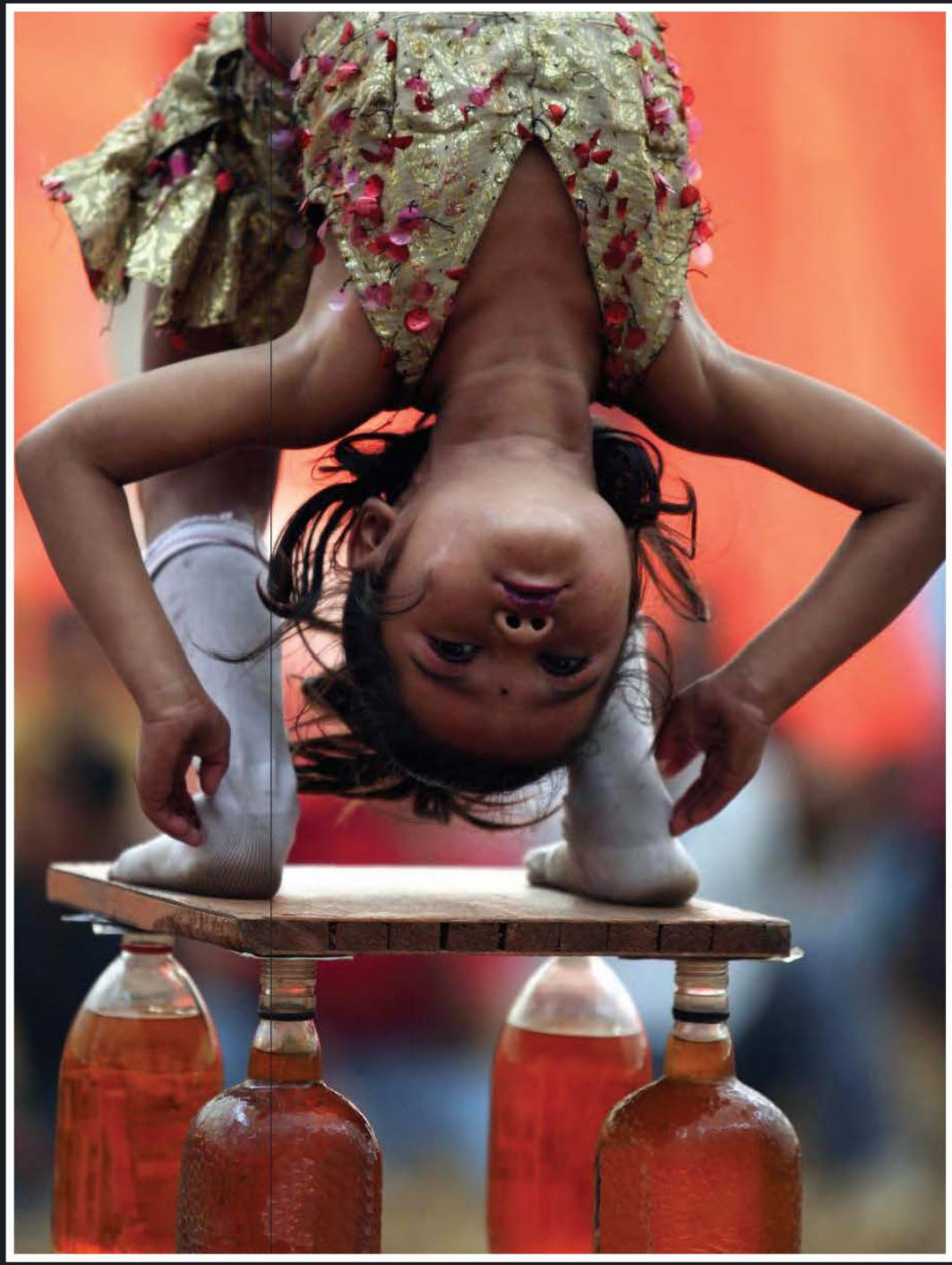
INDIAN LAWS PROTECTING CHILDREN



AN INFORMATION BOOKLET

HRLN

INDIAN LAWS PROTECTING CHILDREN

AN INFORMATION BOOKLET

Editor

Pankaj Sinha, Advocate

HRLN

Human Rights Law Network

New Delhi

August 2011

HRLN Vision

- To protect fundamental human rights, increase access to basic resources for the marginalised communities and eliminate discrimination.
- To create a justice delivery system that is accessible, accountable, transparent, efficient and affordable, and works for the underprivileged. Raise the level of pro bono legal expertise for the poor to make the work uniformly competent as well as compassionate.
- Professionally train a new generation of public interest lawyers and paralegals who are comfortable in the world of law, as well as in social movements, and who learn from social movements to refine legal concepts and strategies.

Indian Laws Protecting Children

August 2011

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—**Pankaj Sinha,** Advocate

Preface

Children constitute one of the most vulnerable sections of various segments of society. The initial years of one's life are the most crucial ones as they are the formative years that play a major role in shaping our personality and framing distinct individuals. Therefore, it becomes all the more important to take due care of them especially those in conflict with law and children in need of care and protection. These juveniles not only run the risk of living through a distorted childhood, but a perilous future as well.

Thus, it is in this context that the book aims at sharing information on a larger scale about the laws that protect children in India, especially focusing on the Juvenile Justice (Care and Protection of Children) Act, 2000, the consequent amendments and so on. It further elaborates on the punishments enshrined for offences against Juveniles under the Indian Penal Code, 1860; Narcotic Drugs and Psychotropic Substances Act, 1985; the Child Labour Prohibition and Regulation Act, 1986; the Plantations Labour Act, 1951; the Mines Act, 1952; the Immoral Traffic (Prevention) Act, 1956 etc.

This book has been written with the view of achieving a few objectives. The theme of the book revolves around the issues of juveniles, their rights and the legal provisions protecting those rights. It attempts to serve as a (one-stop reference/user-friendly) guide for judges, lawyers and activists to effectively deal with cases of juveniles. The book presents to readers the legal provisions for children through a comprehensive compilation of recent judgments in a simple and lucid manner. People who are working with juveniles or are interested in the same can also enhance their knowledge with the help of this book. All in all, the book talks about protecting rights of the juveniles involving the legal mechanisms.

