suggested by sociologists, psychologists, doctors, social workers and other ‘experts’.

4.6.1. c. Strain Theories
This approach decisively shifts responsibility for crime from individual to social structure. Crime is not the result of an individual predisposition for crime, but happens because of the
way society has structured common goals and ways to achieve them. For example in Merton’s (1959) analysis, if all individuals share the common American dream of financial success, but the institutional means to achieve success is limited to a few, then one outcome would be crime, which is a non institutional means to achieve the same. Thus crime is seen as an outcome of a social disease, be it inequality of opportunity, inability to integrate those considered alien or a socially and culturally discriminatory attitude.

4.6.1. d. Social Control Theory

The social control theory is premised on the idea that it is an individual’s bond with society, which makes the difference in terms of whether or not they abide by society’s general rules and values. Hirschi (1993) theorized that the social bond is made up of four elements:

- Attachment: ties of affection and respect to significant others in one’s life, and more generally a sensitivity to opinion of others
- Commitment: investment of time and energy in activities such as school and various conventional and unconventional means and goals
- Involvement: patterns of living which shape immediate and long term opportunities, for example, the idea that keeping busy doing conventional things will reduce exposure of young people to illegal opportunities
- Belief: the degree to which young people agree with the rightness of legal rules, which are seen to reflect a general moral consensus in society.

It is a combination of attachment, commitment, involvement and belief which shapes the life world of the young person and essentially dictates whether they will take advantage of conventional means of social advancement or they will pursue illegal pathways to self gratification.

4.6.1. e. Youth Subcultures

Another important theory closely linked to social control theory is the idea of youth subcultures, wherein what society calls criminal behaviour is learnt in a group setting. The subculture sees itself as operating on different value systems, different notions of right and wrong and individual acts in conformity with the norms of the subculture to which they
belong. Subcultures are also seen as a response to social and economic marginalisation and are a creative mode of coping with or resisting deprivation.

4.6.1. f. Labelling Theory

Labelling theories focus on the fact that deviancy is subjectively made and not objectively given. Deviance is seen to be a product of the juvenile’s interaction with the criminal justice system. Once the juvenile commits the act prohibited by law, and he is apprehended then the very interface with the criminal justice system produces the identity of the criminal. Society identifies the individual henceforward with only one identity, namely that of the criminal. This kind of societal reaction results in the individual taking on the identity as a response to societal stigma and learning the norms of behaviour conferred by the label. The label thus serves to amplify deviance or criminality.

4.6.1.g. Marxist Theories

Traditional Marxist theories locate the cause of crime in the unequal access to material resources with the crime itself being seen as a class response to inequality. Later applications of Marxist thinking to criminology have carried the analysis further and analyse how wrongdoing by the powerful and wrong doing by the powerless is defined. Wrong doing by the powerful may sometimes not even be defined as a crime, (negligent conduct which causes the death of thousands i.e. Bhopal gas tragedy). If so defined, the powerful are able to defend themselves because of their greater resources. By contrast the wrong doing by the less powerful tends to be highly visible and be subjected to wide scale intervention by the police, courts, prisons, welfare agencies etc. This approach raises the fundamental questions of legitimacy of intervention in the lives of poor people while the harm done by the powerful is not taken note of.

4.6.2. Indian Laws and Juvenile Justice

The first legislation governing delinquent children was the Apprentice Act–1850 (the last being The Apprentices Act, 1961) which provided that children in the age group of 10-18 convicted by courts were to be provided with some vocational training, which might help their rehabilitation. It was followed by Reformatory Schools Act, 1897. The Act was the first curative legislation concerning children in conflict with laws. It specified creation of
reformatory schools for children below 15 who have committed crimes. The focus of this Act is to prevent youthful offender whose antecedents are not shown to be bad to send them to ordinary jails, which may have the effect of making them hardened criminal. In stead, they will be sent to reformatory schools out of which they cannot go during the period of punishment. In the Reformatory School, they were provided with every basic facility of food, clothing, education and opportunity for exploring themselves. These measures are under the Government control and scrutiny of the head of Reformatory School. Offenders are restricted within a particular boundary. However, it does not mean that the Reformatory School Act always guides all offences committed during youth. The limitations of this Act are: the offence of murder, which is punishable to death or imprisonment of life does not include offences to be dealt with by Reformatory Schools Act. The Indian Jail Committee (1919-1920) brought to the fore the vital need for square trial and treatment of young offenders. Its recommendations prompted enactment of the Children Act in Madras in 1920. This was followed by Bengal and Bombay Acts in 1922 and 1924 respectively. The three pioneer statutes (i.e. Acts concerning Madras, Bengal and Bombay) were extensively amended between 1948 and 1959.

In 1960 at the second United Nations Congress on Prevention of Crime and Treatment of Offenders at London the issue of delinquent children was discussed and some therapeutic recommendations adopted.

The central enactment, the Children Act 1960 was passed to cater to the heads of Union Territories. To remove inherent lacunae of the above-mentioned Act, the Children (Amendment) Act was passed in 1978. But the need of a uniform legislation regarding juvenile justice for the whole country had been expressed in various fora, including in Parliament but it could not be enacted as the subject matter of such legislation fell in the State List. To bring the operations of the juvenile justice system in the country in line with the UN Standard Minimum Rules for the Administration of Juvenile Justice, Parliament exercised its power under Article 253 of the Constitution read with Entry 14 of the Union List to make law for the whole country to fulfil international obligations. On August 22, 1986, the Juvenile Justice Bill, 1986 was introduced in the Lok Sabha. However, India became a signatory to the UN convention on the Rights of the Child and a comprehensive
legislation on juvenile justice was required. The new legislation Juvenile Justice (care and protection) Act came into being. The new Act tried to protect the three main principles of the children’s rights, namely: best interests, non-discrimination, and child’s voice to be heard.

