CHAPTER-3  
VIOLATION OF CHILD RIGHTS : SITUATION ASSESMENT

GENERAL

Children are the great promise of tomorrow, the dawn of humanity and buds of social development.¹ Children, are ‘supremely important national assets’² and are ‘the greatest gift of humanity’.³ A nations future depends upon young generation, the children deserve compassion and bestowal of the best care to protect his tender age and they also need their faculties to blossom with physical, mental, moral and spiritual excellence. With more than a one-third of its population is below the age of eighteen, India has the largest child population in the world.⁴ India has made some significant commitment towards ensuring the basic rights of children. There has been progress in overall indicators: infant mortality rates are down, child survival is up, literacy rate have improved and school dropout rates have fallen. But the issue of child rights, in India is still caught between legal and policy commitment to children. This is one side of the coin and the other shows the slack miserable picture of the situation of children in India. Childhood in India is not homogeneous; several childhood coexist. Social and economic status, physical and mental ability, geographical location and other differences determine the degree of vulnerability of inequality between various sections of society. The child in India is discriminated against by virtue of these inequalities. Thus, all children in India suffer certain violation on account of their status as a child.⁵

WHO IS A CHILD :- The trouble with child rights begins with the very definition of a child in law. A child domiciled in India attains majority of the age of 18. But there are several grey areas in the law here. Under the child labour regulation, for instance, a child is a person under 14 years.

² Luxmi Kant Pandey vs. UOI (1984)2 SCC 244, 249.
³ Bandhua Mukti Morcha vs. UOI (1997) 10 SCC 551, 553.
⁴ There are more than 375 million children in India, the largest number for any country in the world.
⁵ http://infochangeindia.org/agenda8_01.jsp accessed on 8th March 2009.
Who is a child? When does childhood cease or begin? These simple questions have complex answers. Most of the old world’s civilizations did not consider children human beings with full human value. Legislation did not deal with childhood as a period of life that needs special measures of protection until the early 19th century.

The law, policy and practice of child welfare have undergone significant changes from an historical perspective. Before 1839, authority and control was important. It was an established common law doctrine that the father had absolute rights over his children. After this, the welfare principle was reflected in the dominant ideology of the family. It was only during the 20th century that the concept of children’s rights emerged. This shift in focus from the ‘welfare’ to the ‘rights’ approach is significant.6

The rights perspective is embodied in the United Nations Convention on the Rights of the Child (CRC), 1989, which is a landmark in the international human rights legislation. This convention was ratified by India in Dec. 1992.

According to Article 1 of CRC, “a child means every human being below the age of 18 years unless, under the law applicable to the child, majority is attained earlier.” The Article thus granted individual countries the discretion to determine by law whether childhood ceases at 12, 14, 16 or whatever age is found appropriate.

Today, almost everywhere, age limits formally regulate children’s activities’ when they can marry; when they can vote; when they can be treated as adults by the criminal justice system and when they can work. But age limits differ from activity to activity.

LEGAL AGE OF CHILD IN INDIAN LAW

I) The Constitution of India

(A) Age of free education and child labour: contradiction: In India, after amending the Article 21, the minimum compulsory age of education is now fixed

6 Ibid.
as 14 years. Article 21A provides that the state shall provide free and compulsory education to all children of the age of six to fourteen years.

(B) Prohibition of Employment of Children in Factories (Article 24) :- “No child below the age of fourteen years shall be employed to work in any factory or mine or engaged in any other hazardous employment.”

But the legislations like Child Labour (Prohibition and Regulation) Act, 1986, Merchant Shipping Act 1958, Apprentices act 1961, Bidi Cigar workers Act, 1966 etc. deal with employment and working conditions of workers and prescribe the eligible age as fourteen that straight away contradict the fundamental right guaranteed under article 24 and deserves to be declared unconstitutional.

Contradiction :- Article 24 read with article 21A proves that the right to education and the prohibition of child labour are violated by these legislations as they permit the children to be employed in factories and other areas of work. Argument that Article 24 permits employment of children in non-hazardous employment does not hold good because that article 24 says no child below the age of 14 years shall be employed to work in any factory or mine or in any other hazardous employment. The word or used between ‘in any factory or mine’ and ‘any other hazardous employment’ and it is mandatory for the state not to allow child to be employed in any factory or mine.

The State fulfilled that mandate by prohibiting employment of child in any mine, but violated it by reducing the age of employment eligibility to 14 in factories Act and other legislations. Hence those laws are unconstitutional to the extent they permitted the employment of child above 14 to 18, because of inherent contradiction with Article 24.

(C) Article 45 :- It provides the provision for early childhood care and education to children below the age of six years. The state shall endeavour to provide early
childhood care and education for all children until they complete the age of six years.

(D) Article 51 (K):- Lays down a duty that parents or guardians provide opportunities for education to their child/ward between the age of 6 and 14 years.

All these enactments contradict the prescription of age of 18 for child by the UN Child Rights Convention.

II) Legislations on Age of Child in India

(A) Child Labour and Contract Act, 1872: - Employing children below 18 is basically against the fundamentals of general contract Act. Employment of a child is a contract and the child is not capable of entering into contract until he/she did not attain age of majority, i.e. 18 years according to section 11 of the Indian Contract Act, 1872.

"Every person is competent to contract who is of age of majority according to the law to which he is subject, and who is of sound mind, and is not disqualified from contracting by any law to which he is subject."

(B) Age of Majority: - According of S. 3 of Indian Majority Act, 1875, "every person domiciled in India shall be deemed to have attained his majority when he shall have completed the age of 18 years." In case where a guardian is appointed for the property of minor, then the minor shall be deemed to have attained has majority when he shall have completed his age of 21 years.

The Hindu Minority and Guardianship Act (HMGA), 1956 in Sec. 4(9), defines a 'minor' as a person who has not completed the age of 18 years.

The age of majority for the purpose of appointment of guardians of person and property of minors, according to the Dissolution of Muslim Marriage Act, 1939, is also completion of 18 years.

(C) Contracts that Benefit Child and the Age of Child: - According to customs of Hindu undivided family, a child becomes member of the joint family the
moment he is born and eligible to hold property. Same is the case under Transfer of Property Act (S. 13) and Indian succession Act (S. 20).

(D) Age of Capacity to Marry :- Christian and Parsis reach majority at 18. Significantly, under the Child Marriage Restraint Act, 1929, which is secular law, the age of marriage is 21 years for males and 18 years for females. But the age of marriage in Muslim Personal Law is the age of puberty.

III) Age of Child and Criminal Liability

(A) Infancy and Criminal Responsibility :- Sections 82 and 83 of the Indian Penal Code deals with criminal responsibility. There is a total immunity from criminal responsibility upto the age of 7 and from 7 to 12 years, the liability depends upon the capacity of understanding of the child. From 12 to 18 years, though the liability is not conditional, the Juvenile Justice Act deals with the child offenders.

(B) Age of Consent for sexual Acts :- In India, the law considers anyone less than 18 years to be a minor, not competent to take major decisions affecting herself or others for the purpose of the Indian Majority Act, Contract Act, Juvenile Justice Act, or Child Marriage Restraint Act. However, under section 375 of the Indian Penal Code, the girl aged 16 to 18 is given the right of consent to sexual intercourse. Yet she cannot marry at that age even with the consent of her parents. She cannot be taken out of the keeping of her lawful guardian, even with her consent, for lesser purposes. But she can consent to sexual intercourse so long as she does not go out of the keeping of her lawful guardian. The law commission of India did attempt, in its 84th report, to bring the age of consent in rape to 18 years, in tune with other enactments but unfortunately that was not accepted.

(C) Expression of Opinion/Child Witness

Under India Evidence Act, 1872, even in the absence of an oath, the evidence of a child witnesses can be considered under section 118 provided such a witness is able to understand the answers thereof. The evidence of a child
witness and credibility would depend on the circumstances of each case. The only precaution the court should bear in mind whilst assessing the evidence of a child witness is that the witness must be reliable, his/her demeanour must be like that of any other competent witness, and that there is no likelihood of him/her being tutored.

A child who is around 6 years old, who is unable to form a proper opinion about the nature of the incident because of immaturity of understanding, can be recognized as a competent witness if can give rational answers to the question.

IV) Age of Voting

The age at which child can vote in government elections is the age of voting, in India is 18 years for both boys and girls. Notably, under the Child Marriage Restraint Act, 1929, the age of capacity to marry for girls is 18 but for boys it is 21 years. If a boy attains majority at age 18 and is so responsible that he can cast vote then why the age of capacity to marry for him is 21 years should it not be 18 years.

All this discussion and information logically leads to following proposals

1. For all protective purposes the age of the child should be uniformly up to 18 years. This includes the age for employment which should be raised from 14 to 18. Under the age of 18 years, there should be totally prohibition on employing of child.

2. If employment of child is prohibited up to 18 years. This means that the child attaining the age of 18 shall be entitled to have right to free and compulsory education.

3. For the purpose of protecting girls, their rights and life, the provision of marriage age shall also be recommended to be raised up to 21 years on par with male person.

4. The age of consent as per penal law on sexual offences also should be raised from 16 to 18. A person inducing a girl of age group 16-18 to give
consent for sexual intercourse escapes liability as per existing law, which should be removed and criminal liability shall be imposed for such offences though the consent is given by girl child before attaining 18 years of age.

5. For receiving benefits, protection, right to expression of opinion etc, the age of capacity shall not be made limited at all.

It is further submitted that the definition of ‘child’ be brought in line with the Convention on the Rights of Child – viz all those below 18 years of age. If the best interest of child is the guiding norms. Universalisation of definition of child is the possible solution.

**WHAT IS CHILD PROTECTION**

UNICEF uses the term ‘Child Protection’ to refer to preventing and responding to violence, exploitation and abuse against children – including commercial, sexual exploitation, trafficking, child labour and harmful traditional practices, such as female genital mutilation and child marriage. UNICEF’s child protection programmes also target children who are uniquely vulnerable to these abuses, such as when living without parental care, in conflict with the law and in armed conflict. Violence of the child’s right to protection take place in every country. India is also not exception to this.

In India, child protection involves keeping children safe from the risk of harm caused by neglect, physical or sexual abuse. It aims at reducing children’s vulnerability in assuring them necessary care, protection and support to survive, develop and thrive.

In its simplest form, child protection addresses every child: right not to be subjected to harm. India has recognized the right to protection for its children through constitutional commitments and laws, policies and programmes it has put
in place over the years.\textsuperscript{7} It has recognized that some children are in ‘especially difficult circumstances.’\textsuperscript{8}

I) Factors that Make Children Vulnerable to Violence

(A) Traditional and Cultural Values :- Sometimes our traditional and cultural values allow the abuse/violence against child. And it is significant here that both child and abuser may see nothing unusual or wrong in the child being subjected to violence. They may not consider it violence at all, perhaps viewing it as justifiable.

(B) Mute spectator :- Our society most often silent or a mute spectator and unwilling to speak about this in justifiable phenomenon.

(C) Orphan Children :- Children who are orphan or abandoned one are must vulnerable part of our society and easy prey to violence of all kind.

(D) Economic Factors :- "Poverty is a great enemy of human happiness; it certainly destroy liberty and it makes same virtues impracticable and others extremely difficult."\textsuperscript{9}

In cold winter-nights when we and our children are still huddling in the comforts of our cosy beds, little kids, as young as 5 years or 6 years, venture out for livelihood with gunny bags on their backs to pick up rags; children standing outside wedding Shamianas or restaurants and standing in a row outside a temple, with bowls in their hands waiting for left-overs, is a common sight.\textsuperscript{10}

This poverty and lack of nutrition etc. frequently force vulnerable children to turn to child labour or to sexual exploitation, where they are, physically, emotionally and sexually abused.

\textsuperscript{7} Thakral Enakshi Ganguly and Abbasi Razia Ismail, "Ensuring Child Protection", Seminar 574, June 2007, P. 20.
\textsuperscript{9} Johnson Samuel, Boswell, Life, iv, 157.
(E) Illiteracy: The parents who are itself illiterate, unable to understand the value of education, this is a big reason their children being uneducated. The illiterate parents believe in "more children more work more money". The uneducated children have few opportunities for their future and are therefore more vulnerable.

(E) Other Factors: Other factors that make children vulnerable include unemployment, alcohol abuse, drugs consumption etc. Further, most of the violence is hidden. The child victim may feel ashamed or guilty, believing that the violence was deserved and violence go unreported.

II) Various Protection Issues

Millions of children throughout the world are victims of violence. They continue to be abused, exploited and trafficked. Violence against children is certainly not new. However, what we understand as "violence" against children is continually changing.

Violence against children occurs when a child experience harm, usually as the result of failure on the part of the parent or caregiver to ensure a reasonable standard of care and protection. It includes neglect or negligent treatment, harassing behaviour like buying; mental and physical abuse and injury; exploitation and sexual abuse.

Violence against children broadly defined to include deliberate behaviour by people against children that is likely to cause physical or psychological harm. This includes physical abuse, sexual abuse and exploitation, societal forms of violence, such as exploitative child labour, and children's involvement in armed conflict.11

There are children who are particularly disadvantaged because of their social, economic, physical or mental condition and because of these conditions

they face the violence of their rights. Violence against children manifests itself in a number of forms, some of protection issues related to child in India are follows:

(A) Child labour :- “We are guilty of many errors and many faults, but our worst crime is abandoning the children, neglecting the fountain of life. Many of the things we need can wait, the child cannot. Right now is the time his bones are being formed, his blood is being made and his sense being developed. To him we cannot answer “Tomorrow” “his name is today”.12

The wheels of the world are spinning so fast today that we are all overpass our limitations continuously and interminably. In the general living of families with adequate incomes, parents go their profession everyday and children are left to go to school. However, such is not the case for the 218 million of world’s child labours who daily engage themselves working long hours under harsh, dangerous and exploitative conditions. Child labour abuse has attracted national and international attention during the last decade of the 20th century. Millions of immature lives are being maltreated, misused and throttled and deprived of their rights.13

(1) Defining Child Labour :- There is no universally accepted definition of working children. Various agencies have defined child labour in terms of work-types and age criterion.

The term ‘Child Labour’ is, at times, used as a synonym for ‘employed child’ or ‘working child’. In this sense it is co-extensive with any work done by a child for gain. But more commonly than not, the term ‘child labour’ is used in pejorative sense. It suggests something which is hateful and exploitative. The ILO has provided a very comprehensive definition of child labour. According to it: Child Labour includes children permanently leading adult lives working long hours for low wages under conditions damaging to their health and to their

physical and mental development, sometimes separated from their families, frequently deprived of meaningful educational and training opportunities and could open up for them a better future.\textsuperscript{14}

The UNICEF has given comprehensive formulation in its attempt at defining child labour:

(i) Starting full time work at too early an age.
(ii) Working too long i.e. nearly for 12-16 hours a day.
(iii) Work resulting in excessive physical, social and psychological strains upon child.
(iv) Work on streets which is unhealthy and dangerous
(v) Inadequate remuneration for working
(vi) Too early responsibility at early an age as in the domestic situation where children under 10 may have to look after young brothers and sisters for the whole day, thereof, preventing school attendance
(vii) Work that does not facilitate the psychological and social development of the child
(viii) Work that inhibits the child’s self-esteem as in bonded labour and prostitution and in a less extreme cases the negative perception of street children.\textsuperscript{15}

V.V. Giri has distinguished two senses of the term ‘child labour’\textsuperscript{16}:

*The term “Child Labour” is commonly interpreted in two different ways. First, as an economic practice and secondly, as a social evil: in the first context it signifies employment of children in gainful exceptions with a view to adding to the labour income of*

\textsuperscript{15} Mahaveer Jain, “Perspective on Child Labour in India”, Awards Digest, vol. XX, No. 7-12, July-December 1994, p. 35.
\textsuperscript{16} V.V.Giri, “Labour Problems in India Industry”, p. 360.
the family. It is in the second context that the term child labour is now more generally used. In assessing the nature and extent of the social evil, it is necessary to take into account the characters of the jobs on which the children are engaged, the dangers to which they are exposed and the opportunities of development which they have been denied.

Thus, child labour, in a restricted sense, means the employment of children in gainful occupations which are dangerous to their health and deny them the opportunities of development. Three things, therefore, are necessary to include employment of a child within the notion of child labour:

(i) the child should be employed in gainful occupation,
(ii) the work, to which he is exposed, must be dangerous, and
(iii) it must deny to him the opportunity of development

"Child Labour" is, generally speaking, work for children that harms them or exploits them physically, mentally, morally, or by blocking access to education and better future opportunities.

The term child labour not only applies to the children working in industries but also to the children working in all forms of non-industrial occupations which are injurious to their physical, mental, moral and social development.

(2) Types of Child Labourers :- Child labour is a term that needs to be unpacked: it cannot be used in a sweeping manner but covers a range and variety of circumstances in which children work.

(i) Child Labour :- Those children who are doing paid or unpaid work in factories, workshops, establishments, mines and in the service sector such as domestic labour. The Ministry of Labour, Government of India has employed the term ‘child labour’ only in the context of children doing ‘hazardous’ work. By implication, children who are not doing ‘hazardous’ work are not considered to be
child labourers and are said to be doing child work. The consequence of this narrow definition of child labour is that the Labour Ministry's definition only includes a very small percentage of children who are in the work-force and leaves out millions of children who require policy and programmatic support from the Government.

(ii) Street Children: *Children living on and off the streets, such as shoeshine boys, ragpickers, newspaper-vendors, beggars, etc.* The problem of street children is somewhat different from that of child labour in factories and workshops. For one thing, most children have some sort of home to go back to in the evenings or nights, while street children are completely alone and are at the mercy of their employers. They live on the pavements, in the bus stations and railway stations. They are at the mercy of urban predators as also the police. They have no permanent base and are often on the move. So their problem is more acute than that of children working in a factory and living at home.

(iii) Bonded Children: *Children who have either been pledged by their parents for paltry sums of money or those working to pay off the inherited debts of their fathers.* Bonded child labour is an acute problem in some states. Bonded children are in many ways the most difficult to assist because they are inaccessible. If the carpet owner has bought them, they cannot escape. If the middle-class housewife has paid for them, they cannot run away. If the landlord in the village owns them, they will spend their life in servitude till they get married and can, in turn, sell their children.

(iv) Working Children: *Children who are working as part of family labour in agriculture and in home-based work.* If children are working 12-14 hours a day along with their parents at the cost of their education, their situation is similar to that of children working for other employers. In fact children, particularly girls, are expected to take on work burdens by parents in complete disproportion to their strengths and abilities. This is the largest category of children who are out-
of-school and are working full time. And it is here that we find the largest percentage of girls working at the cost of education.

(v) Children used for sexual exploitation: Many thousands of young girls and boys serve the sexual appetites of men from all social and economic backgrounds. Direct links between the commercial sexual exploitation of children and other forms of exploitative child labour are numerous. Factories, workshops, street corners, railway stations, bus stops and homes where children work are common sites of sexual exploitation. Children are especially powerless to resist abuse by employers, either as perpetrators or intermediaries. Village loan sharks often act as procurers for city brothels, lending money to the family which must be paid back through the daughter’s work. Almost all such children are betrayed by those they trust and end up with their trust abused. The physical (health, danger of HIV/AIDS, sexually transmitted diseases) and psycho-social damage inflicted by commercial sexual exploitation makes it one of the most hazardous forms of child labour.

(vi) Migrant children: India faces a huge challenge with “distress seasonal migration”. Millions of families are being forced to leave their homes and villages for several months every year in search of livelihoods. These migrations mean that families are forced to drop out of schools, something that closes up the only available opportunity to break the vicious cycle generation after generation. At worksites migrant children are inevitably put to work. All evidence indicates that migrations are large and growing. The number of children below 14 years of age thus affected, may already be in the order of 9 million.17

Migrant populations overwhelmingly belong to Scheduled Caste, Scheduled Tribes, and Other Backward Castes. They comprise the landless and

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land poor whose possess the least amount of assets, skills or educational Studies reveal that the majority of migrant labour is to be found in states like Andhra Pradesh, Rajasthan, Karnataka, Gujarat, Tamil Nadu and Maharashtra. Almost all major states appear to be affected by migration, although to varying degrees. Many industrial and agro-industrial sectors like brick-making, salt manufacture, sugar cane harvesting, stone quarrying, construction, fisheries, plantations, rice mills and so on run largely on migrant labour.

(vii) Children engaged in household activities :- Apart from children who are employed for wages (either bonded or otherwise) as domestic help, there are a large number of children (especially girls) who are working in their own houses, engaged in what is not normally seen as “economic activity”. These children are engaged in taking care of younger siblings, cooking, cleaning and other such household activities. As seen in the literature on women’s work, such activities need to be recognised as ‘work’. Further, if such children are not sent to school, they will eventually join the labour force as one of the above categories of child labour.

(vii) Girl Child Labour: The girl child requires a special mention in the context of child labour. Although the labour of young children of both sexes is exploited, the plight of the girl child labourers is worse off. She is a child, a girl, and a labourer, and she faces discrimination on all counts, in almost all areas—rural and urban. There are many reports of girls being allocated tasks that are more tedious or arduous, more damaging to education, less well paid, and requiring a fairly longer working day than boys. The girl child labour is prevalent in the following areas:

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• **Household work**: Girls between the ages of six and eleven sweep, wash, collect water and firewood, and mind younger siblings and livestock.

• **Agriculture work**: Young girls work long hours in the fields.

• **Home-based piece-rate work**: Girls toil in this kind of work. Her existence as an economic entity is rarely known to anybody. Large numbers of home-based girls are employed in rolling beedis, carpet industry, lock making, and gem polishing. Poverty forces them to work but cultural tradition prevents them from seeking work in the organized sector. Therefore, in their case there is no legal protection at all. Her work is seen as part of her mother’s labour. The patriarchal value system that operates in the family justifies the unequal labour of boys and girls.

• **Bonded labour**: During drought, famine, or natural calamities, they may be given away as bonded labour to moneylenders or sold into beggary or prostitution. The red light areas of India’s major cities are full of female child prostitutes who have been sold by families or lured away. Some communities institutionalize prostitution by dedicating their young girls as devadasis.

• **Domestic servants**: Girl children are forced to work for long duration, without wages, or on low wages. In return they have no opportunity for acquiring any skill. They have to face rampant and systematic physical and sexual exploitation.

Therefore, the significant characteristics of the girl child labour are:

• Invisible work—not recognized as economic activity. They do not come under the purview of law.

• No identifiable employer.

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20 Tobacco rolled in leaves for smoking.
• Long working hours and poor conditions that prevent them from attending any school.
• No skill formation.
• Low pay and low status.
• Physical abuse.
• Sexual harassment and abuse.

(3) Causes and Consequences of Child Labour

(i) Causes of Child Labour :- Child Labour is a socio-economic phenomenon. It is generally conceded that illiteracy, ignorance, poverty, low income, unemployment, low standard of living and appalling backwardness of the countryside are all severally and collectively, the root cause of child labour. Anti-constitutional policies, inadequate legislative measures and lack of political will may also be taken as important factors responsible for the persistence of this unlawful social evil. It is true that problem of child labour is an amalgamation of various economic and non-economic causes, persistent in our society. We can divide these causes under two broad headings:

(a) Economic causes, and
(b) Non-economic causes

(a) Economic Causes

Poverty :- There are many other economic causes of child labour. However, the main cause is portrayed as “poverty”. In India, child labourers belong to the socio-economically poor families, the working members are often short of employment, even when they are employed, low wages coupled with rising prices of essential commodities further deteriorate their already vulnerable economic condition and they left with no option but to send their children to seek employment.
Inadequate Income of Adult bread earners of the family:- The state of the unemployment is even worse than that of the poor low wages make a man poorer but unemployment makes him absolutely poor. This very inadequacy in wages of adults compels them to send their children to do some work in return of some wage and the employer also takes the benefit of this weakness by providing work to their children on low wages in spite of the various protective laws.

Why do the employer prefer to hire children?22

Today it is crystal clear that employers prefer to hire small children rather than adults because employers felt that during the tender age they are more active and does not tired soon. Moreover, children cannot form unions, strikes and can be easily removed from the job. Further, employer can demand children to work for long hours for less wages. In toto, children are multipurpose.

Employer’s desire for cheap and flexible labour

As revealed above, mostly employer think that a lot of work can be done by the children in their establishment and this labour of children is very cheap labour in comparison to that of men. In fact, it ensures them more margin of profit over less investment.

(b) Non-economic causes

Illiteracy :- There is a correlation between literacy rate and the magnitude of child labour. Countries having low literacy and school attendance rates generally have the most acute child labour problems. Same is the case of India. In India, the lower socio-economic groups of population are illiterate. Due to lack of education and awareness of parents, many children are sent to work. They never think of future. They are fully satisfied with what they gain by the earning of children.

Tradition and attitude: The notion of child labour is also rooted in the traditions and attitudes of the regions where it is practiced, as a remnant of the past, a form of resistance to change. For instance, it is widely believed in our country that the more the children in a family, the more the hands to help increase the family income.

Cultural reason: The cultural ethos is so penetrating that it contributes to the increasing stock of child labour. In many social countries, giving education to girl children is looked down upon. This apathy coupled with the excuse of poverty enhances the chances of fostering child labour.

Lack of political will: Child labour persist in our country because of lack of political will to deal with the problem and because child labour laws are not adequately enforced. There are numerous flaws in the legislative enactment.