The book also puts across views and insights of a number of experts from this field like Mr. Rajib Haldar, an Additional Director of Child in Need Institute who updates us on recent amendments in juvenile justice (Care and Protection of Children) Act, 2000.

Mrs. Minna Kabir, a voluntary social worker has rich experience and expertise of working with children on a number of issues related to them. She has thrown light on a very intricate issue that is the 'age-debate' in the Juvenile Justice system in the article "Age: Determinant in Juvenile Justice."

Mr. Shashank Shekhar, who has been a member of Delhi Commission of Protection of Child Rights, has put forth his views on child labour and simultaneously he has also pointed out the lacunae in the existing legislations for prohibiting child labour.

Ms. Roma Debabrata, an Associate professor at Miranda House, University of Delhi has been working on child-trafficking issue over last twenty years. Her invaluable experiences get reflected in the article "Combating Child-Trafficking", where she talks of the reasons of child-trafficking, ways to curb it and the challenges one faces while working towards eradicating child-trafficking.

Mr. Rajive Raturi, who has been the Director of Disability Rights Initiative HRLN and working in disability for past seven years, has in his article "Right to Education for persons with disabilities" talked

about this important aspect harmonising the Right to Education, the Persons with Disabilities (Opportunities, Protection of Rights and Full Participation) Act, 1995 and the United Nations Convention Rights of Persons with Disabilities [2008].

Dr. Niranjanaradhya.V.P Fellow, Centre for Child and the Law, National Law School of India University, Nagarbhavi, Bangalore-560072, is also the Programme Head, Universalisation of school education. He is also a Member of the Karnataka Commission for the Protection of Child Rights. In the article "A Regressive Legislation for School Education in Progressive Child (Human) Rights Age", he has given an insightful analysis of the Right of Children to Free and Compulsory Education Act, 2009 and its basic flaws.

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Introduction

India has the largest number of children in the world. More than one-third of country's population is below 18 years. Approximately 40% of the population (around 440 million) constitutes of children. Millions of children in India grow up uncared for, condemned to miserable conditions. They live in abject poverty without medical treatment, education or food. The innocent childhood that should be protected and allowed to grow at its own pace, is often at stake. Despite grand policy announcements and new legislations, the effect in practice is dismal. Child-slavery is rampant, violence against children endemic and the right to education though now established by 86th amendment in the Constitution of India (which declares it to be a Fundamental Right under Article 21) and further the Right of Children to Free and Compulsory Education Act, 2009; exists only on paper.

The status of children in India is very alarming. A look at some of the figures makes it evident. India has the highest rate of neo-natal deaths (around 35%), and 40% of child malnutrition in the developing world. There is a constant reduction in the number of girls as in the 0-6 age group; there are 927 girls for every 1000 boys. Moreover, 46% of children from Scheduled Tribes and 38% from Scheduled Castes background are out of school. Further, there are a great number of high school dropouts, especially among girls. There is a high rate of child-marriage, which adds to the lack of education among children; 37% of literate & 51% of illiterate girls are married below 15 years of age, while 10% of literate & 15% of illiterate boys married are below 18 years of age. A large number of children are labourers and at the same time there a large number of sexually-abused children.

The issue of child labour in India first came to be considered by the Supreme Court in M.C. Mehta v. State of Tamil Nadu. The Court noticed that the Planning Commission's estimate of child labour as far back as 1983:

> ".....was 17.36 million in the age group of 5 – 14 years… None of the official estimates included child workers in the unorganized sector, and therefore, are obvious gross underestimate. Estimates from various non-governmental sources… range from 44 million to 100 million."

About 200 girls and women enter prostitution daily of which 20% are below 15 years of age. Research on cross-border trafficking has indicated that 5,000-7,000 young Nepali girls were trafficked into India annually. This research also highlighted the fact that in the last decade, the average age of the trafficked girl has steadily fallen from 14-16 years to 10-14 years.

Action needs to follow awareness and commitment. The huge gap between the reality faced by children in contemporary conflicts and the accepted standards calls for specific actions to be implemented within the existing resolutions. Though, there is no dearth of legal provisions those protect children; but the effective implementation of the same is the big question.

Take for example the Juvenile Justice (Care and Protection of Children) Act, 2000. Despite the fact that the Act is wonderfully named as Juveniles Justice Act, it seldom benefits the juveniles. They are mostly tried as adults and are continued to be harassed and beaten by law-keepers, trafficked,

exploited and sexually abused across the country.

A look at the various schemes like Mid-Day Meal and Sarva Shiksha Abhiyan, bring into the picture the constant efforts of the Government to ensure the rights of the child. Such schemes are beautifully developed to cater to the developmental, health and educational needs of the children. But the same cuts a sorry figure when the ground realities are exposed. The young age of the affected makes them more vulnerable to grave forms of exploitation resulting in serious violation of child rights. It intensifies all the more if the child is disabled, or if the disabled child is a girl. The common practice of denying admission in schools to disabled children speaks for itself the unjustifiable discrimination against them. The Ministry of Human Resources Development admits that less than 1.8% of disabled children in the age group of 6 to 14 years are in school. The estimate throws light on the kind of society we live in, that is indifferent and apathetic towards a disabled child. This is an unfortunate, but the hard reality.

It becomes all the more distressing to learn that the Constitution of India contains provisions that aim at protecting the rights of the citizens of India, with special provisions for the marginalized. We have had major accomplishments in the field of ensuring legal provisions for the needy, but somewhere or the other a lurking lacuna always comes up. For instance, declaration of right to education under the Right of Children to Free and Compulsory Education Act, 2009 was celebrated as a momentous event without reflecting on the point that the said Act does not take into account, the children in the age group of 0-6 years.

Moreover, there is an urgent need to respond to an ever increasing number of children and youth growing up in a violent society, confronting brutality on a large scale. The childhood needs to be dealt with utmost care, as it plays a vital role in making oneself. It is with this aim that the book "INDIAN LAWS PROTECTING CHILDREN" was published in 2006, which shares legal knowledge pertaining to juveniles. The second edition of this book aims at making it more informative and reader friendly so that it can be of greater help to a wide range of readers.

Hence, this book will help bring awareness among the readers from different backgrounds about the laws that are specifically meant to protect children of our nation, and at the same time enable them to contribute effectively towards the mission of protecting child-rights.