The 1986 Act came into force as a piece of legislation designed for the care, protection, development and rehabilitation of the neglected and delinquent juvenile, as well as for the adjudication and disposition of certain matters relating to them. The Act covers neglected, delinquent, pre-delinquent juveniles as also the street and working children. It covers 16 years in case of boys, and up to 18 years in case of girls. It makes a distinction between ‘delinquent’ juveniles and ‘neglected’ juveniles. A delinquent juvenile is one who is found to have committed an offence. But the Act attempts to broadly define the neglected children as those who are in need of ‘care, protection, welfare and rehabilitation’. The ‘neglected juvenile’ is defined as a juvenile who:

(i) Is found begging; or
(ii) Is found without having any home or settled place and without any ostensible means of livelihood and destitute;
(iii) Has a parent or guardian who is unfit or incapacitated to exercise control over the juvenile;
(iv) Lives in a brothel or with a prostitute or frequently goes to any place used for the purpose of prostitution;
(v) Who is being or is likely to be used or exploited for immoral or illegal purpose for gain (Panicker, 2000: 4-5).

They may be abused in some ways or are likely to be abused or happen to be under situations of possible abuse, such as in red-light areas or under similar depraved conditions (PRAYAS, nd: 1). Considering the probable situations, the Juvenile Justice Act defines parameters of the Juvenile Justice System. Neglected juveniles are those without ostensible means of subsistence/survival not leading a child-like life, nor getting proper education and care or they may happen to be vagrants or on the streets or in any condition of want and care.

The Juvenile Justice Act, 1986 thus tends to provide a preventive, protective and rehabilitative umbrella to those children who are found in situations of neglect and
vulnerability to crime. It incorporated several novel features towards restoring justice to juveniles. To mention a few, these include, inter alia, a specialised approach towards juveniles coming in conflict with the law, a differential handling of neglected juveniles vis-à-vis delinquents, prohibition of the confinement of the juvenile in a police lock-up or jail, separate institution for the processing, treatment and rehabilitation of the neglected and delinquent juveniles, a wide range of disposition alternative with a preferences to family/community based placement, a vigorous involvement of voluntary agencies at various stages of juvenile justice process, stringent penalties against those who commit offences against juveniles, and linkages between juvenile justice system and community-based welfare resources.

Not only does the Act spell out justice to the juvenile but also gives emphasis on the machinery and infrastructure required for the care, protection, development and rehabilitation of children. The machineries are Juvenile Welfare Boards for the screening of neglected juveniles; Juvenile Courts for the processing of delinquent juveniles; and Observation Homes for temporary reception of juveniles during the pendency of their cases.

Despite all the good intentions of the Act, there are considerable failings in it. The juvenile justice system was supposed to respond to the needs of all ‘delinquent’ and ‘neglected’ children but it fails to provide the facilities. Konar explicitly mentioned two reasons that compel a re-examination of juvenile justice are lack of clear understanding, and inadequacies of the system, which may lead to re-criminalizing delinquency (Konar, 2002). Panicker’s explanation on the failure of this system was due to the non-implementation of the Act and a general lack of political will to address the needs of groups of children living in difficult circumstances, there is not sufficient infrastructure or manpower in place within the juvenile justice system to respond to the number of children who may be defined as ‘in need’. In many case, non-implementation is seen as resulting from:

- Lack of clarity in the provisions of the Act
- Lack of infrastructure at the state level
- Lack of orientation for the functionaries of the Juveniles Justice Act

A review of the working of the Juvenile Justice Act 1986 Act indicated that greater attention is required for children who may be found in situations of social maladjustment,
delinquency or neglect. The 1986 Act does not provide a very clear definition of the neglected nor was there any provision for implementation of the policies. It was felt that it was necessary to:

1. Provide for a specialised approach towards prevention and treatment of juvenile delinquencies in its full range in keeping with the development needs of the child found in any situation of social maladjustment;

2. Spell out the machinery and infrastructure required for the care, protection, treatment, development and rehabilitation of various categories of children coming within the purview of the juvenile justice system. This is proposed to be achieved by establishing observation homes, juvenile homes for neglected juveniles and special homes for delinquent juveniles;

3. Establish norms and standards for the administration of juvenile justice in terms of investigation and prosecution, adjudication and disposition and care, treatment and rehabilitation;

4. Develop appropriate linkages and coordination between the formal system of juvenile justice and voluntary agencies engaged in the welfare of neglected or society maladjusted children and to specifically define the areas of their responsibilities and roles

5. Constitute special offences in relation to juveniles and provide for punishments;


The Juvenile Justice Act 1986 was reformulated and approved as Juvenile Justice Act 2000 (care and protection of children). The new Act came into being not only to overcome the shortcomings of the 1986 Act, it came up as a result of India’s ratification of the Convention on the Rights of the Child (CRC). The Convention on the Rights of the Child, signed by 190 member-states of the UN in 1989 and ratified by India on 1992 bound India to make policy changes on the lines of the Convention which is the most comprehensive document on children and its rights and best interest (see infra).
The Juvenile Justice (care and protection) Act-2000 provides effective provisions of a number of alternatives for rehabilitation and social reintegration, such as adoption, foster care, sponsorship and aftercare. It also deals with civil and political rights of the children, including juvenile delinquents. The Act also dealt with entitlement rights of the children which include shelter, health, nutrition, education and recreation. Emphasis was given on reintegration of children with his family. The Act also envisages a system of partnerships with local communities and local governments to implement the legislation. The Act makes a distinction between delinquent children who are in conflict with laws and neglected juvenile, who have run away from parents or have no wherewithal and are unattended by their parents.


