

The Legislative and Institutional Framework for Protection of Children in India

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Foreword

Children below the age of 18 years account for nearly 40 per cent of India's population. It goes without saying that enabling all children to realize their full creative potential is critical for sustaining India's economic growth and accelerating human development. Not all children have benefited equitably from the remarkable progress and transformation that the country has witnessed in recent years. Tens of millions still face basic challenges of survival and healthy development.

Children are first and foremost individuals, born with indivisible and inalienable human rights. They also belong to families and communities that need to have access to resources and services, as well as capacities to ensure realization of their rights. Policy approaches are needed that address both the income and non-income dimensions of children's deprivations. Continued neglect of material, human and psycho-social dimensions of child well-being can prevent children from living a full life and from making informed decisions later on in their life. India too would miss out on the dividends that can accrue from a full expansion of children's capabilities.

The Institute for Human Development (IHD) and UNICEF are partnering to offer a platform for examining different dimensions of child rights. Experts and commentators were invited to explore the impact of development policies on children and women and suggest alternative approaches to the elimination of children's deprivations. They have explored how best to ensure that all children benefit from equal and non-discriminatory access to basic social services. They have looked at ways of capitalizing on the demographic dividend, creating fiscal policy space for investing in children and strengthening the legislative and institutional framework for protecting children.

These contributions are being brought out as IHD - UNICEF Working Paper Series *Children of India: Rights and Opportunities*. We hope that the series will contribute to enriching public discourse and strengthening public action to promote the rights of children.

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The Legislative and Institutional Framework for Protection of Children in India

Asha Bajpai*

Summary

Children constitute over 400 million of the one billion plus population of India. The twenty-first century has heralded a number of important policy and legislative initiatives as well as significant Court interventions relating to child protection. The law, policy and institutions for child protection have undergone a significant change from a needs-based to the ‘rights-’ and ‘development-’ based approach. The rights-based approach includes children as rights-holders and States as primary duty-bearers. This paper aims to give a broad overview of the law, policy and legal institutions of child protection in India and examines the current legal issues in a rights-based perspective. The paper discusses and critiques the laws, analyses the court trends, and gives suggestions for law reform relating to a child’s right to survival, development, protection and participation in India. It begins with the very definition of ‘child’ in Indian laws that have been used in various legislations as a term denoting relationship, capacity, and special protection. Various issues including children in the juvenile justice system and in conflict with law, their claim to juvenility, the minimum age of criminal responsibility, competency of child witnesses, children in need of care and protection, and the various institutional and non-institutional

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services available for them are dealt with. The legal aspects of child abuse and exploitation, child trafficking, child pornography and child sex tourism are also examined.

The roles of legal institutions and structures under the various laws to protect the rights of the child like Child Welfare Committees, Juvenile Justice Boards, Family Courts, Children's Homes, National and State Commissions for the Protection of Child Rights, and State Juvenile Police Units have also been highlighted. The paper points out the poor enforcement and implementation of laws, and suggests multi-disciplinary convergence or the 'working together' approach of various professionals, departments and Ministries, including mental health professionals, for facilitating more effective enforcement and implementation of the laws. Some of the important Bills pending before the Parliament of India, such as the draft bill on child sexual abuse and exploitation are also discussed. Further, the need for laws on corporal punishment, surrogacy and reproductive tourism, adoption, and cyber crimes against children has been demonstrated. Concerns have been expressed about lacunae in the prevention, rehabilitation and compensation aspects of child victims in legislations relating to children. India ratified the Convention on the Rights of the Child in December 1992 and is bound to make laws in conformity with the Convention. It is recommended, in this paper, that the process of change in laws must involve civil society and their recommendations on the effects of processes of globalization, privatization and liberalization on children must be seriously considered. Children's involvement in conciliation and mediation services, and in litigated/contested/defended court proceedings concerning their care arrangements or guardianship issues has been strongly advocated. In conclusion, the paper calls for a move towards a therapeutic jurisprudence and presents an urgent case for increasing expenditure on child protection, and for making child budgeting an essential component of the country's planning and strategy for development.

The Legislative and Institutional Framework for Protection of Children in India

1. Introduction

The law, policy and practice of child welfare have undergone a significant change from a historical perspective over the years. Before 1839, there was the concept of authority and control. 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. Children were recipients of welfare measures (Bajpai, 2003). It was only during the twentieth century that the concept of children's rights emerged. This shift in focus from the 'welfare' and 'needs' to the 'rights' and 'development' approach is significant. Earlier, the child was considered a beneficiary and a recipient of services. Today, the child is a participant and partner in his/her own development and decisions that affect his/her life. The rights approach is primarily concerned with issues of social justice, non-discrimination, equity and empowerment. 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. India ratified the Convention on the Rights of the Child in December 1992 and is bound to make laws in conformity with the Convention. The rights-based approach includes children as rights-holders and the states as primary duty-bearers.

Children constitute over 400 million of the one billion plus population of India. The twenty-first century has heralded a number of important policy and legislative initiatives as well as significant Court interventions and there are important Bills pending before the Parliament of India to make the laws more children-friendly. The Constitution of India is the basic law of the country, which includes the fundamental rights¹ and directive principles² for every

1. The violation of Fundamental Rights can be brought before the Courts. A writ petition can be filed in the Supreme Court and High Courts.

2. The Directive Principles lay down the guidelines that the Governments have to follow. Although the violation of these Principles cannot be taken before the Courts, yet because of judicial interpretation, many

citizen. The Constitution encompasses most rights included in the CRC as fundamental rights and directive principles of state policy. It is significant to note that the Constitution mandates special protection of children through adoption of positive discrimination by making special provisions for them³. The fundamental rights in the Constitution of India impose on the State the primary responsibility of ensuring that all the needs of the children are met and that their basic human rights are fully protected⁴. In addition, the rights to equality, protection of life and personal liberty, and the right against exploitation enshrined in Articles 14⁵, 15⁶, 16⁷, 17⁸, and 21⁹ of the Constitution of India are fundamental rights applicable to all Indian citizens including children. Constitutional Remedies to the Supreme Court and the High Courts can be resorted to in case of any violations of fundamental rights.¹⁰ Judicial activism has been displayed in several court decisions, in public interest litigations by civil society groups relating to children in institutions, adoption, child labour, child marriage, child prostitution, and the educational and health rights of children.¹¹

It was after a long campaign and struggle that the 86th Constitutional Amendment to make the right to education a fundamental right was made in 2002. Article 21A provides for free and compulsory education to all children in the age group of 6-14 years. The manner of education has to be determined by enacting a law. The expression 'education' must be given a broader meaning with regard to Article 21A of the Constitution of India as also

of the Directive Principles relating to children have now become enforceable through legal actions brought before the Courts. Articles 39(e) and 39(f) direct that the State policies be directed towards securing children because of their tender age.

3. Constitution of India, Article 15(3).

4. Article 23 prohibits trafficking of human beings including children and Article 24 mandates that no child below the age of 14 years can work in any hazardous occupation or industry.

5. Right to equality.

6. Prohibition of discrimination on grounds of only religion, caste, sex, place of birth, or any of them.

7. Promoting equality of opportunity for all citizens in matters of public employment.

8. Untouchability has been abolished and its practice in any form is forbidden.

9. Right to life and due process of law.

10. Articles 32 and 226 of the Constitution of India.

11. Some instances of judicial activism relating to children are: *Bhagwan Singh and Ors v. State of M.P.* AIR 2003 SC 1088, *M.C. Mehta v. State of Tamil Nadu and Ors* AIR 1997 SC 699, *Sanjay Suri v. Delhi Administration* AIR 1986 SC 414, *Lakshmikant Pandey v. Union of India* AIR 1984 SC 469; AIR 1986 SC 272; AIR 1992 SC 118, *Gaurav Jain v. Union of India* AIR 1990 SC 292, *People's Union for Democratic Rights (PUDR) v. Union of India* AIR 1982 SC 1473, *Vishal Jeet v. Union of India* AIR 1990 SC 1412, *Dukhtar Jahan v. Mohammed Farroq* AIR 1987 SC 1049, *Sheela Barse v. the Secretary, Children's Aid Society and Ors* AIR 1987 SC 656, *Delhi Domestic Working Women's Forum v. Union of India and Ors* (1995)1 SCC 14, *Sarita Sharma v. Sunita Sharma* (2000)3 SCC 14, *Shantisar Builders v. Narayan Khimlal Totane* AIR 1990 SC 630, *Kishen Pattnayak v. State of Orissa* AIR 1989 SC 677, *Unnikrishnan J.P. and Ors v. State of Andhra Pradesh* AIR 1993 SC 2178.

the directive principles of the state policy. The State is under a Constitutional mandate to provide educational institutions at all levels, which must function to the best advantage of the citizens.

The long awaited Right of Children to Free and Compulsory Education Act, 2009 (RTE Act) received the Presidential assent on 26 August 2009.¹²

Some of the shortcomings in the Act are:

- RTE 2009 Act is an instrument that legalizes the existing multi-layered education system, which depends on the economic capacity of the parents. It legalizes the current four operating systems—government schools, aided private schools, the special category schools, and non-aided private schools.
- The provisions relating to recognition of schools under the Act raise concerns about the children studying in unrecognized schools.
- The Act is silent on child labour. In fact, the Right to Education Act must be used to eliminate child labour. Issues of children with special needs and the availability of trained teachers for such children are also missing in the Act.

12. Some of the salient features of this Act are as follows:

- Every child has a right to free and compulsory admission, attendance and completion of EE (elementary education).
- No child liable to pay any fee/expense preventing her from pursuing and completing EE.
- Compulsion on the state and parental duty to send children to school.
- Not enrolled/dropout children be admitted to age-appropriate class.
- No child shall be failed or expelled up to class 8.
- Bars corporal punishment for mental harassment.
- Qualification for appointment of teachers to be laid down by academic authority authorized by Central Government. Academic responsibilities of teachers laid down.
- Prohibits deployment of teachers for non-education purpose, except for Decennial census, Disaster relief, Elections to Parliament, State Legislatures, and Local Bodies.
- Community participation in schools ensured through School Management Committees (SMC) comprising elected representatives, teachers and parents, members from among parents of children in the school; 50% women, Proportionate representation to weaker and deprived sections, SMC to plan, manage and monitor schools in collaboration with the local authority.
- All aided schools to provide free education to at least 25% children.
- Special category schools and unaided schools to admit in Class I at least 25% children, belonging to weaker section and disadvantaged group, from the neighbourhood, and provide free and compulsory elementary education.
- No capitation fees, No screening for admission, No school without recognition.
- Curriculum and evaluation procedure laid down by prescribed academic authority should: conform to constitutional values, make child free from fear, trauma and anxiety, be child-centred, child-friendly and provide for learning through activities. There will be no Board examinations till completion of EE.

- The sixty-year old Constitutional promise of free and compulsory education for all children between the ages of 0 and 14 years has been snatched away. The Right to Early Childhood Care and Education of children below the age of 6 years has been denied. The RTE Act should have covered the entire school education system for children aged 0-18 years. The exclusion of groups of children is a violation of human rights. The Constitutional Right of Early Childhood Care and Education must be restored and the requisite provisions for its quality delivery must be made. The directive principle in the Constitution relates to early childhood care and education and also states that it is the fundamental duty of parents to send their children to school¹³. It would have been more effective if early childhood care and education had been guaranteed as a fundamental right rather than as a directive principle.
- Higher education to children completing secondary schooling as per the Constitutional Directive of Article 41 must be ensured by the State. Education is a fundamental right. Therefore, privatization and computerization of the education system under the guise of PPP (private-public partnership) or ‘decentralization’ is not proper.
- Certain important norms and standards need to be included like distance of school from the child’s residence, teaching aids, computers, equipment in laboratories, promotion of teachers, etc. These issues must be made justiciable.

2. Who is a child in Indian laws?

The trouble with child rights begins with the very definition of a child under the law. There are several grey areas in the law here (Bajpai, 2007). Who is a child? When does childhood cease? These simple questions have complex answers. Age limits are a formal reflection of society’s judgment about the evolution of children’s capacities and responsibilities. Almost everywhere, age limits formally regulate children’s activities: when they can leave school; when they can marry; when they can vote; when they can be treated as adults by the criminal

13. Constitution of India, Articles 45 and 51 A.

justice system; when they can join the armed forces, and when they can work. But age limits differ from activity to activity, and from country to country, and in India, from legislation to legislation.

According to Article 1 of the United Nations Convention on the Rights of the Child, 1989¹⁴, “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 grants the discretion to individual countries to determine by law whether childhood should cease at the age of 12, 14, or 16 years, or whatever age they find appropriate.”¹⁵

The word ‘child’ in Indian laws has been used in various legislations as a term denoting relationship; as a term indicating capacity; and as a term of special protection. Underlying these alternative specifications are very different concepts about the child.

For purposes of criminal responsibility, the age limit is 7 and 12 years under the Indian Penal Code, 1860. For purposes of protection against kidnapping, abduction and related offences, the age limit has been fixed at 16 years in the case of boys and 18 years in the case of girls. However, the Indian Penal Code, while defining rape, in Section 375, exempts a person from the charge of rape if he has forcible sexual intercourse with his wife, who is above 15 years of age. Under the Immoral Traffic (Prevention) Act, 1986, a child means a person who has not completed 16 years of age and a minor means a person who has completed 16 years of age but not completed 18 years.

Under the Child Labour Prohibition and Regulation Act, 1986, a child means a person who has not completed his fourteenth year of age, but below the age of 14, s/he can work in non-hazardous industries. An area of concern is that no minimum age has been specified for child labour. For purposes of special treatment under the Juvenile Justice (Care and Protection of Children) Act, 2000, the age limit is 18 years for both boys and girls. The Protection of Women from Domestic Violence Act, 2005 defines a child as any person below the age of 18 years and includes any adopted step- or foster child. Under the Plantation Labour Act, 1951, a child means a person who has not completed his fourteenth year of age, while an adolescent means a person who has completed his fourteenth year of

14. India ratified the Convention on the Rights of the Child in 1992.

15. *Ibid.*

age but has not completed his eighteenth year of age.