(c) Other reasons: The problem of child labour apparently may be seen to be product of such factors like – population explosion migration from rural to urban area because of neglect of agrarian sector, industrialization, disturbed family atmosphere, disabled parents, inadequate social protection and many more.

There is a need to curtail these causes from the very base so that child labour practice could not grow up in future.

(ii) Consequences of Child Labour

Child labour has far-reaching repercussions on the physical, mental and emotional well-being of children. It prevents the full realization of a child’s personality. Being the most vulnerable section of the population, they are exposed to all sorts of exploitation. Child labourers are at high risk of:

(a) Physical and Psychological Damage: Child domestic workers are routinely subjected to abuse, including lack of food, unsafe working conditions, being beaten, deliberately burnt or sexually abused.

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(b) **Loss of basic and fundamental human rights** :- Some children are confined, reduced to “slavery”, they work in conditions that violate their right to health, education and protection, they are denied freedom of movement and go home to their families.

(c) **Loss of child’s education and future opportunities** :- Most of these children are denied a normal childhood and an education. This perpetuates the cycle of poverty in the life of these children, and depresses national economic development.

(4) **Magnitude of Problem** :- The problem of child labour is more acute in developing country like ours. The accurate and precise estimate of the overall magnitude of child labour is not possible due to the fact that the Indian ‘Government’ has been negligent in its refusal to collect and analyse current and relevant data regarding the incidence of child labour. The problem of estimating the child labour force becomes all the more complicated and complex on account of the multiplicity of concepts, modes of measurement and the source of information for data collection.

Although it is not possible to place accurate data on child labour. But we can place estimation on child labour.

(5) **Estimated number of child labourers**

The census reports clearly points to the increase in the number of child labours in the country from 11.28 million in 1991 to 12.59 million in 2001.24 Reports from M.V. Foundation in Andhra Pradesh reveal that nearly 400,000 children, mostly girls between 7 and 14 years of age, toil from 14-16 hours a day in cotton seed production across the country, 90 percent of them are employed in Andhra Pradesh alone.25 Rescue operation in Mumbai and Delhi in 2005-06 also highlight employment of children in zari and embroidery units.

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(6) International and National Framework on Child Labour

(i) International framework to combat child labour

(a) Convention on Right of Child (CRC) 1989 :- Contain article that refer specifically to the issue of child labour. Article 32 calls for the recognition of the right of children to be protected from economic exploitation and dangerous labour that will be harmful to their health, physical moral or social development. India ratified CRC in 1992.

(b) ILO Conventions :- The ILO has been promoting protective action in respect of working children, since its inception in 1919, through the mechanism of international labour standards in the form of conventions and recommendations. The ILO has so far adopted 14 conventions relating to child labour. India has so far ratified 6 of the conventions and they are

International Conventions ratified by India

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<th>Name of Convention</th>
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<td>i) Right of Night work of young persons (Industry)</td>
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<td>ii) Minimum Age of (Trimmers and stokers) Convention,</td>
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<td>iv) Right to Night Work of young persons (Industry)</td>
<td>February 1950</td>
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<td>convention (revised), 1948 of ILO</td>
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<td>v) Employment of Children under Minimum Age September</td>
<td>September 1955</td>
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<td>Convention, 1919 by ILO</td>
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<td>vi) Minimum Age (underground work) convention, 1965</td>
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ILO Conventions 138 (1973) :- Sets minimum ages for general, light or hazardous work. It defines child laborers as all children younger than 12 working
in any economic activities, children 12-14 years old engaged in more than light work.

**ILO Conventions 182 (1999)** :- Defines the “worst forms of child labour” in which children are enslaved, forcibly recruited, prostituted, trafficked, forced into illegal activities or exposed to hazards.

(c) **International Programme an Elimination of Child Labour (IPEC)**

The IPEC is an important global programme launched by the ILO in 1991. India was the first country to join the programme. The long-term objective of the IPEC is to contribute to the effective abolition of child labour in the world. Its immediate objectives are:

(i) enhancement of the capability of ILO constituents and NGO’s to design, implement and evaluate programmes for child labour,

(ii) to identity intervention at community and national level which could serve as models for replication; and

(iii) creation of awareness and social mobilization for securing eliminations of child labour.

(d) **UNICEF** :- Elimination of child labour is a key component of UNICEF’s policy. UNICEF is the only UN agency devoted exclusively to the needs of children. Founded in 1946, supports government efforts in providing services essential to the survival and development of children. UNICEF collaborates with governments, international agencies, NGO’s, trade unions and legal experts to promote the elimination of child labour. It has been a major funding agency for improving the lot of children in general and child labour in particular.

(e) **United Nations Educational, Scientific and Cultural Organisation (UNESCO)** :- Is an another UN’s specialized agencies. UNESCO has special responsibility for everything involving prevention of various forms of discrimination and promotion of the educational and cultural rights.
UNESCO has been making efforts to combat with the problem of child labour. Set up in 1946 UNESCO aims at promoting co-operation among nations through education, science and culture. It has tried to attack the problem of child labour through the spread of education.

(ii) National Framework to Combat Child Labour:

(a) Constitutional Provisions\(^{26}\) :- The Supreme Law of the land secure certain provisions to prohibit child labour.

*Art 21 A* :- of the Indian constitution provides that the state shall provide free and compulsory education to all children of the age of 6-14 years, in such a manner as the state, by law, may determine.

*Article 23* :- Prohibits the traffic in human being and forced labour.

*Article 24* :- Provides that no child under the age of 14 years shall be employed in any mine or engaged in any other hazardous employment and any contravention of this provision shall be an offence punishable in accordance with law. Whoever employ child below 14 years as domestic servant it will be a punishable offence with imprisonment for a term which may extend upto Rs. 20,000/-, or both. Further, an amount of Rs. 20,000/- is also of a child under the directions of the Hon’ble Supreme court of India.

*Article 39 (e) and (f)* :- of the directive principles of state policy require the state to ensure that the health and strength of workers, men and women, and the tender age of children are not abused and that citizens are not forced by economic necessity to enter a vocation unsuited to their age or strength and that "children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment. Art. 39 states

\(^{26}\) See the Constitution of India, parts III and IV. The fundamental rights are embodied in part III of the constitution and the directive principles are in part IV of the constitution.
that the state shall direct its policy towards securing: (a) That the tender age of children are not abused and that citizens are not forced by economic necessity to enter avocations unsuited to their age or strength.

(b) that children are protected against exploitation.

**Art 45** :- of the constitution provides that the state shall endeavour to provide, within a period of ten years from its commencement, for free and compulsory education for all children until they complete the age of 14 years.

**b) Indian Penal Code** :- The relevant provisions under which a case can be registered against a person committing crime against child:

(i) Buying or disposing of any person as a slave (S. 370)
(ii) Habitual dealing in slaves (S. 371)
(iii) Unlawful compulsory labour (S. 374)

The Indian Penal Code in these provisions deals with the combating of child labour. It provides whoever import, removes, buys, sells or dispose of any person as a slave or him/her against his will, shall be punished with 7 years imprisonment (Section 370). And if all these is done by a person of habitual nature then a term of 10 years is provided in the penal code (Section 371). And if any one unlawfully compels any person to labour against the will of that person, shall be punished with one year imprisonment

**c) Acts relating to child labour** :- The first Act in India relating to child labour was the enactment of The Factories Act, 1881. Since then there have been different Indian legislations relating to child labour. A resume of the history of legislative relating to child labour and some salient features are presented below.27

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Children (Pledging of Labour) Act 1933

This act prohibited pledging of children, i.e. taking of advances by parents and guardians in return for bonds, pledging the labour of their children – a system akin to the bonded labour system. The Royal Commission noticed this practice of pledging of labour of children in areas such as Amritsar, Ahmedabad, Madras, etc., and in carpet and beedi factories. The children in these situations were found to be working under extremely unsatisfactory conditions.

The Employment of Children Act 1938

This Act was passed to implement the Convention adopted by the twenty-third session of ILO (1937) which inserted a special article on India:

- Children under the age of thirteen years shall not be employed or work in the transport of passengers, or goods, or mails, by rail, or in handling of goods at docks, quays, or wharves, but excluding transport by hand. Children under the age of fifteen years shall not be employed or work ... in occupations to which this Article applies which are scheduled as dangerous or unhealthy by the competent authority.

This Act:

- Prohibited employment of children under fifteen years in occupations connected with transportation of goods, passengers, and mails, or in the railways;
- Raised the minimum age of handling goods on docks from twelve to fourteen years;
- Provided for the requirement of a certificate of age.

The Factories Act 1948

This Act raised minimum age for employment in factories to fourteen years.
Employment of Children (Amendment) Act 1949

This Act raised the minimum age to fourteen years for employment in establishments governed by the Act.

Employment of Children (Amendment) Act 1951

As a result of the ILO Convention relating to night work of young persons this act prohibited the employment of children between fifteen and seventeen years at night in the railways and ports and also provided for requirement of maintaining a register for children under seventeen years.

The Plantations Labour Act 1951

This Act prohibited the employment of children under twelve years in plantations:

The Mines Act 1952

This Act prohibited the employment of children less than fifteen years in mines. The Act stipulates two conditions for underground work:

- Requirement to have completed sixteen years of age; and
- Requirement to obtain a certificate of physical fitness from a surgeon.

The Factories (Amendment) Act 1954

This included prohibition of employment of persons under seventeen years at night. (‘Night’ was defined as a period of twelve consecutive hours which included hours between 10 p.m. and 7 a.m.).

The Merchant Shipping Act 1958

This prohibits children under fifteen to be engaged to work in any capacity in any ship, except in certain specified cases.

The Motor Transport Workers Act 1961

This Act prohibits the employment of children less than fifteen years in any motor transport undertaking.
The Apprentices Act 1961

This prohibits the apprenticeship/training of a person less than fourteen years.

The Beedi and Cigar Workers (Conditions of Employment) Act 1966

This Act prohibits:

- The employment of children under fourteen years in any industrial premises manufacturing beedis or cigars;
- Persons between fourteen and eighteen years from working at night between 7 p.m. and 6 a.m.

Employment of Children (Amendment) Act 1978

This Act prohibited employment of a child below fifteen years in occupations in railway premises such as cinder picking or clearing of ash pit or building operations, in catering establishments and in any other work which is carried on in close proximity to or between the railway lines.

The Child Labour (Prohibition and Regulation) Act, 1986:--The enactment of Child Labour (Prohibition and Regulation) Act, of 1986 which came into force on 23rd December 1986, is indeed the bold step to prohibit the child labour. This Act is an outcome of various recommendations made by various committees there was a national consensus in favour of comprehensive legislation, to prohibit the engagement of children in certain other employment. Therefore the parliament enacted the aforesaid Act.

Legislative history in India has traversed a long way since 1881 by progressively extending legal protection to the working children. Provisions relating to child labour under various enactments have concentrated mainly on aspects such as minimizing working hours, increasing minimum age, and

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prohibition of employment of children in occupations and processes detrimental to the health and welfare of children of tender age.\textsuperscript{29} The Employment of Children Act 1938, which was the first enactment on child labour, was repealed by the Child Labour (Prohibition and Regulation) Act 1986.

\textbf{Main Objectives of Child Labour Act}

The objectives of the Child Labour (Prohibition and Regulation) Act 1986 are:

- Banning the employment of children, i.e. those who have not completed their fourteenth year;
- Laying down procedures to decide modifications to the schedule of banned occupations or processes;
- Regulating the conditions of work of children in employment where they are not prohibited from working.

\textbf{Important Provisions of the Child Labour Act}

The preamble to the Act states that it is an Act to prohibit the employment of children in certain employment and to regulate the conditions of work of children in certain other employment. The Act prohibits the employment of any person who has not completed his fourteenth year of age\textsuperscript{30} in occupations and processes set forth in Part A\textsuperscript{31} and Part B\textsuperscript{32} of the Schedule of the Act.

All establishments according to Act can be classified in two categories:

- Those in which employment of child labour is prohibited, and
- Those in which the working conditions of child labour shall be regulated.

The Central Government has the power to amend the schedule.\textsuperscript{33} The Central government may by notification in the official gazettee constitute an advisory

\textsuperscript{29} Supra n. 27
\textsuperscript{30} CLPRA 1986, Section 3 : ‘No child shall be employed or permitted to work in any of the occupations set forth in Part A of the Schedule or in any workshop wherein, any of the processes set forth in Part B of the Schedule is carried on’.
\textsuperscript{31} Annexure – 1.
\textsuperscript{32} Annexure – 2.
\textsuperscript{33} Child Labour (Prohibition and Regulation), Act, 1986, Section 4.
committee called the Child Labour Technical Advisory Committee for the purpose of addition of occupations and processes to the Schedule. Several occupations and processes have been added. More have to be added. For instance, domestic child labour, and work in artistic performances like clubs, circuses, etc., present a risk of serious damage to the health or morals of young persons.

The prohibition of employment of children is not applicable to any workshop wherein any process is carried on by the occupier with the aid of his family, or to any school established by or receiving assistance or recognition from government.

Part III of the Act provides for regulation of conditions of work of children in establishments in which none of the occupations or processes referred to in the Schedule are carried out. It provides for the hours and period of work and weekly holidays for the children. The period of work of the child on each day shall be so fixed that no period shall exceed three hours and that no child shall work for more than three hours before he has had an interval for rest for at least one hour. The total period of work inclusive of the interval for rest should be not more than six hours. The child is not permitted to work between 7 p.m. and 8 a.m. or overtime. The double employment of a child is banned. The Act also empowers the appropriate government to make rules for the health and the safety of the children employment or permitted to work in any establishment or class of establishments.

Procedure for Prosecution of Offences

The procedure laid down in the Act relating to the prosecution of offences is as follows:

34 Id; Sec. 5.
35 Id; proviso to Sec. 3.
36 Id; Sections 7(1) (2) (3) (4) (5) (6)
37 Ibid.
38 Id; Sec. 13.
• Any person, police officer, or inspector may file a complaint of the commission of an offence under this Act in any court of competent jurisdiction.

• Every certificate as to the age of a child which has been granted by a prescribed medical authority shall, for the purposes of this Act, be conclusive evidence as to the age of the child to whom it relates.39

• No court inferior to that of a metropolitan magistrate or a magistrate of the first class shall try any offence under this Act.

**Penalties Provided under CLPRA**

The penalties under this Act are relatively more stringent than the earlier Acts and violating the provisions relating to child labour in certain other Acts results in a penalty under this Act.40

The penalties41 under this Act are as follows:

• Whoever employs any child or permits any child to work in any hazardous employment shall be punishable with imprisonment for a term which shall not be less than three months but which may extend to one year, or with fine which shall not be less than ten thousand rupees but which may extend to twenty thousand rupees, or with both.42 For a repeat offence, the punishment is imprisonment for a term which shall not be less than six months but which may extend to two years.43

• For failing to give notice to the inspector as required by Section 9, or failing to maintain a register as required by Section 11, or making any false entry in the register, or failing to display an abstract of Section 3,44 of

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39 Id; Sec. 10.
40 Id; Sec. 15.
41 Id; Sec. 14.
42 Id; Sec. 14(1).
43 Id; Sec. 14(2).
44 Every railway administration, every port authority, and every occupier shall cause to be displayed in a conspicuous and accessible place at every station, its railway or within the limits of a port or at the place of work, as the case may be, a notice in the local language and in the English language containing an abstract of Sections 3 and 14 Section 12 of CLPRA 1986.
failing to comply with any other provisions of this Act or rules, the
punishment is imprisonment which may extend to one month, or with fine
which may extend to ten thousand rupees, or both.\textsuperscript{45}

It is to be noted that the Act provides for both fines as well as imprisonment. But
in practice, in those few instances where the employer is prosecuted, he is
generally fined.

\textit{Main Features of the CLPRA, 1986}

- It increases and makes more stringent the penalties for employing child
labour in violation of the law for factories, mines, merchant shipping, and
motor transport.\textsuperscript{46}

- It defines ‘family’ and thereby makes it more explicit, thus precluding the
possibility of its abuse.

- It empowers the Union government to bring into force provisions that
regulate conditions of work of children in non-hazardous employment and
also empowers state governments to make rules for further regulation. It
provides the machinery, i.e. the Child Labour Technical Advisory
Committee, for adding to the list of occupations and processes in which
the employment of child labour is prohibited. (This was not possible in the
Employment of Children Act 1938).

- It permits any person, besides a policy officer or inspector, to file a
complaint against anyone employing or permitting a child below fourteen
in the prohibited occupations and processes.

- It makes the display of Sections 3 and 14 of CLPRA a mandatory
requirement for the railway administration, the port authority, and the
occupier.

\textsuperscript{45} CLPRA 1986, Section 14(3).
\textsuperscript{46} \textit{Ibid}, Sec. 15(1) and (2).
Technical Advisory Committee to advise the central government for the purpose of addition of occupations and processes to the schedule of the Act. The committee comprises a chairperson and such other members not exceeding 10 who may be appointed by the central government.

In 2002, the Union government issued a notification banning employment of children in six more activities and processes. Thus, the total number of hazardous occupations and processes notified in the schedule of the Act went up to 70, that is 5th time more than it was before, these include 13 occupations and 57 processes. Section 14 of the Act has provided for punishment upto one year minimum being three months or fine upto Rs. 20,000/-, minimum being ten thousand or both to one who employs or permits any child to work, in contravention of provisions of Section 3.

The Act was limited in scope in the sense that children can continue to work if they are part of family or labour. Further, children may continue to work in industries which are not specified in part A and part B of the schedule appended to the Act. The act also did not lay as to the rehabilitation of the child once the employer is prosecuted.

In order to expand the scope of ban of child labour, in the year, 2006 a notification was issued by the government which amended the child labour (Prohibition and Regulation) Act, 1986. The notification prohibits employment of children under the age of 14 as domestic servant. This notification come into force from October 11, 2006. It provides employ child below 14 years as domestic servant it will be a punishable offence with imprisonment for a term which may extend upto one year or fine upto Rs. 20,000/-, or both. Further, an amount of Rs. 20,000/- is also recoverable for rehabilitation of a child under the direction of the Hon’ble Supreme Court of India.
(d) Supreme Court order on Child Labour\textsuperscript{47}:- In order to check exploitation of Child Labour in hazardous industries, the Supreme Court of India, in its judgment dated 10\textsuperscript{th} December, 1996 has given certain directions regarding the manner in which children working in the hazardous occupations are to be withdrawn from work and rehabilitated, and the manner in which the working conditions of children working in non-hazardous occupations are to be regulated and improved.

The judgment of the Supreme Court envisages:

(a) Simultaneous action in all districts of the country;

(b) Withdrawal of children working in hazardous industries and ensuring their education in appropriate institutions;

(c) The employer of the factory must be asked to pay a sum of Rs. 20,000 if he employed a child in contravention of the Act and that amount is to be deposited in welfare fund established for the purpose.

(d) 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. 5000/- to the welfare fund to be made by the State Government.

(e) 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/ 25,000.00 deposited in the welfare fund as long as the child is actually sent to the schools;

(f) If a child is working in non-hazardous occupation then their working hour do not exceed 6 hours per day and education for at least two hour is ensured. The entire expenditure on education is to borne by the concerned employer;

The above directions and guidelines would have been fruitful had they been implemented effectively but they were not.

\textsuperscript{47} Supreme Court order on writ petition (c) No. 465 of 1986, M.C. Mehta vs. State of Tamil Nadu and Others, December 1986.
Indian Government Policies for Child Labour

"Every child has the right to receive the best that the country and community have to offer. Every child should grow in an atmosphere that provides education and opportunities to help the child grow into a worthy citizen. Unfortunately, a large chunk of our child population is forced to work. The problem, in itself, is so gigantic and multi-faceted that only a holistic understanding of its complexities would enable us to formulate policies and design action programmes."

The government has been making efforts consistently to protect the child labour by prohibiting their employment in absolute terms in hazardous employment as well as to regulate the employment of child labour in order to prevent their exploitation by the employer in other areas of employment by ensuring effective implementation of child labour (Prohibition and Regulation) Act, 1986. In order to accomplish this task in the year 1987, the Government of India announced National policy on Child Labour.

National Policy on Child Labour: -- The future action plan of this policy is set out under the following three heads:

Legal Action plan: -- Emphasis will be laid on strict and effective enforcement of legal provisions relating to child labour under various labour laws.

Focussing of general development programmes: -- Utilisation of various ongoing development programmes of other ministries/department for the benefit of child labour wherever possible.

Project based plan of Action: -- Launching of projects for the welfare of working children in areas of high concentration of child labour.

In pursuance of this policy; Ministry of Labour and Employment has been implementing the National Child Labour Project (NCLP) scheme which is a project based action programme.

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National Child Labour Project (NCLP) :- Under the legal Action Plan of the National Policy on Child Labour, there have been National Child Labour Projects (NCLP) set up in different areas to rehabilitate child labour. Under the scheme project societies are set up at the district level under the chairpersonship of the collector/district magistrate for overseeing the implementation of the project. Instruction to involve civil society and NGO’s have also been issued. The main thrust of a National Child Labour Project is to reduce the incidence of child labour in the project areas thereby encouraging the elimination of child labour progressively. A major activity undertaken under the NCLP is the establishment of special schools to provide non-formal education, vocational training and supplementary nutrition etc. to children withdrawn, from employment.

National Resource Centre on Child Labour :- In order to provide input in policy formulation and to provide back-up institutional support to various child labour eradication programmes, the National Resource Centre on Child Labour (NRCCL) was set up by V.V. Giri National Labour, Institute in Noida, U.P., with financial support from the Ministry of Labour and UNICEF. The main task of the institute is to document, publish and create a databank on child labour research and training, media management and technical support services. It assist the Centre and State Governments, NGOs, policy-makers and other social groups concerned with child labour through a variety of support programmes, and organizes training programmes for the labour factory inspector.

National Authority for Elimination of Child Labour (NAECL) :- A major program was launched on 15th August 1994 for withdrawing child labour working in hazardous occupations and for rehabilitating them through special schools. And after the ratification by India of UN convention on Rights of Child, 1989; there is renewed concern in governmental circle for honouring the country’s commitments and obligations under the convention. As a follow-up, a high
powered body, the NAECL was constituted on 26th September 1994 under the Chairmanship of the Minister of Labour, Government of India. The functions of NEACL are:

(i) to lay down policies and programs for the elimination of child labour, particularly in hazardous employment;

(ii) to monitor the progress of the implementation of programs, projects and schemes for the elimination of child labour;

(iii) to coordinate the implementation of child labour related projects of the various sisters ministries of the Government of India.

It is, however, important to note that no country can eliminate child labour without making basic education compulsory for children. That is why Article 21-A was inserted in the constitution of India because it is only the most effective way of ending child labour in India.

(7) Laws Relating to Bonded Child Labour

Article 23 of the Constitution of India prohibits the practice of debt bondage and other forms of slavery, both modern and ancient. Along with the Child Labour (Prohibition and Regulation) Act 1986 and other labour laws, the following laws provide legal protection to bonded child labourers.

(i) Bonded Labour System (Abolition) Act 1976

In this Act, bonded labour system is defined in Section 2(g) as the system of forced, or partly forced, labour which a creditor extracts from a debtor by virtue of an agreement between the two. The Bonded Labour System (Abolition) Act purports to abolish all debt agreements and obligations. It is the legislative fulfillment of the Indian Constitution’s mandate against beggar and forced

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50 People's Union for Democratic Rights vs. Union of India [Asiad Workers’ Case], AIR 1982 SC 1473, paragraph 1486.
51 Bonded Labour System (Abolition) Act, 1976, Sec. 2(g).
labour. It frees all bonded labourers, cancels any outstanding debts against them, prohibits the creation of new bondage agreements, and orders the economic rehabilitation of freed bonded labour. It also prescribes a penalty of up to three years in prison and rupees two thousand in fine for any violators.

(ii) Children (Pledging of Labour) Act 1933

This Act predates independence but remains in force. It is rarely used in discussions of bonded labour and child labour, probably because the penalties provided under the Act are more lenient.

The Act calls for penalties to be levied against any parent, middleman, or employer involved in making or executing a pledge of child’s labour. Such a pledge is defined as an ‘agreement written or oral, express or implied, whereby the parent or guardian of a child, in return for any payment or benefit received or to be received by him, undertakes to cause or allow the services of the child to be utilized in any employment.' Lawful labour agreements are limited to those made in consideration of reasonable wages and terminable at seven days’ or less notice. The fines for violating this law are fifty rupees against parent and two hundred rupees against either the middleman or employer.

(8) Child Labour and Right to Education : A Contradiction

Child Labour (Prohibition and Regulation) Act, 1986 does not speak for “abolition” but just for “prohibition” and “regulation” of child labour. In the statement of object and reasons of this Act the child labour has been justified on the ground of economic necessity. India has the highest number of child labours in the world census reports clearly points to an increase in the number of child labours.

Consequently, post-act social action litigation of behalf of bonded labours is brought under both the Bonded Labour System (Abolition) Act and the Constitution of India. For a discussion of cases, see Reddy, Bonded Labour System in India, chapter 4.

The Children (Pledging of Labour) Act 1933, Sec. 2, ‘Child’ is a person less than fifteen years old.
labourers in the country, from 11.28 million in 1991 to 12.59 million in 2001.\textsuperscript{55}

The existing law on child labour that allows children to work in occupations that are not part of schedule of occupations that are considered harmful to children contradicts the right of every child to free and compulsory education. And yet no attempt is made to resolve this contradiction. If child labour as mentioned above is justified from economic point of view then how can children be at work and at school at the same time? 