CHAPTER I

CHILD AND JUVENILE JUSTICE (CARE AND PROTECTION OF CHILDREN) ACT, 2000

A. An Update on the Implications of Amended Sections of the Juvenile Justice (Care and Protection of Children) Act, 2000 and 2006

B. Care and Protection of a Juvenile under the Juvenile Justice (Care and Protection of Children) Act, 2000

A. An Update on the Implications of Amended Sections of the Juvenile Justice (Care and Protection of Children) Act, 2000 and 2006

Rajib K. Haldar

This critical review highlights the amendments of the Juvenile Justice (Care and Protection of Children) Act, 2000 and 2006 in the perspective of the UN Convention on the Rights of Child, which is by itself an international legal instrument. It identifies a variety of issues and a wide range of judicial and child developmental interventions. It interprets the implications of some of the recent amendments for the judiciary that can be used to strengthen the juvenile justice system by innovative application of law, to make the rights of the children within the legal framework a reality.

India has a progressive track record on updating legislations and policies relating to human rights, particularly child rights and child protection. The juvenile justice system is one such example, which is based on promoting, protecting and safeguarding the rights of children in India. The Juvenile Justice (Care and Protection of Children) Act, 2000 was enacted by Parliament in response to a long-standing demand for rationalising the rights based approach.

The Juvenile Justice Act, 2000 was found to have some lacunae in its linkages between the governmental and non-governmental efforts in disposition, adoption, age determination and investigation of children/juveniles. The amendment was made in the light of practical experiences gained while functioning under the Juvenile Justice Act, 1986, and the crucial need to empower and involve the voluntary sector. The Act brings out some of the radical changes responding to India's commitment to the United Nations Convention on the Rights of the Child, 2008; United Nations Standard Minimum Rules for Administration of Juvenile Justice, 1985 (the Beijing Rules) and the United Nations Rules for the Protection of Juveniles Deprived of their Liberty, 1990 to suit the best interests of children. This is a central landmark legislation of child protection that requires each state and union territory to establish infrastructure and protocols in order to ensure its effective implementation. The Act envisages not only a separate machinery and infrastructure required for its enforcement, but also a set norms and standards of services at various stages of investigation and prosecution, adjudication, disposition, care, treatment, rehabilitation and social reintegration. The recent amendment in the Act in 2006 has further strengthened the juvenile justice and child protection system.

The Juvenile Justice (Care And Protection of Children) Act, 2000 is aimed to consolidate and amend the law relating to juveniles in-conflict-with-the law (JCL) and the children in need of care and protection

(CNCP) by providing for proper care, protection, and by catering to their growth, and by adopting a child-friendly approach in the adjudication, and disposition of suits in the best interests of children, and for their rehabilitation in the mainstream society.

In order to implement its provisions and follow procedures, the Act provides for:

⇨Juvenile Justice Boards	⇨Special Juvenile Police Units
⇨Child Welfare Committees	⇨Juvenile Justice Fund
⇨Institutional care through children's homes, observation homes, shelter homes, special homes and aftercare organizations	⇨Central/State/District Advisory Boards
	⇨Local Authority
⇨Non-institutional care through Adoption, Foster Care, Sponsorship and After Care	⇨Selection Committee
	⇨Inspection Committee.

The Act defines a juvenile/child as a person who has not completed the age of 18 years. It has two separate chapters -- one for JCL and the other for CNCP. It also contains an exclusive chapter concerning rehabilitation and social reintegration of children. The Act defines the *juvenile in conflict with law* as a child who is alleged to have committed an offence and *children in need of care and protection* broadly as children who are neglected, abused, abandoned, victim of any armed conflict or natural calamity, amongst others. Offences committed against a child as listed in the Act are cognizable and punishable under the provisions of this Act.

■ The competent authority in relation to CNCP is Child Welfare Committee and in relation to JCL is the Juvenile Justice Board.

■ The members of the committee in the board have been given magisterial power.

■ The social workers and the representatives of the NGOs having prescribed qualifications under the Act can now become member of the competent authority.

■ For the JCL, the Act envisages establishment of Observation Homes and Special Homes. For the CNCP, provision has been made to establish Comprehensive Children's Homes, while the Shelter Home and the After-Care organisations may be established for juveniles or children. The Shelter Home shall be exclusively established and run by the voluntary sector with the assistance from the government. All other Homes can either be established or run by the government in association with the voluntary organisations.

■ The representatives of voluntary organisations and social workers may be members of the Advisory Committee.

■ New mode of dispositional alternatives like, counselling and community services, have been incorporated for the juveniles in accordance with the Beijing Rules.

■ A new chapter on rehabilitation and social reintegration comprising adoption, foster care and sponsorship has been added.

■ The police have been assigned a specialised role in accordance with the Beijing Rules. Special Juvenile Police Unit shall be set up in every district and a police officer shall be designated in every police station as Child Juvenile Welfare Officer. He shall be assisted by two local voluntary social workers.

■ A new concept of Social Audit has been introduced in accordance with the Beijing Rules. Besides the police, the social workers and the voluntary organizations, too, have a role in producing children before the Child Welfare Committee. A child himself/herself can also appear before the competent authority and demand his/her rights.

■ Juvenile/child cannot be kept in a police lock-up or in jail. No juvenile can be sentenced to death or life imprisonment. Efforts shall be made to release the juvenile on bail or probation. Institutionalization should be taken to be the last resort.

Comparative Overview Of The Juvenile Justice Act 2000 And The Juvenile Justice Amendment Act 2006[1]

The Juvenile Justice (Care and Protection of Children) Amendment Act, 2006 has made twenty-six (26) amendments, which are explained below:

Key Features:

JJ Act 2000	Amendment Act 2006
Enacted on December 30, 2000	Enacted on August 22, 2006
Notified on April 22, 2001	Notified on August 23, 2006
Central rules notified on June 26, 2001	Central rules notified October 2007

The Amendment Act, 2006 repealed the Juvenile Justice Act, 1986 and replaced the JJ Act 2000.

Preamble – Key Focus Areas:

■ Child-friendly and rights based approach,

■ Best interests of children,

■ Proper care, protection, treatment and rehabilitation, reintegration,

■ Constitution / Human Rights / CRC / Beijing Rules/ UN Rules for Protection of Juveniles.