Under the Merchant Shipping Act, 1951, no person under 15 years of age shall be engaged or allowed to work in any capacity in any ship, except in a school ship, or training ship, in accordance with the prescribed conditions; or in a ship in which all persons employed are members of one family; or in a home trade ship of less than 200 tonnes gross; or where such person is to be employed on nominal wages and will be in the charge of his father or other adult near male relative.

Under the Age of Majority Act 1875, every person domiciled in India shall attain the age of majority on his completing the age of 18 years and not before that. The Indian Majority Act, 1875, was enacted in order to bring about uniformity in the applicability of laws to persons of different religions. Unless a particular personal law specifies otherwise, every person domiciled in India is deemed to have attained majority upon completion of 18 years of age. However, in the case of a minor for whose person or property, or both, a guardian has been or appointed or declared by any court of justice before the age of 18 years and in case of every minor the superintendence of whose property has been assumed by the Court of Wards, before the minor has attained that age, of majority will be 21 years and not 18 years. The Hindu Minority and Guardianship Act (HMGA), 1956 in Sec. 4(a) defines a 'minor' as a person who has not completed the age of 18 years. The age of majority for the purposes of appointment of guardians of person and property of minors, according to the Dissolution Muslim Marriages Act, 1939, is also the completion of 18 years (Bajpai, 2006).

An anomaly is prevalent as far as a child's consent to sexual intercourse is concerned. The law considers a person aged less than 18 years to be a child/minor, not competent to take major decisions affecting herself or others for the purposes of the Indian Majority Act, the Contract Act, the Juvenile Justice Act, the Child Marriage Act, and the Representation of Peoples Act. However, under Section 375 of the Indian Penal Code, the girl is given the right to 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 strangely, she can give consent to sexual intercourse as 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 up the age of consent in rape to 18 years in tune with other enactments and to make it consistent with the refined

and modern notions regarding the concern and compassion which society should bestow on its younger members. But that was not accepted, with the result that the age of consent in an offence of rape continues to be 16 years even today. Raising the age of consent for sexual intercourse to 18 years to make it consistent with the stipulations in the subsequent enactments appears to be the unavoidable imperative before the system.

The Hindu Marriage Act, 1955, states that a female has to be 18 years of age before she can legally marry. Similarly, under the Christian and Parsi marriage laws, the age of marriage is 18 years. Under the Muslim Personal law, the age of marriage for both boys and girls is the age of attainment of puberty. In a Public Interest Litigation (PIL), the complex issue of a girl's marriageable age was brought before the Supreme Court of India by a father whose 15-year old daughter went missing and then claimed to have got married. But despite the girl not being of the marriageable age of 18 years, and also being a year short of the age of consent for sex, the father found himself unable to press rape charges against the husband because of contradictory rulings by the Courts. Two courts—Delhi and Andhra Pradesh—have ruled that 15 years could be considered as the age of discretion and that the marriage need not be annulled if it has the girl's consent. In both the cases, though the girls were not of marriageable age as per the Hindu Marriage Act, 1955, the High Courts had refused to proceed on rape charges against the husbands holding that the girls, being 15 years old, had reached the age of discretion. The Supreme Court took a humanitarian approach and said that it would not set aside the orders of the High Courts, as that would unsettle the young couples.

The absence of a comprehensive and common definition of the term 'child' creates confusion and a dilemma. Although one would like to have a uniform age limit legally prescribed for the status of childhood, that may perhaps not be possible. Nevertheless, some rationalization is possible or some norms can be laid down, as some of the age limits in the laws appear to be arbitrary while some are based only on socio-cultural perceptions. If 'the best interest of the child' interpretation were to be adopted, one could perhaps err on the side of a higher age limit for protective care and a lower age limit in respect of civil and cultural matters. The question of review of the definition of the 'child', in the light of Article 1 of the Convention on the Rights of the Child, has been referred to the Law Commission of India to be considered by the Commission while undertaking a comprehensive review of the Code of Criminal Procedure, the Indian Evidence Act, and the Indian Penal Code.

2.1 The minimum age of criminal responsibility

The legal definition of a child also affects how the courts deal with offenders. The age is very significant here, as a person who is a minor or a child cannot be tried and convicted in the same manner as an adult as at the time of commission of the offence, the child was not capable of understanding the consequences of his/her actions and had no *mens rea* and was a *doli incapax*—that is, not understanding the right from the wrong. Article 40 (3) (a) of the CRC requires State Parties to promote the establishment of a minimum age below which children shall be presumed not to have the capacity to infringe the penal law. The age of criminal responsibility in India is 7 years¹⁶. Hence, a child below the age of 7 years cannot be considered a child in conflict with law. Nothing is an offence done by children between 7 and 12 years of age who have not attained sufficient maturity of understanding to judge the nature and consequences of their conduct on that occasion and did not know that what they were doing was wrong¹⁷. If there is a legislation dealing with the criminal liability of minors, the benefit of this legislation must be accorded to an accused who is a minor, and such accused should not be tried under the ordinary law for adults. Children have to be dealt with under the juvenile justice system and not the adult criminal justice system. Children can never be given imprisonment or death sentence.

2.2 Competency of child witnesses

The Courts have held that a child witness, if found competent and reliable to depose to the facts and such evidence, could be the basis of conviction. In other words, even in the absence of oath, the evidence of a child witness can be considered under Section 118 of the Evidence Act, provided that such witness is able to understand the answers. Therefore, the evidence of a child witness and his/her credibility would depend upon the circumstances of each case. The only precaution that the Court should bear in mind while assessing the evidence of a child witness is that the witness must be a reliable one and his/her demeanour must be like any other competent witness so that there is no likelihood of the child being tutored.

16. Section 82 of the Indian Penal Code, 1860.

17. Section 83 of the Indian Penal Code, 1860.

Further, Section 118 of the Indian Evidence Act, envisages that all persons shall be competent to testify, unless the Court considers that they are prevented from understanding the questions put to them or from giving rational answers to these questions, because of tender years, extreme old age, disease—whether of mind, or any other cause of the same kind. However, a child of tender age can be allowed to testify if s/he has the intellectual capacity to understand questions and give rational answers. Recently, the Mumbai High Court upheld the testimony of a 12-year old in a murder case, as the lone eyewitness account of the 12-year old grandson helped nail the two murder accused. The court held that the ‘child witness was a witness of truth’. The court reiterated yet again that depositions by children who have the capacity to understand things and their consequences cannot be discarded as evidence in a criminal trial. The child’s testimony was corroborated by other evidence of strangulation marks and stone injury.

While the law recognizes the child as a competent witness, a child particularly at a tender age, say of six years, who is unable to form a proper opinion about the nature of the incident because of immaturity of understanding, is not considered by the court to be a witness whose sole testimony can be relied upon without other corroborative evidence. The evidence of the child is required to be evaluated carefully because s/he is an easy prey to tutoring. Therefore, the court looks for adequate corroboration from other evidence to his testimony.

3. Children in the juvenile justice system

Children come into contact with the juvenile justice system as offenders or as victims. The Juvenile Justice (Care and Protection of Children) Act, 2000 and amended in 2006, deals with two categories of children—‘juvenile in conflict with the law’¹⁸ and ‘child in need of

18. ‘Juvenile in conflict’ with the law means a person who is alleged to have committed an offence under the law of the country and who is below 18 years of age on the date when the offence was committed.

care and protection”¹⁹. Its objective is to provide for proper care, protection and treatment by catering to their development needs, and by adopting a child-friendly approach in the matters and in the best interest of children and for their ultimate rehabilitation. The Juvenile Justice (Care and Protection of Children) Act (JJA), 2000, is a legislation that conforms to the CRC and the United Nations Minimum Standards for Administration of Justice to Children (Beijing Rules). The CRC has laid down the basic principles of decision-making to promote the best interests of children, and all decisions relating to children need to be guided by this consideration. The Beijing Rules direct that institutions should be used only as a last resort and only after community measures are not available for children. As the JJA, 2000 was specifically made to implement India’s obligations under these and other international instruments, it is incumbent upon the authorities implementing this legislation to ensure the protection and promotion of the principles embodied in the JJA, 2000. The Act also provides that no report in any newspaper, magazine, news-sheet or visual media of any inquiry regarding a juvenile in conflict with the law or a child in need of care and protection under this Act shall disclose the name and address of the school or any other particulars calculated to lead to the identification of the juvenile or child, nor shall any picture of any such juvenile or child be published. The authority holding the inquiry may permit such disclosure, in exceptional cases, if in its opinion such disclosure is in the interest of the juvenile or the child. In spite of these specific provisions, many well-known publications even today, reveal the identity of the child.

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19. According to the Juvenile Justice Act 2000, a ‘child in need of care and protection’ means a child:
- who is found begging or is a street child or a working child;
 - who is found without any home or settled place or abode and apparently without any means of subsistence;
 - who resides with a person (he may or may not be a guardian of the child) and such person;
 - who has threatened to kill or injure the child and there is a reasonable likelihood of the threat being carried out;
 - who has killed, abused or neglected some other child or children and there is a reasonable likelihood of the child in question being killed, abused or neglected by that person;
 - who is mentally or physically challenged or ill children or children suffering from terminal diseases or incurable diseases having no one to support or look after them;
 - who has a parent or guardian and such parent or guardian is unfit or incapacitated to exercise control over the child;
 - who does not have either parent and no one is willing to take care of him/her or whose parents have abandoned or surrendered him/her or who is a missing and run-away child whose parents cannot be found after reasonable inquiry;
 - who is being or is likely to be grossly abused, tortured or exploited for the purpose of sexual abuse or illegal acts;
 - who is found vulnerable and is likely to be inducted into drug abuse or trafficking
 - who is being or is likely to be abused for unconscionable gains; or
 - who is a victim of any armed conflict, civil commotion or natural calamity.

In this Act, ‘juvenile’ or ‘child’ means a person who has not completed the eighteenth year of age, mainly to bring juvenile legislation in conformity with the CRC. Both boys and girls below the age of 18 years enjoy the protection of juvenile legislation.

3.1 Children in conflict with the law

The definition of ‘juvenile in conflict with the law’ was amended in 2006 and it is clear today that this term means a juvenile who is alleged to have committed an offence and has not completed the eighteenth year of age as on the date of commission of such an offence. The occurrence of violent juvenile crimes is a global phenomenon. Juvenile crimes are also increasing at an alarming rate in India. Today, newspapers are full of news of murder, rape, and kidnapping committed by teenagers. The National Crime Research Bureau (NCRB) claims that 83.7 per cent of the crimes committed by juveniles in 2006 came under the Indian Penal Code. While Maharashtra reported the highest number of IPC crimes among juveniles in 2006, Madhya Pradesh registered the highest number of crimes such as murder, rape, kidnapping and abduction (GoI, 2006). The news of teenagers being used to smuggle marijuana also makes regular headlines in the dailies.

The legal definition of a child also affects the manner in which the courts deal with offenders. A person who is a minor or a child cannot be convicted in the same manner as an adult. If a juvenile is accused of an offence under the provisions of the Narcotics Drugs and Psychotropic Substances Act (NDPS), or Prevention of Terrorism Act (POTA), he is certainly entitled to the necessary benefits under the special enactment, namely the Juvenile Justice Act. While different high courts have taken different positions on the applicability of JJA 2000 to cases where the accused is a child, the Supreme Court has clearly held that JJA, 2000 will apply to children alleged to have committed offences under those special penal legislations too.²⁰

20. Madan Singh v. State of Rajasthan, SC DOJ 2.4.05; Raj Singh v. State of Haryana, [2000] 6 SCC 759.

3.2 Claim of juvenility

Whenever a claim that a person is a juvenile or below 18 years is raised before any court or a court is of the opinion that an accused person produced before it was a juvenile on the date of commission of the offence, the court shall make an inquiry, take such evidence as may be necessary (but not evidence of age on an affidavit) to determine the age of such person, and then the court shall record a finding as to whether the person is a juvenile or a child or not, stating his age as near to the actual as may be. If the court finds that the person was below 18 years on the date when the offence was committed, the court must send the juvenile to the Juvenile Justice Board, as only the latter can pass any order in such a case. An important provision is that a claim of juvenility or that the accused was a juvenile may be raised before any court and it shall be recognized at any stage even after disposal of the case. In India, there are millions of children, especially in the villages, who do not have birth certificates. It has been observed that in many instances, if the police take a child into custody, and find him/her to be well-built, s/he is considered as an 'adult' and denied the beneficial provisions of the Juvenile Justice system. A mention must be made of a 'Baba Room' in one of the well-known prisons, wherein children whose age had not been confirmed or could not be confirmed were huddled up waiting for their age verification.

Age determination of the children in conflict with the law is a very complex issue. The largest number of cases that come before the High Courts and the Supreme Court under this legislation and its predecessors pertain to the determination of age. In the absence of a birth certificate, a child may easily be excluded from the operation of the JJA and denied its care and protection (Ved, 2007). Ameena, the minor girl from Hyderabad married to a 60-year-old Arab, rescued by air hostess Amrita Ahluwalia, remained in the observation home in Delhi for over seven months before being sent back to Hyderabad. But her age was never properly determined and different courts kept referring to her as 10, 11 or 12 years old. In the case of Ramdeo Chauhan,²¹ the Supreme Court refused to determine the age of the accused on the basis of entries in the school register or medical evidence, both of which indicated him to be a child on the date of the offence, and confirmed the death penalty for the offence of murder even though one judge expressed a doubt as to whether the boy was

21. [2001] 5 SCC 714 and 2000 II AD [Cr] SC 801).

a child on the date of commission of offence. The governor later commuted his sentence to life imprisonment on the recommendation of the National Human Rights Commission (Ved, 2007). There have also been some recent judgments on this issue. The Supreme Court has held that as regards the point of proof of age, the school-leaving certificate is the best evidence and that as far as the medical certificate is concerned, the same is based on an estimate and the possibility of error cannot be ruled out. However, the date of birth in the Secondary School Certificate is not to be taken to be correct unless corroborated by the parents of the child who have got the same entries made.