There are numerous legal protections for the delinquent as well as for the negligent children. While there are legal protections for children who are in conflict with laws, the Act also makes provision for the neglected children who are in need of protection and care. The protections under the Juvenile Justice Act, 1986, continue with the new enactment with their being no additional protection guaranteed to the child in conflict with the law. The protections can be enumerated as follows:

- Whether a juvenile commits a bailable or non-bailable offence, the child shall be released on bail with or without surety. The only grounds on which the juvenile can be detained are if there is reasonable ground for believing that the release is likely to bring him into association with any known criminal or expose him to moral, physical or psychological danger or that his release would defeat the ends of justice. Further, detention can only be in observation home and not in prison or police station. The bail provisions for young offenders are far more liberal than those applicable under the Criminal Procedure Code.(Sec 12)

- In terms of the orders which the board may pass regarding the juvenile, there is a discretionary power to send the child home after admonition or advice, order the juvenile to perform community service, release the child on probation of good conduct etc.(Sec 15) The only controversial part of the power of the board is the power to send the child to a special home for a minimum period of not less than two
years for a child who is over 17 and less than 18 and in case of any other juvenile till he ceases to be a juvenile. There is a proviso under which the child could reduce the period of stay having regard to the nature of offence and circumstances of the case. However, this provision is in clear contravention of Article 37(b) of the Convention of the Rights of the Child, which notes that No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of the last resort and for the shortest appropriate period of time.

- The Act also clearly prohibits sentencing a child to death or life imprisonment or committing to prison in default of payment of fine or furnishing of security. (Sec 16)
- For a juvenile sentenced under the Act, there is a clear mandate such juvenile shall not suffer any disqualification attaching to a conviction of an offence under the law. Further, after a reasonable period of time the board is enjoined to remove the records. (Sec 19)
- The Act also stipulates that there shall be no joint trial of a juvenile with a person who is not a juvenile. (Sec 18)
- The Act also protects the privacy of the child by mandating that no report by newspaper etc shall disclose the name, address or school or other particulars which could lead to the identification of the juvenile nor shall any picture of such juvenile be published. (Sec 21)

4.6.2.b Expansion of Category of Child in Need of Care and Protection

The category of children in need of care and protection has been expanded to include victims of armed conflict, natural calamity, civil commotion, child who is found vulnerable and likely to be inducted into drug abuse etc. The expansion of the category of children in need of care and protection has itself led to serious questions as the system still remains custodial in nature and one that in effect brings more children within the criminal justice framework.

4.6.2.c Custodial Framework for Children in Need of Care and Protection

The framework of law remains within the criminal justice system as the police still have power to contact a child and produce him before the committee. In fact, the powers of the police have been expanded, as under the new Act the police have also been empowered to hold an inquiry on the child in the prescribed manner. Further, if the child is sent to a Juvenile Home, then such home remains a place where the child is deprived of his liberty, thereby reinforcing the custodial nature of the institution.
4.6. 2.d. Restoration as Option for Child in Need of Care and Protection

The innovation that the law makes with respect to children in need of care and protection is the conceptualisation of restoration of the child as being the focal point, with restoration being conceptualised as restoration to parents, adopted parents or foster parents. (Sec39). This being the crux, the law then outlines four options for children in juvenile homes and special homes which include adoption, foster care, sponsorship and after care. While the aim of minimizing the stay of the child in the juvenile home and special home as conceptualised is laudable, there are serious concerns as to whether restoration can be the only solution. Especially in the case of sexual abuse the solution can be ill-conceived. Further, in the case of children in difficult circumstances such as children on streets, children in prostitution restoration might not be an immediate solution. The other concern is as to the fact that no safeguards have been built into the procedures regulating adoption and foster care in the Act itself leaving it entirely to the discretion of states, which have the power to make rules under the Act.

4.6. 2.e. Police torture and protection of children under the Juvenile Act

The Juvenile Justice Act 2000 was enacted “to consolidate and amend the law relating to juveniles in conflict with law and children in need of care and protection by providing for proper care, protection and treatment by catering to their development needs and by adopting a child-friendly approach in the adjudication and disposition of matters in the best interest of children and for their ultimate rehabilitation through various institutions established under this enactment. While the previous section deals with changes made in laws that deal with children in conflict with laws and the institutional mechanism thereof, it is pertinent to raise the question that are they really deviant? Have they run into conflict with laws? What are the constitutional and other protective mechanisms for the protection of these children?

The Juvenile Justice Act prohibits sending of children who have been arrested for offences under Indian Penal Code to the ordinary jails. In stead, it has made provisions for observation home for undertrial children and juvenile home for the convicted. It also makes provision for the Juvenile Board and where there is no juvenile court, juvenile welfare board
for the trial of the children. In many districts, Juvenile Boards have not been set up. More often the police pick up street children, lock them up in police station for two days and torture them and then take them to Juvenile Board. There are many who are still incarcerated in regular jail.