Highlights Of The Major Changes In The JJ Amendment Act Of 2006

A) The amended Act has provided larger scope of rehabilitation of the CNCP or a JCL, through not only the institutional care, but also community based non-institutional approach.

1. Source: Mehta N. (2008): Child Protection and the Juvenile Justice System for Children in need of care and protection, published by CHILDLINE India Foundation.

B) It clarifies that the JJA shall apply to all cases of detention or criminal prosecution of juveniles under any other law. Unlike the 2000 Act, it clears doubt regarding the relevant date in determining the juvenility of a person and the applicability of the JJA. The procedure to be followed has been provided in Section 7A in the Amendment Act. The Central Model Rules 2007 lay down procedures whereby a claim of juvenility can be raised before any court.

C) Another major change is made regarding exclusion of the local authority from the provisions authorising them to discharge or transfer a child in need of care and protection or a juvenile from a children's home or special home or for sending a JCL undergoing imprisonment to a special home or fit institution. This reaffirms the exclusive accountability of the State or the competent authority as provided under the Act and model rules.

D) A landmark amendment was made by doing away with the involvement of any police officer in the enquiry process, for the CNCP as this task was assigned to the Child Welfare Committee and also to cover other cases where the child can remain in a children's shelter/home after completion of enquiry. (Section 33)

E) As per the amended JJ Act, 'adoption' means the process through which the adopted child is permanently separated from his or her biological parents and becomes the legitimate child of the adoptive parents with all rights, privileges and responsibilities that are attached to the relationship [Section 2(aa)]. The Act widens the scope of adoption of a child to childless parents in addition to the existing provisions and to limit the same to the Indian citizens only. Section 41 (sub-section 2, 3 and 4), CWC (at least two members) must declare the child legally free for adoption and two months reconsideration period must be over for the surrendered children. The child's consent is necessary where a child can understand and express her or himself.

F) The Act and Rules have clarified that the Juvenile Justice Board shall be created in every district, and omitted 'or a group of districts'. (Section 6)

G) The amendment of Section 34 (sub-section 2) of the Act and the Rules make it mandatory for the state governments/ union territories and voluntary organizations to register all institutions for children in need of care and protection under the JJ Amendment Act, 2006 in the prescribed manner. This shall ensure institutional accountability to minimum standards of care to children and the State.

Points to ponder over by the Judiciary, the Government and other JJ System stakeholders

The existing institutions and programmes being implemented in the child protection sector in India primarily originate from the legal provisions as provided under the Juvenile Justice (Care and Protection of Children) Amendment Act and the National Plan of Action for Children, 2005. While it is an agreed fact that the Juvenile Justice Amendment Act, 2006 is the most contemporary legislation and a blue print for child development and protection of children's rights, uniform implementation of its provisions throughout the country has been a challenge. This is perhaps the only legislation in the country and the South Asian region that is backed by policy support, programme scheme (namely, Integrated Child Protection Scheme) and necessary budgetary allocation for the effective implementation in the Eleventh Five Year Plan (2007-11).

However, in order to achieve the set objectives of the Act, it is imperative for the judiciary, the state governments and the civil society organizations, to take note of these crucial amendments and address proactively the following issues by innovative application of legal instruments and Rules.

■ Lack of legal resources and manpower at state and district levels for implementation and mandated monitoring of the provisions of the Act;

■ Inadequate infrastructure mandated by JJ Act in terms of number of Juvenile Justice Boards, Child Welfare Committees, Special Juvenile Police Units (SJPU);

■ Acute shortage of qualitative and quantitative data relating to CNCP, children in conflict with law and children in institutional care;

■ Inadequate training and capacity building of judiciary, police and other functionaries involved in the juvenile justice system;

■ Child protection is not in the priority list of state government's planning process;

■ Convergence with other laws and child welfare sectors to implement the provisions of the Act.

The 2006 Amendments do not include 'child abuse' and provided for appropriate provisions. All those who are, directly or indirectly, involved in the implementation of the Juvenile Justice (Care and Protection of the Children) Act, 2000 / 2006 whether in government or non-government organisations should be sensitised about child abuse issues. State governments and union territory administrations should be called upon to firmly deal with reported cases, conceive and plan child-abuse prevention programmes. A significant percentage of cases of violence against children are pending and this needs to be urgently dealt with through appropriate legislations, policy support and programmatic actions. Apart from the provisions in the JJ Act, specific laws may be framed to deal with offences against children.

Judicial accountability are not properly monitored and are rarely enforced in most of the states and union territories, despite legal provisions of social audit and inspection powers given to the Chief Judicial or Metropolitan Magistrates and the Hon'ble High Courts.

There is an opportunity to establish linkage with Integrated Child Protection Scheme (ICPS), a Scheme by the Ministry of Women and Child Development, Government of India, which has been framed to address issues of child-protection and implementation of the Juvenile Justice system in the country.

With the necessary legal resources and supportive policy environment for promotion of child rights, the judiciary needs to rise to the occasion and adopt judicial activism in the juvenile justice sector.

To conclude, it is evidently clear that the juvenile justice system with amendments in 2006 is not only a system of law and justice, as understood by many even within its sub-systems, it is an integrated system of social justice that fulfils basic needs and rights of every child in the country.

B. Care and Protection of a Juvenile under the Juvenile Justice (Care and Protection of Children) Act, 2000

I. Procedure To Be Followed By A Magistrate Not Empowered Under The Act

Nature of Offence	Where to find in the Juvenile Justice Act?	Relevant Provisions	Punishment
-	Chapter II: Juvenile in conflict with Law	Section 7	-

When any Magistrate, who is not empowered to exercise the powers of a Board under this Act, is of the opinion that a person brought before him is a juvenile or a child, he shall without any delay record such opinion and forward the juvenile or the child, and the record of the legal proceedings to the competent authority having jurisdiction. Furthermore, the competent authority to which the proceeding is forwarded shall hold the inquiry, as if the juvenile or the child had originally been brought before it.