The following are some important rulings under the Juvenile Justice (Care and Protection of Children) Act, 2000, dealing with juveniles in conflict with the law (Bajpai, 2006):

- i. When the school-leaving certificate shows the age of the child as below 18 years, but the arrest memo shows it as 18 years, the court should first enquire about the current age of the child and the order of rejecting the bail without such inquiry in respect of the age in the NDPS Act is improper.
- ii. If the age of the accused during the recording of the statement under Section 313 of the Cr. P. C. is 22 years, but the accused was a 'juvenile' at the time of commission of the offence, s/he must be treated as a 'juvenile' for sentencing purposes.
- iii. The plea of juvenility can be taken at any time even before the appellate court.
- iv. The conduct of trial of a juvenile by the sessions court without first enquiring his/her age in order to ascertain as to whether s/he is a juvenile or not is not proper and the Rajasthan Court had directed the sessions judge first to conduct an enquiry about the age of the accused and if he were found to be juvenile, then to forward the relevant record to the competent court, and if found otherwise, to decide the sessions case as per the law.
- v. The provisions of the JJ Act, 2000 would be applicable even to those cases that have been initiated and pending for offences committed under the Act of 1986, provided the offender has not completed 18 years of age as on 1 April 2001.
- vi. The reckoning date for determination of age of a juvenile offender is the date of offence and not the date when he is produced before the court/competent authority.
- vii. Considering the difficulty of transportation of juveniles from remote places for trial and considering the fact that only five Juvenile Justice Boards (JJBs) were constituted

to deal with the entire state of Karnataka, the High Court directed the Karnataka state government to consider the necessity of establishing one JJB in each district.

- viii. The JJB Board has the exclusive power to deal with the trial of juveniles in conflict with the law. To the extent, the jurisdiction of any court including that of the Sessions Court or Fast Track Court is barred (Bajpai, 2006).
- ix. In one case, a juvenile was not presented before the court on various dates. The jail authorities misplaced the copy of the order of the court declaring the petitioner to be juvenile and directing that he be shifted to the observation board. So, the juvenile had to remain in an adult's jail for 25 months. The court then granted the juvenile a compensation of rupees one lakh. In the same case, the Bombay High Court directed the Sessions Court and Magistrates' Courts to get a compliance report of their orders in six weeks in all cases wherein bails are granted to avoid such incidents in the future.
- x. The Sessions Courts cannot refuse to make an enquiry for the purpose of determination of the age of the alleged juvenile offender on the sole ground that the JJ Board has been constituted for this purpose. If the accused had admittedly opened an account in a bank, his contention that he was a minor at the time of the commission of the offence cannot be accepted because he could not have opened the account, had he been a minor.
- xi. While dealing with the question of determination of the age of the accused, for the purpose of finding out whether he is a juvenile or not, a hyper-technical approach should not be adopted while appertaining the evidence adduced on behalf of the accused in support of the plea that he was a juvenile, in borderline cases.
- xii. The law has recognized the importance of the speedy disposal of cases and the 2006 amendment provides that the Chief judicial Magistrate or the Chief Metropolitan Magistrate shall review the pendency of cases of the Board every six months and shall direct the Board to increase the frequency of its sittings or constitute additional Boards.²²

3.3 Children in need of care and protection

The children in need of care and protection include vulnerable children like street children; orphaned, abandoned, abused and destitute children; working children; child labourers;

22. Juvenile Justice Care and Protection of Children Act 2000 amended 2006, Section 14(2).

trafficked children; mentally ill children; children affected or infected by HIV/Aids; and children who are victims of conflict and disaster situations. These children have committed no offence but they are victims of their circumstances or situations. Some other categories of children who need special assistance are migrants, those affected by armed conflict, and victims of natural calamities like floods or cyclones. These are children in especially difficult circumstances and need to be protected from all kinds of abuse, neglect and exploitation. The Act has expanded the definition of the child in need of care and protection very significantly. There, however, are no figures available on the number of children in need of care and protection as defined under JJA, 2000. It has to be ensured that this expanded definition does not lead to undue interference in the lives of several poor children and their families by the ‘system’.

3.4 Non-institutional services under the Juvenile Justice Act, 2000

The Juvenile Justice Act (JJA), 2000, provides for the rehabilitation and social re-integration of children in conflict with the law as well as children in need of care and protection.

The process of a child’s rehabilitation and social re-integration has to begin in the children’s home or special home.²³ Non-institutional services are based on Articles 20²⁴ and 21 of the CRC. The Act provides for non-institutional services like adoption²⁵, foster care²⁶, and sponsorship²⁷.

23. Section 40, Juvenile Justice (Care and Protection of Children) Act, 2000.

24. Article 20, CRC—children deprived of family environment provided with alternate family care or institutional placement.

25. Adoption means the process through which the adopted child is permanently separated from his biological parents and becomes the legitimate child of his adoptive parents, with all rights, privileges and responsibilities that are attached to the relationship [Section 2(aa) JJA]. Adoption is considered as the best service for the orphaned, abandoned, destitute child since it provides permanent substitute care in a family environment. In India, adoption laws are religious-based. There is an adoption law for Hindus called the Hindu Adoption and Maintenance Act, 1956. But there is a legal vacuum as regards adoption by or of other communities in India.

26. Foster care provides temporary substitute care for children, whose parents are unable to care for them due to illness, death, or desertion, of one parent or any other crisis situation.

27. Providing financial support to families to meet the medical, nutritional and educational needs of children and to improve the general quality of their lives.

Adoption is the most important non-institutional service. The JJA, 2000 has introduced a secular law on adoption. Under Section 41 of the JJA, the adoption of orphaned, abandoned or surrendered children has been provided for under the Act. In keeping with the provisions of the various guidelines for adoption, issued from time to time, by the state governments or the Central Adoption Resource Agency and notified by the Central Government, children may be given in adoption by a Court after it is satisfied that the requisite investigations have been carried out. The children must be declared free for adoption by the Child Welfare Committee. The Court may allow a child to be given in adoption to a person irrespective of marital status, or sex of the child to be adopted, to childless couples. In-country adoption is the first option as per the Hague Convention which India has ratified.

4. Child victims of abuse and crime

Child abuse and exploitation can be physical, sexual and emotional. An estimated number of 600,000–700,000 children are sexually abused in India (<http://www.chennaionline.com/society/06/june 12thasp>). The sexual abuse of a child is defined as a situation when a child is used for sexual gratification by an adolescent or an adult. Crimes against children are rising alarmingly as corporal punishment is on the rise, children are being trafficked for marriage, and they are vulnerable to abuse anywhere, including within homes, outside homes, in schools and institutions, and at work.

A total of 18,967 cases of crimes against children were reported in the country during 2006 as compared to 14,975 cases during 2005, indicating an increase of 26.7 per cent. Among IPC crimes, the number of foeticide cases increased from 86 in 2005 to 125 in 2006, registering an increase of 45.3 per cent over the year. There was, however, a decline of 18.9 per cent in cases under the Child Marriage Restraint Act during the corresponding period (122 cases in 2005 to 99 cases in 2006). Cases of abetment to suicide increased by 4.7 per cent during the year 2006 (from 43 to 45 cases). Cases of kidnapping and abduction increased by 45 per cent (3,518 cases in 2005 as against 5,102 cases in 2006). Madhya Pradesh (3,939), Maharashtra (2,841), Delhi (2,160) and Uttar Pradesh (1,767) accounted for 20.8, 15.0, 11.4 and 9.3 per

cent of the total crimes, respectively, against children at the national level during the given period. The crime rate increased marginally from 1.4 per cent in 2005 to 1.7 per cent in 2006. The rate was the highest in Delhi (13.3 per cent), followed by Chandigarh (6.3 per cent), and Sikkim and Dadra & Nagar Haveli (6.0 per cent each), as compared to the national average of 1.7 per cent (GoI, 2006).

4.1 Physical abuse

At present, the physical abuse of children is dealt with under the Indian Penal Code (IPC), under Sections 323-326²⁸. Under the Juvenile Justice (Care and Protection of Children) Act, 2000, special offences covered under Section 23 relate to cruelty to a juvenile or a child by persons having charge. Any person with the charge or control of a juvenile or child, who assaults, abandons, neglects or exposes a child to physical and mental suffering or employs or uses them for begging or provides intoxicating liquor or narcotic drugs or psychotropic substance, or uses the child in hazardous employment, will be punished. All these acts have been made cognizable and a complaint can be filed against the offenders.

Incidents of brutal corporal punishments in schools are on the rise. There is no national prohibition in law of corporal punishment in schools. The government has issued instructions to the states to stop its use in schools and the National Policy on Education (1986, modified 1992) states in Section 5.6 that “corporal punishment will be firmly excluded from the educational systems”. A draft Free and Compulsory Education for Children Bill, which proposes the prohibition of corporal punishment in schools, applicable to the whole of India, is under discussion.

Some states have prohibited corporal punishment in schools. In 2003, the Andhra Pradesh government imposed a ban on corporal punishment in all educational institutions by amending Rule 122 of the Education Rules (1966), violations of which should be dealt with

28. Section 323 IPC—voluntarily causing hurt
324 IPC—voluntarily causing hurt by dangerous weapons or means
325 IPC—voluntarily causing grievous hurt
326 IPC—voluntarily causing grievous hurt by dangerous weapons or means.

under the Penal Code. Corporal punishment was prohibited in Tamil Nadu in June 2003 through an amendment of Rule 51 of the Tamil Nadu Education Rules prohibiting the infliction of mental and physical pain during 'corrective' measures. In February 2004, the Calcutta High Court ruled that caning in state schools in West Bengal was unlawful, and it was prohibited in Chandigarh in the 1990s. In December 2000, the Delhi High Court ruled that provisions for corporal punishment in the Delhi School Education Act (1973) were inhumane and detrimental to the dignity of children.

Children have limited protection from physical violence and abuse under the Indian Penal Code 1860 (IPC), and the Juvenile Justice (Care and Protection of Children) Act, 2000. Under the Indian Penal Code, 1860, corporal punishment is unlawful under the Juvenile Justice (Care and Protection of Children) Act, 2000, which prohibits torture and other cruel, inhuman or degrading treatment or punishment. In such cases, the Juvenile Justice Act (JJA), 2000 and the IPC provisions can be used against the accused. The National Commission on the Protection of Child Rights has introduced guidelines for the protection of children against corporal punishment.

4.2 Protection of children from domestic violence

The Protection of Women from Domestic Violence Act, 2005 covers all children below the age of 18 years and even includes any adopted step- or foster child.

Domestic Violence has been defined as any act that:

- Harms or injures or endangers the health, safety, life, limb or well-being, whether mental or physical, of the child or tends to do so and includes causing physical abuse, sexual abuse, verbal and emotional abuse and economic abuse;
- Harasses, harms, injures or endangers the child with a view to coerce her or any other person related to her to meet any unlawful demand for any dowry or other property or valuable security; or
- Has the effect of threatening the child or any person related to her by any conduct.

An Order of Protection of children from domestic violence can be obtained under this Act.

4.3 Sexual abuse and exploitation

The phenomenon of sexual abuse and exploitation of children is not new, and the problem is severe to the extent that children are sold, rented out and sexually abused by adults everywhere. While it is almost impossible to obtain accurate figures, it is a fact that millions of girls and boys worldwide are being used in prostitution, pornography, trafficking, and other forms of sexual abuse and exploitation. There is no uniformly accepted definition of child abuse. There have been a number of definitions of the phrase ‘child sexual abuse’ (CSA). It could be termed as an activity relating to the engaging of sex organs for sexual gratification, which takes advantage of, violates or deceives children or young people. CSA 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 the age of 16 years, without informed consent.

As per some other definitions, CSA is any kind of physical or mental violation of a child with a sexual intent, usually by an elder person, who is in possession of trust or power vis-à-vis the child (Bajpai, 2006). CSA becomes exploitation when a third party benefits through a profit. Commercial sexual exploitation of children commonly refers to the use of a child for sexual purposes in exchange for cash or in-kind favours between the client/customer and intermediary or agent who profits from such trade in children. Those who profit from such trade in children include a wide range of persons, including parents, family members, agents, and community members, largely men, but also women. It includes child prostitution, through trafficking, child sex tourism and child pornography.

4.4 Laws relating to child sexual abuse

The laws dealing with sexual offences do not specifically address child sexual abuse. The Indian Penal Code, 1860, does not recognize child abuse. Only rape and sodomy can lead to criminal conviction. Anything less than rape as defined by the law, amounts to ‘outraging the modesty’ of the victim. The word ‘rape’ is too specific; this does not even include abuse on ‘boys’.²⁹

29. The provisions in the Indian Penal Code, 1860, relating to sexual abuse are as follows: Section 354—Outraging the modesty;

There is no comprehensive law on child sexual abuse. For a girl child, Section 375 (rape) and Section 354 (outraging the modesty) are generally used, which are highly inadequate, as they do not cover the forms of sexual abuse borne by children. For lack of any specific section for boy children, Section 377 (unnatural offences) is presently being used for cases of child sexual abuse of boys. This is an area of great concern.

A pilot study on the implementation of the existing law on child sexual abuse³⁰ revealed the following facts:

- Statements taken by the Investigating Officers (IOs) mostly revolve around one episode of CSA.
- The increase in the number of acquittals in cases of CSA is primarily because of insufficient medical evidence. Medical examinations and reports need to be scrutinized extensively to recommend appropriate changes so that the abuse is reflected in all its complexities when it is a long-term abuse.
- All the victims were under the age of 10 years when the abuse first occurred. The data also shows that 17 of the abusers were below the age of 18 years.

Child marriage also constitutes a form of sexual abuse of children. In Rajasthan, on *Akshya Tritiya* day, which is popularly known as the *Akha Teej*, hundreds of child marriages are openly performed. *Akha Teej* is regarded as the most auspicious day for celebrating marriages. On this day, even infants who have just been born or are only a few years old and cannot even sit or walk are married. In April 2003, the Forum for Fact Finding Documentation and Advocacy (FFDA), a human right NGO, filed a public interest case³¹ seeking strict implementation of the Child Marriage Restraint Act 1929 (CMRA).³² In December 2006, the Indian Upper House of Parliament approved a Bill outlawing Child Marriages called the Prohibition of Child Marriage Act 2006.

• Section 366—Kidnapping, abducting or inducing a woman to compel her for marriage, etc.