4.7. Entitlement Rights

While Indian Constitution ensures equality and certain category of rights for the child, it also protects him from immoral trafficking and from working in hazardous industries (Article 23 and 24). The 93rd Constitutional Amendment also ensured children’s right to education (Article 21 A). The Supreme Court through liberal interpretation of the right to life of Article 21 of the Constitution also made right to livelihood as a Fundamental Right. Keeping the tender age of the children in view, the Directive Principles of State’s Policies also protect children. (see infra).

The government made different laws and launched many schemes for children, that apply to street children as well. All these schemes come under the integrated schemes for street children. The objective of this integrated programme is to prevent destitution of children and facilitate their withdrawal from life on streets. The programme provides for shelter, nutrition, health care, education, recreation facilities to street children, and seeks to protect them against abuse and exploitation. The strategy is to develop awareness and provide support to build capacity of the Government, NGOs and the community at large to realize the rights of the child enshrined in the UN Convention on the Rights of the Child (CRC) and in the Juvenile Justice (Care and Protection of Children) Act, 2000. The target group of this programme is children without homes and family ties i.e., street children and children especially vulnerable to abuse and exploitation such as children of sex workers and children of pavement dwellers. Children living in slums and with their parents are excluded from the coverage of this scheme.

State Governments, Union Territories, local bodies, educational institutions and voluntary organisations are eligible for financial assistance under this programme. The Centre provides up to 90% of the cost of the project, and the remainder has to be borne by the organisation/institution concerned. Under the programme, no predefined cost heads are
stipulated. Depending upon the type of activity and the nature of service, an appropriate amount not exceeding Rs 1.5 million per annum can be sanctioned as recurring cost for each project. The grant under the programme is released to selected organizations in two equal half yearly instalments. The programme component of a project under this scheme can be:

- City level surveys
- Documentation of existing facilities and preparation of city level plan of action
- Contact programmes offering counselling, guidance and referral services
- Establishment of 24 hours drop-in shelters
- Non-formal education programmes
- Programmes for reintegration of children with their families and placement of destitute children in foster care homes/hostels and residential schools
- Programmes for enrolment in schools
- Programme for vocational training
- Programmes for occupational placement
- Programmes for mobilizing preventive health services
- Programmes aimed at reducing the incidence of drug and substance abuse, HIV/AIDS etc
- Post ICDS/Anganwadi programmes for children beyond six years of age
- Programmes for capacity building and for advocacy and awareness building on child rights (http://socialjustice.nic.in/social/welcome.htm).

Since the inception of the programme, 2,50,938 street children have been extended help by the Ministry through 214 organisations in 24 States and UTs.

4.7.1. Implementing Agencies

The 2000 Act spells out responsibilities of the government on care, protection, and development of neglected children. Above all, it attempted to smoothen the issues related to crime prevention and rehabilitation of juvenile delinquents. The provision contained in the Act distinguishes two categories of children: those defined “in conflict with the law” and

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3 Sarva Shiksha Abhiyan is an effort to universalise elementary education by community-ownership of the school system. It is a response to the demand for quality basic education all over the country. The SSA programme is also an attempt to provide an opportunity for improving human capabilities to all children, through provision of community-owned quality education in a mission mode. The Sarva Shiksha Abhiyan is to provide useful and relevant elementary education for all children between 6 and 14 years by 2010. There is also another goal to bridge social, regional and gender gaps, with the active participation of the community in management of schools.

4 ICDS(launched in 1975) promotes child survival and development through an integrated approach for converging basic services for improved child care, early stimulation and learning, improved enrolment and retention, health and nutrition, and water and environmental sanitation (www.wcd.nic.in).
those considered to be “in need of care and protection”. The first one, “in conflict with the law,” is those apprehended for violating the Indian Penal Code. The Act sanctioned establishment of new institutions vested with the responsibility of care of neglected and delinquent children. The institutions machineries like Observation Homes serve as temporary holding facilities for juveniles who were arrested by the police or found to be living in neglect. Juveniles “in conflict with the law” remain there awaiting trial; if convicted, they are institutionalised in Special Homes.

The second one “in need of care protection” encompasses minors who are found begging on streets; those who are homeless; those whose parents were declared unfit because of their indigence or lifestyle; those who have suffered physical or sexual abuse; and those who are believed to be at high risk of being abused in the future. Virtually all street children face these problems and fall into this category.

Children “in need of care and protection” stay there pending the completion of a government investigation aiming to track down their parents and collect information on their family background. If the parents turn out to be dead, untraceable, unfit, or simply unwilling to take the child back, the Juvenile Welfare Board arranges for the child’s placement in a Juvenile Home, where the government is responsible for providing room, board, education, and vocational training.

Institutional mechanisms for ensuring two aspects of juvenile justice i.e. for neglected and delinquent children can be classified into two types – institutional and non-institutional. Institutional care refers to closed-door, residential facility for a group of children. These institutions may be statutory i.e. under the laws enacted for the welfare of children e.g. Observation or Remand Homes set up under the provisions of Juvenile Justice Act 2000 and run by voluntary organisations. The table below describes various types of institutions and services under statutory and non-statutory levels.
Table 4.1: Classification of Institutional and Non-institutional Care of Juvenile Justice