■ In the case of *Mohd. Irshad @ Shiv Raj* v. *State*,[1] there was a petition against the order directing petitioner to undergo trial before Special Judge, under the Narcotic Drugs and Psychotropic Substances Act, 1985 and not before the Juvenile Justice Board. However, a juvenile can be tried only in terms of Juvenile Justice (Care and Protection of Children) Act, 2000 [hereinafter referred to as 'Juvenile Justice Act, 2000']. It was consequently held that the impugned order is set aside and the Juvenile be forwarded to the Juvenile Justice Board. It was also decided that all matters pertaining to juveniles are to be forwarded to Juvenile Justice Board for trial.

■ In the matter of *Pawan* v. *State of Uttaranchal*,[2] the accused had been convicted under Sections 34, 302, 376 and 377 of Indian Penal Code, 1860. The appellant put forth a plea for juvenility, under Section 7A, before the Hon'ble Supreme Court. It was held that in a case where plea of juvenility is found unscrupulous or the materials lack credibility or do not inspire confidence and even, prima facie, satisfaction of the Court is not made out, then it is unnecessary to call for the report or an enquiry be ordered to be made.

1. 134 (2006) DLT 507.
2. 2009 (3) SCALE 195.

II. Bail Of Juvenile

Nature of Offence	Where to find in the Juvenile Justice Act?	Relevant Provisions	Punishment
-	Chapter II: Juvenile in conflict with Law	Section 12	-

A juvenile must be released on bail irrespective of the offence, notwithstanding anything contained in the Code of Criminal Procedure, 1973. A juvenile may be released on bail with or without surety or placed under the supervision of a Probation Officer or under the care of any fit institution or fit person. Though, a juvenile may not be released on bail only if:

1. Release will bring him into an association with a criminal.
2. Expose him to moral, physical or psychological danger.
3. Defeats the end of justice.

If a juvenile is not released on bail, he must be kept in an observation home/ place of safety pending enquiry.

■ In the case of *Asawani Kumar Singh* v*. State of Jharkhand*,[3] the High Court of Jharkhand dealt with the issue of a bail of juvenile. The petitioner was arrested for offence under Sections 25, 26 and 35 of the Arms Act, 1959 and he was found to be a juvenile. His prayer for bail under Section 12 of the Juvenile Justice Act, 2000 was rejected by the Juvenile Justice Board as well as the Sessions Judge. It was argued by the State that the petitioner had developed company of anti-social elements and his release was likely to bring him in association with old associates. However, there was no firm basis for arriving on such a conclusion. A report from the Probationary Officer regarding antecedents and other aspects of the petitioner mentioned, among other things, that the parents of the petitioner were willing to take custody of him under their protective control. The Court held that none of the exceptions under which a juvenile can be denied bail were satisfactorily indicated. Therefore, the petitioner was to be released from custody on furnishing the bail bond and subject to the condition that the father of the petitioner would undertake his custody and produce him before the Juvenile Justice Board, at the trial till its conclusion.

■ In the case of *Atul Kumar @ Kuldeep* v. *State of UP and Anr.*,[4] the High Court of Allahabad also dealt with the issue of bail of a juvenile. The accused revisionist Atul Kumar was alleged to have raped a five year old girl in his shop, and was charged under Sections 376/506 of the Indian Penal Code, 1860. The accused was declared to be a juvenile. The Juvenile Justice Board denied him bail on the ground that his release may expose him to danger and involve him in crime again whereas he could be reformed in the better atmosphere of the Government Protection Home. But, they did not mention the ground for the above conclusion. The lower appellate Court refused bail on the ground that bail would defeat the ends of justice, but without giving any reason as to how justice would be

3 2008 (3) JCR 459 (Jhr).

4 MANU/UP/0731/2008.

defeated. The High Court held that justice requires that an innocent should not be punished and the guilty should not go unpunished. Therefore, it conformed to the observation of the lower appellate court which had taken into account Section 12 of the Juvenile Justice Act, 2000. Therefore, the revision was dismissed.

■ In the case of *Dev Vrat* v. *Govt. of N.C.T. of Delhi*,[5] it was held that the decision of the Addl. Sessions Judge to refuse the bail of the petitioner (who is a minor) merely on the ground that the nature of offence which was committed was a heinous crime violative of Section 12 of the Juvenile Justice Act, 2000. The minor was thus released on bail on the petitioner's father furnishing a personal bond in the sum of Rs. 20,000 with one surety of the like amount to the satisfaction of the Juvenile Justice Board.

III. The Proceedings of A Juvenile And An Adult Should Be Separate

Nature of Offence	Where to find in the Juvenile Justice Act?	Relevant Provisions	Punishment
-	Chapter II: Juvenile in conflict with Law	Section 18	-

■ The issue of the age-inquiry of a juvenile was dealt by the Honourable Supreme Court of India in the case of *Babloo Pasi* v. *State of Jharkhand and Anr.*,[6] the accused in the appeal, was apprehended for having committed offences under Sections 304B and 306 of the Indian Penal Code, 1860, in relation to the death of his wife on basis of the statement made to the police by brother of the deceased (appellant). The Juvenile Justice Board concluded that the accused was not a juvenile. The High Court in exercise of its revisional jurisdiction overruled the verdict and as such the victim went into appeal to the Supreme Court. Hon'ble Supreme Court stated:

> "*The medical opinion obtained under the State Juvenile Justice Rules is only a guiding factor and not the sole criterion for determination of age and, therefore, the High Court could not ignore other relevant factors and the evidence on record and as such in exercise of its revisional jurisdiction the High Court cannot pass an order, prejudicial to any person without affording him a reasonable opportunity of being heard.*"

The Court also went on to state that no fixed norm had been laid down by Juvenile Justice (Care and Protection of Children) Act, 2000 for the age determination of a person and the plea of the juvenile must be judged strictly on its own merit. The medical evidence as to the age of a person, though a very useful guiding factor, is not conclusive and has to be considered along with other cogent evidences. The Court allowed the appeal and directed the Chief Judicial Magistrate concerned to hold an enquiry in the determination of the age of the accused again.