• Section 366 A—Procuration of minor girls;

• Section 375—Rape;

• Section 376—Punishment for rape;

• Section 377—Unnatural sexual offences.

30. Pilot Study by Trupti Panchal, TISS, Mumbai.

31. Forum for Fact Finding Documentation and Advocacy (FFDA) v. Union of India, W.P. No. 212 of 2003 (Supreme Court of India, April 25, 2003).

32. CMRA repealed by the Prohibition of Child Marriage Act 2006.

The salient features of the Prohibition of Child Marriage Act, 2006, are as follows:

- Promoting, permitting, or participating in child marriages is punishable.
- Child Marriage Prevention Officers have been appointed to deal with cases of child marriage.
- Child marriages can be declared null and void at the option of the contracting party—a child—within two years of his/her attaining majority.
- While granting the decree of nullity, the court shall order both the parties to the marriage and their parents or guardian, to return to the other party, the money, valuables, ornaments and other gifts received on the occasion of marriage by them from the other side or an amount equal to their value.
- The court can order maintenance for and residence to the female contracting party.
- If the children are out of child marriage, then their best interests should be the paramount consideration.

The following are some of the shortcomings of the Prohibition of Child Marriage Act, 2006:

- The child marriage is declared void only in cases of compulsion and trafficking.
- The onus of declaring the marriage void is on the court only if the child or his/her guardians file legal proceedings, but in reality, the parents may never take such a step.
- The Act implicitly acknowledges traditional marriages.
- There is no provision for the punishment of officials under the Act.
- There are no incentives for traditional communities to motivate them to stop the practice of child marriage.

The Supreme Court of India, on 14 February 2006³³, made it mandatory for all marriages to be registered, and directed authorities across the country to amend rules so that its order could be implemented within three months. This judgment was expected to have a significant

33. Smt Seema v. Ashwani Kumar T.P. Civ No 291 of 2005.

effect on child marriages. The Court was of the view that one way of curbing the practice of child marriages was to make it legally mandatory for everyone to register their marriages to ensure that people record their ages at the time of marriage. The Supreme Court asked the Central Government to give wide publicity to this order. The Central and state governments were asked to incorporate appropriate provisions for the consequences of non-registration as well as false documentation during the registration of marriages. The Court also made it clear that the rules should specifically contain a provision for appointment of an officer for this purpose.

4.5 Child trafficking and child prostitution

Child trafficking means the procurement, recruitment, transportation, transfer, harbouring or receipt of persons, legally or illegally, within or across borders, by means of threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of giving or receiving payments or benefits to achieve the consent of a person having control over another person, for monetary gain or otherwise.

Under the Juvenile Justice (Care and Protection of Children) Act, 2000, child victims of trafficking are treated as children in need of care and protection. In the Indian Penal Code, there are provisions for dealing with children who are trafficked³⁴. The Immoral Traffic (Prevention) Act, 1986 (ITPA) was enacted for the prevention of immoral traffic. All persons, whether male or female, who are exploited sexually for commercial purposes, fall under the purview of ITPA.³⁵ Offences involving children are being dealt with through increased strictness by enhancing the period of imprisonment. Prostitution *per se* is not illegal

34. Section 340—Wrongful confinement;
Section 342—Punishment for wrongful confinement;
Section 343—Wrongful confinement for three or more days;
Section 344—Wrongful confinement for ten or more days;
Section 346—Wrongful confinement in secret;
Section 347—Wrongful confinement to extort property, or constrain to illegal act;
Section 365—Kidnapping or abducting with intent to secretly and wrongfully confine person;
Section 366—Kidnapping, abducting or inducing a woman to compel her for marriage, etc.;

in India but related activities such as brothel-keeping, living off the earnings of a prostitute, soliciting or seducing for the purposes of prostitution are all punishable offences. ITPA provides more severe penalties for the trafficking of women and child prostitution.

A child is a person under 16 years of age and a minor is between 16 and 18 years of age under the ITPA. For procuring, inducing, or taking a person for the purpose of prostitution, the punishment in the case of a child is rigorous imprisonment for a term of not less than seven years but may extend to life.

Other significant provisions in the ITPA are as follows:

- Offences under the Act being cognizable;
- Search without warrant;
- Rescue of person;
- Intermediate custody of persons removed or rescued;
- Power to establish Special Courts; and
- Power of Courts to try cases summarily.

The age of the rescued, trafficked victims is an important factor in law enforcement and justice delivery. A person under 18 years is a child under the Juvenile Justice Act, 2000, and cannot be sent to a jail, but has to be looked after in a Home and treated as per the provisions of the Act. There are several anomalies relating to the issue of age verification of trafficked minor girls after rescue. The Indian Penal Code, 1860, states that sexual intercourse with

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- Section 366A—Procuration of a minor girl;
Section 366B—Importation of a girl from a foreign country;
Section 367—Kidnapping or abducting in order to subject a person to grievous hurt, slavery, etc.;
Section 372—Selling a minor for purposes of prostitution, etc.;
Section 373—Buying a minor for purposes of prostitution, etc.
35. Offences under ITPA include:
Section 3—Keeping a brothel or allowing premises to be used as a brothel;
Section 4—Living on the earnings of a prostitute;
Section 5—Procuring, inducing or taking a person for the sake of prostitution;
Section 6—Detaining a person in a premises where prostitution is carried on;
Section 7—Prostitution in or in the vicinity of a public place;
Section 8—Seducing or soliciting for the purpose of prostitution.

a girl child under the age of 16 years, even with her consent, is an offence of rape under Section 375 IPC. Under Section 366 (A), the procurement of a minor girl under 18 years of age is an offence. Under Section 366 (B), the importation of girls of less than 21 years of age from the state of Jammu & Kashmir to any other state or from any foreign country to anywhere in India is an offence. Under Sections 372 and 373 IPC, the selling/buying of minor girls under 18 years of age for purposes of prostitution, etc. is an offence.

The Immoral Trafficking (Prevention) Act (ITPA) has to be broadened to cover the trafficking of children to beaches, hotels and guesthouses, and their subsequent sexual abuse. First of all, it does not define trafficking. But it has been found that through concerted efforts, traffickers, brothel owners, etc. make it sure that the age of the rescued minor is entered as 18 years or above, thereby making her an adult in the records and when they are sent to jail, the traffickers, brothel owners, etc. bail them out and the victims are once again returned to their effective confinement.

There is a need to ensure the accountability of the doctors who carry out age verification and also of the police officers who record the age immediately after the rescue of the minors. The age verification reports usually place the victims in an age bracket. There are plenty of police records wherein the age of the girls is recorded as “appears to be of 18-19 years of age”. Even medical examinations place the age in a bracket. The Supreme Court has held that when the expert’s opinion is given in an age bracket, the lower age in the bracket should be the one taken into consideration, so that the benefit of doubt favours the victim. Therefore, if the age verification report says that the girl is in the age bracket of 17-19 years, for the purposes of law-enforcement, the age has to be considered as 17 years [and not 19, or even 18].

4.6 Child pornography and child sex tourism

Child pornography can be dealt with under the Information Technology Act, 2000, as the publishing of information, which is obscene, in electronic form is punishable. The Indian Penal Code can also be used. Child sex tourism is a frighteningly well-organized operation and police enforcement against it in India has been notoriously lax. A decade or so ago, the Interpol listed the state of Goa in India as an organized hub of such activities and other states too have been known to attract such offenders.

The Goa Children's Act, 2003, is applicable only in Goa against child sexual abuse, especially those related to sex tourism. The legislation has specifically made all cases of abuse of such nature, a non-bailable offence under Section 2 (a) of the Criminal Procedure Code, 1973. The fines and jail terms against the accused are also severe—Rs. 100,000 with imprisonment of 1–3 years for sexual assault and incest, and Rs. 200,000 with a 7–10 years jail term in the case of a grave sexual assault. The setting up of a Children's Court to try all offences against children is a bold step prescribed by this law. A child-friendly court will help minimize the double trauma that abused children are subject to in courts, which even adults find awesome and terrifying.

According to the Goa Children's Act, 2003, a lot of the onus to prevent child trafficking and prevent child sexual abuse in the form of sale and procurement of children lies on establishments like hotels and airports and rentals. Any form of soliciting or publicizing or making children available to any adult or even other children by hotels for purposes of commercial exploitation is prohibited. This includes hosting websites, taking suggestive or obscene photographs, providing materials, soliciting customers, guiding tourists and other clients, appointing touts, using agents, or any other form, which may lead to the abuse of a child. Airport authorities, border police, railway police, traffic police are required to report any suspected case of trafficking of children or of an adult travelling with a child under suspicious circumstances. The sale of children is also prohibited under this Act.

The Act also envisages the government's role in making sure that all child prostitutes are removed from their existing place of exploitation and in ensuring that they are rehabilitated and integrated into society. The Act further provides that the State shall provide for the setting up of one or more Victim Assistance Units, which shall facilitate the child to deal with the trauma of abuse and assist the child in processes involved with appearing as a witness before any Court or authority handling a case of abuse of a child. The State is also expected to carry out child sensitization programmes for police officers at all levels, which shall include an orientation on child rights laws. Child rights laws and methods of handling child abuse-related cases should also be specifically included in the Police Training School curriculum. The State shall undertake child sensitization training for those involved in healing and rehabilitation and other assistance programmes for children who are victims and promote programmes of information support and training for such children.

4.7 Some important judicial responses to child sexual abuse and exploitation

As regards child prostitution in the light of *devadasi* and *jogin* practices, the Supreme Court asked the state governments to set up advisory committees to make suggestions for the eradication of child prostitution and to evolve schemes for the rehabilitation of the victim girls and children³⁶.

The Delhi High Court initiated several proactive steps by summoning NGOs and government officers for ensuring effective rescue, rehabilitation and re-integration. Emphasis was laid on the accountability of officers, empowerment of the survivors and preventing prospects of their re-trafficking.³⁷

The Bombay High Court has held that³⁸:

- Medical examination of rescued girls to determine their age and to check if they are suffering from any medical ailment;
- Counselling and aftercare to be ensured;
- Children rescued from brothels to be treated as “children in need of care and protection” under the Juvenile Justice (Care and Protection of Children) Act, 2000; and
- The lawyer representing the accused not be allowed to represent the victims.

It has now been well established that all judicial proceedings relating to victims of sexual abuse must be conducted in an ‘in-camera’ trial³⁹. The Delhi High Court allowed the evidence of victims of trafficking who had been rehabilitated in their home states to be recorded through video conferencing, in consonance with the judgement of the Supreme Court in *State of Maharashtra v. Dr. Praful Desai*⁴⁰. This is the first instance of a court allowing evidence to be recorded through video conferencing in a case of trafficking.

36. Vishal Jeet v. Union of India, 1990 (3) SCC 318.

37. Court on its own motion v. UOI (Crl. M. No. 862/01) in a PIL: Crl. W. No. 532/92 filed in Delhi HC for implementation of ITPA.

38. Public at large v. State of Maharashtra: W.P. 112/92.

39. State of Punjab v. Gurmit Singh, 1996 SCC (CR) 316.

40. AIR 2003 SC 2053.

In the leading case of *Sakshi v. Union of India*⁴¹ the court gave the following directions for holding the trial of child sex abuse or rape:

- (i) A screen or some such arrangements may be made where the victim or witnesses (who may be equally vulnerable like the victim) do not see the body or face of the accused.
- (ii) The questions put in cross-examination on behalf of the accused, insofar as they relate directly to the incident should be given in writing to the Presiding Officer of the Court who may put them to the victim or witnesses in a language which is clear and is not embarrassing.
- (iii) The victim of child abuse or rape, while giving testimony in court, should be allowed sufficient breaks as and when required.

4.8 Victim and witnesses of trafficking for commercial sexual abuse and exploitation

Incidents of violence against women and children (including trafficking) have considerably increased during the last decade in South Asia though few cases are reported to the law enforcement agencies and even fewer reach the trial stage. A small percentage of the accused are convicted. Most cases result in acquittals. The reason is the reluctance of victims to come forward in filing complaints against those who have violated their rights or to testify in court. There is also a need to have a law on victim witness protection. A draft protocol called Regional Victim/Witness Protection Protocol to Combat Trafficking, Commercial Sexual Exploitation and Sexual Abuse of Women and Children in South Asia has been drafted⁴². This protocol recommends basic guidelines on the standards of prosecution of offenders and specific measures to be taken collaboratively by the State and civil society. It deals with the protection of victims, prevention, repatriation, rehabilitation and re-integration and extradition of such victims and witnesses of trafficking.

The SAARC Convention on Preventing and Combating Trafficking in Women and Children for Prostitution was signed on 5 January 2002 and ratified on 2 September 2003. The SAARC Convention on Regional Arrangements for the Promotion of Child Welfare in South Asia

42. Final Protocol drafted by Prof. Asha Bajpai, prepared for Sariq, India.

was signed on 5 January 2002 and ratified on 2 September 2003. At the international level, Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography was ratified and signed on 15 November 2004. More multilateral and bilateral efforts are required to control this offence, which has now taken the form of an organized crime.

4.9 Proposed law reform relating to child protection

Some current initiatives of the Government of India include the ‘Prevention of Offences against the Child Bill, 2009’⁴³ and the Criminal Law (amendment) Bill 2010⁴⁴. Under the ‘Prevention of Offences against the Child Bill, 2009’, a child has been defined as any person who has not completed the age of 18 years. Another significant definition in the bill is that of duty-bearer, which means any person who has been entrusted with the bill, the Juvenile Justice Act, 2000, and the Immoral Traffic Prevention Act, 1956.

Some of the child-friendly guiding principles included in this Bill are the Principle of Best Interest of a Child; Principle of ‘Protection’ of a Child; Principle of Equality and Non-discrimination—“Leave No Child behind”; Principle of Individuality and Participation; Principle of Privacy and Confidentiality; Principle of Non-stigmatizing Language, Decisions and Actions; Principle of Avoidance of Harm; and the Principle of Non-criminalization of a Child.

The definition of ‘Sexual Assault of a Child’ in this Bill attempts to include the various forms of sexual abuse against a child. The Bill also includes the definition of aggravated forms of sexual assault of a child or a person less than twelve years of age, unlawful sexual contact and also non-contact-based sexual offences with a child.