<table>
<thead>
<tr>
<th>Institutional</th>
<th>Non-Statutory</th>
<th>Non-Institutional care</th>
</tr>
</thead>
<tbody>
<tr>
<td>Statutory</td>
<td></td>
<td>1. Foster care</td>
</tr>
<tr>
<td></td>
<td></td>
<td>2. Sponsorship</td>
</tr>
<tr>
<td></td>
<td></td>
<td>3. Adoption</td>
</tr>
<tr>
<td></td>
<td></td>
<td>4. Programme of state</td>
</tr>
<tr>
<td></td>
<td></td>
<td>government assistance</td>
</tr>
<tr>
<td></td>
<td></td>
<td>to voluntary organisations</td>
</tr>
<tr>
<td></td>
<td></td>
<td>5. Day-care services</td>
</tr>
<tr>
<td></td>
<td></td>
<td>6. Programme for working</td>
</tr>
<tr>
<td></td>
<td></td>
<td>children like Railway's</td>
</tr>
<tr>
<td></td>
<td></td>
<td>platform school</td>
</tr>
<tr>
<td></td>
<td>1. Orphanages run by States or UT</td>
<td></td>
</tr>
<tr>
<td></td>
<td>a. Under Grant-in-aid of Central Social Welfare Board</td>
<td></td>
</tr>
<tr>
<td></td>
<td>b. Under Grant-in-aid Ministry of Social Justice and Empowerment</td>
<td></td>
</tr>
<tr>
<td></td>
<td>c. Privately run orphanages</td>
<td></td>
</tr>
<tr>
<td></td>
<td>2. Children’s Homes under the Centrally sponsored villages</td>
<td></td>
</tr>
<tr>
<td></td>
<td>3. SOS Children’s villages</td>
<td></td>
</tr>
<tr>
<td></td>
<td>4. After-care Homes</td>
<td></td>
</tr>
</tbody>
</table>

(Source: Rane, A. U. Naidu & Kapadia (1986))

These institutions are being run either by State Government agencies or by voluntary bodies. The Ministry of Social Justice and Empowerment, Government of India gives funding up to 90% of the project cost. The table below presents the state-wise grant by the Ministry for juvenile homes.

Table 4.2. Statement Showing the State-wise Release of Grant-in-aid Under the Scheme 'A Programme for Juvenile Justice', Number of Inmates Assisted and Number of Homes Assisted Under the Scheme During 2004-05.

<table>
<thead>
<tr>
<th>States</th>
<th>Amount released [in Rs.]</th>
<th>No. of inmates assisted</th>
<th>No. of homes assisted</th>
</tr>
</thead>
<tbody>
<tr>
<td>Tamil Nadu</td>
<td>1,38,17,803</td>
<td>1780</td>
<td>19</td>
</tr>
<tr>
<td>Orissa</td>
<td>5,73,310</td>
<td>143</td>
<td>5</td>
</tr>
<tr>
<td>Rajasthan</td>
<td>11,94,829</td>
<td>284</td>
<td>4</td>
</tr>
<tr>
<td>Sikkim</td>
<td>2,32,750</td>
<td>25</td>
<td>1</td>
</tr>
<tr>
<td>Haryana</td>
<td>23,59,092</td>
<td>354</td>
<td>7</td>
</tr>
<tr>
<td>Meghalaya</td>
<td>9,92,465</td>
<td>76</td>
<td>3</td>
</tr>
<tr>
<td>Chhattisgarh</td>
<td>90,10,580</td>
<td>528</td>
<td>12</td>
</tr>
<tr>
<td>Goa</td>
<td>4,95,140</td>
<td>74</td>
<td>2</td>
</tr>
<tr>
<td>Karnataka</td>
<td>50,31,333</td>
<td>2764</td>
<td>62</td>
</tr>
</tbody>
</table>
4.8. Street Girls as Victims of Prostitution, Sexual Exploitation, Rape

The relative invisibility of girl children on the streets of urban India indicates a grimmer reality. Many of the street girls were sexually abused by their male counterparts, by musclemen and were later sold to brothels. Rape and subsequent sell remains one of the most abhorrible crimes committed against the street girl children. Many, often the father or foster father, turns out to be engaged in incestuous relations and later force her to the world of prostitution (Debabrata, 1997). The girl ran away from home only to be found in the clutches of pimp who sells her to a brothel. A survey conducted by an Indian health organization of a red light area of Mumbai shows:

1. 20 per cent of the one lakh prostitutes are children.
2. 25 per cent of the child prostitutes had been abducted and sold.
3. Six per cent had been raped and sold.
4. 18 per cent sold by their fathers after forcing them into incestuous relationships
5. 2 lakh minor girls between 9 and 20 years were brought every year from Nepal to India and 20,000 of them are in Mumbai brothels
6. 15 per cent to 18 per cent are adolescents between 13 years and 18 years.
7. 15 per cent of the women in prostitution have been sold by their husbands, 8. Of 200m suffering from sexually transmitted diseases in the world 50m alone were in India, 9. 15 per cent of them are devadasis (temple prostitutes). (http://www.pucl.org/from-archives/Child/prostitution.htm)

The Constitution (Article 23), Indian Penal Code (IPC) and Convention on Rights of Children (CRC) prohibit immoral traffic and sexual exploitation of women including girl child. The Immoral Traffic Act 1956 also makes child trafficking and prostitution a penal offence. CRC also protects the child from sexual exploitation. Article 34 of the CRC states that the States parties undertake to protect the child from all forms of sexual exploitation and sexual abuse. For these purposes, States parties shall in particular take all appropriate national, bilateral and multilateral measures to prevent: (a) The inducement or coercion of a child to engage in any unlawful sexual activity; (b) The exploitative use of children in prostitution or other unlawful sexual practices; (c) The exploitative use of children in pornographic performances and materials.