5. MANU/DE/8999/2006.
6. 2008 (13) SCALE 137.

IV. Prohibition Of Publication Of Name, Etc., Of Juvenile Involved In Any Proceeding Under The Act

Nature of Offence	Where to find in the Juvenile Justice Act?	Relevant Provisions	Punishment
-	Chapter II: Juvenile in conflict with Law	Section 21	Penalty which may extend to twenty- five thousand rupees

The issue of publication of a juvenile's name was dealt with by the High Court of Kerala in the case of *Jose Maveli, Director* v. *State of Kerala and Anr*.[7] Five children were produced before the Chief Judicial Magistrate under Section 32(1) of the Juvenile Justice Act, 2000. They were found begging, who were without any home or settled place of abode or any other means of subsistence. It was contended, among other issues, that the names and photographs of the children, revealing their identities were published in certain newspapers at the instance of the petitioner which was in violation of Section 21 of the Juvenile Justice Act, 2000. The Court held that this was illegal. Section 21 has to be scrupulously followed by the media and others. Publication can be made only to the extent, if any, permitted by the appropriate authority concerned.

V. Cruelty To A Juvenile

Nature of Offence	Where to find in the Juvenile Justice Act?	Relevant Provisions	Punishment
Cognisable	Chapter II: Juvenile in conflict with Law	Section 23	Imprisonment upto 6 months, or fine, or both

It is interesting to note that cruelty to juvenile or child includes:

1. Beating,
2. Sexual abuse,
3. Non provision of basic meals,
4. Severe physical punishment, and
5. Detention of children in prison.[8]

■ In a recent case of *State* v. *Rameez and Ors.*,[9] certain police officers were accused for sexually and physically abusing four juvenile boys whom they had taken into their custody. These boys had been

7. 2007 Cri LJ 2709.
8. Section 23 of the Indian Penal Code, 1986.
9. Decided on 6th of April, 2009.

accused of murder. The police officers were alleged to have committed offences violating Section 23 of the Juvenile Justice Act, 2000. The State attempted to defend the accused police officers. The Court held that the physical and sexual abuse of the respondents in the police station were certainly not the acts to be performed by the policemen in the course of their official duty. There cannot be any question of the State trying to defend such policemen. It further stated that the consequences that will ensue if the State's prayer in this petition were to be accepted, is that the errant policemen will escape prosecution with impunity. It was held that the direction to the area Deputy Commissioner of Police to transfer investigation to any independent agency was also perfectly justified. In the case of *Court on its own motion* v. *Govt. of N.C.T. of Delhi*,[10] there were allegations by two child welfare workers that Delhi police are compelling and forcing children to sign statements made to the police officers and are relying upon the said statements before the Juvenile Justice Board. The Court held that certain aspects and provisions such as Section 162(1) of the Criminal Procedure Code, 1973 and Section 10 of the Juvenile Justice Act, 2000 must be kept in mind by the police as well as the Juvenile Justice Board whenever any allegation of misuse or violation of the provisions of the said Act and the rules are brought to their notice, appropriate steps ought to be taken as provided under Section 23 of the Juvenile Justice Act, 2000.

VI. Other Acts Amounting To An Offence

Under the Juvenile Justice Act, 2000 various acts by adults committed against a juvenile or a child have been identified as offences. The same have been listed in the table below:

Sl. No.	Name of the Provision	Nature of Offence	Where to find in the Juvenile Justice Act?	Relevant Provisions	Punishment
A	Employment Of A Juvenile For The Purpose Of Begging	Cognisable	Chapter II: Juvenile in conflict with Law	Section 24	Whosoever uses a child or juvenile for begging: Imprisonment upto 3 years and fine If the person having actual charge of the child or juvenile abets begging: Imprisonment upto 1 year and fine.

10. WP(C) No. 8801/2008.

B	Penalty For Giving Intoxicating Liquor Or Narcotic Drug Or Psychotropic Substance To Juvenile Or Child	Cognisable	Chapter II: Juvenile in conflict with Law	Section 25	Imprisonment upto 3 years and fine
C	Exploitation Of Juvenile Or Child Employee	Cognisable	Chapter II: Juvenile in conflict with Law	Section 26	Imprisonment for a term which may extend to 3 years and fine.

VII. Age Enquiry Of A Minor

■ In the case of *Pratap Singh* v. *State of Jharkhand and Anr*.,[11] it was held that the date of committing the offence would be the date of determining the age of the juvenile in accordance with Section 2(1) of the Juvenile Justice Act, 2000. Regarding the applicability to the cases pending under the Juvenile Justice Act, 1986 where a person has not completed the age of eighteen years as on 01.04.2001, he would be governed by the new Juvenile Justice Act, 2000.

■ In the case of *Jyoti Prakash Rai @ Jyoti Prakash* v. *State of Bihar*,[12] the Appellant committed the offence on 12.05.2000 when he was seventeen years of age and the medical board on 24.04.2001 adjudged the age of the accused to be between eighteen and nineteen years of age. The Act which was in force was the Juvenile Justice Act, 1986, in terms of which "juvenile" meant a boy who had not attained the age of sixteen years. Later, Juvenile Justice Act, 2000 came into force with effect from 1.04.2001 under which "Juvenile" has been defined to mean a person who has not completed eighteen years of age. Additional Sessions Judge convicted the appellant on the ground that the Juvenile Justice Act, 2000 would be applicable only in the condition when on 01.04.2001, the age of the petitioner has not crossed 18 years, which was upheld by the High Court. It was held that the age of the offender is essentially a question of fact which is required to be determined on the basis of the materials brought on records by the parties.

■ In the case of *Hari Ram* v. *State of Rajasthan and Anr*.,[13] it was held that if the accused has on the date of commission of the alleged offence not completed eighteen years of age when the Juvenile Justice Act, 2000, came into force, in view of Sections 2(k), 2(l) and 7A read with Section 20 of the said Act, the provisions thereof would apply to the case and the accused would be treated as a juvenile.

11. AIR 2005 SC 2731.
12. AIR 2008 SC 1696.
13. MANU/SC/0744/2009.

CHAPTER II

CHILD AND CRIME

A. Age: Determinant in Juvenile Justice

B. Exemption and Punishment for Offences against Juveniles, under Indian Penal Code, 1860

C. Laws Protecting the Child Under the Criminal Procedure Code, 1973

A. Age: Determinant in Juvenile Justice

Minna Kabir[1]

Age determination is the cornerstone of the Juvenile Justice System, its importance can never be underestimated, because it is the deciding factor to know whether an individual alleged to have committed an offence, should be given benefits of the Juvenile Justice Act, 2000, with its Amendment of 2006, and its Rules of 2007, or whether he or she should be tried by ordinary adult criminal courts.