\textbf{(9) Role of Judiciary to child labour & Bonded child labour}

The judiciary in the country has shown its great concern for the working children by bringing occupations or processes under the judicial scrutiny by directly applying the constitutional provisions relating to children.

In \textbf{People’s Union for Democratic Rights’s case,}\textsuperscript{56} the court held: But apart from the requirement of ILO Convention No. 59, we have Article 24 of the Constitution which even if not followed up by appropriate legislation must operate \textit{proprio vigore} and construction work being plainly and undoubtedly a hazardous employment, it is clear that by reason of constitutional prohibition no child below fourteen years can be allowed to be engaged in construction work. There can, therefore, be no doubt that notwithstanding the absence of specification of construction industry in the Schedule to the Employment of Children Act 1938, no child below fourteen years can be employed in construction work and the Union of India as also every state government must ensure that this constitutional mandate is not violated in any part of the country.

The Supreme Court has suggested that it is the duty of the government to ensure education of children of parents who are working in construction sites. Labourers Working on \textbf{Salal Hydro Project’s case,}\textsuperscript{57} the Supreme Court directed that whenever the Central Government undertakes a construction project which is

\textsuperscript{55} Office of the registrar General, India, Census of India 1991 and census of India 2001, New Delhi

\textsuperscript{56} People’s Union for Democratic Right vs. Union of India, AIR 1982 SC 1480.

likely to last for a considerable period of time, it should ensure that children of construction workers who are living at or near the project site are given facilities for schooling. The Court also specified that this may be done either by the Central Government itself or if the Central Government entrusts the project work or any part thereof to a contractor, necessary provision to this effect may be made in the contract with the contractor.

M.C. Mehta’s case, in this case the Supreme Court allowed children to work in a prohibited occupation like fireworks. According to Justice Ranganath Mishra and Justice M.H. Kania, the provision of Article 45 in the Directive Principles of State Policy still remained a far cry and though according to this provision all children up to the age of fourteen years are supposed to be in school, economic necessity forces grown-up children to seek employment. Children can, therefore, be employed in the process of packing of fireworks but packing should be done in an area away from the place of manufacture to avoid exposure to accident.

Rajangam, Secretary, District Beedi Workers Union’s case, the Supreme Court opined that tobacco manufacturing was indeed hazardous to health. Child labour in this trade should therefore be prohibited as far as possible and employment of child labour should be stopped either immediately or in a phased manner that is to be decided by the State Government but it should be within a period not exceeding three years.

M.C. Mehta, case vs. State of Tamil Nadu and others, when news about an accident in one of the Sivakasi cracker factories was published in the media wherein several children were reported dead, the court took suo motu cognizance of it. The court gave certain directions regarding the payment of compensation.

58 M.C. Mehta vs. State of Tamil Nadu and others, AIR 1991 SC 283.
59 Rajangam Secretary, District Beedi Worker’s Union vs. State of Tamil Nadu and Others, (1992)1 SCC 221.
60 AIR 1997 SC 699.
An Advocates' Committee was also constituted to visit the area and report on the various aspects of the matter.61

A three-judge Bench of the Supreme Court comprising Justice Kuldip Singh, Justice B.L. Hansaria, and Justice S.B. Majumdar delivered a landmark judgement on 10 December 1996. This judgement is of considerable important and is a progressive advancement in public interest litigation and child jurisprudence. The decision has attempted to tackle the problem of child labour.

M.C. Mehta, a lawyer, filed a writ under Article 32 of the Constitution of India, as the fundamental right of children against exploitation (Article 24) was being grossly violated in the match and fireworks industries in Sivakasi where children were employed. The Court then noted that the manufacturing process of matches and fireworks is hazardous, giving rise to accidents including fatal cases. Therefore, keeping in view the provisions contained in Article 39(f) and 45 of the Constitution, it gave directions as to how the quality of life of children employed in the factories could be improved.

Social action through law and the struggle for children’s rights got a new impetus with the passing of the above directions. This ruling has certainly succeeded in generating a lot of enthusiasm relating to the elimination of child labour amongst the agencies concerned and State Governments. Since labour is on the concurrent list of the Constitution, there has to be coordination between both the Central and the State Governments. Besides the labour ministry, the education ministry also needs to be involved as more schools, teachers, and staff will be required. Teachers and staff will have to be oriented and mobilized to integrate child labourers entering their schools. In requires an inter-sectoral action. Massive additional funds will be required to comply with the judgement. Rules will have

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to be immediately framed by the State Governments for implementing the directions of the Court.

Child labour has been made expensive and thereby deterrent to both the employer and the government. An important dimension is the award of compensation granted to the affected parties, i.e. the children. This implies that it is the obligation or a social duty of the state to protect the fundamental rights of children.

A tremendous responsibility has been placed on the inspectors appointed under the Child (Labour Prohibition and Regulation) Act, 1986. But many of these inspectors are themselves responsible for the tardy implementation of the Act. There is a need for orientation and training of these inspectors and the other staff concerned. A question that arises is how these inspectors will ensure that, in non-hazardous industries, the child receives education for at least two hours each day at the cost of the employer.

Certain aspects that need to be considered are:

- Greater involvement of voluntary agencies concerned with child welfare.
- Access to adequate schooling facilities as, in our country, in many areas, schools are simply not available.
- Accountability of enforcement officers involved.
- Review and amendment of the Child Labour Act, the Juvenile Justice Act, and the rules made under them.
- The invisibility of the girl child, especially those who work as helpers of adult workers.

The judgement certainly holds out hopes for the future. These hopes should turn out to be true in the cause of justice to the child and they should not become another ‘lucrative’ option for the enforcement officials and parents. Perhaps, an independent enforcing body can monitor the enforcement of this judgement.
(10) Important case Law Related to Bonded Child Labour

Bandhua Mukti Morcha vs. Union of India and others, the court emphasized that when the allegations revealed that the workers were being held in bondage without basic amenities like shelter, drinking, water, or two square meals a day, it was a violation of the fundamental rights as in this country everyone has a right to live with dignity and free from exploitation. The court also ruled that its power under Article 32 is very wide and it can adopt any ‘appropriate’ proceedings.

Neeraja Choudhary vs. State of Madhya Pradesh, it was held that the case was on behalf of a group of bonded quarry workers in the early 1980s. A letter was sent to the Supreme Court referring to an article written by the petitioner. The reporter had visited three of the villages in Madhya Pradesh where released bonded labourers were returned after the Court had ordered their release in a case filed by Bandhua Mukti Morcha. All the seventy-five released bonded labourers from these villages were from tribal communities and they had not been rehabilitated six months after their release. The Supreme Court stated that it was imperative that the freed bonded labourers are properly rehabilitated after their identification and release. The Supreme Court also ruled that ‘it is the plainest requirement of Articles 21 and 23 of the Constitution that bonded labourers must be identified and released and on release they must be suitably rehabilitated. Any failure of action on the part of the State Government(s) in implementing the provisions of the Bonded Labour System (Abolition) Act would be the clearest violation of Article 21 and Article 23 of the Constitution’.

People’s Union for Democratic Rights vs. Union of India, the Supreme Court in this case provided a rule to determine what situations constitute forced labour.

The court held; ‘Where a person provides labour or service to another for

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62 Bandhua Mukti Morcha is an organization working for the release of bonded labourers.
65 See Bandhua Mukti Morcha vs. Union of India and others.
remuneration which is less than the minimum wage, the labour or service provided by him clearly falls within the scope and ambit of forced labour."

**Bandhua Mukti Morcha vs. Union of India**, in this judgment the court directed the Central Government to convene a meeting of the concerned ministers from different states to evolve policies for the progressive elimination of child labour. Some of the areas pointed out were compulsory education of children, vocational training, health checkups, and nutritious food.

(11) **Area of concern**

Access to data on child labour from the concerned Labour Ministry is difficult. What is available is the information on 5-14 year olds in the tables on ‘Workers by Educational Level, Age and sex’ in the Census of India. Here too, the collection of information is by the same categories and criterion that is applicable to adults. Therefore, like adults, child workers in the 5-14 age group are also categorized as main Workers, Marginal Workers. There is no information on children less than 5 years who may be employed or those above 14 years.

Numerous laws and rules at the Central as well as State levels are in place to assess the extent of child labour in the country, and to tackle. Court directives too lend a hand. But Comptroller and Auditor General (CAG) reports show that those responsible for carrying out this reform are indifferent to the vast tragedy. As seen from the CAGs reports, states either routinely under-report the true numbers of working children, or simply do not bother to conduct the surveys needed to properly identify the children. The CAG’s reports show that this maladministration is now routine, and millions of children around the country continue to languish in labour during their ‘childhood’. Our children can’t read

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67 AIR 1997 SC 2218.
and write because the adults responsible for liberating them can’t – or wont’ – count them correctly.\textsuperscript{69}

The rate of conviction under the child labour laws is poor, clearly pointing to weak enforcement of laws. Of the 2504 prosecutions under the Child Labour (Prohibition and Regulation) Act between January to 31 May 2003, there were only 318 convictions, the rest 2050 ending up in acquittal.\textsuperscript{70}

Trafficking of children for labour, be it for domestic work or shrimp cultivation, zari industry, diamond cutting, precious stone industry or any other form of work, is in the news almost every day. Yet there is no law to address this problem.

Child labours fall within the ambit of not just the child labour law and certain other labour laws but also the Juvenile Justice Law, as they are children in need of care and protection. However, in the case of rescue and rehabilitation of such children, involvement of both the labour department and the social welfare department along with the Child Welfare Committees causes confusion, only to the detriment of the child.

The child labour policy and programmes of the Ministry of Labour have failed to achieve the desired results. In fact there is a huge gap between the need and allocation for programmes for elimination of child labour.

The general lack of a protective environment exposes children to all forms of exploitative labour and sexual abuse.

\textbf{(B) Child Sexual Abuse}

The future, bright and hopeful belongs to children everywhere. These are the real assets of society. The violence against child is going on unhidden and cases related to these go unreported, many a times, because of socio-economic

\textsuperscript{69} Himanshu Upadhaya, "Children can't read, adults can't count", India together. (http://www.indiatogether.org/child/labour.htm), accessed on 14\textsuperscript{th} March 2009.

\textsuperscript{70} HAQ : Centre for Child Rights, Parliament of India, p. 48.
condition prevalent in society. In our society when sexual morals are rigid, sexual abuses of children are on the rise.⁷¹

(1) Meaning :- Child sexual abuse has been “the involvement of dependent and immature children in sexual activities they do not fully comprehend, to which they are unable to give informed consent”. Simply CSA⁷² has been defined as any kind of physical or mental violation of a child with sexual intent usually by a person who is in a position of trust or power vis-à-vis the child. CSA is also defined as any sexual behaviour directed at a person under 16, without informed consent.

The Juvenile Justice act, 1986, defines child sexual abuse as “interaction between a child (under the age of 18 for girls and 16 for boys) and an adult, in which the child is being used for the sexual stimulation of the perpetrator or another person”.

In general, sexual abuse is any kind of unwanted or forced sexual behavior. It includes rape, sodomy, harassment and eve-teasing. Sexual violence against children is most commonly perpetrated by someone known to the child, but assaults by strangers in the community happens as well.

The Standing Committee on Sexually Abused Children⁷³ has defined Child Sexual Abuse as:

“Any child below the age of consent may be deemed to have been sexually abused when a sexually mature person has by design or by neglect of their usual societal or specific responsibilities in relation to the child engaged or permitted engagement of that child in activity of a sexual nature, which is intended to lead to the sexual gratification of the sexually mature person. This definition pertains whether or not it involves genital or physical contact, whether or not initiated by the child and whether or not there is a discernible harmful outcome in the short run.”

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⁷² Child Sexual Abuse.
⁷³ SCOSAC 1984.
The Children's Act 1989 of Great Britain defines 'sexual abuse' as the involvement of dependent, developmentally immature children and adolescents in sexual activities they do not normally comprehend, to which they are unable to give informed consent, or that which violate the social taboos of family roles. This definition introduced the concepts of 'informed consent' and 'dependent'. It is the dependent nature of child and young people that make child sexual abuse a particular problem.

In Australia, child sexual abuse refers to a variety of behaviour ranging from enthusiasm to intercourse, from initiate kissing and cuddling to penetration with an object. The penetration may be oral, vaginal, or anal. In 1988, a National Seminar on Child Abuse in India recognized the need for defining afresh the term 'child abuse' in the Indian Context. The committee concerned evolved the following definition:

"Child Abuse and Neglect (CAN) is the intentional, non-accidental injury, maltreatment of children by parents, caretakers, employers or others including those individuals representing government/non-government bodies which may lead to temporary or permanent impairment of their physical, mental, psychological development, disability or death".

The Problem of child sexual abuse is, for feminists, the problem of masculine sexuality. Saakshi defines child sexual abuse as any behaviour directed at a person under sixteen, without that person's informed consent.

According to Saakshi child sexual abuse is the physical or mental violation of a child with sexual intent, usually by an older person, who is on some position of power and/or trust vis-à-vis the child. Child sexual abuse includes an adult.

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74 See Australian Report Commissioned by the Law Reform Commission of Victoria.
76 A Non-governmental Organization, New Delhi.
77 See Child Sexual Abuse – A draft manual, Sakshi, Unpublished.
exposing his or her genitals to a child or persuading the child to do the same; an adult touching a child’s genitals or making the child touch the adult’s genitalia; an adult involving a child in pornography; an adult having oral, vaginal, or anal intercourse with a child; any verbal or other sexual suggestions made to a child by an adult; and so on. Sexual abuse of children can take place in the family, in the neighbourhood, in school, in institutions, and on the street. The abuser, generally a male, usually violates a relationship of trust with the child, taking advantage of his power and position.  

The United Nations has defined child sexual abuse as contacts or interactions between a child and an older or more knowledgeable child or adult (a stranger, sibling, or person in a position of authority, such as a parent or a caretaker), when the child is being used as an object of gratification for the older child’s or adult’s sexual needs. These contacts or interactions are carried out against the child, using force, trickery, bribes, threats, or pressure.

Some other definitions define it as any kind of physical or mental violation of a child with a sexual intent, usually by an older person who is in possession of trust or power vis-à-vis the child. The list is not exhaustive.

(2) Causes of sexual abuse on children :- The main causes of sexual abuse may be the adjustment problems of the perpetrators, family disorganization, victim’s characteristics and psychological disorders of the abusers. Behaviour of child and environment of family may also be the causes of child sexual abuse.

(3) Impact of Sexual Abuse on children :- The sexual exploitation of children not only has damaging and long-term impact on the victim, but also affects the families, communities, and society at large. Like any crime that continues to go unchecked, the sexual exploitation of children—both within the homes and as an organized trafficking racket-directly suggests the health of a society as a whole.

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Children suffer severe traumas or damage which can be physical, mental, emotional, or psychological and if the process of healing does not take place, it may last a lifetime. Sexually transmitted diseases of HIV or pregnancy at an early age can be some of the disastrous outcomes of CSA. If there is no family support the child can face social isolation and social stigmatization. Very often, the child is blamed for being sexually exploited, for ‘affecting the honour of the family’. The child is made to feel guilty for what happened and a deep sense of worthlessness develops. Children may also feel powerless, angry, frightened, and lonely. Depression, isolation, and self-destructiveness are also some of the short-term and long-term impacts of sexual abuse.

(4) Indian Legal System and CSA :- At present there is no comprehensive law on child sexual abuse. The Constitution of India contains provision for the protection of children. Under the Constitution, it is the duty of the state to secure that children of tender age are not abused and forced by economic necessity to enter vocations unsuited to their age and strength and to ensure that children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity. According to Article 23 of the Constitution, trafficking in women for immoral purposes is prohibited. The Constitution directs the State to enact special legislations and policies for protecting children and youth against exploitation of moral and material abandonment.

In India, legal intervention is presently in the form of investigations which start with registration of offences under the earlier Juvenile Justice Act 1986 or the present Juvenile Justice (Care and Protection of Children) Act 2000 or the Indian Penal Code or the Prevention of Immoral Traffic Act 1956 (amendment in 1986).

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80 The Constitution of India, Art. 39(e).
81 Id; Art 39(f).
(i) The Juvenile Justice Act 1986 (JJ Act 1986) :- JJ Act 1986 was enacted to provide for the care, protection, treatment, development, and rehabilitation of neglected or delinquent children. The Act did not directly deal with child sexual abuse but the definition of a neglected juvenile included a juvenile who lived in a brothel or with a prostitute or frequently went to any place used for the purpose of prostitution or was found to associate with any prostitute or who was being or was likely to be abused or exploited for immoral or illegal purposes. Such neglected children were produced before a Juvenile Welfare Board who would, after an inquiry, send the child to a juvenile home for care, protection, and rehabilitation.

Under the Juvenile Justice act 1986, a prostitute's child was automatically a neglected child. The magistrate had the power to segregate the prostitute from her child and place the child in a corrective institution. Besides, under the Act, while males above eighteen years were considered adults, the age was reduced to sixteen years for females. The Juvenile Welfare Boards generally were not equipped to deal with cases of child sexual abuse. The observation homes could not provide special care and treatment for such victimized children.

(ii) Juvenile Justice (Care and Protection of Children) Act 2000

Since the Juvenile Justice Act 1986 has been replaced by the Juvenile Justice (Care and Protection of Children) Act 2000, such children are now being produced before the Child Welfare Committees which have replaced the Juvenile Welfare Boards. In practice, at present, it appears that there has been a change only in the nomenclatures. The actual functioning of the earlier Boards and the present Committees remain almost the same.

The Indian Penal Code does not recognize CSA as an offence. It is through the application of certain other provisions in the IPC that a child sexual offender is criminalised. These are–

82 See the chapter on juvenile justice.
(a) Rape (Sec. 375) :- Sec. 375 defines the offence of rape as “sexual intercourse committed by a man on a woman against her will or without her consent. The section goes on to provide certain other circumstances where the standard of will or consent does not apply. Among these, intercourse with a girl under 16 years of age, even with her consent, is rape. The section provides an explanation that “penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape”. Thus only CSA of girl-children where peno-vaginal penetration has taken place falls within the ambit of this section. Most often CSA does not take this form. Penetration of the vagina with any other object, even if life-threatening, does not amount to rape.

(b) Assault or Criminal force to woman with intent to outrage his modesty (Sec. 354) :- In cases of CSA concerning girl-children, where penetration of the Vagina has not taken place, section 354 comes into operation. This section punishes the offence of assault or use of criminal force to outrage the modesty of a woman. And ‘modesty’ of a woman remains ambiguous. Especially in the case of CSA, it becomes even more confusing because the ‘victim’ is a child and whether as a child she can be said to possess modestly is a point of argument in court.

(c) Unnatural Offences (Sec. 377) :- The last provision of I.P.C., Section 377, is purportedly meant to be applied in cases of CSA, where penetration is not peno-vaginal in nature – defined as ‘unnatural offence’ by the law. The unnatural offence consists in a carnal intercourse against the order of nature by a man with a man or in the same unnatural manner with woman or with beast. This section is gender-neutral. While it addresses the sexual abuse of boys, when the abuse does not include penetration it escapes the ambit of the section. This means that there is no provision in the IPC to criminalise molestation of boys.

83 It may range from exhibitions, touching, to all forms of penetration (including penile – anal, penile-oral, object-vaginal, and finger-vaginal). http://www.tulircphcsa.org
(5) Non-commercial forms of child sexual abuse and Judicial activism: Important case law Delhi Domestic Working Women's Forum vs. UOI, the Supreme Court laid broad parameters in this case in assisting rape victims. The Court indicated the inherent defects in the present system as:

- Complaints are being handled roughly and not given due attention;
- The victims are, more often than not, humiliated by the police;
- The experience of furnishing evidence in court has been negative and destructive.

The court suggested the following guiding principles:

- The complainant of sexual assault is to be provided with legal representation; it being important to secure continuity of assistance by ensuring that the same person who looked after the complainant's interest in the police station represents her up to the end of the case.
- Legal assistance is to be provided at the police station as the victim would be in a state of distress.
- The police should be under a duty to inform the victim of her right to representation before any questions are asked of her and the police report should state so.
- Victims who do not have their own lawyers should be provided with a list of advocates at the police station.
- The Court upon application shall appoint the advocate by the police at the earliest convenient moment.
- In all rape trials anonymity of victims must be maintained as far as necessary.
- It is necessary having regard to the directive principles contained under Article 38(1) of the Constitution that victims are awarded compensation by the court on convention of the offender.

84 1995 (1) SCC 14, 18 to 21.
In Mathura's case, Mathura, a girl aged between 14 and 16 years, was raped by two policemen attached to Desaigunj police station where she had gone along with others for recording a complaint. The sessions court held that the prosecution had failed to prove its case, and that Mathura was a 'shocking liar' whose testimony is riddled with falsehood and improbabilities and that, of her own free will, she had surrendered her body to a police constable. The medical examination showed old injuries on the hymen, and no semen stains were traced.

In an appeal, the High Court while convicting the accused observed: 'Mere passive or helpless surrender of the body and its resignation to the other’s lust induced by threats or fear cannot be equated with the desire or will, nor can it furnish an answer by the mere fact that the sexual act was not in opposition to such desire or violation. On the other hand, taking advantage of the fact that Mathura was involved in a complaint filed by her brother and that she was alone at the police station at the dead of the night, it is more probable that the initiative for satisfying sexual desire must have proceeded from the accused and that the victim Mathura must not have been a willing party to the act of sexual intercourse. Her subsequent conduct in making a statement immediately not only to her relatives but also to the members of the crowd leave no manner of doubt that she was subjected to forcible sexual intercourse.'

The Supreme Court set aside this conviction on the grounds that sexual intercourse is not proved to amount to rape in the present case and that no offence is brought home. It further held that there were no circumstances available which made out a case of fear on the part of the girl and there was no finding that she was put into fear of death or hurt. Therefore, Section 375(3) of the Indian Penal

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85 Tukaram & Anothers vs. State of Maharashtra, AIR 1979 SC 185.
Code does not apply. This judgement was severely criticized by women’s organizations and led to the amendments of rape laws in India.

**Gorakh Daji Ghadge’s case**, this was a case where a father had raped his thirteen-year-old daughter in their home. The Mumbai High Court held that seminal emission is not necessary to establish rape. What is necessary to establish rape is that there must be penetration. The High Court has also dealt with the father-daughter relationship and stated that: ‘Crimes in which women are victims need to be severely dealt with and in extreme cases such as this when the accused, who is the father of the victim girl, has thought it fit to ‘deflower’ his own daughter of tender years to gratify his lust, then only a deterrent sentence can meet the ends of justice’.

In **Gurmit Singh’s case**, the Supreme Court has advised the lower judiciary, that even if the victim girl is shown to be habituated to sex, the court should not describe her to be of loose character.

While dealing with the importance of in-camera trial in rape cases, the Supreme Court also observed that a trial in camera would not only be in keeping with the self-respect of the victim of the crime and in tune with the legislative intent, but it is also likely to improve the quality of the evidence of a prosecutrix because she would not be so hesitant or bashful to depose frankly as she may be in an open court under the gaze of the public.

It is hard fact that many a times the trial of sexual abuse cases is conducted in such an insensitive manner that a sexually abused child, rather than being treated for her own trauma, has to fight the adversarial system and end up in being further traumatized. The child has to be cross-examined by the defence lawyer who may use different strategies to get the answers desired. Lack of proper

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understanding of the law among the judges and insensitivity to child rights has resulted in the accused being discharged in several child sexual abuse cases.

The judges do not at all consider the issue of the child’s trauma. Besides, the offence of sexual assault are generally tried by the criminal justice system under three different sections, viz., rape, attempt to rape, and molestation depending upon the proximity of molestation.

(6) Demand for specific law on child sexual abuse: In 1999 Supreme Court Sakshi’s case, was the first attempt to challenge inadequacies of the provisions in the IPC to make CSA an offence. Sakshi, a women’s resource centre working with victims of sexual abuse, filed the PIL in 1997 after the Delhi High Court declared that the case of an 8 years old child, penetrated in three orifices by her father, could not be considered either rape or an ‘unnatural offence’. The PIL questioned the legal procedures during trial and urged the apex court to alter the definition of sexual intercourse, with reference to section 375 of the IPC, to mean all kinds of sexual penetration on any type of orifice of body, not just intercourse understood in the traditional sense.

The 2004 judgment in this case, instead of broadening the definition of ‘rape’ only focused on reducing the trauma of the victim. Interestingly, in this judgment the court admitted the wide prevalence of CSA, yet it failed to clearly define sexual abuse and stated: “An exercise to alter the definition of rape by a process of judicial interpretation is bound to result in a good deal of chaos and confusion and will not be in the interest of society at large.

Pursuant to the order passed by the Supreme Court in Sakshi case, the Law Commission of India has reviewed the laws with regard to CSA and recommended amendments. The major amendments recommended in the 172nd

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90 Annexure-3.
report of the Low Commission of India (LCI) were that the offence of ‘rape’ be substituted by ‘sexual assault’ which would make it gender-neutral and bring into its fold a range of sexual offences and not merely forced peno-vaginal penetration. But unluckily, the recommendations were not accepted by the Govt.