43. A few years ago the Ministry for Women and Child Development (MWCD) developed a new draft bill, The Offences against Children’s Bill, to cover the lacunae in several other acts relating to children. It also included a section on CSA. The draft bill was submitted by MWCD to the Ministry of Law and Justice, which returned the bill asking for changes. After a hiatus of a couple of years MWCD submitted the bill to the National Commission for Protection of Child Rights (NCPCR) asking for a recommendation.

44. The main objectives of the 2009 Bill are:

- to consolidate and define the different offences against the child and to provide legal remedies for violation of the same;
- to make the applicability of the laws uniform to both boys and girls;
- to bring the existing laws and procedures in conformity with international, regional and national standards;

The Bill also deals with issues relating to offences regarding trafficking and commercial sexual exploitation, offences relating to economic exploitation of a child and child labour, offences relating to the child's body, which includes corporal punishment and ragging, the use of a child in armed conflicts, offences restricting the freedom of a child's movement, offences relating to pornography, and using a child or children for pornographic purposes, offences committed on disabled children, offences relating to court hearings and proceedings, procedure for media, and the creation of vigilance committees to prevent offences from being committed.

Recently, the National Commission for the Protection of Child Rights organized a consultation with civil society representatives to discuss the Prevention of Offences against the Child Bill, 2009⁴⁵. At the consultation, the unanimous view of the participants was that instead of a general legislation covering all offences against children, the immediate focus should be on a Bill for Sexual Offences against Children, the reason being that there are already existing laws covering most offences against children, which would definitely require amendments; however, there is presently nothing in place which specifically addresses the issue of child sexual abuse and its consequences. CHILDLINE India Foundation has also drafted a bill on child sexual abuse to cover all substantive and procedural gaps in the law on Child Sexual Abuse (CSA).

The objective of the Criminal Law (amendment) Bill 2010 is to amend the Indian Penal Code, the Code of Criminal Procedure 1973, and the Indian Evidence Act 1872. It inserts clause 376C (1) defining child sexual abuse in IPC⁴⁶. The changes proposed in Section 375, which broaden the definition of rape to include within it all forms of penetrative sexual assault, constitute a first step in the right direction. Rape has been redefined as sexual assault so as to include forms of child molestation. Pornography has been mentioned but it needs to be defined. Section 166A has been added to the Penal Code, which prescribes punishment to a public servant who does not follow the law relating to investigation of a crime. There

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- to set forth good practices, relevant norms and principles for administering justice to a child;
 - to provide stringent penalties to any person who violates the provisions of this Bill, thus creating deterrence;
 - to ensure that the criminal justice machinery functions, keeping the best interest of the child, as the focal point at all stages;
 - to ensure the speedy disposal of cases, with a view to avoiding delays, which can result in intimidation, retaliation and secondary victimization of the child.

45. NCPCR held a national consultation on 19 January 2010 in New Delhi and shared the revised 2009 Bill with the civil society representatives.

46. The draft bill by the Ministry of Home Affairs, Government of India, seeks feedback to "The Criminal Law (Amendment) Bill 2010" on their website.

is an amendment to Section 273 CrPC by way of an insertion stating that the victim should not be confronted by the accused. The term ‘appropriate measures’ in the Section provide liberty to the court to evolve its own methods. These changes in the age-old provisions are welcome. But the current changes do not address those offenders who have a history of perpetrating sexual crimes against children, which is the hallmark of abuse, bringing attention to the point that abuse is ‘not momentary lust or lapse of judgment’. The criminal justice system, at present, does not take into account the events before the alleged reported event, even though looking at the history of abuse is not prohibited.

We need a comprehensive law on child sexual abuse that addresses the special needs of children, keeps track of sex offenders so that they do not come into contact with children, includes mandatory reporting for certain professionals, lays down court and police procedures that are child-friendly and sensitive, addresses issues of survivors of child sexual abuse, and provides compensation to victims. This is because the above bill has several loopholes and India today appears to be a ‘haven’ for child sexual abusers and paedophiles. It is strange but true that the Indian Penal Code does not recognize child sexual abuse and there is no proper law nor policy on child sexual abuse in India. The laws dealing with sexual offences are outdated and do not specifically address child sexual abuse. Only rape and sodomy can lead to criminal conviction. Anything less than rape amounts to outraging the modesty. There are no procedural provisions to ensure that the best interests of the child are protected. The laws focus more on technicalities. Medical reports prepared by some insensitive doctors are vague and inadequate. The absence of a proper medical report in the case of a sexual assault goes against the assaulted child. The insensitive interviewing of children by untrained police personnel also causes further trauma to the child. Further, a child has to give his/her evidence several times and re-live the trauma and the laws have no provision to prevent such trauma to the child.

In the jurisprudence of fair trial in India, exceptions of hearsay evidence are accepted in cases of dying declaration, murder victims, etc. Why can such an exception not be made in the case of a child victim’s testimony too? There is thus a need to amend both the substantive and procedural laws to ensure successful prosecution and to protect the best interest of the child. The physical and psychological well-being of child sexual abuse victims and witnesses and protection of their best interests are sufficiently important to outweigh the technicalities of the law. In child sexual abuse cases, the child victim is the main witness. The language of the child has to be understood by the interviewers. Children need legal protection right from

the time of the incident onwards, while filing the FIR (First Information Report), during the trial and the post-trial period. Video-recorded testimony (done only once) of a child victim of sexual abuse must be admissible as evidence in courts. Protection orders must be issued by the courts. For this purpose, various professionals must work in co-ordination with each other. Area-wise joint investigation committees too need to be formed. Each such committee can consist of a trained police officer, mental health expert, social worker, child rights lawyer, teacher, government official and a sensitive medical doctor. Such teams must be recognized by the law and immediately swing into action as soon as a child sexual abuse case comes to light. There must be a list of responsible persons like teachers and doctors who have to report for duty when such a case comes to light. The State has a duty to protect minor victims from sexual abuse by foreigners and paedophiles, who run institutions, in the name of charity. Many a times they escape even the minimal government inspections because they 'do not use funds' from the State.

5. Child sex ratio and the right to life

The child sex ratio has deteriorated across the country over the last decade. In the Indian context, there is a strong preference for sons. The girl child's very existence is threatened. Girl children are vulnerable to foeticide and infanticide. The Indian Penal Code deals with these offences⁴⁷ but there is hardly any prosecution or conviction under the IPC. The Prenatal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994 (PNDT) now stands renamed as 'The Pre-Conception and Prenatal Diagnostic Techniques (Prohibition of Sex Selection) Act, 2003 (PCPNDT). The PCPNDT Act provides for the prohibition of sex selection, before or after conception and regulates the use of pre-natal diagnostic techniques for the purpose of detecting genetic abnormalities or other sex-linked disorders in the fetus. The PCPNDT Act stipulates that no person shall conduct or cause to be conducted any

47. Indian Penal Code, Sections 312-318.

pre-natal diagnostic techniques including ultrasonography for the purpose of determining the sex of a foetus. Several offences and penalties have been included in the PCPNDT Act. Every offence under this Act is cognizable, non-bailable and non-compoundable.

In order to implement the provisions of the PCPNDT Act more rigorously, the Supreme Court, in a landmark judgment, has issued a number of guidelines for the Central Government, the Central Supervisory Board and the State Governments⁴⁸.

The first conviction came in the case of the State through the District Appropriate Authority-cum-Civil Surgeon, Faridabad v. Dr. Anil Sabhani, Kartar Singh and M/s Dr. Anil Ultrasound, Faridabad⁴⁹. In this case, the District Appropriate Authority-cum-Civil Surgeon, Faridabad filed a complaint against the accused on the grounds that M/s Dr. Anil Ultrasound Centre, Faridabad, a registered genetic clinic, was engaged in illegal sex determination in violation of the Act. One doctor and a decoy patient visited the clinic with marked currency notes. The doctor accompanying the decoy patient as her attendant carried a hidden tape recorder while other members waited outside for the signal. While performing the ultrasound on the patient, the doctor also prompted that he could also disclose the sex of the foetus for an additional payment. On payment of the required amount, the doctor performed ultrasonography on the decoy patient without any written consent and orally conveyed that it was a female foetus. No receipt for payment or any written report of sex determination was issued by the accused except a routine ultrasound report. After getting the signal, the entire team entered the clinic and took into their custody all files and records. The accused admitted to disclosing the sex of the foetus, which was video-recorded. On the basis of the above circumstantial and corroborative evidence, the accused were held guilty and convicted. There have been some more convictions after this episode.

Recently, an area of concern emerged relating to the Right to Life of an unborn child in the case of Nikita Mehta, who moved the Bombay High Court seeking abortion of her 25-week old foetus that was diagnosed with a congenital heart block. Mehta's plea to carry out the medical termination of pregnancy was rejected by the court, which upheld a law

48. Centre for Enquiry into Health and Allied Themes (CEHAT) and Ors v. Union of India and Ors AIR 2003 SC 3309.

49. Case No. RBT-298/2 of 2001 decided on 25 March 2006 in the Court of the Sub-divisional Judicial Magistrate, Paliwal.

that bans termination of late pregnancies. India's MTP (Medical Termination of Pregnancy) Act is not unlike the abortion law in most European countries as it sets a gestation limit (in India's case, 20 weeks), before which abortions may be performed without being considered criminal; and then provides for exceptions in which abortions may be performed after the limit. In India as well as in the UK, two registered medical practitioners must certify that an abortion is called for; with the exception that one medical practitioner may unilaterally decide to perform an abortion if s/he decides that the termination is immediately necessary to save the life or to prevent grave permanent injury to the physical or mental health of the pregnant woman.

There is no foetal-impairment 'test' that a woman or doctor must pass in any US state including those with the most restrictive abortion laws.⁵⁰ The decision to abort even outside of state term limits rests solely on the pregnant woman's opinion [re: damage to her mental health] and the agreement of a physician. In the US, it is unconstitutional for state abortion laws not to include exceptions for the mental health of the woman, regardless of term-length or viability.

In contrast, India's MTP Act only provides for the mother's life being endangered; and does not provide for the risk of serious handicaps to the child. In fact, the MTP Act was actually drafted as a population control measure in the 1970s. Today the MTP Act needs to be reviewed with a rights perspective.

50. See, for example, Kansas law KS ST 65-6703, which says that exceptions (to viability limit) are for life or 'irreversible bodily harm'. The Kansas Supreme Court found in *Alpha Medical Clinic v. Anderson*, (280 Kan. 903, 128 P.3d 364) that "Until the United States Supreme Court or the federal Constitution says otherwise, however, the mental health of the pregnant woman remains a consideration necessary to assure the constitutionality of the Kansas criminal abortion statute."

6. Economic exploitation of children—child labour

Another vulnerable group of children subjected to abuse and exploitation are the child labourers. In almost all societies, children work in some way, though the types of work they do and the forms of their involvement vary. But many millions of children work under abusive and exploitative conditions that are clearly dangerous to them. The census survey of 1991 indicates that there are six crore child labourers working in various sectors, which excludes a large number of children employed in the unorganized sector and agriculture.

A new form of child labour seems to be emerging. Some visibly tired looking children are now regularly seen in daily soaps on television. It is stressful enough for adults performing in daily soaps and shows, and there have been reports of some of them fainting on the sets. The adverse effects of such work on children can well be imagined. It is said that some of them bring their homework on the sets. With these tender minds balancing both work and school, and the consequent stress associated with it, it is obvious that they are being abused and cannot develop in a healthy manner. The stressful working conditions and unhealthy competitions faced by child artistes not only harm them physically and mentally but also affect their schooling and studies. Insensitive and harsh comments passed on their performances (many a times to boost the image of the judges or to raise the TRPs of the programme) affect their psychology and act as a deterrent to their development. Although the word ‘hazardous’ has not been defined under the Act, any labour that hinders the education of the child and causes him/her physical and/or mental stress can be regarded as hazardous.

The National Child Labour Policy, 1987, is an endeavour to progressively eliminate child labour in India. The policy attempts to deal with situations wherein children are compelled to work on a regular or continuous basis to earn wages for themselves and/or for their families, where their conditions of work result in their being severely disadvantaged and exploited, and where abuses connected with such factors impacting on wage-employed children need to be closely examined by the State for rectification, amelioration and regulation through specific legal and administrative instruments and measures.

The Child Labour (Prohibition and Regulation) Act, 1986 (CLPRA) uniformly laid down the 14th year as the watershed for the definition of a child.⁵¹ The Act replaces definitions of a 'child' in the Minimum Wages Act, 1948; Merchant Shipping Act, 1958; and the Motor Transport Workers Act, 1961. A landmark judgment delivered in the case of *M.C. Mehta v. State of Tamil Nadu and others*⁵², held that:

51. The major provisions of the Child Labour Prohibition and Regulation Act (CLPRA), 1986 are as follows:

- No child below the age of 14 years can work in any hazardous occupations and processes that are written down in Part A and Part B of the Schedule to the Act.
- Part A lays down hazardous occupations like transport of passengers, goods or mails by railways, cinder picking, work relating to construction of railway station, etc. Employment of children as domestic workers or servants and in dhabas (roadside eateries), restaurants, hotels, motels, tea shops, resorts, spas or other recreational centres have been recently (on 10 October 2006) included in Part A.
- Part B of the schedule includes processes like bidi-making, carpet weaving, tanning, building and construction industry, manufacture of matches, explosives and fireworks, etc.
- A child below 14 years of age can work in hazardous processes if the process is carried on by the occupier of a workshop, with the help of his family and who has the ultimate control over the affairs of the workshop. Another exception wherein a child below 14 can work in a hazardous process is a school established by the Government or receiving assistance from the Government.
- There is a Child Labour Technical Advisory Committee constituted by the Central Government, for the purposes of addition of occupations and processes to the Schedule.
- If a child below 14 is employed in hazardous occupations or processes, the employer will be punished with imprisonment for a period between three months to one year or pay a fine upto Rs. 20,000. In this case, the court has the discretion of awarding imprisonment or fine or both.
- If the employer, after being punished, once again employs child labour in hazardous occupations or processes, the imprisonment will be between six months to two years.
- Under the CLPRA, a child below 14 can work in occupations and processes that are not listed in Part A and Part B of the schedule, but the working conditions of these children are regulated as follows:
 - (i) The child can work continuously for three hours and then he has to be given a break for rest for an hour.
 - (ii) The total number of hours in a day should not be above six hours.
 - (iii) A child cannot work between 7 pm and 8 am
 - (iv) No child is allowed to work overtime.
 - (v) A child can work only in one establishment on any one day.
 - (vi) A one whole day holiday each week must be give to every working child.
 - (vii) Whenever a child worker is employed, a written notice must be sent within 30 days, to the concerned Inspector. The notice must contain the name and address of the establishment, name of the manager, and the nature of occupation or process.
 - (viii) Any disputes relating to the age of the child will be referred by the Inspector to the medical authority.
 - (ix) A register has to be maintained by the employer stating the name, date of birth, hours of work and rest of the child, and the nature of work done by the child.
 - (x) A notice has to be displayed in every establishment regarding hazardous occupations and processes in which a child cannot work and the penalties for violating this provision. If this is not done, the punishment is imprisonment up to one month or fine up to Rs. 10,000 or both.
 - (xi) The rules relating to cleanliness, disposal of wastes, ventilation, dust, lighting, drinking water, protection of eyes, safety of buildings and machinery, etc. are provided in the rules to the Act.