The Indian Penal Code and the Immoral Traffic (Prevention) Act (ITPA)-1956 make offences of child trafficking, prostitution of children and their sexual abuse liable for higher punishments than those against adults. The ITPA also contains a provision for presumption of guilt on the part of a person in certain circumstances when the victim is a child who has been sexually abused.

Following an order of the Supreme Court on a public interest litigation, the Centre in 1998, pursuant to the directions issued by this court in Gaurav Jain case, constituted a ‘Committee on Prostitution, Child Prostitutes and Children of Prostitutes’ and ‘Plan of Action to Combat Trafficking and Commercial Sexual Exploitation of Women and Children’. In 1998, in a report containing an action plan that highlighted problems in addressing issues of commercial sexual exploitation, detailed recommendations were made with a view to arresting the systematic problem, including issues relating to law enforcement and legal reforms. While Indian laws are quite stringent on sexual exploitation of children, the Criminal Procedure Code was not friendly to the victim of sexual violence. There are many changes which have been made in CrPC, especially in rape laws.
The Central and the State Governments have set up advisory committees for recommending measures to eradicate child prostitution. The Central Advisory Committee studied the problem and came out with recommendations which were sent to the State Governments.

In accordance with another order of the Supreme Court in a public interest writ petition Gaurav Jain vs Union of India, a committee on prostitution, child prostitutes and children of prostitutes was constituted. The committee drew up a plan of action to combat trafficking and the commercial sexual exploitation of women and children, containing action points grouped under prevention of trafficking, health services, education, awareness generation and social mobilisation, economic empowerment programmes, setting up of institutional machinery, legal reforms and law enforcement and monitoring. The plan of action has been approved in a meeting chaired by the Prime Minister. It has been sent to all Central Ministries/Departments and State Governments for implementation. Action has been initiated to set up a Central Prevention and Rehabilitation Committee as laid down in the Plan of Action.

The Immoral Traffic (Prevention) Act-1956 was amended by both Houses of Parliament and came into force from January 26, 1987. Under the amended Act, detention of a woman for purposes of prostitution is punishable with a minimum of seven years of imprisonment and maximum of life imprisonment. Equally, stringent punishment will be awarded to those procuring children for prostitution. Earlier, the Act was known as Suppression of Immoral Traffic in Women and Girls Act (SITA) which has since been changed and been made more effective. The definition of prostitute itself has been changed to include persons of both sexes. Earlier it included girls and women only. The amendment takes into account the growing menace of male prostitution, especially that involving young boys.

Under the new Act there are three categories of victims—children, minors and majors. The children are those up to 16 years and minors are those between 16 and 18 years and majors are those above 18 years. The earlier Act recognized only women and girls—a woman being the one who has completed 21 years. Punishment for offences committed
against these categories differs in severity. Offences committed against children and minors will be dealt with more severely than those against majors (Gathia, 1999).

One important step taken in the direction of ensuring justice to victims of rape is the crisis intervention centre set up in nine districts of Delhi. There are numerous cases of rape of girl children in Delhi and the data from the National Crime Record Bureau shows that Delhi heads the chart on child rape (National Crime Record Bureau, 2001). Ironically, rape laws make no distinction between rape of a minor and that of an adult. Since sexual abuse of minors has its own characteristics, it needs to be addressed separately from the offence of sexual assault on an adult person. The chart presents the number of rape cases in Delhi between 1997 and 2000. In 1997, there are 544 rape cases of minor which have come down to 300 in 2000 (PRAYAS, 2001: 11).

The Rape Crisis Intervention Centre (RCIC) was set up in each of the nine districts of Delhi to provide assistance to rape victims. However, the investigation and the procedure of recording the statement of victims further compounds the trauma of the victims. The RCIC provides a mechanism for a coordinated response of the police, NGOs and others to rape cases. RCIC has four major partners: police, earmarked voluntary organisations, doctors and lawyers including prosecutors and special counsels. One of the senior NGO representatives is the convener of RCIC. He coordinates police efforts with voluntary organizations, lawyers and doctors for helping the victim and the family to manage the crisis and provide counselling services to the victim to enable her to reduce her trauma and to parents to accept the victim back in home environment and provide her with moral and psychological support. Except at the time of reporting, the Investigating Officer will not call the victim or her relatives to police station and will visit victim’s residence himself whenever such a requirement arises. Administrative direction is given to IOs not to probe the character and antecedents of the victim and her family when they come for reporting to the police station.
4.9. India's Policies towards Street Children in the wake of CRC

The Convention on the Rights of the Child (CRC) is the boldest and most comprehensive pronouncement on the rights and best interests of the child. The document, based on three pillars of rights, best interest and non-discrimination, tried to incorporate the broad principles of earlier UN conventions and declarations including the Universal Declaration of the Human Rights-1948. The CRC invokes rights of a child enshrined in various monumental documents such as the Geneva Declaration of the Rights of the Child of 1924, the Declaration of the Rights of the Child adopted by the General Assembly on November 20, 1959, the Universal Declaration of Human Rights- 1948, the International Covenant on Civil and Political Rights-1977 (in particular Articles 23 and 24), the International Covenant on Economic, Social and Cultural Rights (in particular Article 10) and the statutes and relevant instruments of specialized agencies and international organizations concerned with the welfare of children, provisions of the declaration on social and legal principles relating to the protection and welfare of children with special reference to foster placement and adoption nationally and internationally; the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules) (General Assembly resolution 40/33 of November 29, 1985); and the Declaration on the Protection of Women and Children in Emergency and Armed Conflict (General Assembly resolution 3318 (XXIX) of December 14, 1974).