The Convention on the Rights of the Child, 1989, the Beijing Rules or the Standard Minimum Rules for the Administration of Juvenile Justice 1985, and the United Nations Rules for the Protection of Juveniles Deprived of Their Liberty, 1990, set the minimum standard of conferring on children certain special rights. In addition, our Constitution and the Juvenile Justice Acts also lay down that "the beginning of the age of criminal responsibility should bear in mind the facts of mental and intellectual immaturity in children, so that they would be presumed to be innocent of any *mala fide* or criminal intent up to the age of eighteen years."

The Juvenile Justice Legislation is a social and benevolent legislation, and it should give the benefit of doubt at any given moment always in favour of the juvenile. Supreme Court in the *Pratap Singh*,[2] judgment said:

> "*The JJ Act is not only a beneficent legislation, it is also a remedial one……and so the…….. interpretation must be given which would advance the cause of the legislation so as to give benefit to the juveniles.*"

We should not be protecting society from juveniles, but society should be protecting juveniles so that it gives them a chance to reform and correct their mistakes. We should be more worried about making a mistake in not giving them the benefits of the Act, than that we should be worried if they are misusing the Act, because it is better to err on the side of the juvenile, than to err the other way and deny them this very important right of being tried under this special law for children under eighteen years of age.

Since the enactment of various children's Acts and the Juvenile Justice Act of 1986, and the Juvenile Justice Act of 2000, there has been an evolutionary process where different interpretations have been given as to how and at what age an individual should be called a juvenile, who should be given the benefits of this social legislation. This evolutionary process culminated in the 2006 Amendment to the 2000 Act on August 22, 2006 and in the enactment of the Juvenile Justice Rules of 2007 on October 26, 2007. I shall now try to use these amendments to show how it has changed the criteria

1. The author is a voluntary child rights worker.
2. AIR 2005 SC 2731.

for age determination.

Section 2(K) Of The JJ Act:

'Juvenile' or 'child' means a person who has not completed eighteenth year of age. Previously, a boy under sixteen and a girl under eighteen years of age were considered to be juveniles who would get the benefits of the Act. The 2000 Act then decided that all children under the age of eighteen would be eligible for consideration regardless of their sex, and this uniform age has removed any discrimination there might have been between the sexes.

Section 2(L) Of The JJ Act:

"Juveniles in conflict with law" means a juvenile who is alleged to have committed an offence and has not completed eighteenth year of age as on the date of commission of such offence.

There had been for many years a controversy as to whether the date for determining age was the date of commission of offence or the date on which the juvenile was brought before the Board. In the *Pratap Singh* judgment,[3] this question was finally set to rest, but a host of children had suffered because of a different interpretation. It is now definitely stated that it is the date of commission of offence from which the age has to be calculated, and this leaves no room for doubt anymore.

However, many juveniles had suffered because of the older interpretation. Boys had been determined as adults when they were above sixteen years on the date of commission of offence, and many juveniles had their age determined according to the date on which they were brought before the Board, and not on the date on which they were alleged to have committed the offence. This created a situation where a juvenile in the same circumstances at different points of time was given either sentence of three years or a sentence of life imprisonment when they were convicted on murder charges. In addition, the *Pratap Singh* judgment[4] even laid down that the Act only had a prospective and not a retrospective component, therefore, any juvenile could not claim the benefits of the changes in interpretation or the changes in age for boys after these changes came into force.

A boy of sixteen years of age who was considered an adult before the 2000 Act, would now be considered a juvenile after the Act came into force, and this seemed to be unfair to a boy who committed the same offence in 1997 and to a boy who committed the offence in 2002. Moreover like in the *Arnit Das* judgment,[5] a boy who had committed an offence had his age adjudged by the date he was brought before the Board, which was almost a year after he committed an offence. In this case, he would have been a juvenile if the determining date were the date he committed the offence, but because of the interpretation at that time he was declared and tried as an adult. This created an anomaly and an injustice to many children, and the introduction to Section 2 (l) tries to set this right by creating a level playing field for all juveniles in the same situation by saying simply that a person has to be eighteen on the date of commission of the offence. As a result, any juvenile at any point of time if

3. AIR 2005 SC 2731.
4. AIR 2005 SC 2731.
5. *Arnit Das* v. *State of Bihar*, AIR 2001 SC 3575.

he was under eighteen at the time of committing an offence would and should have been given the benefits of this Act. This section, therefore, created the ground for the next Section 7A, which was to be amended in 2006, and this section laid the ground for children aggrieved to be able to appeal against their decisions.

Section 7A Of The Act:

The said section provides for the Procedure to be followed when claim of juvenility is raised before any court. This section has further reinforced Section 2(l), by now raising three propositions. Hence, a claim of juvenility can now be raised.

- Before any court or by any court;
- At any stage, even after final disposal of the case;
- Even if the juvenile has ceased to be so on or before the date of commencement of the Act i.e. even before 01.04.2001 when the JJ Act 2000 came into force.

This now gives the JJ Act a retrospective effect, which it was not given before and it now makes it possible for all juveniles who were considered adults under the earlier Act to appeal against their life sentences, if they were juveniles simply under Section 2(l). This gives an equality of opportunity to all juveniles at any point of time, it also removes the discrimination against juveniles who did not enjoy the benefit of the eighteen years bar after the coming into force of the 2000 Act, and those who before the *Pratap Singh* judgment,[6] had their age determined on the date on which they were brought before the Board.

Section 20 Of The Act: The Proviso

In all pending cases including trial, revision, appeal, or any other criminal proceedings in respect of a juvenile in conflict with law, in any court, the determination of juvenility of such juvenile shall be in terms of clause (l) of Section 2, even if the juvenile ceases to be so on or before the date of commencement of this Act and the provisions of this Act shall apply as if the said provisions had been in force, for all purposes and at all material times when the alleged offence was committed.

The insertion of this proviso to Section 20 after the Amendment in 2006, removes all doubts as to the intentions of the legislature to correct the anomaly that had risen in the earlier interpretations. It again reinforces what Section 7A says that at any point of time a juvenile can raise his claim to juvenility which is to be established by clause (l) and not even to be restricted to only when the 2000 Act came into force on 01.04.2001. It also again reinforces the fact that a juvenile did not have to be less than 18 years of age on 01.04.02001 to avail the benefit of the Act and its Rules.