52. AIR 1997 SC 699.

- The offending employer must be asked to pay compensation of a sum of Rs. 20,000 for every child employed in contravention of the provisions of the Child Labour Act.
- Inspectors appointed under Section 17 of the Child Labour Prohibition and Regulation Act should be made responsible to see that for each child employed in violation of the provisions of the Act, the concerned employer pays Rs. 20,000, which is to be deposited in the Child Labour Rehabilitation-cum-Welfare Fund. The income of the fund so generated shall be used only for the concerned child.
- The State should see that an adult member of the family whose child is in employment in a factory or a mine or in other hazardous work gets a job anywhere, in lieu of the child.
- In those cases where alternate employment is not made available, the parent/guardian will be paid the income, which would be earned on the 'corpus', which would be a sum of Rs. 5000 for each child per month.
- The employment given or payment made would cease to be operative, if the child would not be sent to school for education by the parent or guardian.
- Creation of a separate cell in the Labour Department is mandatory to deal with issues of child labour.
- The scheme will be monitored by the Secretary of the Department and by the Ministry of Labour of the Government of India.
- Regarding non-hazardous jobs, the Inspector shall have to see that the working hours of the child are not more than 4–6 hours a day and that the child receives education for at least 2 hours each day at the cost of the employer.

The implementation of this judgment along with the Right to Education will go a long way in reducing child labour.

6.1 Enforcement of the Child Labour Prohibition and Regulation Act, 1986

The enforcement of the Act is poor. Table 1 reveals the official government statistics for the enforcement of the CLPRA.

Table 1: Enforcement of the Child Labour Prohibition and Regulation Act, 1986

Year	No. of Inspections Carried Out	No. of Violations	Prosecutions Launched	Convictions	Acquittals
1997-98	2,88,150	25,909	19,496	6073	157
1998-99	2,22,856	11,263	6469	4125	725
1999-00	2,42,269	7598	3972	1333	356
2000-01	1,89,842	10,537	2398	1036	343
2001-02	4,49,042	16,604	9201	1799	606
2002-03	3,72,504	28,850	5660	1717	2229
2003-04	3,46,212	26,411	9221	4013	642
2004-05	2,42,223	16,632	2609	1385	447
TOTAL	23,53,098	1,43,804	59,026	21,481	5505

Source: Ministry of Labour, Government of India.

Table 1 shows that from 1997 to 2005, out of 1,43,804 violations detected, only 59,026 prosecutions were launched and 21,481 convictions were obtained. This means that only around 38 per cent of the violators of the law were convicted and around 62 per cent were acquitted. This indicates poor enforcement of the law, which protects children and ensures their right to education and right to childhood. Several factors are responsible for the poor enforcement of the law such as the absence of witnesses, prevalence of corruption, ineffective age determination, certain lacunae in the law, and the insensitivity of the civil society. The CLPRA does not cover a major section of the workforce in India, viz. the unorganized workers. This legislation thus does not cover a majority of the child labourers who are to be found in the unorganized sector. Children working in the agricultural sector and in home-based industries have been left out. The laws cover only the child labour force employed in the formal, industrial sector in occupations identified as 'hazardous' under the law, and children working in plantations.

The word 'hazardous' is not clearly defined in this Act. Several hazardous industries have been excluded. The notion 'hazardous' needs to be clarified and besides its physical implications, its psychological implications on the child also have to be taken into consideration. The 1986 Act is silent on the educational needs of the child, which is a key strategy for the elimination of child labour. It should integrate the rehabilitation in its purview. The implementation of

the CLPRA needs to be done in co-ordination with other related legislations.

There is an increasing trend of migration and trafficking of children for labour in different parts of the country. Compelled by their socio-economic conditions, a large number of children are migrating from economically backward areas to big cities for work. In many of these cases, these children are being trafficked by middlemen and agents, who are bringing them to the employers in the city by extending meagre advances to the parents and by offering false assurances of lucrative jobs, etc. These children work under highly exploitative situations like very long working hours, paltry wages, and unhygienic and most difficult working conditions. Such children mostly work in industries like zari-making, jewellery units, dhabas, and tea stalls, and as domestic help. Very often, they are kept within the confines of the workplaces and, therefore, not only lack any kind of freedom but are also vulnerable to abuse. Various state governments have been conducting raids to rescue such children from the clutches of these unscrupulous employers. On being rescued, they are, in most cases, repatriated to their native places. Till their repatriation, they are kept in temporary shelters.

A disturbing trend, which has not been considered at all in the Child Labour Act of 1986, is that there are instances of migration or trafficking of children for labour from neighbouring countries like Nepal and Bangladesh. These children are being brought to big cities in India in search of labour and they end up working in highly difficult conditions, mostly in dhabas and tea stalls or as domestic servants. Far away from their families, these children are highly vulnerable to all kinds of abuses, including physical and sexual abuse. Issues related to repatriation and rehabilitation of children who are victims of cross-border trafficking become even more complex and difficult as they involve coordination with the other countries from where these children are migrating to India. A mechanism for the smooth repatriation of such children thus needs to be put in place so that these children do not suffer and can be safely sent back home.

Several laws need to be combined for the protection of children. The NCPCR has issued the following guidelines to all the states to ensure that child labour is totally abolished and that every child attends full-time formal school:

- The Labour Department must book cases against the employers and issue strict warnings to all the potential employers. This must be taken up as an area-wise drive through mobile labour courts and a plan of action for pursuing the cases that have been booked must be put in place.

- The Juvenile Justice Act 2006 includes within its purview, child labourers up to 18 years of age, as children in need of care and protection.
- The Bonded Labour System Abolition Act, 1976, must be used as an instrument to book cases against the employers of children. It is noted that most children work against advances taken by their families. Such children are also working mostly as migrant labourers. The vigilance committees under the Act have to be activated and the Revenue and Labour Departments must enforce the law strictly. It must be recognized that there is no age restriction to book cases under the Act and that the burden of proving that there is no advance involved is that of the concerned employer.
- In addition, the Contract Labour (Regulation and Abolition) Act, 1970, can be used to prosecute the principal employer in cases wherein the engagement of child labour has been done through a contractor. This practice is common and used by many companies to absolve themselves of any liability. This Act draws on the principle of ‘vicarious liability’ and can be used effectively to prevent companies and contractors from engaging child labour.

All the above Acts together would cover most children who are in the labour force, including agriculture and allied activities, and must be used individually and/or collectively, by the government and other stakeholders to take firm action against the employers concerned.⁵³

6.2 A suggested model law on child labour

It is high time that we took a stand on the rights of a child. Poverty can no longer be the excuse for child labour. There is need for a legal framework with a child rights perspective, aiming towards a time-bound and complete abolition of child labour in all forms of employment and towards sending all children who are working to full-time formal school and ensuring that their families are economically strengthened by providing employment to adults.

The model law needs to define a child labourer as any child out of school and working, and ‘hazardous work’ as any work that interferes with the child’s schooling and his or her physical, mental, psychological and emotional well-being. Other considerations to be included in the

53. Guidelines for the abolition of child labour issued by the NCPCR.

model law are as follows:

- No child to be permitted to work during school hours on school working days;
- Provision of a time-bound programme for the complete abolition of child labour with a child rights-based approach;
- Complete abolition of child labour within the next five years;
- Introduction of poverty alleviation programmes for the families of a child;
- Rescuing of child labourers and sending them to schools;
- Provision of economic assistance and alternate employment to parents of the rescued child labourers;
- Imparting training for the enforcement of this law; and
- Creation of awareness of child rights.

The law needs to adopt a rights-based approach, which considers children as rights-holders as per the CRC, which India ratified in 1992. A rights-based approach makes it incumbent upon the State to take measures to strengthen the access right of the child by creating an environment conducive to formal schooling. Enforcement of the law through labour inspectors, teachers, principals, NGOs and civil society organizations, panchayats (local self-governments) must be ensured. Joint Inspections also need to be carried out by state labour inspectors and civil society organizations.

7. Personal laws and adoption of children

The adoption of children today forms a part of personal laws or family laws in India. Religion has played a very dominant role in this sphere and is the basis of various personal laws including adoption. The fact is that today a Hindu child is being governed by the Hindu

Adoptions and Maintenance Act, 1956 and has the opportunity of being taken in adoption under the Act only because he is a Hindu by religion. The children of other religions have to be taken as wards under the Guardians and Wards Act, 1890 (GAWA). Presently, there is a huge gap in India between the number of children who need to be adopted and the number being adopted every year. It is estimated that there are nearly 12.5 million orphaned children in the country and millions others who are neglected, abused and/or abandoned. There are thousands of non-Hindus who wish to adopt these children but barring those who agree to take a child home under GAWA, a majority of them end up dissuaded and decide not to do so since the Indian law does not permit them to adopt and they do not wish to take the child as a mere ward. Many of these millions of children, who are deprived of their right to life in any sense of the term, could get adopted into loving and caring families and homes, which would, in turn, open the doors of life to them.

The Muslim, Christian and Parsi children are denied this opportunity only because of their religions. Many of these orphan, destitute children do not have the historical or social background, educational or cultural outlook, way of life or thought common to their respective communities, and therefore, the discrimination against these children is solely on the ground of religion. Thus, Article 15 of the Constitution forbidding discrimination on the ground of religion alone should strike down all these provisions as unconstitutional and ultra-vires.

The Constitution has itself recognized the existence of various personal laws in operation in our country. When the Constitution was being adopted and enacted, in Article 44, it directed that the State shall endeavour to secure for the citizens a Uniform Civil Code throughout the territory of India. In 1949, when this Article was enacted, there were already uniform codes covering every aspect of legal relationship except only those matters in which we were governed by the various personal laws. The laws of Contracts, of Transfer of Property, of Sale of Goods, Partnership, Companies and Negotiable Instruments, of Civil Procedure, Arbitration and Limitation of Crimes and Criminal Procedures and a host of other statutory laws were Uniform Civil Codes applying to all citizens throughout the country. As Dr. B.R. Ambedkar observed during the debates in the Constituent Assembly on the draft Article 35 (subsequently enacted as Article 44), the only sphere which was not covered by any Uniform Civil Code was Marriage and Succession, and it was the intention of those who enacted Article 44 as part of the Constitution to bring about that change. In fact, Article 44 could have only the different personal laws in view, with the rest of the areas having mostly been

covered by Uniform Civil Codes. The Article, therefore, appears to be a demonstration of the conviction on the part of its framers that the existence of the different religion-oriented personal laws of ours was not in tune with the egalitarian philosophy.⁵⁴

Since the Juvenile Justice Act, 2000 provides secular adoption only to certain limited categories of children, there is an urgent need to enact a special enabling law for adoption, which can be availed of by any person, irrespective of his/her religion for the adoption of a child of any religion/sex. The issue of adoption is beyond political, religious and patriarchal issues. This legislation would ensure justice to the child, and provide all the rights and privileges to the adopted child, as those available to a child born in legal wedlock. In *Re Manuel Theodore D'Souza and Mrs. Lourdes D'Souza*, the Bombay High Court held that that the abandoned, orphaned, destitute, or a similarly situated child has a right to be adopted as a part of his fundamental right to life embodied in Article 21 of the Constitution. The right to life of these children includes the right to be adopted by willing parent/parents and to have a name and nationality. The right to be adopted is, therefore, an enforceable civil right, which is justiciable in a civil court.⁵⁵ The case for a secular law on adoption, therefore, arises as part of the fundamental right to equality and life under Articles 14 and 21 of the Constitution of India as also as per the numerous international instruments to which India is a signatory, like the Convention on the Rights of the Child (CRC)⁵⁶ and the Hague Convention, which urge for recognition of the right of every child, to a family, and to be adopted.

54. Constituent Assembly debates while drafting the Indian Constitution.

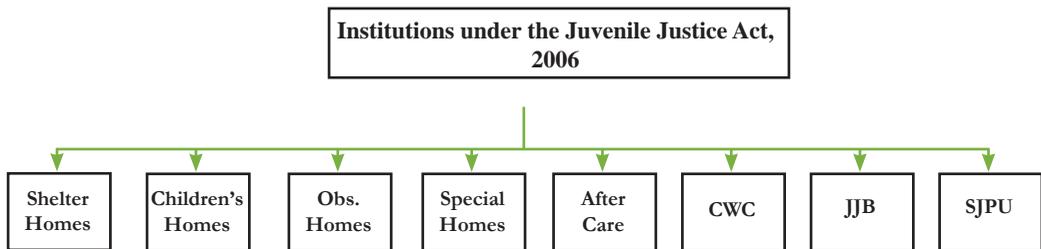
55. 2000 (3) BCR, 243.

56. Article 9.

8. Institutional structures relating to protection of children

Institutions and structures under the various laws have been provided to protect the rights of the child. The institutions and structures under the Juvenile Justice Act are: Observation Home, Special Homes, Children's Homes, Shelter Homes, Juvenile Justice Boards (JJBs), Child Welfare Committees (CWCs), Special Juvenile Police Units (SJPUs), Child Protection Units, and After-care Organizations.