As in case of other compulsory Conventions, when a country has acceded to the CRC, all its provisions apply to it. Countries have to abide by it and periodically report on it. States have an obligation to take relevant and appropriate measures to implement children's rights. CRC seems to have a sharp focus and puts States under the direct obligation to report to an international body about the progress in the implementation of children's rights by establishing the committee on the rights of the child and making States answerable to international scrutiny on the progress of implementation of the Convention. CRC has definitely put the State Parties under more pressure to perform. WHO and UNICEF have requested to intensify their activities to formulate creative methods to reach the rights to the least privileged child, to the last corners of the world. The main contribution of the CRC is

13 www.unicef.org/cre/cre/htm/USA, and Somalia however have not ratified the Convention
the codification of children's rights into one international document, recognizing aspirations which mankind has for its children.

The CRC comprises a set of international standards and measures intended for the protection and promotion of the well being of children in society. It provides for four sets of civil, political, social, economic and cultural rights of every child. For the purpose of common understanding, the rights of the child can be divided into four broad categories (Geetha, 2000: 58): the right to survival, development, protection and participation.

These are:

- **The Right to Survival:** It includes the right to life, the highest attainable standard of health, nutrition and adequate standards of living. It also includes the right to name and nationality.
- **The Right to development:** It involves right to education, support for early childhood development care, social security, and the rights to leisure, recreation and cultural activities.
- **The Right to Protection:** It includes freedom from all forms of exploitation, abuse, inhuman, or degrading treatment, and neglect including the right to special protection in situations of emergency and armed conflicts.
- **The Right to Participation:** It includes respect for the views of the child, freedom of expression, access to appropriate information and freedom of thought, conscience and religion.

The CRC is divided into three sections and 54 articles out of which 41 articles are substantive and the rest deal with the implementation and measures and the miscellaneous provisions (Geetha, 2000: 58 and Rao, 2004: 46-47). It articulates five sets of basic rights namely: civil and political rights, social and economic rights, cultural rights in abnormal or dangerous situations, and the right to the due process of law. These sets of rights are based on certain principles of equality and non-discrimination (Article 2), the principles of the best interest of the child (Article 3), the obligation of states to protect all rights of the child (Article 4): and obligations to respect parental responsibilities, rights and duties (Article 5).

While many of the provisions of the CRC have already been covered under the Fundamental Rights, DPSP and other statutes over the last 60 years, juvenile justice for negligent and

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3 The Directive Principles of States Policies in the chapter IV of the Indian Constitution charts out the ideal goal for the Indian nation-state. It also took into account the tender age of the children and their interests into accounts and stipulates that The Directive Principles embodied in Article 39 (e) and (f) reinforce the fundamental reading when they obligate the state to ensure that e. The health and strength of workers, men and women and the tender age of children are not abused; f. Citizens are not forced by economic necessity to enter avocations unsuited to their age or strength. “Children are given opportunities and facilities to develop in a
delinquent is still a far cry. The Juvenile Justice Care and Protection Act has stipulated numerous provisions for the neglected child. These, coupled with other initiatives, for education, health, night shelter, alternative education and effort to restore the children to parents are very comprehensive provisions and policies undertaken by the government of India from time to time. For girl children there are special provisions like Kasturba Gandhi Balika Yojana, which also applies to street girls as well (Bhaskar et. al. 1998: 2–6).

However, implementation of the Juvenile Justice (Care and Protection of Children) Act of 2000 still remains incomplete. Enactment of a legislation does not necessarily guarantee its implementation and enforcement. Many states have still not constituted adequate number of Juvenile Courts or Juvenile Welfare Boards. There is a poor network of juvenile Observation Homes or reception cum-classification centres. Even if, some Observation Homes or boards do exist, they are not manned by the kind of sensitive personnel envisaged under the Juvenile Justice Act. Even today, juvenile justice thrives under the shadow of adult criminal justice agencies and institutions like the police. Moreover, the juvenile adjudicatory cadres are drawn from the pool of magistrates from the state.

The story of the Juvenile Justice Act is one of broken promises and dashed hopes. All too often, the Act is implemented inadequately or not at all. Because the legislation enacted by the Union Government, application is responsibility of the state and local administrations. Years after introduction, many states have failed to incorporate the Act in their legislative apparatus or dispose the necessary measures to render the law efficacious. In addition, while filling a gaping legislative lacuna, the Juvenile Justice Act is per se inadequate to deal with the growing numbers of street children. In particular, while the law distinguishes juveniles “in conflict with the law” from those “in need of care and protection,” the law effectively criminalizes both by putting them under the jurisdiction of

healthy manner and in conditions of dignity and freedom; Childhood and youth are protected exploitation and against moral and material abandonment.” (Bakshi, 2003: 86). Some other important provisions of DPSP relate to make effective prerequisite for securing the right to work, education and public assistance in the event of unemployment, old age, sickness and disablement or other cases of undeserved want (Art. 41); the provision for early childhood care; free and compulsory education to children up to the age of 14 years (Art. 45); promotion of educational and economic interest of the Scheduled Castes and Scheduled Tribes and other weaker sections (Art. 46); duty of the state to raise the level of nutrition and the standard of living and to improve public health (Art. 47) (Bakshi, 2003: 90).
the criminal justice system. The two groups are generally housed together in Observation Homes for months on end: adolescents who have committed serious offences are kept together with children—often much younger—whose only crime is that of being neglected. In practice, there is no difference in the nature of their detention. The law simply prescribes the confinement of both as the only means by which they can be rehabilitated.