(i) Offences Against Children Bill, 2005: In 2005, the Ministry of Women and Child Development (MWCD) of the government, in consultation with NGO’s legal experts and social workers, drafted the Offences Against Children Bill, 2005. In a post-Nithari situation, this Bill came into scene. This Bill defines CSA and makes ‘consent’ of the Child the qualifying ground for ascertaining abuse when the child is between 16-18 years of age. The law deems children below 16 years of age incapable of giving consent to any of the sexual acts mentioned in the Bill. The problem with such a provision is that it could actually lead to criminalizing consensual sexual acts between young people. Under this law, if a child of 14 years has consensual sex with another child of 17 years, the 17-year old, who is capable of consent, would have committed a crime against the other child, as he is deemed incapable of giving consent. Interestingly, in a situation where both are under 16, they are both guilty of committing sexual assault since their consent is invalid according to law.

The offences Against Children Bill will create yet another provision which can be used to harass and penalize teenagers for victimless crimes, only to serve public morality.

Section 10 states that any person who prepares, produces, facilitates, distributes or knowingly abets in the creation of child pornography will be liable to rigorous imprisonment of not less than 7 years, but which may extend to 10 years, and a fine. While for distribution of child pornography the Bill stipulates a minimum punishment of seven years. According to section 6, if a person is guilty

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91 Offences against Children Bill, 2005, Sec. 2(c)
of sexual abuse of a child between 16-18 years, the minimum punishment is imprisonment of not less than 6 months. This disparity allows a child sexual offender to get away with only 6 months imprisonment whereas a distributor of child pornography. Who has not physically abused a child – can be booked for 7 years.

Though the framers of the Bill have given considerable attention to punitive measures and indeed it is a useful piece of legislation on CSA.

But, in a major set back to the MWCD, the law ministry has rejected the Bill, saying the bill is just a repetition of provisions in our laws. The Law Ministry has told the MWCD that most provisions for child protection already exist in different laws and therefore, there is no need for a separate enactment of legislation.93 there is a need to be careful about an over-reliance on law, believing that it will fulfil the promise of phenomenal transformation.

(ii) Ruchika’s case: Behind the silence a tale of harassment: - Harased is too small a word to describe what the Ruchika’s family went through these 19 years. Initially geared up to fight the case, the father and brother backed out, terrified with the chain of events that struck them one after the other. Ruchika was suspended from the Haryana Lawn Tennis Association, which was then headed by Rathore. In September 1990, her school expelled her without citing any reason. Her father sold their house at Panchkula and Ashu, who was also in his teens, had six cases of car theft slapped on him.

Ashu was arrested by the crime Bureau of Panchkula police in October 1993, allegedly at the behest of Rathore, and kept in illegal detention for a period of more than two months. He was allegedly forced to sign on blank papers, which were used by the police to show his ‘confession’ that he stole 11 cars. One day

when he was still in illegal confinement, Ashu was allegedly taken to his house and beaten mercilessly

Rathore allegedly asked him to tell his sister that if she did not take back the complaint, her family will face the same action.

On December 28, 1993, Ruchika consumed insecticide. She died the next day. She blamed herself for traumatizing her family. The traumatized family left the state fearing more harassment. Ashu was acquitted by the court in all the cases later on.94

Shocked by the inordinate delay of 19 years in the conviction of Rathore, the law ministry has also promptly drafted a Bill to set up special courts all over the country for the trial of the accused in such cases. The sexual offences (special courts) Bill will be taken to the cabinet for its approval shortly. The draft of the bill will cover offences under IPC sections 354 (assault or criminal force to women with intent to outrage her modesty), 375 (rape), and 376 (Punishment for Rape), among others.95

(iii) Sexual Offences (Special Courts) Bill, 2010 is almost finalized and is awaiting a cabinet nod. The new law proposes:

(i) Sexual abuse is defined to include not just physical but also mental harassment. Punishment for both to be similar.

(ii) Sexual abuse to be treated on par as rape, which means punishment for both to be equally stringent. Until now, maximum punishment for sexual abuse is one year.

(iii) Onus to prove that suicide was not due to sexual harassment lies with the accused.

(iv) All cases of sexual harassment to be death with special courts cleared within 6 months to a year. Law member Veerappa Moily said, “All

94 The Indian Express, 22nd December 2009.
95 Ibnlive.in.com>India accessed on 20th May 2010.
those people who conspired or abetted in the offences will have to be lined up as accused. That is how the case has to be shown as a model case for the entire world.” However, the question is whether the sexual abuse bill will be enough to fight for justice for many Ruchikas? It remains to be seen whether Ruchika will finally get justice but the Govt. certainly wants to send out a message through this law that it wants to get tough on cases of sexual abuse.

(C) Child Prostitution/Commercial sexual Exploitation

(1) Child Prostitution :- As defined in the declaration of the first world congress against commercial sexual exploitation of children, held in Stockholm in 1996, commercial sexual exploitation of children is sexual abuse by an adult accompanied by remuneration in cash or in kind to the child or third person(s).

Child prostitution in general, may be defined as the sexual exploitation of a child for remuneration in case of kind usually but not always organized by intermediaries such as parent, family members; procurer, etc.96

Evidence of trafficking for forced begging, marriage, and labour in informal work ghettoes are on the rise within the Indian context. There are some evident forms of trafficking with religious or community sanction— the Bassanis, Joginis, Bhogam Vandhis, and Venkatesinis in Andhra Pradesh; the Muralis, Aradhinis, and Tamasha girls in Maharashtra; the Thavadiyars in Tamil Nadu; the Bedias, Bachhda and Sansi communities in Madhya Pradesh; and the Natcommunity in Uttar Pradesh. The community justifies and legitimizes the practice and, ultimately, many of the victims get trafficked into prostitution.

In India, traditional systems of children in prostitution varied as the devdasi or the Jogini, and the trafficking system that moves young girls across South Asia and into urban centres reveal the active exploitation and the socio-

96 Supra n. 71.
economic realities that make such exploitation possible. In the last few years, increasing number of instances of commercial sexual exploitation of children have also come to light in popular tourist destinations like Goa.

(2) **Child Sex Tourism** :- Is a form a child commercial sexual exploitation. It is a commercial sexual exploitation of children by men or women who travel from one place to another, usually from a richer country to one that is less developed, and there engage in sexual acts with an individual under 18. It may happen that a traveler may not intend to engage a sex with children while he is away from home, but he does so because a child is made easily available to him. Opportunities explanation, then, along with organised child sex tourism, is a critical factor compounding the complex socio-economic factors that push children into local prostitution industries.

(3) **Child Pornography** :- The internet was new and relatively unexplored territory until a few years ago. At first, it was used primarily as an educational tool. But from sometime back it is being used for other unlawful purposes also. One of these unlawful purposes is by abuser to reach and abuse children sexually, worldwide. Research has established that on-line pornography plays an accessory role in negative social issues such as child abuse, violence against women, rape, inequality, relationship and family breakdown and youth crime, promiscuity and sexually transmitted disease.

The easy access to the pornographic contents readily and freely available over the internet lower the inhibitions of the children. Pedophiles\textsuperscript{97} lure the children by distributing pornographic material, then they try to meet them for sex or take their nude photographs including their engagement in sexual positions.

As internet is very fast becoming a household commodity in India and the children are most viable to the cyber crime. Thus, first we must have to understand what actually child pornography is –

\textsuperscript{97} Adults engaged in sexual crimes against children.
Defining Child Pornography:

The Council of Europe’s Cyber Crime Convention 2001 which came into force on July 2004, define child pornography under article 9(2) as “pornographical material that visually depicts” –

(i) a minor engaged in sexually explicit conduct;
(ii) a person appearing to be a minor engaged in sexually explicit conduct;
(iii) realistic images representing a minor engaged in sexually explicit conduct.


“any representation, by whatever means, of a child engaged in real or stimulating explicit sexual activities or any representation of the sexual parts of a child for primarily sexual purposes.”

Both of the above said documents define child as under 18 years of age and cover both real plus realistic and stimulated representation within the definition of child pornography.

(4) Impact of Commercial Sexual exploitation on Child:

Impact of commercial sexual exploitation on child has assumed staggering positions. The child loses its childhood, its dignity, often its future. These are unquestionable causes, but there are mal-effect of exploitation which are more vulnerable. The most obvious of these relates to the health of the child. HIV/AIDS is both a cause and consequence of commercial, sexual exploitation of children. The evidence shows that children are being chosen as sex partners by the miscreant people who consider sex with a child as “safer”. But the fact is otherwise because of their vulnerability and weaknesses.

The children trapped in the cycle of commercial sex lose their self-respect and develop deprivation, aggression violence, lose of self control etc. Their lives become miserable leading to the end of suicide.

They also face stigmatization, exclusion and even criminalization. Sexually exploited children are often treated as criminals and they are imprisoned when they are arrested.

**5) Magnitude of Crime :-** As all we knows, while both boys and girls are victims of trafficking, girls are more vulnerable, especially to trafficking for sexual purpose. 60% of estimated women and child commercial sex worker in India came from schedule castes/Schedule Tribes, and according to an ILO estimate, 15% of them are children. The number of trivial girls, a large number of them under 18 years, migrated from states like Chattisgarh and Jharkhand to Metropolitan cities every year, runs into thousands.

Over the last few years, there has been an increase in trafficking of girls for and through marriage. States where there is gender imbalance due to low sex ratio, finding brides for eligible men is becoming difficult. The girls trafficked for marriage are forced to work as agricultural labourers during the day and cater sexually not only to their husband but to others too at night.

Although there is a dearth of comprehensive and precise data on the subject, information gathered from the US State Department’s report of 2006 states that ‘Independent sources report that the municipal government of Mumbai – India’s largest city and largest concentration of victims of commercial sexual exploitation – arrested 13 suspected sex traffickers in 2005, but did not prosecute or convict any traffickers. Similar is the case with the Calcutta and Chennai. This reason further enhance the magnitude of crime.

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99 Central Social Welfare Board (CSWB)
(6) International framework on child sexual exploitation

(i) The UN Convention on the Rights of the Child, 1986: The United Nations Convention on the Rights of the Child (CRC), which has been ratified by several countries including India, gives a common, cross-national, comprehensive foundation standard for all the world's children. Article 6 enjoins all State parties to take appropriate measures to suppress all forms of traffic in women and exploitation of prostitution of women. Article 11 prohibits the illegal transfer of children abroad. Article 19 is also relevant. It refers to the States' obligation to protect children from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment, or exploitation including sexual abuse perpetrated by parents or others responsible for their care. Articles 34 and 35 lay down the obligations of the State to protect the child from all forms of sexual exploitation and sexual abuse. For these purposes, State parties shall, in particular, take all appropriate national, bilateral, and unilateral measures to prevent:

- The inducement or coercion of a child to engage in any unlawful sexual activity.
- The exploitative use of children in prostitution or other unlawful sexual practices.

On the exploitative use of children in pornographic performance and materials, Article 35 enjoins the State parties to take all appropriate national, bilateral, and multilateral measures to prevent the abduction or the sale of or traffic in children for any purpose or in any form. Article 39 ensures that States take all appropriate measures to promote the physical and psychological recovery and social reintegration of a child victim from any form of neglect, abuse, torture, or any other form of cruel, inhuman, or degrading treatment or punishment or armed conflict.
Many other international instruments also address the issue and offer international legal protection against abuses of human rights.

(ii) The Convention for the Suppression of Trafficking in Persons and of the Exploitation of the Prostitution of Others 1949

The preamble to the Convention states that prostitution and the accompanying evil of the traffic in person for the purpose of prostitution are incompatible with the dignity and worth of the human person and endanger the welfare of the individual, the family and the community.

The salient features of the Convention are as follows:

- Any person, who in order to gratify the passions of another, procures, entices, or leads away for the purpose of prostitution another person, even if with such person’s consent, or exploits the prostitution of another person, even if with such person’s consent, is liable for punishment.\(^{102}\)

- Any person who keeps or manages or knowingly finances a brothel or knowingly lets or rents a building or other place or any part thereof for the prostitution of another is liable for punishment.\(^{103}\)

- The above offences shall be regarded as extraditable offences in any extradition treaty entered into between state parties to this Convention.\(^{104}\)

- Each State party to this Convention shall establish or maintain a service to coordinate and centralize results of investigation of offences under the Convention, and such service should compile all information for facilitation of prevention and punishment of offences, and such service

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\(^{102}\) The Convention for the Suppression of Trafficking in Persons and of the Exploitation of the Prostitution of others, 1949, Art. 1.

\(^{103}\) Id; Art. 2.

\(^{104}\) Id; Art. 8 and 9.
should be in close touch with corresponding services of other state parties.\textsuperscript{105}

- The service so established should furnish particulars of an offence or an attempt to commit such offence to services established by other state parties. The information so furnished should include the description of the offender, fingerprints, photographs, method of operation, police record, and record of conviction.\textsuperscript{106}

- The State parties should take measures for the prevention of prostitution and for the rehabilitation and social adjustment of the victims of prostitution.\textsuperscript{107}

- The State parties shall undertake with immigration and emigration authorities such measures as are required to check the traffic in persons of either sex for the purpose of prostitution.\textsuperscript{108}

- The State parties shall, pending the completion of the procedure for repatriation, make suitable arrangements for the temporary care and maintenance of destitute victims of international traffic. Repatriation should take place only with the consent of the victim or the person claiming such victim and after agreement is reached with the state of destination.\textsuperscript{109}

- The state parties are to communicate to the Secretary General of the United Nations such laws and regulations that have been promulgated in their respective stats, and each year thereafter, such laws and regulations that have been promulgated and measures taken by the State parties concerning the applicability of the Convention.\textsuperscript{110}

\textsuperscript{105} Id; Art. 14.  
\textsuperscript{106} Id; Art. 15.  
\textsuperscript{107} Id; Art. 16.  
\textsuperscript{108} Id; Art 17.  
\textsuperscript{109} Id; Art. 8 and 9.  
\textsuperscript{110} Id; Art. 21.
(iii) The International Covenant on Civil and Political Rights (ICCPR) 1966

This Covenant lays down that every child, without any discrimination, has the right to such measures of protection as are required by his status as a minor on the part of his family, society, and the state.

(iv) The Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW)

This enjoins State parties to take all appropriate measures, including legalization, to suppress all forms of traffic in women and exploitation of prostitution of women.\textsuperscript{111}

India has ratified all the above instruments and therefore is bound to make laws in consonance with the above provisions.

(v) The United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984

The Monitoring Body under this Convention is the Committee Against Torture. The Convention states that there should be no expulsion or return of a person to another State if there are substantial grounds for believing that she would be in danger of torture. The alleged victims of torture have the right to complain to and have her case promptly and impartially examined by competent authorities. Complainant and witnesses shall be protected against any consequential ill treatment or intimidation. There is also a provision for redress and right to compensation.

(vi) ILO (International Labour Organization) Convention No. 29 on Forced Labour\textsuperscript{112} 1930

Under this Convention, the States have to suppress use of forced or compulsory labour within the shortest possible period. The officials shall not

\textsuperscript{111} CEDAW, Article 6.

\textsuperscript{112} Under this Convention, 'forced or compulsory labour' means all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily.
constrain any person to work for private individuals, companies, or associations. The monitoring body, as of all ILO Conventions, is the Committee of Experts on the Application of Conventions and Recommendations.

(vii) The Universal Declaration of Human Rights 1948

Though not a legal binding document, this sets the stage for most of the international instruments. Article 4 of the Declaration stats that no one shall be held in slavery or servitude. Slavery and the slave trade shall be prohibited in all its forms. Article 5 provides that no one shall be subjected to torture or to cruel, inhuman, or degrading treatment or punishment.

(viii) The Tourism Bill of Rights and the Tourist Code 1985

This was adopted by the World Trade Organization (WTO). It enjoins that the States should prevent any possibility of using tourism to exploit others for prostitution purposes. The Tourist Code enjoins tourists to refrain from exploiting others for prostitution purposes.

These Covenants and Conventions which India has ratified, unless they infringe on the fundamental rights, do not need legislative measures to enforce them in the courts of India.

(ix) The SAARC Regional Convention on preventing and combating Trafficking in Women and Children for Prostitution, 2002

The Declaration adopted by SAARC member states at the close of the Eleventh SAARC Summit called for a Regional Convention on Combating the Crime of Trafficking. The convention calls for cooperation amongst member states in dealing with various aspects of prevention and suppression of trafficking in women and Children for prostitution and where countries of the region are the countries of origin, transit and destination. Some of the significant features of this Convention agreed to by the parties are as follows:
• Trafficking in women and children for prostitution is a crime against human dignity and as such effective measures, including legal, socio-economic, and administrative, to be taken to effectively prevent trafficking in women and children.

• To provide in their national legislations, punishments for any person who keeps or manages or knowingly finances or takes part in the financing of a brothel or rents out a building or a place or any part thereof for the purposes of prostitution.

• In a spirit of cooperation among themselves, the parties agree to assist and coordinate the various aspects of trafficking in women and children inside the outside their countries.

• To specify in their national legislation, the procurement, enticing, or taking away of another person for the purposes of prostitution and exploitation even with consent, as a serious offence.

A regional task force has been formed in all the member states to monitor and assess the implementation of various provision of the convention. The Regional Task Force has met in 2007, 2008 and 2009. And very recently, the special session of Regional Task Force held at the SAARC Secretariat in April 2010 prepared the draft outline for the establishment of two regional toll-free help-lines dedicated for women and children respectively. Women and children survivors or victims of violence or discrimination can then dial by these numbers to seek help and support irrespective of the country they are in South Asia.113


The important articles of this protocol (adopted by the UN General Assembly) are as follows.

• Criminal or penal law to be made to cover sale of children including offering, delivering, or accepting a child for purposes of sexual exploitation, transfer of organs for profit of forced labour.\(^\text{114}\)

• To ensure appropriate training for persons working with child victims.

• To prohibit sale of children, child prostitution, and child pornography\(^\text{115}\)
  
  – Sale of Children has been defined as any act or transaction whereby a child is transferred by any person/s to another for remuneration or other consideration\(^\text{116}\)
  
  – Child Prostitution has been defined as use of a child in sexual activities for remuneration or other consideration.
  
  – Child Pornography has been defined as any representation of a child engaged in real or simulated explicit sexual activities or any representation of the sexual parts of a child for primarily sexual purposes.

• To protect rights of child victims in criminal justice process keeping the best interest of the child in view.

  – Protection of rights of child victims in the criminal justice process: In recognizing their special needs, especially as witness; in keeping them informed at all times of all things; providing support services; protecting privacy and identity of the child; providing for their safety and that of their family where appropriate; and avoiding unnecessary delay in granting compensation.

  – Best interests of the child shall be a primary consideration.

(xii) The ILO Convention No. 182 Concerning the Prohibition and Immediate Action for the Elimination of the Worst Form of Child Labour

• Use of child for prostitution production of pornography, or pornographic performances.

\(^{114}\) Optional Protocol to the CRC Article 3.

\(^{115}\) Optional Protocol to the CRC Article 1.

\(^{116}\) Optional Protocol to the CRC Article 2.
• Use, procuring, or offering of a child for illicit activities, in particular for the production and trafficking of drugs; are included in this convention. An accompanying Recommendation\textsuperscript{117} defines ‘hazardous work’ as ‘work which exposes children to physical, psychological or sexual abuse’. Paragraph 11 recommends how countries may cooperate with each other to deal with criminals and criminal networks, such as those involved in the trafficking of children and child pornography.

(xii) International Initiatives to Prevent Child Pornography on the Internet\textsuperscript{118}

In the Netherlands the hotline for child pornography on the Internet was created by the Foundation for Internet Providers, Internet users, the National Criminal Intelligence Service, the National Bureau against Racial Discrimination, and a psychologist. Like other national hotlines that are starting to be set up, it operates by asking Internet users to report any child pornography that they find. The Netherlands hotline tries to have a preventive attitude towards the problem, in that once a site is reported, the web site provider will ask the issuer of the material, if he can be traced, to remove it from the Internet, and will report that person to the police if he or she fails to do so.

Singapore has attempted to regulate the content of the Internet as far as possible, through a Class Licence Scheme, where Internet service providers and Internet content providers are required to block out objectionable sites as directed by the Singapore Broadcasting Authority. Schools, libraries, and other providers of Internet access to children are required to institute a tighter level of control, although options as to how this could be implemented have not yet been identified.

\textsuperscript{117} Paragraph 4 of the recommendation.
In China, Internet users must register with the police, and it is reported that a company in Massachusetts, United States, is investing in technology designed to allow the Government of China to censor the Internet.

The Internet Society of New Zealand and the Internal Affairs Department set up a joint working group to tackle pornography on the Internet in December 1996. This followed several high-profile raids and monitoring exercises by the authorities. The society is also developing a code of practice for Internet service providers.

The United Kingdom police were involved in Operation Starbust, an international investigation of a paedophile ring thought to be using the Internet to distribute graphic pictures of child pornography, and the biggest operation so far carried out in the United Kingdom. Nine British men were arrested as a result of the operation which involved other arrests in Europe, America, South Africa, and the Far East. The Operation identified thirty-seven men worldwide.

(7) National Framework

(i) The suppression of Immoral Traffic in women and Girls Act 1956 (SITA) :- Under the Constitution of India, trafficking in women and children for immoral purposes is prohibited.119 The directive principles of State policy state that it is the duty of the state to secure that the tender age of children are not abused and forced by economic necessity to enter vocations unsuited to their age and strength and directs the state to ensure that the children are given opportunities to develop in a healthy manner and in conditions of freedom and dignity.120

Trafficking was first dealt with by The Suppression of Immoral Traffic in Women and Girls Act 1956 (SITA), which was passed on 31 December 1956.

119 The Constitution of India, Art. 23.
120 Id; Articles 39(e) and (f).
The legislation was enacted in pursuance of the UN Convention of 1950. The Act had several loopholes. Some of the drawbacks were:

- The Act did not conform fully to the international convention on the subject.
- The definition of prostitution was unsatisfactory.
- No provision for dealing with policing and punishment of criminals who have set up interstate and international networks to procure children.
- No specific provisions to deal with prostitution of children.
- No provision for dealing with sexual exploitation of boys.
- Lesser sentence compared to that in the Indian Penal Code to offenders who induct children and women into prostitution.
- Customer not made accountable.
- Protective homes set up under the act were mainly custody homes and not properly staffed.
- No provision for the children of prostitutes.
- No accountability placed on the superintendent of the protective homes.


As a result of substitution of the words ‘Immoral Traffic (Prevention) Act’ for the words ‘Suppression of Immoral Traffic in Women and Girls Act’ made by

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121 UN Convention for the Suppression of Traffic in Persons and of Exploitation of the Prostitution of Others. This was approved by the General Assembly resolution 317 (iv) of 2 December 1949. In 1950, the Government of India ratified this Convention.

Section 3 of the amending Act of 1986, the principal Act was short titled as the Immoral Traffic (Prevention) Act. This Act does not make prostitution *per se* a criminal offence or punish a person because the person prostitutes himself or herself. The purpose of the enactment is to inhibit or abolish commercialized sexual abuse and exploitation and the traffic in persons as an organized means of living. The object is attempted to be achieved by two major strategies, namely, by punishing those who are guilty of such conduct and by rescuing and rehabilitating the victims of such exploitation.\(^{123}\)

Prostitution under this Act means the sexual exploitation or abuse of persons for commercial purposes and the expression ‘prostitute’ should be construed accordingly.\(^{124}\) This definition is wider and includes sexual exploitation and abuse of any person—female, eunuch, or male—for commercial purposes. The Act has introduced the concept of child\(^ {125}\) victims as against minors\(^ {126}\) and majors\(^ {127}\) and imposes higher degree of criminality to sexual exploiters of children.

By the use of presumptions, the burden of the prosecution is lightened by the ITPA 1986. There are certain presumptions under the act in favour of the child victims. These are:

- If a child is found in a brothel or under suspicious circumstances in the custody of a person, other than the parent or lawful guardian who is unable to explain satisfactorily the presence of such a child, that person shall be presumed to have procured the child for the purposes of prostitution.


\(^{124}\) *The Immoral Traffic (Prevention) Act, 1986*, Section 2(f).

\(^{125}\) *Ibid*, sec. 2(aa), ‘Child’ means a person who has not completed the age of sixteen years.

\(^{126}\) *Ibid.*, sec. 2(cb), ‘Minor’ means a person who has completed the age of sixteen years but has not completed the age of eighteen years.

\(^{127}\) *Ibid.*, sec. 2(ca), ‘Major’ means a person who has completed the age of eighteen years.
• If a child is found accompanying, in suspicious circumstances, a person who is neither its parent or lawful guardian and who is leaving the country, that person is committing the offence of immoral trafficking.

(iii) Rescue & Rehabilitation of Children :- Where a magistrate has reason to believe from information received from the police or from any other person authorized by the state government that any person is living on, or is carrying on, or is being made to carry on prostitution in a brothel, he may direct a police officer not below the rank of a sub-inspector to enter such brothel and to remove such person and produce him before him. A minor or a child rescued under this Act is treated as a neglected child under the Juvenile Justice Act 1986 now the Juvenile Justice (Care and Protection of Children) Act, 2000, and has to be produced before the Juvenile Welfare Board, now the Child Welfare Committee for reception and rehabilitation, and placing in safe custody. There is a provision for providing for intermediate custody in a shelter home or corrective institution after rescue pending detailed inquiry.

(iv) Art 23 Constitution :- According to Article 23 of the Constitution of India, trafficking in women and children for immoral purposes is prohibited. Articles 39(e) and (f) of the directive principles of State policy state that it is the duty of the state to secure that the tender age of children are not abused and forced by economic necessity to enter vocations unsuited to their age and strength and directs the state to ensure that the children are given opportunities to develop in a healthy manner and in conditions of freedom and dignity.