In addition, there are Family Courts established under the Family Courts Act, 1984, and the National Commission for Protection of Children Act, 2005.



Shelter Homes function as temporary drop-in centres for children in need of care, protection, and urgent support. The state governments recognize reputed and capable voluntary organizations and provide them with assistance to set up and administer as many shelter homes as required.⁵⁷

Children's Homes have to be established and maintained in every district or group of districts by the state government or voluntary organization certified by the state government, for the reception of a child in need of care and protection initially during the pendency of any inquiry. After the inquiry is over, the Child Welfare Committee may send the child to the Home for their care, treatment education, training development and rehabilitation.⁵⁸

Observations Homes are set up and maintained in every district or a group of districts by the state governments or voluntary organizations, certified by state governments, for children in

57. Section 37, Juvenile Justice (Care and Protection of Children) Act 2000.

58. Section 34, Juvenile Justice (Care and Protection of Children) Act 2000.

conflict with the law⁵⁹. Children in conflict with the law are temporarily placed in Observation Homes during the pendency of any inquiry pertaining to them under the Act. Initially, a juvenile is kept in the reception unit of the observation home for preliminary inquiries, care and classification of the juvenile according to his/her age group, physical and mental status, and nature of offence.

Special Homes have to be established and maintained in every district or group of districts by the state government or voluntary organization certified by the state government for reception and rehabilitation of children in conflict with the law.⁶⁰

After-care Organizations have to be established or recognized by the rules under the Act made by the respective state governments. These organizations are slated to take care of juveniles or children after they leave special homes and children's homes to enable them to lead honest, industrious and useful lives. The report of the probation officer for each child, before his/her discharge from the Special Home or Children's Homes, and the necessity and nature and period of after-care will be determined for each child. The maximum period of stay in after-care organizations is three years and the juvenile or child must be above 17 years but less than 18 years of age, and s/he would be able to stay there till s/he is 21 years of age.⁶¹ The after-care organizations, at present, are highly inadequate. They need to have facilities for career counselling and guidance, as also trained staff.

Child Welfare Committees (CWCs) have to be constituted under the Act to deal with children in need of care and protection for every district. In the case of *Prerana v. State of Maharashtra and Ors*⁶², it was held that children rescued from brothels should be treated as "children in need of care and protection" under the Juvenile Justice (Care and Protection of Children) Act, 2000. A lawyer representing the accused should not represent the victims. The Committee will consist of the Chairperson and four other members, and among the members, one of them has to be a woman and another an expert on matters concerning children. The Committee will have the powers of a Metropolitan Magistrate or a Judicial Magistrate of First Class. A child in need of care and protection can be produced before the

59. Section 8, Juvenile Justice (Care and Protection of Children) Act 2000.

60. Section 9, Juvenile Justice (Care and Protection of Children) Act 2000.

61. Section 44, Juvenile Justice (Care and Protection of Children) Act 2000.

62. Writ petition No. 788 of 2002, Bombay High Court.

CWC by any police officer or a designated police officer or special juvenile police unit, by any public servant, by Childline (a registered voluntary organization) or any state government-recognized voluntary organization, or by the child himself or herself. There is a provision in the Act for a social worker or a public-spirited citizen to produce the child before the CWC, provided the child is produced before the CWC within 24 hours (excluding the time necessary for the journey). Restoration of a child to his/her parents including adopted and foster parents, guardians, fit persons and fit institutions, and protection to a child are the primary objectives of setting up the CWCs. Members of a CWC have the very serious responsibility of dealing with issues that include victims of child sexual abuse, trafficked children, child labourers, bonded labourers, disabled children, displaced children, migrant children, etc. Many of them, however, are part-time honorary staff members and are not trained to deal with such complex legal issues that they have to face. There is thus a need for full-time dedicated, trained members for the CWCs.

The Juvenile Justice Board (JJB) has been constituted under this Act to deal with juveniles in conflict with the law.⁶³ The Chief Metropolitan Magistrate (CMM) or Chief Judicial Magistrate (CJM) must review the pending cases every six months. In case there is a large pendency of cases, they must direct to increase the frequency of sittings of the Board or constitute additional Boards, to clear the pending cases. The Juvenile Justice Board can pass the following orders:

- Allow the juvenile to go home after advice and admonition and counseling, or
- Direct the juvenile to participate in group counselling and similar activities, or
- Order the juvenile to perform community service, or
- Order the parent of the juvenile or the juvenile herself/himself to pay a fine, if s/he is over 14 years of age and earns money, or

63. A JJB must consist of a Metropolitan Magistrate or a Judicial Magistrate of the first class, and two social workers. One of the social workers must be a woman. The Magistrate is designated as the Principal Magistrate of the JJB. The Magistrate must have special knowledge or training in child psychology or child welfare, and the two social workers must have been actively involved in health, education or welfare activities relating to children for at least seven years.

- Direct the juvenile to be released on probation of good conduct and placed under the care of any parent, guardian or other fit person; such parent or guardian or fit person must execute a bond for the good behaviour and well-being of the juvenile for a maximum period of three years, or
- Direct the juvenile to be released on probation of good conduct under the care of any fit institution for a period not exceeding three years, or
- Make an order directing the juvenile to be sent to a special home for a period of three years. The JJB has powers to reduce this period taking into consideration the nature of the offence and the circumstances of the case, in case the juvenile is over 17 years but less than 18 years of age, for a period that is below two years; in any other case, till he attains the age of 18 years. In case of any juvenile above 16 years who has committed such a serious offence that s/he cannot be kept in a special home, the Board can send her/him to a place of safety after reporting the matter to the state government.

Some of the above orders are very innovative and the JJBs can implement them in the best interests of the child. For instance, the order relating to community service can be creatively implemented. For this, the functionaries of the entire juvenile justice system, including the magistrates, need to be trained to implement the true spirit of the Act.

The JJBs cannot pass orders directing juveniles in conflict with the law to be placed in jail or police lock-up, or be sentenced to death or imprisonment for any term including life imprisonment or send him/her to prison if they are unable to pay fine or provide security.

The final disposal of the case against a juvenile must be done by at least two members of the JJB, including the Principal Magistrate. In case of a conflict of opinion among the members of the JJB, the majority opinion will prevail. The JJB has been mandated to complete an inquiry within four months from the date of its commencement and if it requires an extension, it has to give reasons in writing.

The JJBs, in practice, work like second class criminal courts. The atmosphere and attitude in JJBs resemble those of a criminal court, which needs to be changed. There is also a need for a court-appointed child rights representative.

The Special Juvenile Police Unit (SJPU) of the police force of a state for dealing with juveniles in conflict with the law or children in need of care and protection has to be formed. In every police station, at least one trained police officer needs to be designated to deal with

children⁶⁴. In Greater Mumbai, there is the Juvenile Aid Police Unit (JAPU) to handle missing, trafficked and runaway children. In the Central Region of Mumbai, trained, designated police officers have been identified and their contact details including the police station, residential address and mobile numbers have been circulated to the local NGOs. These officers have also been given the details of NGOs working for children in their area. In certain states like Karnataka, voluntary organizations are also associated with the SJPU.

It is generally the police that apprehends the juvenile in conflict with the law and produces him/her before the Juvenile Justice Boards. A charge-sheet also has to be submitted by the police after investigation. Within 24 hours of apprehension, the SJPU or the designated police officer produces the child before the JJB. Pending production, the juvenile has to be kept in the Observation Home. The SJPU must inform the parent or guardian or any other person of the juvenile's apprehension. Section 12(2) of JJA, 2000 gives the police the authority to release the juvenile on bail immediately on apprehension. In case of any dispute relating to age, the JJB directs the police to take the juvenile for medical examination to determine the age. As per the Model Rules of the JJA, 2000, the police, while dealing with the juvenile, must be in plain clothes and not in uniform. A juvenile in conflict with the law must never be handcuffed and any police officer found guilty, after due inquiry, of torturing a child mentally or physically shall be liable to be removed from service besides being prosecuted for the offence.

8.1 Management of institutions

All institutions constituted under the JJA have to be registered. Inspection committees and social auditing are provided for the monitoring of these homes. The inspection of the institutions must also include the quality of care and also involve civil society representatives. At present, the inspection generally involves quantity and accounting checks. Homosexual behaviour is largely common in institutions. During inspections, the child's view must be ascertained⁶⁵. Compensation can be provided for children who have been victims of custodial

64. Section 63, Juvenile Justice (Care and Protection of Children) Act, 2000.

65. A Joint Inspection format is available with the Department of Women and Child, Government of Maharashtra, which could be a model.

and institutional abuse. The Government schemes relating to child development, education and child labour have to be made available to the children in institutions. Standards of quality care have not been laid down under the Act. The rules of the Juvenile Justice Act, 2000 and the Orphanages and Charitable Homes Act, 1960 have to be synthesized.

Although the legislation has rightly increased the age of children, keeping in conformity with the Convention on the Rights of the Child, the infrastructure as well as human resources under the Act have not been upgraded and are grossly inadequate. The education, training and recreation of children have not been provided for. Besides, basic or school education, even higher education and training of these children have to be considered. The educational and vocational facilities in the institutions need modernization. Instead of the age-old non-marketable vocations like making of shirts or making of brooms, what is required are courses like computer education, and certified courses on dress designing, among others. The Open School and Open University education system should be made accessible to these children. Trained Duty Counsels have to be appointed by the State Legal Services Authority to represent the children in the courts. Some states like Maharashtra have appointed Duty Counsels in the Juvenile Justice Boards. The institutional staff and the law enforcers including the police and judiciary need to be trained so that the spirit of the Act can be followed. The law enforcers have to be made aware that children have a right to legal aid and other constitutional rights like the right to counsel, right to speedy trial, right to speedy disposal of cases, and right to child-friendly proceedings.

8.2 Family courts

The main objective of the Family Courts is to stabilize the marriage, to preserve the family, and where a marriage has broken down irretrievably, to dissolve it with maximum fairness and minimum bitterness, distress and humiliation. The Family Court system also visualizes the assistance of specialized agencies and experts. Family disputes involve many problems that need to be resolved. These relate to parties to marriage, their children and their property. The Family Courts are supposed to be specialized courts wherein sensitive, delicate matters have to be dealt with. The human element, therefore, has to be present. The Courts and their environments and ambience have to be sensitive and humane. The process of problem resolution has to be quick, less expensive and less technical. Family courts require not only

inputs in law but also a sociological knowledge of the family system and the plight of women in society, and a commitment to the policy of gender justice. The Act emphasizes conciliation, counselling and concern for an individualized approach based on initiative and innovative procedural modifications (Bajpai, 2006).

Children's issues come before the Family Court in custody, guardianship and maintenance cases. It is clear that rulings granting custody are affected by issues like poverty, character adultery, immorality, religion, sex, age, abandonment, remarriage, the wishes of parents and children, and nearness of kin. These are the factors that are taken into account by the courts while determining the best interests of the child.

There have been some important judgments on the issue of custody, guardianship and maintenance of children. In one case, the court would not compel a girl, though she is a minor, to stay with her father or husband if she can decide her benefits on her own.⁶⁶. Another ruling stated that orders related to the custody of a minor are not final but interlocutory in nature and subject to modification at any future time upon proof of change of circumstances⁶⁷. In a custody suit, where the minor lives with the mother, the place of jurisdiction is the mother's residence and not the residence of the father⁶⁸.

The Family Courts Act, 1984, is a legislation which relies significantly on networking among a large number of professionals concerned with the complex dimensions of families in India. The networking envisages the working of judges, social workers, counselors, case workers, psychiatrists, psychologists, police and NGOs. The concept of networking underscores the need to share roles in a dispute to get a shared and multi-disciplinary understanding of the situation. At present some of the family courts, especially in big cities like Mumbai, Nagpur and Pune, have introduced services within the court premises like child guidance clinics, children's complex wherein the parents can get access to their children, inquiry cells, drug addiction centres, and counselling and stress management centres, which perform psychological screening and testing, diagnostic and counselling therapy, for all litigants wherein psychological problems are detected, whether during the litigation or pre-litigation

66. Krishna Prasad Paul v. State of West Bengal 2005 (4) CHN 308.

67. R.G Bhuvanesh v. G Usha Rani 2004 (5) CTC 179; Leeladhar Kachroo v. Umang Bhat Kachroo 2005 (82) DRJ 609; Jai Prakash Khadria v. Shyam Sunder Agarwalla AIR 2000 SC 2172.

68. Ranubala Moharana and Anr. v. Mina Mohanty and Ors JT 2004 (5) SC 377.

stage. In cases relating to custody, guardianship and maintenance of children, the courts have to adopt the best interest of the child principle.

Decisions in Family Courts cannot simply be decided on the basis of the case ‘proved’ or ‘not proved’. They are sensitive and emotive issues. Such decisions necessarily involve lengthy investigations of the family, personalities and their motivations. Family Courts are courts in which the principles of law, the conscience of the community and the social sciences, particularly those dealing with human behaviour and personal relationships, work together. It is clear that successful innovations depend upon particular individuals being at the right place at the right time. Children’s rights in family courts need to be protected. There is a need to provide quality services to the family courts so that justice is provided to women and children who are the victims of domestic violence, broken homes and marriages, and matrimonial disputes. Above all, the families must be made aware of and must avail of these services.

8.3 Best interests of children in family courts

There are no hard and fast rules or precedents, in fact, there cannot be. Decisions are based on the facts and circumstances of each case. Courts often prefer not to disturb the status quo and generally place the child in the custody of the person who has already exercised custody at the time of the petition. Courts have also in recent times rejected the arguments of working women, and economic well-being, but in some cases, orthodox views still persist. Issues like child abuse, and cruelty to children have not come up frequently. The child’s interests are fashioned primarily on the perspective, needs and wishes of competing adult claimants or to protect the general policies of childcare or what the adults perceive to be the best interests of the child. Wherever possible, the courts have taken the wishes of children into account but many children can be easily tutored by the undue influence of the non-custodial parent against the absentee parent.