The Act also fails to express the minimum age, below which the Act would not be applicable. The definition of juvenile delinquency provides very little scope for petty acts to be dealt within the community. There is no concept of parental responsibility. The education, training and recreation of children, who are in Observation Homes, have not been provided for. Besides, basic or school education, even higher education and training of these children should be considered in this Act. The Act fails to provide for procedural guarantees like right to counsel and right to speedy trial. The Act does not take into account the orders and directions of the Supreme Court and various High Courts relating to determination of the age of the child. It empowers the Juvenile Justice Board to give a child in adoption even though, it is the Child Welfare Committee that

<table>
<thead>
<tr>
<th>Box 5.1. Observation Home at Vijawada</th>
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<tr>
<td>The Observation Home is housed in a disheveled three-storied building near Benz Circle, in the heart of the city. On the ground floor is the archive—overflowing with papers—the Superintendent’s office, and the room where the Juvenile Welfare Board meets every Friday. Behind a metal door, we finally meet the children. When we first visited—in June 2004—130 children ranging from 3 to 18 years of age were kept in three rooms whose combined size does not exceed 700 sq. feet (about the size of a normal one-bedroom apartment). Of them, only 9 were awaiting trial. The squalid rooms were gloomy and unadorned: the shelves were empty, the walls desolately bare. The children looked weak and emaciated; scars, rashes, and skin infections were scattered throughout their faces and bodies. Dark circles tellingly framed their sunken, faraway eyes. The life of children who have the misfortune of ending up there is frequently more horrifying than the family environment they escaped and often more wretched than the life on the streets from which the government supposedly rescued them. Every Observation Home to which a juvenile is sent under the Act shall not only provide the child with accommodation, maintenance, and medical assistance, but also provide him/her with facilities for useful occupation. No such thing is available in Vijayawada’s Observation Home. The children are never allowed outside. Often, they are packed in one room, where the guards can control them more handily. They spend most of the day sitting cross-legged in silence; they can only get up to go to the restroom and pick up their food rations. Many suffer from the back aches and joint pains that inevitably derive from maintaining the same position for hours.</td>
</tr>
</tbody>
</table>
deals with children in need of care and protection. The Act is silent on inter-country adoption. There is no linkage between the Juvenile Justice Act 2000 and the other legal provisions relating to children, for instance child labour, primary education, sexual abuse, adoption, disabilities and health. Each aspect is a separate concern of individualised department.

The conditions of Observation Homes still remain the same. Many of the Observation and Juvenile Homes have been handed over to NGOs. However, Shelter Homes and Observation Homes are being run by NGOs who suffer from fund crunch.

**Box 5.2. Police Torture of Street Children**

"Anand, a 13-year-old rag picker living in a pavement with his mother, two brothers, and a sister near a tree" in Triplicane, Madras. Because of their poverty, Anand had to work and spent much of his time on the street. He usually slept with other street children on the rail platform of Triplicane, a stop for the Madras local train. He earned about Rs 20 a day. He said he was rag-picking in January 1995 around 2:00 p.m. when two police officers came up to him. They told him they wanted him to pick up some garbage, so he went with them to the Zambazaar Police Station. Anand told Human Rights Watch: When we were inside the station, the police started to beat me with their lathis (thick bamboo canes) and fists, calling me a thief and asking me to tell them where some stolen articles were. I said I had no idea what they were talking about. The beating continued for some 20 or 30 minutes. Then I was put in the cell in the station reserved for criminals and left there for about two hours. At around 4:00 p.m., the police let me go, one of the constables having first grabbed me by the shirt, slapped me, and told me to get out. No charges were filed, and no case was registered. It was the second time I've been detained without justification or explanation by the police.
Appendix

The Commissions for Protection of Child Rights Bill

The Protection of Child Rights Bill was introduced in 2005 to provide for a National Commission and State Commissions. The Bill envisages protection of child rights and children’s courts for speedy trial of offences against children or of violation of child rights and for matters connected therewith or incidental thereto. This Bill has been introduced in the Lok Sabha for the welfare of the largest number of children in the world. Several important functions of the Bill are outlined.

1. As per the Bill, the Government has to commit to provide opportunities and facilities to develop a healthy atmosphere with adequate freedom and dignity, and to ensure that their constitutional and legal rights are protected.

2. In view of the national and international developments and concern for the children the need for a National Commission for Protection of Child Rights has been articulated by many social scientists and non-governmental organisations. The Government has, accordingly, decided to set up the National Commission for Protection of Child Rights.

3. It is proposed to make enabling provisions in the Bill authorising the State Governments to set up State Commissions for protection of child rights in their respective States on the lines of the said commission.

4. The functions of the commission, *inter alia*, shall be as under: (a) to study and monitor all matters relating to constitutional and legal rights of children; (b) to examine and review the safeguards provided by any law for the protection of child rights and recommend measures for their effective implementation in the best interest of the children; (c) to review the existing laws and suggest amendments therein, if considered necessary; (d) to look into complaints or take *su o motu* notice of the cases involving violation of constitutional and legal rights of children; (e) to monitor implementation of laws and programmes relating to the survival, welfare and development of children; and (f) to present reports to the Central Government on working of those safeguards.