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128 Suspicious circumstances in this section includes situations in which (i) the mother tongue of the accused is different from that of the child or the language is different from that generally spoken in the locality, (ii) where the child is wrongfully confined without access to others, and (iii) where the child is married to a foreigner.

129 Immoral Traffic Prevention Act, 1986; sec. 16.

130 Juvenile Justice Act, 1986; sec. 2(e).

131 Id; sec. 4(1).

132 Id; sec. 2(b).
(8) Judicial response on commercial sexual exploitation

Vishal Jeet vs. Union of India, 133 this was a public interest litigation wherein the Supreme Court issued directions that all State governments must direct their law-enforcing authorities to take appropriate speedy steps against the evil and directed to set up advisory committees with experts from all fields to make suggestions regarding measures for eradicating child prostitution, for care and rehabilitation of rescued girls, for setting up for rehabilitative homes, and for a survey of the devadasi and Jogin traditions.

The Public at Large's case, 134 the petition arose due to suo motu notice taken by the court of a newspaper article which indicated that minor girls were illegally confined and forced to be sex workers. The respondents were directed by the court to show cause as to why action had not been taken under Sections 336135 and 366136 of the Indian Penal Code, and Sections 5137 and 6138 of the Suppression of Immoral Traffic in Women and Girls Act 1956. The Court passed directions as under:

- To frame a proper scheme so that the women including minors who are produced for sexual slavery are released from the confinement of their procurers;
- For implementing this scheme, a proper cell, also involving social workers, be created so that by regular checking, minors and others can be released and rehabilitated in the society; and
- Considering the spread of the dreaded disease of AIDS, the State of Maharashtra shall frame a proper scheme with the active assistance of

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133 Vishal Jeet vs. Union of India, AIR 1990 SC 1412.
134 Public at Large vs. State of Maharashtra and others, 1997 (4) Bom CP 171.
135 Act endangering life or personal safety of others.
136 Kidnapping, abducting or inducing women to compel her marriage, etc.
137 Procuring, inducing or taking woman or girl for sake of prostitution.
138 Detaining a woman or girl in premises where prostitution is carried on.
the Municipal Corporation of Greater Mumbai for carrying out HIV
tests for the willing sex workers so that the disease may not spread like
wildfire in the city.

On the basis of the directions passed by the court, raids were carried out and about
473 minor girls and child sex workers were rescued by the police and kept in the
custody of juvenile homes, etc. The respondents pointed out in their affidavit that
a majority of the girls had come to Mumbai from the neighbouring states of
Karnataka, Kerala, Tamil Nadu, Andhra Pradesh, etc., and the North-eastern
states of Assam, etc., and also from countries like Nepal and Bangladesh. The
court constituted a committee for the rehabilitation of the rescued girls. The court
gave the following directions:

- The respondents, State government, to see that strict vigilance is
  maintained in the areas where sex workers normally operate and to rescue
  the child sex workers. Further, adequate steps should be taken to see that
  those who indulge in trafficking of women should be suitably punished.
  For this purpose, appropriate directions should be issued to the
  investigating agencies to take immediate steps. Sometimes, it is noticed
  that a police officer who detects this type of activity does not take
  immediate action on the ground that such duty is assigned to some other
  officer. In the view of the Court, this was not the proper approach because
  all police officers are bound to take immediate action in those cases
  where cognizable offences are committed. They may not investigate those
  cases but they can certainly report them to the proper officer and during
  such time take preventive measures. Section 107 of the Indian Penal Code
  1860 provides that the a person abets the doing of a thing if he
  intentionally aids, by any or illegal commission, the doing of that thing.
• It is high time that the state governments take serious steps to prevent forcible pushing of women and young girls into prostitution and to prevent the trafficking in women, i.e. buying and selling of young girls. These girls may be victims of kidnapping, they may be victims of various deprivation, they may be victims of circumstances beyond their control. For this purpose, regular raids should be carried out in the area where sex workers operate. On numerous occasions, it is reported in newspapers that persons from social organizations who dare to rescue these girls are manhandled, beaten, or threatened. To prevent such situations, for the time being the government must have a squad of police officers who can take immediate action.

• The State government shall set up an advisory committee, if not already set up, within four weeks from the date of the order in terms of Direction No. 2 of Paragraph 15 of the judgement of the apex Court in the case of Vishal Jeet\textsuperscript{139} to comply with the objects set out therein and to further take steps to implement the suggestions made by the advisory committee.

• The State is to set up homes for rehabilitation of rescued sex workers including children so as to enable these rescued sex workers to acquire alternative skills in order to enable them to have alternative source of employment. In a civilized state, it is the duty of the State to take preventive measures to eradicate child prostitution without giving room for any complaint of culpable indifference. One should not forget that these rescued girls are also fellow human beings who require some support and treatment for getting out of the immoral activities.

• To regularly carry out AIDS awareness programmes in the areas where sex workers normally operate.

\textsuperscript{139} Vishal Jeet vs. Union of India, AIR 1990 SC 1412.
• The State government is to submit periodic reports, by taking out notice of motion, either through the learned advocate-general or the learned government pleader, stating what steps are taken pursuant to the aforesaid directions and how many girls are rescued from the clutches of middlemen, whether medical treatment is given, and whether rehabilitation facilities are made available to them. Even recent newspaper reports indicate that pimps or middlemen are raising their muscle strength to prevent NGOs from receiving illegally confined girls.

• The State government is further to place before the court the compliance report of these directions.

Public at Large vs. State of Maharashtra and others\(^\text{140}\) this petition was relating to the rehabilitation of rescued girls. After hearing the various parties and the representations on behalf of various women’s social organizations, consensus on the following points was arrived at:

• There was unanimity on the point that the rescued girls should not be subjected to HIV test.

• If HIV tests have already been carried out on some of the girls, their identity should not be disclosed and they should not be informed of the result of the test.

• All the rescued girls must be subjected to medical examination for finding out their age and also given treatment if they are suffering from any other diseases.

• If the girls are found to be adult and are not covered by the Juvenile Justice Act, and if they do not desire to remain in the present institutes, they must be allowed to leave the said homes.

\(^\text{140}\) Public at Large vs. State of Maharashtra and others, Writ petition NO. 112 of 1996.
• The other State governments should be contacted and if those state governments were ready and willing to make arrangements for reception of these girls, the chairman, Juvenile Justice Board would pass necessary orders. The police should give them necessary escort and the girls must be handed over to the respective States on receipt of the request made by such states.

• Rehabilitation of these girls is possible if they are segregated in groups of ten or fifteen and thereafter counseling work is done.

• Parents of four minor girls who have been traced and who have been pleading that the police have wrongly taken them in custody should be released.

• Until the girls are sent back to their respective States, the State government will direct adequate number of probation officers to carry out the counseling job. The management in charge will permit the police to record statements of the girls. The police should trace the belongings of the girls and restore the same to them.

In Shri Freddie Peats case,\textsuperscript{141} due to the intervention of child rights activist Sheela Barse, the trial in the Freddy Peats Case followed some child friendly procedures like:

• Trial was held in camera in the chamber of the sessions judge. Similarly, examination of child victim/witnesses were also conducted in camera so that the witnesses are not ‘awed’ by the court atmosphere.

• All persons in the trial were in informal dress.

• No police officer was present inside the chamber or at the place where the trial was conducted.

\textsuperscript{141}State vs. Shri Freddie Peats and others, Sessions Case No. 24/1992, Criminal Appeal No. 4/1996.
• While recording evidence, the child was directed to face the judge so that he will not have occasion to look at the accused and be frightened. Similar procedures need to be followed in other CSA trials under the present legal system.

Prerna vs. State of Maharashtra and Others,\textsuperscript{142} Prerna, the petitioner is a registered organization which works in the red light areas of Mumbai and Navi Mumbai with the object of preventing the trafficking of women and children and rehabilitating the victims of forced prostitution. This petition was field in public interest to protect children and minor girls rescued from the flesh trade against the pimps and brothel keepers keen on re-acquiring possession of the girls. On 16 May 2002, the social service branch of the Mumbai police raided a brothel at Santacruz. Four persons who are alleged to be brothel keepers/pimps were arrested. Twenty four females were rescued. On conducting an ossification test, ten of them were found to be minors. In this case the Mumbai High Court passed the following directions which are of great significance for the children rescued from the brothels:

• No magistrate can exercise jurisdiction over any person under eighteen years of age whether that person is a juvenile in conflict with law or a child in need of care and protection, as defined by Sections 2(1) and 2(d) of the Juvenile Justice (Care and Protection of Children) Act 2000. At the first possible instance, the magistrate must take steps to ascertain the age of a person who seems to be under eighteen years of age. When such a person is found to be under eighteen years of age, the magistrate must transfer the case to the Juvenile Justice Board if such a person is a juvenile in conflict with law, or to the Child Welfare Committee if such a person is a child in need or care and protection.

\textsuperscript{142} Criminal Writ Petition No. 788 of 2002, Mumbai High Court.
A magistrate before whom persons rescued under the Immoral Traffic (Prevention) Act 1956 or found soliciting in a public place are produced should, under Section 17(2) or the said Act, have their ages ascertained the very first time they are produced before him. When such a person is found to be under eighteen years of age, the magistrate must transfer the case to the Juvenile Justice Board if such person is a juvenile in conflict with law or to the Child Welfare Committee if such a person is a child in need of care and protection.

Any juvenile rescued from a brothel under the Immoral Traffic (Prevention) Act 1956 or found soliciting in a public place should only be released after an inquiry has been completed by the probation officer.

The said juvenile should be released only to the care and custody of a parent/guardian after such parent/guardian has been found fit by the Child Welfare Committee, to have the care and custody or the rescued juvenile.

If the parent/guardian is found unfit to have the care and custody of the rescued juvenile, the procedure laid down under the Juvenile Justice (Care and Protection of Children) Act 2000 should be followed for the rehabilitation of the rescued child.

No advocate can appear before the Child Welfare Committee on behalf of a juvenile produced before the Child Welfare Committee after being rescued under the Immoral Traffic (Prevention Act 1956 or found soliciting in a public place. Only the parents/guardian of such juvenile should be permitted to make representations before the Child welfare Committee through themselves or through an advocate appointed for such purpose.
• An advocate appearing for a pimp or brothel keeper is barred from appearing in the same case for the victims rescued under the Immoral Traffic (Prevention) Act 1956.

(9) Weakness of Our Laws

The enforcement of law in India has been weak in dealing with abusers, exploiters, and traffickers of children. There have been several gaps in implementation. Some of them are:

• Under the Immoral Traffic Prevention Act 1986, 75 per cent of those arrested are females. It is evident that the spirit of the Act has not been followed as the victims are being harassed.

• The laws governing prostitution are biased against the prostitute. Under the Prevention of Immoral Traffic Act 1986, the customer is not an offender. For a fixed sum of money, a man is able to obtain women or girls to satisfy his sexual needs, with or without her consent. In other words, what constitutes rape outside the brothel is converted to prostitution inside the brothel and both children and women are deprived of their rights.

• Law relating to paedophiles is inadequate. Therefore, the police is generally ineffective when it comes to registering the crimes, especially when it actually comes to registering the cases against foreign tourists where passport officers and international links are involved. The judiciary and the police are not aware of the laws and rights of the children.

• There have been several instances of occurrences of sexual abuse and exploitation of children within families and homes. The law generally presumes that guardians of the child are innocent and it takes a lot of professional commitment to establish such an offence against such guardians.
• To prevent secondary victimization during interrogation/examination by investigating agencies as well as during court procedure, where a child is made to recall minute details of the sexual acts and experience, and is grilled in getting proof, a model code of conduct\textsuperscript{143} should be evolved. There should be a standardized questionnaire for examination of the prosecutrix, indicating the parameters for supervision.

• Questioning should be done mostly by women police officers.

• Adopting a multidisciplinary approach to the crime should be attempted by co-opting additional members into the investigating team so as to include doctors, social workers, co-opting mental health exerts counsellors, or anyone who would be useful in the overall rehabilitation of the child.

• The venue of the trial should be a safe place other than the usual court buildings.

• Police officers should not be in uniform while examining the child and specially trained child-friendly police officers should examine the child.

• The age of the child in applicable Acts varies. The JJ Act defines child as below eighteen years of age. The Child Marriage Restraint Act also specifies eighteen years as the cut-off age for restraining child marriage. Section 375 IPC identifies wife as not being under fifteen years of age and Section 376(2)(f) as not under twelve years of age. The PITA sees a female child as not exceeding sixteen years of age, while a minor is up to eighteen. The age of the child should be uniformly defined as upto eighteen years. There should be a proper mechanism to determine the age of the child.

\textsuperscript{143} Report on the Six Regional Consultations on Sexual Exploitation and Trafficking of Children, sponsored by department of women and child development, Government of India, and UNICEF, India.
• Examination of the victim/witnesses should be in the presence of social workers/women police/parents or others who have the trust or confidence of the child. Examinations should also be done in a familiar atmosphere and not in police stations.

• The laws governing prostitution are biased against the prostitute. Under the Prevention of Immoral Trafficking Act, the customer is not an offender. Under the Indian Penal Code, transmitting a sexually transmitted disease is an offence. The prostitute can be isolated compulsorily if she is found to have AIDS. The rescue operations have led to a pate of glaring human rights abuses of the prostitutes including right to freedom from violence, right to shelter and residence, right to seek legal help, right to family, right to information and right to representation.

• The mental health aspects of the children have to be kept in mind. There should not be too much pressure on the child to speak all the details of the traumatic incident.

• Formation of a nodal cell at the State level to deal with interstate and inter-country dimensions of abuse may be tried.

• The Prevention of Immoral Traffic Act 1986, to be more effective, needs the following measures:
  – Notification of Public place.
  – Closure of brothels keeping minors.
  – Setting up of special courts for speedy trials.
  – Rescue operations to be more humanly and sensitively carried out along with a rehabilitation plan protecting the human rights of the prostitutes.
  – Age verification of the rescued children to be immediately carried out. Infact it should be linked to the rescue operations.
These are some emerging issues which needs special consideration by our legislators and the government.

(D) Child Marriage: Child Marriage involves the marriage of anyone below the age of 18. It is the marriage of a child to an adult or another child, and may be legally condoned by national laws. In India, child marriage is a centuries old tradition, where children as young as two or three years were often married or given away in marriage. However, in traditional societies, marriages were not consummated till children were much older and were perceived to be able to understand the responsibilities intrinsic to marriage over time, giving children in marriage has turned into a major social evil entailing issues of child rights, sexual abuse, etc.

Child Marriage is thus child abuse and a violation of the human rights of the child. It has an extremely deleterious effect on the health and well being of the child. It is a denial of childhood and adolescence; it is a curtailment of personal freedom and opportunity to develop to a full sense of selfhood as well as a denial of psycho-social and emotional well-being and it is a denial of reproductive health and educational opportunities. The girl child is the most affected and suffers irreparable damage to her physical, mental, psychological and emotional development.\textsuperscript{144}

(1) Causes and consequences of Child Marriage

(i) Causes for Child Marriage: Child Marriages continues to be a fairly widespread social evil in India. The phenomenon of child marriage can be attributed to a variety of reasons. Some reasons for child marriage includes:

- Illiteracy and lack of education
- Gender discrimination and unequal status of women.

• Tradition, culture and values based on patriarchal norms.\textsuperscript{145}
• Protection for the girls against unwanted masculine attention.
• Economic necessity and reasons, e.g. higher dowry needs to be given to daughters when they are married at a later age.
• Lacunae and shortcomings in the existing laws.
• Lack of will and action are part of the administration.\textsuperscript{146}
• Securing the girl economically and socially for the future.
• The institution of marriage is used by some communities and societies to strengthen economic and social ties between different families and even communities.

(ii) Consequences of Child Marriage :- Child Marriage is violation of Human Rights. It forces children to assume responsibilities for which they are often physically and psychologically unprepared. It can have serious harmful consequences for children, including:

(a) Risk of Sexual and Reproductive ill health :- Young brides face this problem very often because of their exposure to early sexual activity and pregnancy. Complications and mortality are common during childbirth for young pregnant girls. Risks associated with young pregnancy and child bearing include an increased risk of premature labour, complications during delivery, low birth-weight, and a higher chance that the newborn will not survive.\textsuperscript{147} Young mothers under age 15 are five times more likely to die then women in their twenties.\textsuperscript{148} Maternal mortality amongst girls aged 15-19 years is about three times higher.\textsuperscript{149} Young women also suffer from a high risk of maternal morbidity.

\textsuperscript{145} The girl in our patriarchal set up is believed to be parki thepan (somebody’s property) and a burden.
\textsuperscript{146} Supra n 144.
\textsuperscript{147} Maggie Black, “Early Marriage, Child Spouse”, UNICEF, Innocenti Research Centre, Digest no. 7 (2001) p. 10.
\textsuperscript{149} A. Barua, Hemen Apte, Pradeep Kumar, “Care and Support of Unmarried Adolescent Girls in Rajasthan”, Economic and Political Weekly, vol. XLII No. 44, 3\textsuperscript{rd} November 2007, p. 54.
(b) **Risk of infection with sexually transmitted disease** :- Young brides also run the risk of catching diseases from their respective spouses, as older husbands often engage in sexual relations with other women outside the marriage. Young married girls do not have bargaining power in the marriage and therefore cannot negotiate safe sex and are deemed vulnerable.

(c) **Sudden end of Education** :- There is a close relationship between marriage and the education of the girl child. Education makes the girls aware of their rights and gives them self-confidence. But once married, girls tend not to go to school and so they lose out on the benefits of education: better health, lower fertility, and increased economic productivity. They also lose out on any form of sexuality education, which is rarely taught before secondary school.

(2) **Magnitude of Problem** :- The practice of child marriage is rampant in many parts of the country and the incidence of it is highest in the state of Rajasthan, Bihar, Uttar Pradesh, Chattisgarh and Madhya Pradesh. In state like Rajasthan, mass marriages of very young children take place on occasions like the *Akha Teej*. According to 1991 census, the percentage of married females in the total number of females in the age group 10 to 14 was 13.2 in Rajasthan, the highest in the country. In second place was Madhya Pradesh at 8.5 percent, followed by Uttar Pradesh at 7.1 percent. For the country, the percentage of married women under the age of 18 stood at 53.3 percent.\(^{150}\)

The situation did not change substantially in the following years. In a study carried out between the years 1998 to 1999 on women aged 15-19 it was found that 33.8% were currently married or in a union.\(^{151}\) The 2001 census reports that there are nearly 300,000 girls under 15 who have given birth to at least one child.\(^{152}\) This showed that child marriage is far more prevalent amongst girls.

\(^{150}\) *Supra*, Chapter-2 n. 5.

\(^{151}\) The Demographic and Health Survey (DHS) figures retrieved from UNICEF based website, www.childinfo.org., accessed on Nov. 2007.

National Family Health Survey of 2005-2006 (NFHS – 3) carried out in 29 states confirmed that 45% of women currently aged 20-24 years were married before the age of 18 years. The percentage was much higher in rural areas (58.5%) than in urban areas (27.9%) and exceeded 50% in eight states.\(^\text{153}\)

The NFHS-3 findings show a slight rise in the median age of marriage for women aged 20-49 from 16.7\(^\text{154}\) in NFHS-2 to 17.2. However, this data does not reveal how many marriages are taking place even below the age of 15. Furthermore, with about 315 million people in India being in the age group of 10-24 years (RGI 2001)\(^\text{155}\), and 44.5% of women aged 20-24 still getting married by the time they are 21, the improvement seems trivial.

In 2006 the Hindustan Times reported that 57% of girls in India are married off before they are 18 as per the International Centre for Research on Women.\(^\text{156}\)

According to a report of UNICEF, 40 percent of the world’s child marriages take place in India, resulting in a vicious cycle of gender discrimination, illiteracy and high infant and maternal mortality rates.\(^\text{157}\)

(3) **International and National Framework on Child Marriage**

(i) **International Framework** :- Some international conventions also support the view that child marriages should be eradicated. Although different societies have different perceptions of childhood, but most government have committed through the UNCRC to ensure the overall protection of children and young people under 18 and to promote their full development.

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\(^{153}\) National Family Health Survey of 2005-2006 (NFHS-3), www.infhsindia.org (The NFHS-3 facts and figures mentioned hereafter have all been retrieved from this website), accessed on Oct. 2007.


\(^{156}\) The Hindustan Times Daily, 29\(^{th}\) August 2006

\(^{157}\) The Hindu, 18\(^{th}\) Jan 2009.
(a) **Universal Declaration of Human Rights (1948)**: Provides that men and women are entitled to equal rights in marriage and marriage breakdown, and that both potential spouses should freely and fully consent to the marriage vide Article 16(2).

(b) **Convention on the Abolition of slavery and practices similar to slavery (1956)**: Consider forced marriage akin to slavery.\(^{158}\)

(c) **Convention on Consent to Marriage, Minimum age for Marriage and Registration of Marriages (1962)**: Stipulates that a marriage requires the consent of both parties (Article 1); calls upon parties to eliminate the marriage of girls under the age of puberty and requires that states stipulate a minimum age of marriage.

(d) **The ICCPR (Article 23)**\(^{159}\) and the **ICESCR (Article 10)**\(^{160}\): Again reiterate that marriage shall be entered into with free and full consent of both parties.

(e) **The Convention on the Elimination of all forms of Discrimination Against Women (CEDAW) (1979)**: Which India has ratified, specially addresses age of marriage. Article 16(2) provides that the betrothal and the marriage of a child shall have no legal effect, and all necessary action, including legislation, shall be taken to specify a minimum age for marriage and to make the registration of marriage in an official registry compulsory.”

(ii) **National Framework**: In the post-I world war India, a movement for the social and educational reforms was fairly strong and several measures social reforms were enacted. Pursuant to the same reformist zeal, the child marriage restraint act 1929 was passed. The Act is popularly known as Sharda Act, on the name of the person who was responsible for this reform.

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\(^{158}\) **Universal Declaration of Human Rights**, Article 1(c).


(a) The Child Marriage Restraint Act, 1929 :- It was amended in 1978, which raised the minimum age of marriage to 18 for girls and 21 for boys. This has indeed been very progressive since earlier the minimum age of marriage for girls and boys was 14 and 18 respectively. This was subsequently amended in 1949 to raise the age to 15 for girls while no change was effected in case of boys. Under this Act. Several persons can be punished for allowing, contracting, performing or being involved in a child marriage. They are like:

(i) A male who contracts child marriage if he is over 18 years but below 21 years of age shall be punished with simple imprisonment which may extend upto 15 days or with fine which may extend upto Rs. 1000 or both (sec. 3)

(ii) A male who contracts child marriage if he is over 21 years of age shall be punished with imprisonment which may extend upto 3 months and with fine (Section 4)

(iii) A person who perform or conducts the child marriage, unless he can prove he had no reason to believe it was a child marriage, shall be punished with imprisonment which may extend upto 3 months and with fine (Section 5)

(iv) The parents of guardian of the child who permits, negligently fails, or does any act to, promotes such child marriage can be punished (Section 6).

Although this Act now has been repealed by the new Prohibition of Child Marriage Act, 2006.

(b) Age of Marriage under Various Personal Laws :- The personal laws in India are based on religion. Marriages among the Hindus are regulated by the provisions of the Hindu Marriage Act 1955. A valid marriage between two Hindus can take place where the bridegroom has completed the age of twenty-one years and the bride has completed the age of eighteen years, apart from other conditions like not having a living spouse, not being of unsound mind, etc. Thus, neither party to a marriage amongst Hindus can any longer be of a child’s age,

161 The Act applies to any person who is a Hindu by religion in any of its forms or developments (including a Virashaiva or a Lingayat or follower of the Brahma, Prarthana, or Arya Samaj), to any person who is Buddhist, Jain, or Sikh by religion and to any person who is not a Muslim, Christian, Parsi, or Jew by religion.
that is, of less than eighteen years of age which is the age of majority. Any marriage made in contravention of the age limits has not been declared to be void or voidable under other provisions of the Act, but such marriages have been made punishable with simple imprisonment up to fifteen days and fine up to one thousand rupees or with both. Both the bride and bridegroom are punishable if they marry before their eligible age. Since marriage can be solemnized only between two major persons, there is no question of obtaining consent of the guardian of the persons for the purpose of marriage under the Act. But if the marriage of a girl has been solemnized before she attained the age of fifteen years, she can repudiate the marriage after attaining fifteen years but before attaining the age of eighteen years whether or not the marriage has been consummated. She can also seek divorce thereafter from her husband through the court.

In Muslim law, it is essential that parties at the time of marriage should have attained puberty, which is a biological fact to be ascertained by evidence. Puberty is generally taken to come at the age of fifteen years. According to the Hanafi School of Law, the earliest stage of puberty is twelve years for boys and nine years for girls. The marriage of a person below the age of puberty is to be solemnized by a guardian and such marriage is not void. A marriage arranged by the father or parental grandfather binds the minor. The minor cannot annul such marriage on attaining puberty if the guardian had acted in the interest of the minor. If a guardian other than the father or grandfather arranges the marriage, the minor can exercise the ‘option of puberty’ and repudiate the marriage within a reasonable time if it is not consummated.

The Christian Marriage Act 1872

A minor has been defined as a person who has not completed the age of twenty-one years and who is not a widower or widow. A minor under the Act can marry with the consent of the father and, if he is dead, with the consent of the guardian, and if there is not guardian, with the consent of the mother.
The Parsi Marriage and Divorce Act 1936

A valid marriage amongst Parsis can take place between a boy who has completed the age of twenty-one years and a girl who has completed the age of eighteen years. Since only major persons can marry under the Parsi law, there cannot be any child marriage amongst Parsis.