Clearly, the best interest standards provide tremendous discretion to the judges. The background of judges and their understanding as to what is the best interest of the child play an important role. It is still a question of ‘proved’ and ‘not proved’, based on the facts presented before the courts. There also appears to be tension between the apparent meaning of the ‘best interest’ standard and its construction in legislative and court decisions. The delays and adjournments that are a regular feature of the legal system also pose risks to the child.

Since the child is unrepresented in the family courts, it is up to the judge to ensure that the child's interests are not harmed or negated. The judges are not trained or sensitized to be friendly. Besides, even in those cases where the courts have managed to determine the best interests of the child, the social, administrative and enforcement machineries are not sensitive enough to implement them.

By and large, the spirit and the objectives of the Act have been forgotten and many family courts are working, in practice, like civil courts. There is thus a need to document the best practices of integrating support services in family courts, and after suitable adaptation, replicating them in others which do not have them. The counsellors play a very important role in Family Courts, but in the absence of proper infrastructure and uniform rules with regard to remuneration, etc. of the counsellors, skilled counsellors are either not available or are engaged on very small fees, and consequently, many of them they feel demoralized and have no interest in giving quality time or attention to the cases.

8.4 National Commission for the Protection of Child Rights

The initiative taken by the Government of India to enact The Commissions for Protection of Child Rights Act, 2005 is an important milestone in translating commitments into action. The National Commission for Protection of Child Rights (NCPCR) is a statutory body of the Government of India, set up in March 2007⁶⁹ to protect, promote and defend child rights in the country.⁷⁰ India ratified the United Nations Child Rights Convention in the year 1992 and this Act was passed as one of the necessary steps to protect the rights of the children in the country.

The National/State Commission consists of seven members, including a Chairperson and six members, of which at least two need to be women. The Act provides for Children's

69. The Act received the assent of the President on 20 January 2006.

70. The functions and powers of the National Commission are to:

- Examine and review the legal safeguards provided by or under any law for the protection of child rights and recommend measures for their effective implementation;
- Prepare and present annual and periodic reports upon the working of these safeguards;
- Inquire into the violation of child rights and recommend initiation of proceedings in such cases;

Courts for speedy trial of offences against children or of violation of Child Rights. The Act empowers the state government to notify at least a court in the state or a Court of Sessions in each district as a Children's Court, with the concurrence of the Chief Justice of the concerned High Court. For every Children's Court, the state government is required to appoint a Public Prosecutor or an advocate who has been in practice for not less than seven years as the Special Public Prosecutor. The State Children's Commissions still have to be constituted.

Some of the significant tasks undertaken by the National Commission are to issue guidelines for corporal punishment in schools, investigation into complaints on corporal punishments and child labour, and reviewing of laws relating to juvenile justice and child labour. The Commission has raised a lot of hopes among activists for protecting the rights of the child. And it must now act. There is also a need to enhance the powers and resources of the NCPCR so that it can work effectively. This commission must be given independence from political pressures to work and act to protect children.

-
- Undertake a periodic review of policies, programmes and other activities related to child rights in reference to the treaties and other international instruments;
 - Spread awareness about child rights among various sections of society;
 - Examine and recommend appropriate remedial measures for all factors that inhibit the enjoyment of rights of children affected by terrorism, communal violence/riots, natural disaster, domestic violence, HIV/AIDS, trafficking, maltreatment, torture and exploitation, pornography and prostitution;
 - Undertake and promote research in the field of child rights;
 - Inspect institutions meant for juveniles/children;
 - Inquire into complaints of deprivation and violation of child rights, non-implementation of laws and non-compliance of policy decisions, guidelines or instructions; and
 - Undertake other necessary functions for the promotion of child rights. The Commission has the power of a civil court and all criminal cases brought to the same have to be forwarded to a concerned Magistrate who has jurisdiction to try the same.

9. Conclusion

The last decade has seen a spurt of legislative initiatives on the issue of child rights. The right to protection includes freedom from all forms of exploitation, violence, abuse, and inhuman or degrading treatment. There are around 250 legislations in India that directly or indirectly deal with children⁷¹.

Laws on child sexual abuse and exploitation, corporal punishment, surrogacy and reproductive tourism, adoption, surrogacy, cyber crimes against children, education and child labour, have to be reformed and formulated. It is a matter of concern that the prevention, rehabilitation and compensation of child victims have still to be incorporated in various legislations.

The law on child sexual abuse and paedophiles is the need of the hour. India has become a heaven for paedophiles because of its lax laws. Child labour is assuming new forms like those of child artistes, and migrant child labour, and the law must be equipped to deal with them. Enacting a child-friendly legislation to ensure not just compulsory close links between education and the prevalence of child labour demand a convergence of laws on education and child labour. Education also signifies education of equitable quality to every child in India. There is a need for a national legislation on corporal punishment.

There are links between missing children, forced labour and trafficking. There is no existing national database or uniform tracking procedure existing in India today that deals with

71. Some major policies and legislations issued in the country to ensure children's protection and improvement in their status include the Guardian and Wards Act, 1890; Factories Act, 1954; Hindu Adoption and Maintenance Act, 1956; Probation of Offenders Act, 1958; Bombay Prevention of Begging Act, 1959; Orphanages and Other Charitable Homes (Supervision and Control) Act, 1960; National Policy for Children, 1974; Bonded Labour System (Abolition) Act, 1976; Child Marriage and Restraint Act, 1979; Immoral Traffic Prevention Act, 1986; Child Labour (Prohibition and Regulation) Act, 1986; National Policy on Education, 1986; Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act, 1987; National Policy on Child Labour, 1987; Infant Milk Substitutes, Feeding Bottles and Infant Foods (Regulation of Production, Supply and Distribution) Act, 1992; National Nutrition Policy, 1993; Pre-natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994; Persons with Disabilities (Equal Protection of Rights and Full Participation) Act, 2000; Juvenile Justice (Care and Protection of Children) Act, 2000; National Health Policy, 2002; National Charter for Children, 2004; and National Plan of Action for Children, 2005.

missing children across the country. It is an issue of serious concern post-Nithari⁷² wherein many of the 38 missing children were later found to have been killed. The ‘missing children’ issue can no longer be dealt with through knee-jerk reactions as in the recent Nithari killings. On an average, over 40,000 children in India are reported missing every year (Haq Report on Child Rights, 2005).

Each year, thousands of women agree to carry, for a fee, the child of another woman. There is already an active international trade in the components of baby production—wombs, sperm, and eggs. There are rapidly advancing technologies that are certain to expand both the demand for surrogacy services and the supply of surrogate mothers. The presence of globalization and development of Assisted Reproductive Technologies (ART) has contributed to the emergence of a new reproductive concept, viz. reproductive tourism, in which case couples travel outside of their country for fertility treatment. India is becoming the best option for fertility treatment for many reasons: low cost, availability of many donors, and lenient legislation. Reproductive tourism has emerged as a popular means for infertile couples to overcome their fertility problems. Legal restrictions on fertility treatment in their home countries encourage infertile couples to go abroad. India must create surrogacy laws domestically. Citizens need to know the laws on infertility services in their country as well as to know the implications of seeking services abroad. In India, at present, only ICMR guidelines regulate surrogacy arrangements. The failure to create legislation will further complicate the issues that the states and their citizens have in relation to ART. The rights of the child must also be taken into consideration while creating laws for national and transnational surrogacy arrangements and reproductive tourism.

We are moving towards the standards set by international laws. Now, it is important to monitor and enforce the laws. What is required now is that the spirit of the laws be inculcated among the law-makers, law enforcers and civil society so that children get justice.

72. NOIDA and the surrounding area were for long haunted by incidents of kidnapping. Parents approached police officials for help but were always denied any support. The incidents of kidnapping of little children, mostly girls, continued unchecked. On 29 December 2006, when police were investigating the kidnap of a teenaged girl, electronic surveillance brought them to this unoccupied house owned by Moninder. The electronic surveillance traced the cell phone of the kidnapped girl, who was sexually assaulted and killed in this house. But when the police investigation progressed, skeletal remains of many more children were found in sacks in the drain that was situated behind the house. This is when the case of serial killings came to light. When the skeletal remains and the objects found in the sacks were tested, it was found that they belonged to the children who went missing.

It must be ensured that these laws do not simply remain on paper, as child rights are non-negotiable. Children must be considered as citizens with rights guaranteed to them under the Constitution of India, and the national and international laws. The State infrastructure and services for children need to be enhanced and improved. The major significance of the Convention on the Rights of the Child and other international instruments ratified by India is that it represents a commitment to improving the situation of children in India. Thus, they can be used by public advocates to force the government to take action on child issues.

No law can work in isolation. There is thus a need for convergence of laws and amongst Ministries dealing with them. For instance, close links between education and the prevalence of child labour demand a convergence of laws on education and child labour. Today, there are a number of fragmented laws on various issues relating to children. While laws on child labour speak about penalizing employers who employ child labour, child labour laws do not speak of education, except in the *M.C. Mehta v. Tamil Nadu* case.⁷³ But both require significant commitment and engagement from both state governments and civil society. It is imperative to protect the child from all forms of abuse and exploitation and take all appropriate national, bilateral and multilateral measures to prevent sexual exploitation of children.

Prosecution and conviction rates in cases relating to contravention of the laws pertaining to children are low, pointing out the poor implementation of the law, administrative lapses, lacunae in the laws, and an urgent need for law reform. Policies and legislations for children have, on the whole, suffered from weak implementation, owing to scant attention to issues of child protection, resulting in scarce resources, minimal infrastructure, and inadequate services to address child protection problems. All the laws are passed with good intentions but there is a problem in their implementation and enforcement. Laws relating to children are difficult to enforce as the victims themselves are weak and vulnerable. It must be understood that strict enforcement of the laws should in itself act as a deterrent to the violators. There must be in-built mechanisms and structures in all laws to ensure their implementation and enforcement. When new laws are being drafted or law reform is being undertaken, this factor must be incorporated. The seriousness of a child-related offence must be conveyed to the law enforcers and interpreters. For instance, in the Child Labour Act, there is provision for imprisonment

73. AIR 1997 SC 699.

as well as fine for violations. But it has been observed that this discretion generally goes in favour of the employers as the courts award them fine instead of imprisonment. The process of change in laws must involve the civil society and their recommendations must be seriously considered. A child-friendly judiciary trained in child rights is required.

The issue of the mental health of the rescued and victimized children is absent in Indian laws as well as judgments. In legislations concerning children and their rights, mental health considerations must become an inextricable component of the law, and therapists must be included in the legal framework both as an appreciation of evidence and for the future benefit of the child as a long-term remedy (Sharma, 2005). The lawmakers, medical doctors and judges must take into account the mental health concerns of the child in the laws, medical reports and judgments relating to children. We must move towards therapeutic jurisprudence.

Alternate dispute resolution techniques need to be developed for dealing with child-related issues. Children's involvement is needed in conciliation and mediation services, and in litigated/contested/defended court proceedings concerning their care arrangements or guardianship issues.

Child budgeting carried out by the Ministry of Women and Child Development revealed that the total expenditure on children in 2005-2006 in the areas of health, education, development and protection together amounted to merely 3.86 per cent, rising to 4.91 per cent in 2006-07. There is an urgent case for increasing expenditure on child protection, so that the rights of the children of India are protected. 'Child Protection' is an essential component of the country's strategy to place 'Development of the Child at the Centre of the Eleventh Plan', as envisaged in the Approach Paper to the Eleventh Plan. The Integrated Child Protection Scheme (ICPS) is, therefore, proposed by the Ministry of Women and Child Development as a Centrally-sponsored scheme to address the issue of child protection and build a protective environment for children through government-civil society partnership. The ICPS will hopefully address implementation concerns, through an entirely new bureaucratic structure and increased expenditures for child protection. Set to be completed over the course of the next Five-Year Plan (2007-2012), the ICPS will create new offices at the state and district levels.⁷⁴ The ICPS proposes to bring together multiple vertical schemes under

74. Ministry of Women and Child Development, Government of India.

one comprehensive child protection scheme, combining existing child protection schemes of the Ministry and integrating interventions for protecting children and preventing harm. This will be done through service delivery structures at the state and district levels. Moreover, such a comprehensive approach to child protection is also required to achieve the Millennium Development Goals (MDGs). All budgets for child protection schemes and programmes should be in the Plan category rather than in the non-Plan category.⁷⁵ In this context, the following concluding observations of the UN Committee on Child Rights are very significant:

“Make every effort to increase the proportion of the budget allocated to the realization of children’s rights to the ‘maximum extent of available resources... Develop ways to assess the impact of budgetary allocations on the implementation of children’s rights....”⁷⁶

Awareness of the rights and laws by various stakeholders including children is essential. We have to recognize the enormity of the problem, and tackle it politically, legally, and socially with significant commitment from the State and civil society. The effects of the processes of globalization, privatization and liberalization on children must be seriously considered and addressed. The negative linkage of globalization and privatization on the rights of children in several countries across the world needs to be examined. Today, the country is registering 8-10 per cent growth and claiming that it would become a world economic power by 2020. Can we, however, become a world economic power with our children being abused, exploited and trafficked, and their rights violated?

75. *ibid.*

76. Thirty-fifth session vide letter No CRC/C/15 /Add 228 dated 30 January 2004.

References

Bajpai, Asha, *Child Rights in India—Law, Policy and Practice*, Oxford University Press, New Delhi, 2003.

———, *Child Rights in India—Law, Policy and Practice*, Oxford University Press, New Delhi, Second Impression, 2006.

———, ‘Who is a Child?’, *InfoChange News and Features*, Centre for Communication and Development Studies, Pune, India, 2007.

Government of India (GoI), ‘Crime in India’, Ministry of Home Affairs, New Delhi, 2006.

Haq Report on Child Rights, New Delhi, 2005.

<http://www.chennaionline.com/society/06/june12thasp>, Accessed on 12 June 2008.

Sharma, Parul, ‘Point of View’, *JLACAM*, Vol. 1, No. 4, Article 6, National Law School of India University (NLSIU), Bangalore, India, 2005.

Ved, Kumari, ‘Children and the Criminal Justice System’, *InfoChange News and Features*, Pune, India, June 2007.

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