The Special Marriage Act 1954

The age of marriage under this Act is twenty-one years for males and eighteen years for females. Any marriage solemnized in contravention of the age requirement will be null and void and can be nullified by the court.

(c) Validity of Child Marriages under various Personal Laws

The CMRA\textsuperscript{162} 1929 is applicable to all communities and child marriages are not void under the CMRA 1929. The marriages if performed under the personal laws are not void. The marriages are void only under the Special Marriage Act 1954 and the Parsi Marriage and Divorce Act 1939, but under all the other personal laws, i.e. under the Hindu Marriage Act 1955, Christian Marriage Act 1872, and the Muslim law, the marriages are valid. Marriage below the age of consent is valid under Christian law provided it is with the consent of the guardians. Under Muslim law, every Muslim of sound mind, who has attained puberty may be validly contracted in marriage by their guardians.\textsuperscript{163} The persons concerned, as provided under Sections 3, 4, 5, and 6 of the Act, can be punished but the marriage remains valid. If such child marriages had been rendered void, the sufferer would have been the bride as a stigma of ‘already once married’ would have been attached to her and because the marriage would be illegal she

\textsuperscript{162} Child Marriage Restraint Act, 1929.

\textsuperscript{163} Baillie, Digest of Muhammedan Law, London, Pt I(1865), Pt II(1869) p. 50. Under the Shafei, Ithana Ashari and Ismaili laws, the father or father’s father can act as the marriage guardian for a minor. In so far as Hanafi law is concerned, the list is not so restricted and includes other relations.
would not receive any maintenance. It is also to be noted that women are not punished under the CMRA 1929. Perhaps because of the then social notions, it was presumed that the woman had little say in finalizing and performing marriages. Secondly, the main objective of the Act was preventive rather than punitive.

(d) Repudiation of Child Marriages under various Personal Laws:

The Hindu Marriage Act 1955 gives an option to the girl to opt out of a child marriage and repudiate it if her marriage was performed when she was below fifteen years. However this has to be done before she attains the age of eighteen years. The boys are not given such an option. Under Muslim law, a parent or guardian can validly arrange for the marriage of the child but the child has the option to repudiate the marriage on attainment of puberty. In the absence of evidence, puberty is generally assumed to be at fifteen years. A minor whose marriage has been contracted by any guardian other than the father or father’s father has the option to repudiate the marriage on attaining puberty. The mere exercise of the option of repudiating such a marriage on attaining puberty does not act as dissolution of the marriage unless the act of repudiation has the approval of the court.

(e) Inadequacies in Law

The Child Marriage Restraint Act, 1929 is openly flouted with thousands of child marriages being performed. The provision of appointing child marriage prevention officers is not being implemented. During 1999, the police disposed of

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164 The lowest age of puberty according to its natural signs is twelve in males and nineteen in females. When the signs do not appear both the sexes are held to be adult when they have completed their fifteenth year. See Fatwa Alamgiri, Vol. V, p. 93; See also Md. Idris vs. State of Bihar, 1980 Cr LJ 764.
165 Supra n. 163. It has been held that no formal decree is required to conform the exercise of option of repudiation by a spouse. However, an order of judge is necessary to give it the force of law. See Mafizuddin Mondol vs. Rahima Bibi (1933)58 Cr. LJ 73, 1934 AC. 104; Pirmahommad vs. State of Madhya Pradesh AIR 1960 MP 24.
fifty-eight cases out of sixty-eight including pending cases for investigation from previous year. In forty-five cases, the police submitted charge sheets. Of the 244 cases for trial, forty-nine cases were decided by the courts, but of which only sixteen ended in convictions. The age of sexual consent whether a girl is married or not should be eighteen years. The Child Marriage Restraint Act 1929 needs to be made more stringent. Perhaps, the representatives of the local self-governments or panchayats could be given the responsibility of enforcing this legislation.

Under the current laws, if a child is sexually abused, a case can be filed for statutory rape or 'outraging the modesty of the woman' in the case of girls and for 'unnatural sexual offence' in the case of boys. The ordinary criminal laws are totally inadequate to protect the children who are victims of sexual abuse. These legislations do not include the common forms of child sexual abuse, nor their impact on the children.

The CMRA (Child Marriage Restraint Act), however remained ineffective for a variety of reasons. In a study by UNICEF in 2001 it was found that the number of prosecutions did not exceed 89 in any one year. According to the National Crime Bureau Records 2005, 122 incidences were reported in the country under the CMRA in 2005, compared to the 93 cases that were reported in 2004. These statistics are obviously not an accurate reflection of the number of cases of child marriage which are accruing in the country. Most cases of child marriage are not being reported or being ignored by the police authorities. Even

166 Crime in India, 1999.
167 Supra n. 118 p. 224.
168 Supra n. 147
from the reported 122 cases, only 45 resulted in conviction. This finally lead to the Government to proposed an improved legislation.

(f) The Prohibition of Child Marriage Act (PCMA) 2006 :- The Child Marriage (Restraint) Act, 1929 with some modification was replaced by this Act. The new Prohibition of Child Marriage Act, 2006 (PCMA) brings about far reaching changes in the law as under:

(i) Section 3 of this Act states that “Every child marriage shall be voidable at the option of contracting party who was a child at the time of marriage. It allows for a petition to be filed to declare the marriage void within 2 years of the child attaining majority.

(ii) The Act also allows for the maintenance and residence for the girl till her remarriage from the male contracting party or his parents.

(iii) The Act further allows for appropriate orders for custody for any child born from marriage.

(iv) Enhancement in punishments for male adults marrying a child and persons performing, abetting, promoting, attending etc. a child marriage with imprisonment upto 2 years of with fine upto 1 lakh rupee or both.

(v) The same punishment is also prescribed for anyone who solemnizes a child marriage including by promoting such a marriage, permitting it to be solemnized or negligently failing to prevent the marriage. No woman can however be punished with imprisonment. The Act also makes all offences cognizable and non-bailable.

(vi) Notwithstanding that a child marriage has been annulled, every child of such marriage shall be deemed to be a legitimate child for all purpose.

(vii) States to appoint child marriage prohibition officers whose duties include prevention of solemnization of child marriages, collection of evidence for

\[170\] Ibid.
effective prosecution, creating awareness and sensitization of community etc. **Whether further amendment is required in the Act of 2006**: The present law while making child marriage voidable under a gender neutral provision has also given a male child the right to get out of a forced marriage. The law, however, does not make a marriage invalid whether it is performed when the child is an infant or later at puberty or adolescence. Moreover, under the criminal law, however, section 375 of Indian Penal Code makes it a crime to have a sexual relationship with a child under 15 years of age. A contradiction therefore remains between PCMA and Section 375 I.P.C. It is relevant to mention that prior to the new Act a parliamentary standing committee had examined the government Bill on the prevention of child marriage and suggested that child marriages solemnized after the introduction of new Act should be made void *ab initio*. The standing committee had pointed out that research had shown that a “girl child has to suffer irreparable losses due to biological factors and liability to sustain pressure of marriage at an early age.”

(g) **The National Plan of Action for Children (NPA), 2005**: Aims at eliminating child marriage by 2010.

(4) **Judicial Response to Child Marriages**: Smt. Sushila Gothala’s case was a public interest litigation. The petitioner had approached the court under Art 226 of the Constitution of India for issuance of direction to the respondents to stop immediately the menace of child marriage in Rajasthan in an effective manner, and further for a direction to punish the officer who is responsible for not prohibiting the child marriage, as per the provisions of the Child Marriage Restraint Act 1929. On the occasion of *Akha Teej* every year, child marriages

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173 The festival of Akha Teej is observed every year in the state of Rajasthan. It falls sometimes in the month of April and sometimes in the month of May.
are performed in contravention of the Act as it is considered as an auspicious day for performing marriages.

The writ petition was disposed of with the observations that this social evil can be eradicated only if the people of Rajasthan themselves revolt against this age-old custom, which is primitive in nature and cannot be justified by any civilized society. The court further held that as per Section 13 of the Act, if the child marriage prevention officers have not been appointed, the government should consider the feasibility of making the provisions of the Act more stringent, and punishment for contravention of the Act should be severe.

In William Rebello’s case, an application was filed for dispensing with the age limit of the marriage and to give necessary directions to the civil registration authority to register the marriage of the applicants. As Applicant No. 1 was not 21 years of age and could not marry, the court was requested to remove the impediment as both the parents had given consent for such marriage. In the application, it was also contended that as a result of a friendship between Applicants No. 1 and 2, Applicant No. 2 had become pregnant and the pregnancy was twenty weeks old.

The application for the removal of the impediment was entertained under the provisions of Article 5 of the Portuguese Civil Code and the trial judge, on the basis of the submissions made, considered the application and thought it fit to remove the impediment and accordingly allowed the application.

In P. Venkataramana’s case, the question placed before the Full Bench was ‘whether a Hindu marriage governed by the provisions of the Hindu Marriage Act 1955, where the parties to the marriage or either of them are below their respective ages as set out in Clause (iii) of Section 5 of the Hindu Marriage Act, is void ab initio and is no marriage in the eye of law’.

It was held that clause (iv) inserted in Subsection (2) of Section 13 clearly indicates the mind of the legislature that the violation of clause (iii) of Section 5 is not to render the marriage either void or voidable; but in case the bride was below

175 P. Venkataramana vs. State, AIR 1977 AP 43 (FB).
the age of fifteen years at the time of solemnization of the marriage and she has repudiated the marriage after attaining the age of eighteen years, a decree for divorce can be obtained whether the marriage was consummated or not. If the marriage performed in contravention of clause (iii) of Section 5 was void ab initio, there was no necessity to insert clause (iv) in Subsection (2) of Section 13. It may be pointed out that, by insertion of this clause (iv), the legislature has given to the Hindus an option of what is known in Mohammedan law as Khyar-ul-bulugh (option of puberty). But the legislature has not proceeded on the footing that the marriage between the spouses, when it is performed in violation of clause (iii) of Section 5, is void ab initio. This amendment reinforces and confirms the view that we are taking on a pure interpretation of the different provisions of the Hindu Marriage Act 1955 even as it stood prior to its amendment by the Marriage Laws (Amendment) Act 1976.

It was held for these reasons that the decision of the Division Bench of this High Court in P.A. Saramma’s case, does not lay down the correct law and that any marriage solemnized in contravention of clause (iii) of Section 5 is neither void nor voidable, the only consequence being that the persons concerned are liable for punishment under Section 18 and further if the requirements of clause (iv) of Subsection (2) of Section 13, as inserted by the Marriage Laws (Amendment) Act 1976 are satisfied, at the instance of the bride, a decree for divorce can be granted. Barring these two consequences, one arising under Section 18 and the other arising under clause (iv) of Subsection (2) of Section 13, after the enactment of the Marriage Laws (Amendment) Act 1976, there is no other consequences whatsoever resulting from the contravention of the provisions of clause (iii) of Section 5.

(i) End of Child Marriage: The recommendations of the Law commission are what they are recommendations. It is for the govt. to accept and act upon them. In its latest report, the commission had made some meaningful suggestions like reducing the marriage age of boys from 21 to 18 and declaring all marriages

177 The Tribune, 8th Feb. 2008.
below the age of 16 as void. It may appear going against the national and international trend when the age of consent of boys is reduced but it takes into account the ground reality. As the commission has pointed out, there is no logic in keeping a difference in the marriage age of boys and girls, as is the case now. Even today the law does not accept child marriages. However, there have been several court judgments upholding such marriages mainly to protect the interest of children. A recent judgment of the Delhi High Court reflected that marriages solemnized in contravention of age prescribed U/S 5 (iii) of the Hindu Marriage Act, 1955 are neither void nor voidable.\textsuperscript{178} The court held that judgment was based on public policy and the legislature was conscious of the fact that if marriages, performed in contravention of the age restriction, are made void or voidable, it could lead to serious consequences mainly for children born out of such wedlock. The view that child marriages were valid was upheld in many other judgments like \textit{Durga Bai} vs. \textit{Kedarmal Sharma},\textsuperscript{179} \textit{Shankerappa} vs. \textit{Sushilabai}\textsuperscript{180} and \textit{Ravi Kumar} vs. \textit{The State & Anr}.\textsuperscript{181}

The commission has come up with the suggestion that while marriages below the age of 16 are totally unacceptable and therefore void those between the age of 16 and 18 can be declared void if one of the spouses makes a plea for it. This will ensure the interest of the adolescents who may have been forced into marriage they do not want. To believe that once the govt. accepts these recommendations and enacts the necessary laws for the purpose, child marriage will come to an end is to be naive. Even though child marriages are illegal, thousands of such marriages are solemnized in states like Rajasthan. The administration turns a blind eye to the social practice because it lacks the will to curb it. It is submitted that child marriage are directly linked to ignorance and poverty. The problem is acute in states and communities where illiteracy is widely

\begin{footnotesize}
\bibitem{178} Manish Singh vs. State of Govt. of NCT. And Ors., 2006(1) HLR 303.
\bibitem{179} 1980 (Vol. VI) HLR 166.
\bibitem{180} AIR 1984 Kar. 112
\bibitem{181} MANU/DE/1497/2005.
\end{footnotesize}
prevalent. Educated girls know that early marriages and the resultant early motherhood deprive them of the pleasure of childhood. An adolescent girl is not physically and psychologically prepared to cope with the pressure of marriage. That is why educated boys and girls prefer to marry late. The problem of child marriages can be solved once government and non-governmental agencies, including religious and social organizations, make an all out bid to spread education which alone can liberate people from meaningless customs and practices, not to mention superstitions.

It is further submitted that the law commissions recommendation for reducing the age of consent for boys from 21 to 18 is not at all a right suggestion. Marriage is the time of adjustment in life and the age of 18 years is too low for entering into a practical and real life drama in such a competitive world where marriage means financial stability.

(ii) Issues of concern :- Child marriage is a grave injustice towards children, and like any other social injustice, it cannot be seen in isolation. Measures to curb it have to stem from situating it in the total structure of society, interrelating to existing patriarchal, social and cultural structures, class, religion and customary practices. It thus calls for comprehensive government measures, including measures to provide genuine development opportunities to girl children. Lack of sufficient data and inadequate implementation of the provisions concerning registration of marriage as affect all planning and interventions. Most incentive measures undertaken by the government relate to enhancing opportunities for girls to go to school and get educated. The prevailing social circumstances in the country, however creates a mind-set in which the major concern of parents is early marriage of their daughters. Thus, mind-set needs to be addressed if girls are to be benefited from development opportunities.
Accountability for the well-being of girl children must be reflected in the conduct of all those who have the responsibility to plan and implement the programmes and monitor implementation of law.

Further, inadequate protection for those who have stood up to fight the practice of child marriage only strengthen the perpetrators of such blatant violation of human rights of children. Rape of Bhanwari Devi, a Women Development Project (WDP) worker in Rajasthan faced the wrath for fighting child marriage. The chopping up of the arms of an Anganwari worker in MP who tried to stop a child marriage will also never be forgotten. The absence of any protection for such people only points to the inadequacy of the administrative and judicial involvement and commitment.

(5) Legal Framework Against on-line pornography

(i) Cyber crime convention :- Cyber crime is the most recent type of crime which has become biggest challenge for police and prosecution. Tempering with source code, hacking into computer system, publishing obscene information like pornography are the current example of cyber crime. This convention was entered into force in July 2004 is the only binding international treaty on the subject. Art. 9 of the cyber crime convention provides punishment\(^{182}\) for child pornography. It provides :-

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\text{"Whoever commits internationally and without right the following conduct producing child pornography for the purpose of its distribution through a computer system, distributing or transmitting child pornography through a computer system; producing child pornography through a computer system; possessing child pornography is a computer system or on a computer data storage medium."}
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\(^{182}\) It will be a criminal offence under domestic law of the member states.
(ii) Young Persons (Harmful Publications) Act 1956

In this Act, young person\textsuperscript{183} means a person under the age of twenty years. It is an offence to sell, let, hire, distribute, or publicly exhibit harmful publications.\textsuperscript{184}

(iii) Information Technology Act 2000

Under Section 67 of the Information Technology Act 2000, publication and transmission of pornography is an offence.

**Information Technology Act, 2000** :- As per the Indian Information Technology Act 2000, chapter XI, section 67, the Government of India clearly considers the publication or transmitting obscene material in electronic form as a punishable offence. The section states as following—

**Section 67 – Publishing of information which is obscene in electronic form.**

"Whoever publishes or transmits or causes to be published in the electronic form, any material which is lascivious or appeals to the prurient interest or if its effect is such as to end to deprive and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it, shall be punished on first conviction with imprisonment of either description for a term which may extend to five years and with fine which may extend to one lakh rupees and in the event of a second or subsequent conviction with imprisonment of either description for a term which may extend to five years and with fine which may extend to one-lakh rupees and in the event of a second or subsequent conviction with imprisonments of either description of a term which may extend to ten years and also with fine which may extend to two lakh rupees."

Keeping in view the fast growing menace of on-line crime against child i.e child pornography etc., Government had introduced the Information Technology (Amendment) Bill 2006 in the Lok Sabha on 15\textsuperscript{th} December 2006. Both Houses of Parliament passed the bill on 23\textsuperscript{rd} December 2008. Subsequently the

\textsuperscript{183} Young persons (Harmful Publication) Act 1956, Sec 2(C)

\textsuperscript{184} Id; Sec. 3(1).
Information Technology (Amendment) Act, 208 received the assent of President on 5\textsuperscript{th} February 2009 and was notified in the Gazette of India.

An Amendment vide ITAA 2006 was also made in section 67. Now as per section 67- 

"Whoever publishes or transmit or causes to be published in the electronic form, any material which is lascivious or appeals to the prurient interest or if its effect is such as to tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it, shall be punished on first conviction with imprisonment of either description for a term which may extend to two years and with fine which may extend to two years and five lakh rupees and in the event of a second or subsequent conviction with imprisonment of either description for a term which may extend to five years and also with fine which may extend to ten lakh rupees."

A new section 67A which is about the punishment for publishing or transmitting of material containing sexually explicit act, etc. in electronic form was also inserted vide ITAA 2006. It provides:-

"Whoever publishes or transmits or causes to be published or transmitted in the electronic form any material which contains sexually explicit act or conduct shall be punished on first conviction with imprisonment of either description for a term which may extend to seven years and also with fine which may extend to ten lakh rupees"

This section also provides us an exception. According to it, this section and section 67 does not extend to any book, pamphlet, paper, writing, drawing, painting, representation or figure in electronic form- (i) The publication of which is proved to be justified as being for the public goods on the ground that such books, pamphlet, paper, writing, drawing, painting, representation or figure is in the interest of science, literature, art or learning or other objects of generals concerns; or (ii) which is kept or used bona-fide for religious purposes.
From the day the Act become effective, it had a huge positive impact, primarily because India does not have a special legislation to tackle child pornography. To that extent new IT Act is path breaking.

(iv) Regulation of Cyber Cafes

Attempts to regulate cyber pornography are being made. For instance, the Government of Maharashtra and the Mumbai police have attempted to bring cyber cafes within the purview of the Rules for Licensing and Controlling Places of Public Amusement (Other than Cinemas) and Performances for Public Amusement Including Cabaret Performances, Melas and Teammates Rules 1960 (‘the Amusement Rules’) framed under Section 13 of the Mumbai Police Act 1951.

(v) The Indian Penal Code, 1860 :-Sec. 293 & 293 deals with the crime.

Sec. 292 :- This section of Indian Penal Code deals with sale, etc of obscene books and the punishment prescribed in this section for the offence on first conviction with imprisonment of either description for a term which may extend to two years, and with fine which may extend to two thousand rupees, and in the event of a second or subsequent conviction, with imprisonment of either description for a term which may extend to five years and also with fine which may extend to five thousand rupees.

Now, the test of obscenity is to judge whether the tendency of the matter charged as obscene is to deprive and corrupt those whose minds are open to such immoral influences and into whose hands a publication of the sort may fall. But the term “obscenity” as such not defined in Section 292 which was introduced into the code by the Obscene Publication Act, 1925. It leads to the result that the judge has to make a subjective determination as to what lies notion of obscenity is and see whether the impugned article falls within that determination on the one hand it may be said to be good as it does not set a per standard for all purposes on
the other hand. The vagueness is generally abhorrent and to the strict idea of legal liability particularly in case of criminal offence.

Section 293: - Specifies in clear term, the law against sale, etc. of obscene objects to minors. The section prescribes punishment of imprisonment up to 3 years and with fine of two thousand rupees on first conviction or a subsequent conviction, imprisonment which may extend to seven years with fine of 5,000 rupees.

The above sections of different laws, Indian Penal Code and the Information Technology Act, 2000 make it clear that the chief ingredient of obscenity are as follows:

(i) it is lascivious or appeals to the prurient interest or
(ii) if its effect is such as to tend to deprave and corrupt person who are likely to read or see the matter contained in the publications.

Difference between obscenity and pornography: - There is a difference between obscenity and pornography. The latter denotes writings, pictures etc. intended to arouse sexual desires, while obscenity includes writings etc. not intended to do so but which has that tendency. Both offend public decency and morals. Pornography is obscenity in a more aggravated form.  

The offence of sending obscene video clips through multimedia messaging service is definitely covered under section 292 to 294 IPC but this punishment does not carry any element of deterrent. If the legislation is serious in controlling obscenity it has to make amendment in the Indian Penal Code like the proposed amendment Information Technology Bill.

(6) Government Initiative in the area of Exploitation and Trafficking in India: - The National Plan of Action for Children (1992) includes children of prostitutes in the category of children in especially difficult circumstances, but does not suggest any goals or activities for them. Based on a Supreme Court

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\[185\] P.K. Somnath vs. State of Kerala, 1990 Cr.L.J. 542 (Ker.).

Supra n. 49 pp. 271-272.
judgment in July 1997\textsuperscript{187}, a committee was formed to make an in-depth study of the problems of prostitution, child prostitutes, and children of prostitutes, with the secretariat of the Department of Women and Child Development (DWCD) as its chairperson. The report of this committee\textsuperscript{188} includes a plan of action to combat trafficking and commercial sexual exploitation of women and children, aiming at bringing to the mainstream and reintegrating these women and child victims in the society. The Plan includes action points such as prevention of trafficking, awareness generation and social mobilization, health care services, education and childcare, housing shelter and civic amenities, economic empowerment, legal reforms and law enforcement, rescue and rehabilitation, and so on. It recommends setting up of night-care shelter, education support programme, institutionalization. *Anganwadi*-cum-day-care centres or *Balwadi*, non-formal education, formation of self-help groups by women victims, and community education based on experience of the Devadasi Rehabilitation Programme in Karnataka and Prerana in Mumbai. The DWCD has prepared guidelines for proposals for projects to combat trafficking of women and children through prevention, rescue, and rehabilitation in destination and source areas, including trafficking under sanction of tradition.

There are some networks and organizations that work in the areas of trafficking.

There include the following.

(i) **End Child Prostitution in Asian Tourism (ECPAT)** :- This has been monitoring and acting against sex tourism in Asia. ECPAT promotes transactional governmental cooperation and extraterritorial legislation, which allows governments to bring their nationals to trial for crimes committed in other countries, and draws public attention to the arrest, detention, and conviction of

\begin{flushright}
\textsuperscript{187} Gaurav Jain vs. Union of India, AIR 1997 SC 3021.

\textsuperscript{188} Department of Women and Child Development, Government of India, 1998.
\end{flushright}
paedophiles engaged in sex tourism. ECPAT also engages the interest and commitment of world tourism authorities, travel agents, holiday guide publishers, and tour promoters in actively working against sex tourism.189

(ii) Action Against Trafficking and Sexual Exploitation of Children (ATSEC) :- This is a network that deals with cross-border activities between West Bengal and Bangladesh to facilitate advocacy, research, social mobilization, technical assistance, and programme support at the national and regional levels. It also aims to develop capacity of the government and non-government organizations to plan and implement advocacy programmes.190

(iii) The Network Against Child Sexual Exploitation and Trafficking (NACSET) :- This is a network against commercial sexual exploitation and trafficking. As the prevention of trafficking and CSE is a major orientation and thrust of NACSET, it has given adequate importance to approaching organizations which can play a crucial role on this front. For example, village-based organizations engaged in water conservation, drought relief, soil conservation work in the perennially drought-prone areas along with women's organizations and youth organizations are encouraged to joint the network. NACSET believes effective prevention can be achieved primarily by expanding in this manner to all the relevant organizations and social forces.191

(iv) Action Aid

Action Aid is working to curb the trafficking of women and children. The Action Aid India campaign, aimed at promoting coordinated action against trafficking, looks closely at interventions at the grass roots and links it to policies and action at state, national, and international levels. Prevention at source is attempted by using strong systems and a community-based approach through

189 Supra n. 49 p. 273.
190 Ibid.
191 Ibid.
exact mapping and tracking of the vulnerable areas from where trafficking takes place. A comprehensive analysis of the situation on the ground with respect to trafficking has been carried out. In the course of conducting sensitization and training exercises, a training manual has been developed for use by those doing prevention work. An assessment tool has been designed to go with the training manual. Rehabilitation and reintegration of trafficked persons is attempted through inventions which are sensitive to the situation of the trafficked persons and in keeping with their aspirations. Support has been given to create an organization of trafficked persons themselves to have self-regulatory boards to prevent children from being trafficked into prostitution.192

(v) Campaign Against Child Trafficking (CACT)

The CACT has been initiated by Terre des Homme aiming at developing a national strategy for combating child trafficking using three broad dimensions for addressing the problem: awareness generation, legal interventions, and projects at the grass roots creating and strengthening a region-specific intervention through database and building local strategies; and building partnership with the appropriate groups like decision-makers, media, and citizens to ensure implementation of international conventions, initiating national legislative processes, and aiding its conversion into enforceable law.193

(E) Protecting the girl child from female foeticide and infanticide

Girl child are particularly vulnerable to human rights violations, simply because they are girls, and therefore require additional protections. They are commonly denied their fundamental rights to education, to access to medical care, services and information, to involve in their communities or to express freely but they are also denied their most basic rights such as their right to be born (female foeticide) and to live (girl infanticide). Some of the worst gender ratios, indicating

192 Id; p. 274.
193 Ibid.
gross violation of women’s rights, are found in nowhere else then in south and East Asian countries such as India and China.

(1) Meaning of female foeticide and infanticide

Female foeticide also known as sex-selective abortion by the use of medical technology by identifying the sex of the foetus and to selectively abort female fetuses. Scientific technology facilitates a series of pre-natal diagnostic tools to identity and cure any potential birth defects but has also been misused especially in our country for sex-selective abortion.

The practice of killing children at birth is known as infanticide. It is mostly done in case of birth of a baby girl. Some of the methods used to eliminate girl babies after their birth care: poisoning, throat splitting, starvation, and drawing etc. Many other girl children are disposed of, often in garbage dumb or left abandoned anywhere to die. Now-a-days newspapers are full of these kind of news.

There is a prohibitory norm that “no human being can take the life of another human being”. Whether it applied to foeticide i.e. whether the killing of a foetus amounts to taking the “life” of another “human being”. If this premise does not apply, whether the act is so normally outrageous as to create another legal promise in order to punish it.

Morally speaking, killing of a foetus is not the same as killing an infant, we do not get as normally outraged by an abortion of a foetus as we do when a child has been killed. Legally as well, the killing of an infant is homicide, whereas killing a foetus is not homicide but it is ought to be a special offence against human life. The offence of foeticide must therefore be punished unless there is an excuse or justification for the same.194

Moreover, as Lord Mahavira has said – Age of a child starts in the womb of mother form the day of conception. To count the age of child from the day of birth is just for our convenience.

*Aayu ka Praramb Garbh me hi ho jata hai. Janam ke baad Aayu ka Ginnah Lokik korm hai.*

(2) **Reasons of bias against girl child:** The root causes for discrimination against females in the form of foeticide and infanticide are complex and reflect diverse political, economical, social, cultural and religious practices. They include

(i) **Poverty:** Poverty is the chief and immediate cause for foeticide. In societies, where the daughters are perceived as an economic and social burden on the family. The birth of a female child is the most unwelcome factor. Birth of a male child is a welcome but birth of a female child is taken as a burden. Because the family needs to incur more expenditure for bringing up the girl child.

(ii) **Social Security:** Consequent upon the advances in medical science, the termination of unwanted children especially female fetuses through abortion has become common in families to satisfy their preference for sons due to various reasons including religious and economic ones.

(iii) **Evil of Dowry:** Some people think, a girl means accumulation of sufficient resources for the dowry, the parents have to give away, when the girl gets married. Therefore, the parents think that the girl is a financial burden for them, whereas the boy is an asset who fetches a fabulous dowry for them. The parents of poor and middle class families who cannot offer dowry prefer to have resource to sex test. If the female foetus is detected, an abortion is preferred.

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(iv) Financial dependence of females on husband or in laws: - In India socio-economic background has been the villain behind the tragic female foeticide. Certain communities want to get rid of female child compelled by the circumstances of dehumanizing poverty, unemployment, superstition and illiteracy.

(v) Cultural factors: - The concept of 'Vanshodharak' a male child to perform last rites in Hindus and carry forward measures to reduce female foeticide.

(vi) Illiteracy: - Illiteracy is major factor responsible for these heinous crimes. Woman itself is not conscious of their right which is indispensable for progress. Their mindset needs to be changed towards their own female foetus to this can only be done by educating them.

(3) Effects of Female Foeticide: - Female foeticide cannot be viewed in isolation. It has to be viewed in the greater context of gender discrimination and atrocities against women. As a crime against society it has a number of adverse effects upon the society. It can be broadly summarized as follows:

(i) As a device of selective reproduction it will seriously upset the demographic balance in the society and after a point of time, the number of females in the society will be very few compared to that of male.

(ii) It will result in decline of values in the life and over all social degradation; which in turn will promote social evil and offences against women like rape, exploitation, and kidnapping etc.

(iii) The reduced sex ratio will result in the fewer number of marriageable women and the institution of 'polyandry' will resurface and that would lead to tension in families and later on in the society.

(iv) Low female sex ratio will generate sexual starvation among the males and it will help to flourish the business of prostitution and immoral trafficking.
The increase in prostitution will lead to spread of venereal disease and would pose serious problems like spread of AIDS etc.

(v) Women will not be permitted to go out of their houses on account of increased crimes against them and consequently they will be deprived of better education, employment opportunities and economic freedom.

(vi) Continued practice of female foeticide will give rise to emergence of black market in service and medical profession.

The whole issue of selective elimination of females has to be understood in the wider perspective of gender issues and in the context of increasing violence against women and girls and child protection. Undeniably, sex selection is an extreme form of discrimination and violence against girls. The adverse child sex ratio reflects the real status of the girl child in the country, challenging the constitutional and policy commitments of equality and non-discrimination. It is a gross violation of the human rights of the girl child.

(4) Magnitude of Problem :- According to the Government of India’s first periodic report to the UN Committee on the Rights of the Child, 2001, “every year, 12 million girls are born – three million of whom do not survive to see their 15th birthday. About one-third of these deaths occur in the first year of life and it is estimated that every sixty female death is directly due to gender discrimination”.

UN figures out that about 750,000 girls are aborted every year in India. Abortion rates are increasing in almost 80% of the India states, mainly Punjab and Haryana.

According to a recent report by the United Nations Children’s Fund (UNICEF) up to 50 million females are missing from population of India, as a result of systematic gender discrimination. In most countries in the world, there
are approximately 105 female births for every 100 males. But in India, in almost all the states\textsuperscript{196} the population of female is less than the male in all age groups.\textsuperscript{197}

Today, the nationwide average number of girls to every 1000 boys is 927, according to 2001 census. This has been on a decline since 1991 census. From 945 girls for every 1000 boys in 1991, the child sex-ratio has declined to 927 in 2001.

Table 3.1
Sex-Ratio
No. of female per male in India

<table>
<thead>
<tr>
<th>Age group</th>
<th>Year</th>
<th>No. of female for 1000 males</th>
</tr>
</thead>
<tbody>
<tr>
<td>0-6 years</td>
<td>1961</td>
<td>976</td>
</tr>
<tr>
<td></td>
<td>1971</td>
<td>964</td>
</tr>
<tr>
<td></td>
<td>1981</td>
<td>962</td>
</tr>
<tr>
<td></td>
<td>1991</td>
<td>945</td>
</tr>
<tr>
<td></td>
<td>2001</td>
<td>927</td>
</tr>
</tbody>
</table>


According to Table 3.1, the 0-6 sex ratio was 976 in 1961, it declined to 964 in 1971, 962 in 1981 and 945 in 1991 and 927 in 2001.

Table 3.2
Sex-Ratio
No. of female per male in some northern-states

<table>
<thead>
<tr>
<th>State</th>
<th>No. of female for 1000 males in 1991</th>
<th>2001</th>
</tr>
</thead>
<tbody>
<tr>
<td>Punjab</td>
<td>875</td>
<td>793</td>
</tr>
<tr>
<td>Haryana</td>
<td>879</td>
<td>820</td>
</tr>
<tr>
<td>Himachal Pradesh</td>
<td>951</td>
<td>897</td>
</tr>
<tr>
<td>Gujrat</td>
<td>928</td>
<td>878</td>
</tr>
<tr>
<td>Chandigarh</td>
<td>899</td>
<td>845</td>
</tr>
<tr>
<td>Delhi</td>
<td>915</td>
<td>865</td>
</tr>
</tbody>
</table>

Source: Census of 1991 and 2001 of India.

\textsuperscript{196} Only in Kerala and Pondichery the number of females are 1058 and 1001 per 1000 males, respectively.

\textsuperscript{197} Census of India 2001.
According to the census of 1991 and 2001, in Punjab, the child sex ratio declined from 875 to 793, in Haryana from 879 to 820, in Himachal Pradesh from 951 to 897, in Gujarat from 928 to 878, in Chandigarh from 899 to 845 and in Delhi from 915 to 865.

According to UNICEF study done over 3 years (1994-1996), there are only five states in India where no case of foeticide or infanticide have been reported which are Sikkim, Nagaland, Meghalaya, Mezoram and Jammu and Kashmir.

According to National Crime Record Bureau (NCRB) the crime of foeticide arose from 61 in 1999 to 86 in 2004 and the crime of infanticide arose from 87 in 1999 to 102 in 2004.

<table>
<thead>
<tr>
<th>Crime Head</th>
<th>1999</th>
<th>2000</th>
<th>2001</th>
<th>2002</th>
<th>2003</th>
<th>2004</th>
</tr>
</thead>
<tbody>
<tr>
<td>Foeticide</td>
<td>61</td>
<td>91</td>
<td>55</td>
<td>84</td>
<td>57</td>
<td>86</td>
</tr>
<tr>
<td>Infanticide</td>
<td>87</td>
<td>104</td>
<td>133</td>
<td>115</td>
<td>103</td>
<td>102</td>
</tr>
</tbody>
</table>


(5) International Framework to Protect Girl-Child

(i) The United Nations Convention on the Rights of Child: - Provides for instance for the right to non-discrimination (Article 2), for the right to life (Article 6) and development in a context where the girl child is protected from abuse, exploitation or neglect.

(ii) The Convention on the Elimination of All forms of Discrimination against women (CEDAW): - Adopted in 1979, is the most extensive and widely-ratified international agreement promoting the rights of girls and women. The CEDAW is considered to be equivalent to an international bill of rights for women, defining what constitutes discrimination and providing an agenda for action. It states the negative consequences of female discrimination and seeks full equality between
men and women, in all fields of political, economic, social and cultural life. States that have ratified CEDAW must take concrete steps, such as enacting laws, establishing women’s rights commissions and creating conditions to ensure that human rights of girls and women are fulfilled. Their progress is monitored by the UN committee on the elimination of discrimination against women.

(6) National Framework

(i) The Indian Penal Code 1860: Abortion was first penalized under the I.P.C., which makes the causing of a miscarriage (if it is not done in good faith to save the life of a woman) an offence punishable with imprisonment up to seven years. The code makes both the women who undergo the abortion (voluntarily) as well as the abortionist liable to punishment. In case, it is carried out without the consent of the women then punishment of 10 years is prescribed in the Act and if it is carried out without the consent of the women the person carrying out such an abortion is punishable for life and if death of women is caused by the act then the offence will be punishable with imprisonment up to 10 years.

The most important provision regarding foeticide is the recognition of the foetus as ‘quick’. If a foetus is killed after it becomes “quick”, it is punishable with 10 years imprisonment.

Further, doing of any act with intent to prevent the child from being born alive is punishable with 10 years imprisonment. Section 316 of I.P.C. deals with the cases in which by doing any act death of a woman is caused thereby

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198 Indian Penal Code, Sec. 312.
199 Id; Sec. 313.
200 For the purpose, a women under misconception, a women of unsound mind, a women in an intoxicated state, and a girl below 12 years of age cannot give consent.
201 Supra n. 198, Sec. 314.
202 Ibid.
203 Quickening is the name applied to the peculiar sensation experienced by a woman about the fourth or fifth month of pregnancy. The symptoms are popularly ascribed to the first perception of the movement of the foetus.
204 Supra n. 198, Sec. 315.
causing the death of a ‘quick’ unborn child will be punishable with 10 years imprisonment.

Furthermore, exposing and abandoning the child below 12 years of age, is punishable with seven years of imprisonment.\textsuperscript{205} And concealing the birth of a child by secretly disposing her/his body is punishable with 2 years imprisonment under section 318 of I.P.C.

(ii) \textbf{Code of Medical Ethics} :- Constituted by the Indian Parliament in the Medical Council Act, 1956, the relevant section of the code of Medical Ethics states: “on no account, sex determination test shall be undertaken with the intent to terminate the life of a female foetus developing in her mother’s womb, unless there are other absolute indicators for termination of pregnancy as specified in the Medical Termination of Pregnancy Act, 1971.

Any act of termination of pregnancy of normal female foetus, amounting to female foeticide, shall be regarded as professional misconduct on the part of the physician leading to penal punishment besides rendering him liable to criminal proceedings as per the provisions of this Act (clause 7.6).”

(iii) \textbf{Medical Termination of Pregnancy Act, 1971 (MTPA)} :- Amniocentesis is first started in India in 1974 as a part of sample survey conducted at the All India Institute of Medical Sciences (AIIMS), New Delhi, to detect foetal abnormalities. These tests were later stopped by the Indian Council of Medical Research (ICMR), but their value had leaked out by then and 1979 saw the first sex determination clinic opening in Amritsar, Punjab. Even though women organizations across the country took up cudgels to put a stop to this new Menace, but were helpless because of the MTPA. This is because the amniocentesis test was claimed to be used for detection of foetal abnormalities, which were permitted by the MTPA. According to the MTPA, if any abnormality is detected

\textsuperscript{205} Id; Sec. 317.
between 12 to 18 weeks of gestational period in the foetus, an abortion can be legally carried out upto 20 weeks of pregnancy.206

In the absence of any law, all that the government could do was to issue circulars prior to 1985, banning the misuse of medical technology for sex determination in all government institutions. This, however, led to the mushrooming of private clinics all over the country. In 1986, the Forum Against Sex Determination and Sex Pre-selection (FASDSP), a social action group in Mumbai, initiated a campaign. Succumbing to public pressure, the Maharashtra government enacted the Maharashtra Regulation of Pre-natal Diagnostic Techniques Act 1988, the first anti sex determination drive in the country. This was followed by a similar Act being introduced in Punjab in May 1994.207

Both these were however repealed by the enactment of a central legislation, the Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994. (iv) Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994 (PNDT) :- In 1994, the centure passed this Act but it was only in the year of 1996 that it came into operation. Under the Act, pre-natal diagnostic scans are permitted solely to detect genetic abnormalities. The Act forbids sex determination tests. It also prohibits any advertisements relating pre-natal determination of sex and prescribes punishment for its contravention. The person who contravenes the provisions of this Act is punishable with imprisonment upto 5 years and fine upto 50,000/-

In 2001, a PIL was filed with the Supreme Court.208 The court directed the State Government to enforce the PNDT Act and file an affidavit indicating

207 Ibid.
208 Centre for Enquiry into Health and Allied Themes (CEHAT) vs. Union of India, AIR 2001 SC 2007.
the status of action taken under the Act. Certain guidelines were also issued to the
Central Government like

(i) The Central Government is directed to create public awareness against
the practice of pre-natal determination of sex etc.

(ii) The Central Government is also directed to implement with all vigor
and zeal the PNDT Act and the rules framed in 1996.

Further, Direction were also issued to the Central Supervisory Board (CSB), State
Government and the appropriate authorities.

It was only in 2002, i.e. 8 years after the PNDT Act was passed, that the
Medical Council of India (MCI) authorised under section 23(2) of the Act to take
action against any erring Medical Practitioner ... recognized undertaking sex-
determination tests 'with the intent to terminate the life of a female foetus' as
professional misconduct.

On 17th January 2003, India amended its Pre-Natal Diagnostic Techniques
(Regulation and Prevention of Misuse) Act, 1994 that was renamed as :-

(v) Pre-Conception and Pre-Natal Diagnostic Techniques Act (PCPNDT) of
2002 :- The reason of few convictions under the old Act of PNDT, 1994 and the
grate misuse of scientific technology by richer like “sperm – washing”209
compelled for the amendment in the Act. This new Act is designed to strengthen
the provisions of the previous Act.

Bringing into the ambit of the Act emerging techniques for pre-conception
sex-selection, such as sperm separation and pre-implantation genetic diagnosis,
increasing the fine and additional provisions for the suspension and cancellation
of the registration of violators, the law targets the medical profession the so-called
'supply' side of the practice of sex-selection. Manufacturer of ultrasound

209 Mahesh Sharma, “Anything for a boy: Rick prefer ‘Sperm- washing”, The Tribune, 
7th March 2008.
equipment are now required to sell their products only to registered clinics, and all ultrasonographers now have to maintain records of all tests conducted by them.

(7) Government Incentive :- A sequel to the non-starter ‘Balika Samriddhi Yojana’ of 1997 in which cash payment to poor families were taking long to be disbursed, the new scheme offers money to parents who fulfil four conditions linked to a girl’s survival and welfare – these are – ensuring her birth and registering it, completing her immunization, educating her and delaying her marriage till 18 years. The scheme will be launched as a pilot in 10 economically backward blocks of Andhra Pradesh, Chhattisgarh, Jharkhand, Bihar and Orissa. The Eleventh Five year plan has already provided Rs. 9.11 crore to benefit 99,000 girls in the current year under the Scheme.210

As far as northern area is concerned the government of Haryana has recently announced a price of Rs. 5 lakh to the panchayat who make their strenuous efforts to balance the sex-ratio.211

Further a ‘Jacha Bacha Scheme’ is also launched to promote safe institutional delivery, increase female sex ratio and ensure gender equality and women empowerment. Under the scheme, female multipurpose health workers, staff nurses and medical officers attending to childbirths will be given performance based incentives.212

As all we known that 24th January is observed as the National Girl Child Day213 and Government incentives are also Ok but according to UNICEF’s State of World Children (SOWC) Report 2009 released in the capital a few times back also called for urgent action, with child activities saying the government wastes a lot of time preparing schemes and marking days for girl children. “What we need

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211 The Tribune, 24th February, 2008.
213 The day has been choosen as it marks the assumption of office by India Gandhi, India’s first Prime Minister.
is action on ground. Key Flagship Schemes of the UPA government – like the Integrated Child Protection Scheme (ICPS) – are not taking off. In such a situation, what is the meaning of having one more day dedicated to girls? It is a sham."

(8) Issues relating to crime against girl child i.e. Female Foeticide and Infanticide :- Foremost, it is 16 years since the enactment of the Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act 1994. It is also over eight years since the more comprehensive, amended Preconception and Prenatal Diagnostic Techniques (PCPNDT) Act, 2002 came into existence. Yet enforcing the law has proved to be a major challenge given the resistance from the unethical medical practitioners. Effective implementation of PCPNCT needs to be assured through ensuring registration, curbing the spread of mobile ultrasound and regulating sale of new machines.

The appropriate authorities are ineffective and are not held accountable by the government and civil society and the powerful doctors lobby. Clinics that have been sealed for breaking the law have been re-opened within a few days. Lawbreakers have got away after paying fine of just Rs. 1,000.

Another problem is that the appropriate authorities don’t know their functions and responsibilities. They do not have necessary experience and expertise in legal matters. Deputing of medical professional has not been an effective way to check the practice of sex determination.

Survival of girl child not part of the reproductive health agenda and finds no mention in the Reproductive Child Health (RCH).

Effective and strong implementation of the law should go side by side with reviews of policy and development strategies. We should advocate public acceptance of the reality that the continuing decimation of the number of girl

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child is not just due to "deep rooted socio cultural features" but is exacerbated by short sighted and unsound public policies in population and their accompanying development packages.

(F) Missing Children :- In Philippe Aries’s analysis, children were acknowledged as being central to the family only in the mid 18\textsuperscript{th} century. From then an, children have been identified on the basis of age, gender, socio-economic factors etc. children have been regarded, in history and in law, as dependents, falling within the benevolent jurisdiction of patriapotes (under the care of father, who is regarded as being the head of the family) and parents patria (under the care of state that guarantees rights).

India today has the world’s largest child population in the world with 400 million below the age of 18 in a national population of over one billion.\textsuperscript{216} Despite many child protection schemes and laws, vast majority of India’s children in difficult circumstances. Children face disadvantage due to natural, social and economic factors. They fall victim of crime. In brief, victimised children can be divided over 3 broad categories based on forms of victimization that they have been faced with. The categories are:

(1) Abused children – It includes not only physical but emotional and psychological abuse as well

(2) Victimized by crime – The NCRB, crimes in India Report of 2005 shows that crimes against children rose from 14, 423 in 2004 to 14,975 in 2005. It includes, child abduction, rape and murder etc.

(3) Missing Children – A missing child is, as all we knows, a parents worst nightmare. Every day thousands of children are reported missing. Many are never found.\textsuperscript{217}

\textsuperscript{215} The Lawyers collective, March 2007, p. 30.  
\textsuperscript{216} Ibid.  
\textsuperscript{217} http://www.missingindiankids.com/ accessed on 20\textsuperscript{th} December 2009.
Magnitude of Problem

In India no exact data is available, however, according to figures compiled by the National Human Rights Commission (NHRC) 45,000 children go missing in India every year out of which 11,000 are untraced. According to an article in an English daily quoted on the website of the National Centre for missing children; in every 30 seconds a child runaway from home, and a total number can be estimated upto 10,00,000 per annum. NGO’s working in the field estimate that only 10% of all cases are registered with the police, so the actual numbers could be several times higher. If we add the number of missing, lost and abducted children the number of missing children is phenomenal.

As per statistics provided by state police agencies, the percentage difference of number of children reported missing in 2001 over the corresponding number of 1996 shows increase in most of the states and Union Territories. For example, the average number of children reported missing in one year in Delhi is 6227, in Madhya Pradesh, 4,915; in Gujarat, 1,624 and in Andhra Pradesh, 2,007 There is an abnormally high rates of increase in Andoman and Nicobar Island, Andhra Pradesh, Arunanchal Pradesh, Gujarat, and U.P. (See Table 3.4)

Table 3.4 : Total no. of Children reported missing in India

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Delhi</td>
<td>6,193</td>
<td>6,525</td>
<td>6,4747</td>
<td>5,793</td>
<td>6,223</td>
<td>6,151</td>
<td>37,359</td>
<td>6,227</td>
</tr>
<tr>
<td>M.P.</td>
<td>4,280</td>
<td>4,739</td>
<td>4,823</td>
<td>5,378</td>
<td>5,354</td>
<td>4,914</td>
<td>29,488</td>
<td>4,915</td>
</tr>
<tr>
<td>Gujarat</td>
<td>1,333</td>
<td>1,413</td>
<td>1,673</td>
<td>1,948</td>
<td>1,737</td>
<td>1,639</td>
<td>9,743</td>
<td>1,624</td>
</tr>
<tr>
<td>Andhra P.</td>
<td>1,642</td>
<td>2,048</td>
<td>1,936</td>
<td>2,054</td>
<td>2,011</td>
<td>2,353</td>
<td>12,044</td>
<td>2,007</td>
</tr>
<tr>
<td>A. &amp; N.</td>
<td>47</td>
<td>42</td>
<td>85</td>
<td>76</td>
<td>83</td>
<td>95</td>
<td>428</td>
<td>71</td>
</tr>
<tr>
<td>Arun. P.</td>
<td>36</td>
<td>26</td>
<td>23</td>
<td>86</td>
<td>95</td>
<td>112</td>
<td>378</td>
<td>63</td>
</tr>
<tr>
<td>U.P.</td>
<td>1,595</td>
<td>1,694</td>
<td>1,791</td>
<td>1,942</td>
<td>1,612</td>
<td>1,988</td>
<td>10,622</td>
<td>1,770</td>
</tr>
</tbody>
</table>

Source : Data received from the State Police Agencies
The total number of 66,024 children, who continue to remain missing during the six-year period, making an annual average of 11,008 children. Moreover, in metropolitan cities, except Kolkata, the number of women reported missing is gradually increasing.  

The most shocking revelation of two year study, titled ‘trafficking in women and children in India’ complied by Shanker Sen and P.M. Nair, with a team of Institute of Social Sciences (ISS) researchers, is that the graph of missing children still continues to rise. For example in Delhi which is our national capital, in 2004, 6,227 children were reported missing, according to police report; in 2006 the number of missing kids had climbed to 6,683. If this is the case of our national capital then one would easily imagine the condition of children of in other states and UT’s.

The National Human Rights Commission reported that 50,000 children went missing in 2005-2006. Statistics naturally appear like the tip of iceberg, considering that a majority of poor families shy away from reporting cases involving their missing children. This for the fear of law, which holds them liable for pushing their children into labour.

In an Indian Express investigative study, entitled ‘Find me’ conducted in from January – March 2007 in various states and UT’s, harrowing statistics of the ‘missing child’ phenomena have been reported in every state, including major and minor towns. However, the motivations and the profile of missing children varies from state to state ranging between runaways, to those ending up as child labour or in the flesh trade, as beggars, victims of ransom demands and transnational

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trafficking, child pornography and even organ trade. The fate of these missing children cannot be predicted with certainty.  

(2) The Nithari Killings :- For the purpose of air research on protection issues including missing children as one of the issues, Nithari episode needs to mention that shocked the nation’s consciousness, in the year of 2006. Nithari a place in UP on the outskirt of Delhi is not more then a cluster of slum colonies where mainly migrants from Orissa, Bihar, Nepal lives. Most of the male and female population of this area work as domestic help in nearby Noida city. Children from Nithari were reported missing, FIR were lodged of few but no action was taken, Nandlal, a resident of Nithari approach the P.S, Noida to lodge a report about his missing daughter Payal’s kidnapping and suspected manner against the resident of D 5 Noida. After the intervention of the Allahabad High Court, the case was registered and investigated. On investigation Noida Police unearth skeletal remains of woman and children from a drain behind Moninder Singh Pandher’s residence. Pandher and his domestic help Surrender Singh Koli were arrested. 19 cases of kidnapping, rape and murder of children and young girls were filed against both Moninder Singh Pandher and Surender Koli. And lastly on 13 Feb. 2009, the Special Central Bureau of investigation (CBI) court in Ghaziabad awarded death sentence to both the convicts. But on 11th September 2009, Moninder Singh Pandher was given in clean chit by the Allahabad High Court. And more recently Surender Koli was sentenced to death by special CBI court for raping and murdering another seven year old girl Arti. Lastly justice is done to the victims family.

But now the question arises that is justice in a single or few cases is the solution of the problem that children of our country are facing? If FIR’s were registered and proper action were taken by the Police on time then there would

\[221\] Supra n. 215.
not be any chances of this gruesome Nithari episode to happen. But this is the apathy of our system that even after a number of lessons we do not change our police system. And ‘this is the main reason that why the marginalised and the poor can not make the justice to fall in their Lap.

(3) The present scenario of Law Enforcement

Normally, investigation of a crime commences with the registration of an FIR. FIR pre-symposes a cognisable offence. When it comes to a criminal offence like trafficking, etc., FIR is registered under relevant section of the substantive or special law and thereupon, investigation is carried out by the police. However, when it comes to the issue of a ‘missing person’ being reported to the police station, an entry is made in the General Station Diary (GD). No FIR is registered, except in certain states where a ‘zero FIR’ is registered. Zero FIR means that no crime number is assigned because it is not considered a crime. The follow-up for the zero FIR and the GD entry is the same. The SHO forwards information to the Superintendent of Police/Deputy Commissioner of Police, who, in turn, forwards it to the office of the chief of police. Sometimes, the police stations and their supervisory officers also send messages to their counterparts. At the field level, the local police officials publicise the particulars of the missing persons in the media by putting out the available identification details and photographs.

The message that reaches the Police Headquarters in the state is normally lodged with the Missing Persons Bureau (MPB), which is more often a wing in the National Crime Records Bureau (NCRB) at New Delhi. The message also gets relayed to the police chiefs of police in other states.

(4) Response by NGO’s and others: The importance of the issue has been appreciated by certain national and international NGOs, which have made efforts

223 Ibid. p. 215.
to address the problem by setting up websites. The following are some of the websites available on the internet, as of September 2003.

- www.indianmissing.com
- www.missingindiankinds.com
- www.childlineindia.org
- www.missingchildsearch.net; etc.

To conclude, most missing children are said to remain untraced because the police do not try, and their stories are not taken up in the media. According to Kailash Satharay of the NGO ‘Bachpan Bachao Andolan’, Most missing children came from Dalit, tribal and poor Muslim families, who do not have the means or visibility to pressure the police and media.

The most effective means to find missing children are—

(i) To react quickly to inform the police, the media & different concerned NGO’s

(ii) To create a mass awareness among the general public.

(iii) The issue of missing children needs to be given serious attention by law-enforcement agencies. Because issue of missing children is not a sole issue, it also relates to child trafficking, Beggary, and prostitution etc.

(iv) There should be proper documentation and monitoring of enquiries.

(v) Vigilance and surveillance systems by police personnel and activists need to be augmented. So, another Nithari episode could not happen again.

(G) Child Beggars :- In contrast with child domestic workers, some children work in the most visible places possible – on the streets of developing world cities and towns. They are every where: hawking in markets and darting in and out of
traffic jams, playing their trade at bus and train station, in front of hotels and shopping malls. They share the streets with million of adults, many of whom regard them as nuisances, if not as dangerous mini-criminals. They are none else then child beggars.

Begging has been practiced in India from time immemorial. The so-called bhikshuks lived in the good old days too. Of course the modus operandi and other aspects have altogether changed now. Many aspects of child begging need to be considered are:

(1) Reasons : Why the Child Begs :- Most of the child beggars are into it not because of choice but out of compulsion. And some of the compulsive reasons are as follows:

(i) The foremost reason for every social evil is one and only poverty.

(ii) Abandoned by the parents or homeless children choose begging for their survival

(iii) Pressure by adults or family members. Children often beg because their parents and guardian send them out to beg, or simply because they do not food them.

(iv) Child kidnapped and mailed by mafia usually for the purpose of begging.

(v) They may do this when parents are addicted to substance, very ill or disabled.

(vi) When children have no responsible adult protection.

Besides, these compulsive reasons, the children who work on street are exposed to economic, health and social problems : poverty, lack of education, medical care. They are exposed to physical or sexual abuse, prostitution etc. Sometimes the children who work for mafia’s, cut off their limbs so the child would by able to earn more because of sympathetic attitude of people towards them. Moreover, a
child many a times absorb every humiliation just for 1 or 2 rupee alms. How tragic it is?

The magnitude of the problem is so vigour that only in Delhi there are approximately 100,00 street children, of which nearly half beg for a living. 224

(2) National framework against child begging :

The criminalizing of begging is a relatively recent colonial construction. Traditional societies have been much more tolerant of people who live by begging, and some traditions like Buddhism infact valorise begging by holy men because it is believed to teach them humility, and enables them to break away from all forms of material bondage. It was in the 1920’s that begging was first declared a crime in British India, and the low was updated as the Bombay Prevention of Begging Act in 1959, and extended to 18 states including Delhi in 1960.

(i) Bombay Prevention of Begging Act, 1959 :- This law provides for the jailing up to three years in special ‘beggars’ court of all people caught begging, which can be extended to 10 years in case of second and repeated offences. The definition under this law of beggars includes not just seeking of alms, but also traditional artists, as “signing, dancing, fortune-telling performing or offering any article for sale”, all of which are deemed as offences under this Act. The definition of begging even includes simply “having no visible means of subsistence”. In other words, it makes destitution a crime, punishable by incarceration. Since many beggars suffer from leprosy and mental illness, it implicitly criminalises these ailments as well.

This act has some lacunae that most serious lacuna being that the operation of this potently anti-poor law is more merciless and problematic when it target any person who is poor and destitute. But even a labourer or rag picker may conform to this description and so can be randomly picked up by the authorities

224 www.igovernment.in accessed on 22nd October 2009.
and treated in the same manner as beggar. The another lacunae of this Act is that it treats child beggar like that of adults.

As all we knows that a child begging on the roads in India may hardly appear to be committing a crime—but according to law of the land, it certainly is. The same Act was applied in Delhi in 1961. In order to segregate children the adult beggars and give them protection, the Delhi Commission for Protection of Child Rights (DCPCR) has recently submitted two proposal to the Delhi High Court.  

(i) First proposal is to segregate child beggars from adult. It aimed at "decriminalizing" child begging. The 1959 Bombay Prevention of Begging Act makes begging a crime. However, child beggars are different from adults. Instead of making such a child a criminal, he or she needs care and protection as stated in Juvenile Justice Act.

(ii) Second proposal of Delhi Commission is about proper identification, rescue and rehabilitation of child beggars. And the most ideal way of rehabilitating a destitute child is by them a family. The Juvenile Justice Act states that adoption, sponsorship and foster care are the best methods of rehabilitation and social integration of a child.

(ii) Indian Penal Code, 1860

Section 363 (A) :- According to this section whoever kidnap or maims any minor for the purpose of employing him or her for begging shall be punished with imprisonment for 10 years or for life respectively. For the purpose of this section begging means – soliciting or receiving alms in a public place or private premises or exposing any sore or wound with the object of obtaining alms or using a minor as an exhibit for the purpose of soliciting or receiving alms.

225 De-Criminalise child begging. Find them homes instead; commission available on newspaper.sulekha.com accessed on 18th April 2009.
According to this section "minor" means – a person under 16 years and 18 years for male and female respectively.

It is very sorry state of affair of our law today that we do not have a uniform age of minority till today.

(iii) Juvenile Justice (Care and Protection of Children) Act, 2000 : - Section 2(d) deals with the children in need of care and protection. It includes a child who is found begging or who is either a street child or a working child.226

Section 29 of the Act deals with constitution of Child Welfare Committee. The Child Welfare Committees may be constituted by the State Government for every district or groups of districts. The Government may constitute one or more such committees for exercising the power and discharge the duties in relation to child in need of care and protection under this Act.227

The committee shall consist of a chairperson and four other members, out of which one shall be a woman.228 A child in need of care and protection may be produced before this committee229 and after inquiry which could be completed within a period of 4 months, committee may pass proper order.230 And if committee is of the opinion that the child has no family or is in continued need of protection and care, it may allow the child to remain in children home or shelter home till suitable rehabilitation is found for him or till he attains the age of 18 years.231 Restoration of and protection to a child is the prime objective of these shelter home. And restoration of and protection of a child in need of care and protection232 includes – parents, adopted parents, foster parents, guardians, fit person or fit institution.233

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226 Juvenile Justice (Care and Protection of Children) Act, 2000. Sec. 2(d) (ia).
228 Supra n. 226, sec. 29(2).
229 Id; sec. 32.
230 Id; sec. 33(1).
231 Id; sec. 33(4).
232 Id; sec. 39(1).
233 Explanation to Section 39(3)
(iv) Motor Vehicle Act 1988 :- In a sporadic wax against child begging the Delhi Traffic police recently under Motor Vehicle Act has passed a notification by which a fine of Rs, 1,000 can be inflicted on a person who give alms to people at traffic lights. Beggars are therefore, not seen as a spectacular human tragedy but an impediment to traffic. This view is also endorsed by courts in response to a PIL filed by a group of advocates which characterized beggars as “the ugly face of the nation’s capital”.

Moreover, in an advertisement Blitz last year i.e. in 2008 in many national newspapers, it claimed dramatically that those who give beggars “alms may cause traffic jams, accident, illiteracy, inconvenience, unemployment, biri, cigratee, alcohol, bhang, ganja, charas, heroin, robbery, rape, sex, theft, murder, prostitution, handicapped, assault, hooliganism’ and then even more darkly “slums, poverty, debt, ignorance, aggression, encroachment, molestation, mugging.”

(3) How to tackle cause for child begging :- It is necessary to work on prevention and support, to try and ensure that children are not exposed to situation to earn additional income for their parents, guardians etc. Some of the suggestion to tackle child begging are as follows:

(i) Coercion by adult, guardians to beg must be dealt with in the same way as other forms of child labour are best combated, not by criminalizing the parents or children but by enforcing the fundamental right to education, which for homeless street children requires a network of hundreds of open residential schools in all cities.

(ii) If begging mafia do indeed exist in any city, it does not require any special law i.e. Section 363-A of I.P.C.

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A total ban on begging as a first step would not be fruitful and not a clever decision. The first step should be to make arrangement for the settlement and rehabilitation of child beggars.

Luminaries like Mother Teresa have proved that what can not be achieved by strict enforcement can be achieved by compassion and care. The government with the support of general public can provide them with schooling and clothing.

As begging is a resort not by choice but by compulsion and this compulsion may be of any reason. For their survival they must work. Therefore, instead of putting total ban on begging we can provide them alternate work for earning their livelihood.

The authorities must set up a “poor homes” for the beggars and try to rehabilitate them.

Last but not the least, child beggars and all beggars live out of our sympathy. Once we stop giving alms, begging can be controlled to a great extent.

Moreover, “in the face of a general economic maladjustment, little good can be done to beggars by merely passing deterrent and punitive legislation”, Gore said, nearly four decades ago. Indeed, the attempt made by a member of the Uttar Pradesh Vidhan Parishad to get a bill drafted on the lines of state laws that punish the poor failed, because it was argued by the Minister of Social Welfare that “it would be unjust to ban beggary if society could not provide jobs to everyone”.

**Child with Disability** :- Disability is a source of stigma for the child and his/her family. They are ostracized and looked down upon by the community, children with physical, psycho-social, intellectual or sensory impairments

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encounter in their daily lives a combination of social, cultural, behavioral and physical barriers. Those suffering from mental illness or mental retardation are subject to the worst stigma and severe social exclusion. In daily life, their abilities and capabilities are underestimated and their needs are given low priority. They are especially vulnerable to neglect, physical abuse, sexual violence, exploitation and they lack recognition of their equal humanity by their families and communities.

Girls with disabilities suffer still further discrimination, experiencing exclusion on account of their gender and their disability.

(1) **Meaning of disability** :- The concept of disability differs from society to society. Because attitudes towards disability are deeply rooted in socio-cultural values, the term ‘disability’ has been defined in many ways. Besides, other terms, physically/mentally challenged, handicap, and impairment have been used interchangeably to address a person with disability. But United Nations (UN) defines each term distinctly.

The United Nations uses a definition of disability as:

**Impairment** : Any loss of abnormality of psychological or anatomical structure or function.

**Disability** : Any restriction or lack (resulting from an impairment) of ability to perform an activity in the manner or within the range considered normal for a human being.

**Handicap** : A disadvantage for a given individual, resulting from an impairment or disability, that limits or prevents the fulfillment of a role that is normal, depending on age, sex, social and cultural factors, for that individual.

According to the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 of the Government of India,
a person with disability is a person suffering from not less than 40% of any disability as certified by a medical authority. The conditions included as disability are blindness, low-vision, hearing impairment, locomotors disability, mental retardation, leprosy and mental illness. Autism, cerebral palsy and multiple disabilities have been listed as disabilities in the National Trust Act of 1999.

(2) **Factors responsible for disability** :- The India Human Development Report, 1999 suggests that most physical disabilities are genetic, biological and even birth defects. According to a report by Child Relief and You (an NGO), ‘The Indian Child’, the most significant factors causing disability are:

(i) Communicable disease;
(ii) Infection in early childhood;
(iii) Early motherhood;
(iv) Nutritional deficiencies;
(v) Insufficient or inaccessible health care services;
(vi) Inadequate sanitation;
(vii) Consanguineous marriages.

**The Preventable causes include**

(i) Nutritional anemia, infection, use of toxic drugs, ill-health and lack of required care of mother during the pre-natal phase, all increase the risk of disability in the new born child;
(ii) At natal phase, complications such as lack of oxygen to the foetal brain, hemorrhage and precipitate birth carry similar risks;
(iii) Post child birth, infections like meningitis or encephalitis and head injuries due to accidents may result in a number of disabilities; and

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237 Ibid.
238 Ibid.
Polio has been one of the leading causes for disability in children in India.

Sometimes environmental factors too render children vulnerable to diseases that result in long term disability, such as trafficking, physical abuse and corporeal punishment, sexual abuse and sexual exploitation of children. Children living on streets or without any parental care are also particularly exposed to accidents causing physical disability.

Some other factors like premature/ very low Birth weight, Trauma on delivery, unattended birth may also be responsible for disability of a child.

Most of such factors as above-mentioned, responsible for disability among children are not documented and therefore besides some reported incidents of abuse and violence leading to disability, there is very little collected information linking disability with child protection.

(3) Magnitude of Problem :- Although the Ministry of Social Justice and Empowerment has been the nodal ministry dealing with subject of disability, and a major part of it is addressed through Health Ministry, it is critical to see it as a protection issue also. In fact child disability has never really been a focus area of any ministry and therefore calls for urgent attention. Even today, data related to disability among children varies from one source to another.

Detailed figures on child disability according to the 2001 census report are as follows:

The Indian census 2001 reports that 2.19 crore persons in the Indian total population (2.13%) are disabled, and that 1.67% of the total population within the age-group 0-19 years (7 million) are living with disability.

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Table 3.5

Disabled population in the age-group 0-19 by type of disability, Age and Sex- 
census 2001

<table>
<thead>
<tr>
<th>Total disabled population</th>
<th>21906769</th>
<th>Type of Disability</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>In seeing</td>
<td>In speech</td>
</tr>
<tr>
<td></td>
<td>10634881</td>
<td>1640868</td>
</tr>
<tr>
<td>Disabled population in 0-19 years</td>
<td>7732196</td>
<td>3605553</td>
</tr>
<tr>
<td>Disabled children as per cent of the total population in 0-19 years</td>
<td>1.67%</td>
<td>0.78%</td>
</tr>
<tr>
<td>Disabled children as per cent of the total disabled population</td>
<td>35.29%</td>
<td>33.9%</td>
</tr>
</tbody>
</table>

Source: Census of India 2001

Amongst all persons living with disability, 35.9% are the 0-19 age-group. Three out of five children in the age group of 0-9 years have been reported to be visually impaired. Movement disability has the highest proportion (33.2%) in the age group of 10-19. This is largely true of mental disability also.\textsuperscript{241} Other estimates suggest\textsuperscript{242}

- 3% of India’s children are mentally/physically challenged.

\textsuperscript{241} Office of the Registrar General of India, census of India 2001.
• 20 out of every 1000 rural children are mentally/physically challenged compared to 16 out of every 1000 urban children.

And according to some other sources

• One in every 10 children is born with, or acquires, a physical, mental or sensory disability. So India could have 12 million (1.2 crore) disable children.

• Only one percent of children with disability have access to education.

• As a matter of concern, compared to Indian statistics, the population of persons living with disability in India’s neighbours is substantially higher: 5% in China, 5% in Nepal and 4.9% in Pakistan. In the most developed countries this number raises to 18% (Australia), 14.2% (UK) and 9% (US). One WHO report states that 10% of the entire world’s population live with disability (650 million) and that there are more people living with disability in India than in any other country. The tragedy is that the census commission failed to make any attempt to collect statistics on disability until 2001. The assumption is simple: no census, no statistics and no problem.

(4) International and National Framework on Child with disability

(i) International Framework

(a) Convention on the Rights of Persons with Disabilities: On 13th December 2006, the Untied Nations General Assembly adopted this convention at the Untied Nations Headquarters in New York, and was opened for signature on 30th March 2007. There were 82 signatories to the convention, the highest number of signatories in the history of a UN convention on its opening day.

Article 3 of the convention has stipulated the principle of the convention, which includes respect for the evolving capacities of children with disabilities, and respect for the right of children with disabilities to preserve their identities.

The convention provides them the same rights and freedoms as all children, with particular reference to the rights to be protected from exploitation, violence and abuse; to express their views on all issues which affect them (Article 7). The convention introduces a specific article on awareness – raising to promote respect for the dignity of people with disability, throughout society (Article 8).

According to the convention, persons with disabilities have the right to the highest attainable standard of health without discrimination on the basis of disability. They would receive the same range, quality and standard of free or affordable health services as provided to the other persons and not be subjected to discrimination in the provision of health (Article 25). Countries must also guarantee freedom from torture, cruel, inhuman or degrading treatment or punishment and prohibit medical or scientific experiments without the consent of the person concerned (article 15) and protect the physical and mental integrity of persons with disabilities (article 16).

(b) Optional Protocol to the Convention the Rights of Persons with Disabilities

The Convention on the Rights of Persons with Disabilities and its optional protocol was adopted on the same day i.e. on 13th December 2006 and was opened for signature on 30th March 2007. Signing the optional protocol would mean that the domestic situation of the disabled would become the responsibility of the international community. Accordingly, if all domestic avenues to enforce any of the convention rights have failed, an individual or an organization can approach the Ad Hoc committee with an application.
(c) Indian response towards the convention and optional protocol

India has both signed and ratified the Convention on the Rights of Persons with Disabilities (CRPD) on 30th March 2007 and 1st October 2007 respectively. It came into force on 3rd May 2008, and makes it obligatory on the part of the government to synchronized laws or legal provisions with the terms of the convention. However, by not singing the optional protocol India has managed to safeguard itself in case of not fulfilling the commitments made under CRPD.

(ii) National Framework

(a) Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995; (PD Act) :- The Act was passed in 1995 but came into force in 1996. It covers the following disability areas:

- Blindness
- Low vision
- Leprosy cured
- Loco motor disability
- Hearing impairment
- Mental retardation; and
- Mental illness.

The person with disability should be certified as having no less than 40% of any disability as certified by a medical authority. This Act grant protection of rights, equal opportunities, and full participation by appropriate governments and local authorities in areas like (i) Education where every child with disability is entitled to free education up to the age of 18 years, and government is under obligation to promote setting up of special schools in the government and private sector. Moreover, it will provide for vocational training & special books and equipment, free of cost; (ii) Public accessibility, where there will be no discrimination of person with disabilities in transport facilities, traffic signals;(iii) Employment; and
Health; where the state governments are to promote methods to prevent disabilities, screen all children once a year to identify those “at risk” and create awareness through media. In short, the Act provides for education, employment, creation of a barrier free environment, social security etc.

(b) National Trust for Welfare of persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities Act, 1999 :- The Act covers the disabilities like Autism, cerebral palsy, multiple disabilities and severe disability. The Act provides for legal guardianship and creation of an enabling environment that will allow as much independent living as possible.

(c) Rehabilitation Council of India Act, 1992 :- This Act was passed by the Parliament to regulate the manpower development programmes in the field of education of children with special needs. Earlier, the government in 1986 decided to set up a Rehabilitation Council under the Ministry of Social Justice and Empowerment as an autonomous body. Later, it got the assent from the President and became an Act in 1992, and the Council came into force with effect from June 1993. The major objectives of the RCI Act are:

- To regulate the training policies and programmes in the field of rehabilitation of people with disabilities.
- To recognize institutions/universities running degree/diploma/certificate courses in the field of rehabilitation of the disabled and to withdraw recognition, wherever the facilities are not satisfactory.

245 “Autism” means a condition of uneven skill development primarily affecting the communication and social abilities of a person, marked by repetitive and ritualistic behaviour.

246 “Cerebral Palsy” means a group of non-progressive condition of a person characterized by abnormal motor control posture resulting from brain insult or injuries occurring in the pre-natal, perinatal or infant period of development.

247 “Multiple Disabilities” means a combination of two or more disabilities as defined in cl. (i) of section 2 of the PWD Act, 1995.

248 “Severe Disability” means disability with 80% or more of one or more multiple disabilities.
• To maintain a Central Rehabilitation Register of persons possessing the recognized rehabilitation qualification.
• To collect information on a regular basis, on education and training in the field of rehabilitation of people with disabilities from institutions in India and abroad.
• To standardize training courses for rehabilitation professionals/personnel dealing with people with disabilities and ensure uniformity in various training centres throughout the country.
• To recognize and equalize foreign degree/diploma/certificate in the field of rehabilitation awarded by universities/institutions.
• To prescribe minimum standards of education and training institutions in the field of rehabilitation uniformly throughout the country.
• To encourage continuing rehabilitation education by way of collaboration with organizations working in the field or rehabilitation of persons with disabilities.

The RCI has so far developed more than fifty courses and recognized more than a hundred institutions to offer special education and rehabilitation manpower development programmes in India. Out of these courses, nine are pertaining to visual impairment. Recently, RCI introduced a fully sponsored manpower development scheme so as to enable universities and colleges in the country to conduct need-based courses. This scheme will enable the most difficult regions in the country to initiate teacher preparation programmes in education of children with special needs. The enactment of RCI Act 1992 goes a long way in accrediting special education manpower development programmes in the country.

(d) **Mental Health Act, 1987** :- This Act consolidates and amends the Indian Lunancy Act, 1912 relating to the treatment and care of mentally ill persons, with
a clear aim to making better provision with respect to the management of their property and affairs.

GOVERNMENT INITIATIVES

(e) National Policy for Persons with Disabilities, 2006:– The National Policy recognizes the dignity of persons with disabilities and seeks to create an environment that provides them protection of their rights and freedoms as well as full participation in society. It focuses especially on prevention of disability, rehabilitation measures, education, protection of children and women with disabilities.

(f) Education allowance for disabled children : Sixth Central pay commission:\(^\text{249}\) Consequent upon the decision taken by the Government on the recommendations made by the sixth central pay commission for providing extra-benefits to women employees with disabilities especially when they have young children and children with disability, the president has issued the following instructions:

(i) Women with disabilities shall be paid Rs. 1,000/- per month as special allowance for child care. The allowance shall be payable from the time of the child’s birth till the child is two years old.

(ii) It shall be payable for a maximum of two children.

As for as the reimbursement of education allowance for disabled children of Government employees is concerned it shall be payable at double the normal rates prescribed. The annual ceiling fixed for reimbursement of children education allowance for disabled children of Government Employees is Rs. 24000. These orders shall be effective from 1st September 2008.

It is very unfortunate that society continues to treat disability with apathy or at best pity, on the one hand, and revulsion on the other. Inspite of recognition

of the need to make special efforts for the physically and mentally challenged, the efforts have been inadequate. Disability continues to fall in the realm of “social welfare.” While efforts are on to bring it into the realm of “rights”, there is still a long way to go.

Teachers in the schools are not trained to deal even with learning disabilities. Moreover, lack of data regarding different types of disabilities and number of people living with such disabilities has been an obstacle in planning and making adequate interventions. Even among the disabled children, there are some more vulnerable than others on account of their circumstances and living conditions. For instance, for the working child population, occupational hazards pose a serious threat.²⁵⁰

Last but not the least the link between disability and protection must be recognized and adequate support services should be provided for those who are disabled and also otherwise in need of care and protection.

Although, children are ‘Supremely important national assets’ and are ‘the greatest gift of humanity’, still if we assess the present scenario most of the crimes are committed against children, their rights are violated because of their vulnerability. Moreover, child as a class always being discriminated on the basis of their age. Different age is provided under different laws for their protection. Thus, if we want to give them protection the only solution lies in the universalisation of age i.e. 18 years.

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