Section 49 Of The Act And JJ Rule 12 (1) To (6) [The Method Of Age Determination]

This Section lays down in great detail the method by which the age has to be determined, and again provides a framework under which there should be a transparent enquiry as to the age of the of-

6. AIR 2005 SC 2731.

fender, so that he is not denied the benefits of the legislation if he is a juvenile, and also that he cannot misuse the legislation to get the benefits if he is not a juvenile.

■ It says that the age enquiry has to be done within thirty days.

■ It says that documentary proof of a matriculation certificate, school certificate, or a birth certificate in a certain order should be given precedence over any other criteria in determining the age.

■ It says that a medical enquiry should be conducted only if there is no documentary proof or if there is doubt about the documentary proof. It also says that medical enquiry not being a definite method, a margin of one month in favour of the juvenile should be given in deciding the final age.

■ Rule 12 (4) and (5) read with Section 49 (2) also says that when the age of the juvenile is determined by the Board in finality, then this age will be the age of the juvenile for all time and no subsequent proof will change the age so determined. This age so determined, therefore, becomes like a birth certificate for all subsequent enquiries and no other proof can then be required.

Section 3 And Section 64 Of The Act And Rule 97 Of The JJ Rules:

All reinforce again Section 2(l) by saying that the juvenile shall be treated like a juvenile even if he ceases to be one during the enquiry.

By these provisions the determining factor is that the juvenile was under eighteen years of age when he is alleged to have committed the offence. By virtue of these provisions, a legal fiction has been created to treat the juvenile who during his enquiry has ceased to be a juvenile, as a person who continues to be a juvenile. This again shows that it is very important in the light of the rehabilitatory and restorative nature of the legislation that the juvenile should not be made to suffer if there are delays in completing his enquiry due to some other reasons. It also shows that it is very important that under no circumstances should a juvenile be denied the benefits of this benevolent and socially responsible legislation.

Rule 98: Disposed Off Cases Of Juveniles In Conflict With Law:

Finally, this last Rule provides for a suo moto review even by the Board or the state government to look into the case of a person or a juvenile who feels that his juvenility has not been determined in accordance of the Act and the Rules. Though it does not say anything new, it further reinforces what all the earlier mentioned sections and rules provide for so that in no way can the benefits of this legislation be denied unjustly to any child who is aggrieved in any way.

In conclusion, one can, therefore, say that after the 2006 amendment to the JJ Act and after the enactment of the JJ Rules of 2007, there is now ample scope for all concerned to implement the Act and the Rules in their true spirit and substance in the best interest of children. These children have fallen into these circumstances because of their immaturity, or because of certain conditions and it is the duty of the society to see that they are provided special conditions to reform and change their lives. It does not matter that in some cases we make a mistake in favour of the juvenile, but we cannot be forgiven if we make a mistake so that a child is sentenced to death or life imprisonment. We should

consider it our duty to provide juveniles the conditions for fresh start. We should also try all possible measures like legal aid, counselling, rehabilitation and expediting the enquiry, for the welfare of the juvenile or child through individual care plans carefully worked out. It is only in the true implementation of this legislation that we can ensure all the needs of children are met and that their basic human rights are protected.

B. Exemptions and Punishments for Offences Against Juveniles Under Indian Penal Code, 1860

Children are also exempt specifically from criminal liability under two sections of the Indian Penal Code, 1860. Hence, these are substantive provisions.

Sl. No.	Nature of Offender	Nature of Exemption	Where to find in the Indian Penal Code, 1860?	Relevant Provision (Section)
1.	A child below the age of seven years	Absolute exemption, as nothing is an offence committed by such an offender.	Chapter IV: General Exceptions	82
2.	A child above the age of seven years and under the age of twelve years, who has not attained sufficient maturity of understanding to judge the nature and consequences of his conduct	Absolute exemption, as nothing is an offence committed by such an offender.	Chapter IV: General Exceptions	83

Hereinafter is a list of the offences that have been identified which a Juvenile could be held guilty under provisions of the Indian penal Code, 1860 and it correspondingly provides for the punishments.

Sl. No.	With respect to the Offender	Nature of Offence	Where to find in the Indian Penal Code, 1860?	Relevant Provision (Section)	Punishment Awarded
1.	Consent of the Child	-	General Defense to a Crime	90	As a defense for the accused of the crime.
2.	An Abettor who abets a child to commit a crime	Dependant on the Offence	Chapter V: Abetment	109	Punishment to the abettor equivalent to the accused who commits the crime

3.	The persons who threaten a child on complaining to the relevant authorities (Police, Magistrate etc.)	Non-Cognisable Offences	Chapter X: Contempt of the Lawful Authority or Public Servants	190	Imprisonment up to 1 year or a fine, as per the discretion of the Court, or both
4.	The person who gives fake evidence or fabricates the evidence against a child in a judicial proceeding,	Non-Cognisable Offences	Chapter XI: Of False Evidence Offences Against Public	193	Imprisonment up to 7 year or a fine, as per the discretion of the Court, or both
5.	Person who discloses the identity of a minor who is a victim of a particular offence under Section(s) 376A, 376B, 376C, and 376D, without the authorization of the guardian or next kin.	-	Chapter XI: Of False Evidence Offences Against Public	228A(2)(c)	Imprisonment up to 2 years or a fine, as per the discretion of the Court, or both
6.	A person who sells obscene materials to a child with an intent to corrupt or blackmail	Cognisable	Chapter XIV: Of Offences Affecting The Public Health, Safety, Convenience, Decency and Morals	292, 229A and 293	1. Imprisonment up to 3 years and a fine up to Rs. 2000. 2. In case, there is a subsequent offence then Imprisonment up.
7.	The parent, relative or any other person who is involved in the murder of a child by means of: 1. Religious Sacrifice; 2. Military Use (Use of Children as soldiers during wars and combat missions); 3. Use of children as suicide Bombers.	Cognisable	Chapter XVI: Of Offences Affecting the Human Body	300 and 302	Death/ Life Imprisonment, or a fine as per the discretion of the Court or both

8.	A person(s) who causes death of a child due to a rash or grossly negligent act;	Cognisable	Chapter XVI: Of Offences Affecting the Human Body	304 A	Imprisonment up to 2 year or a fine, as per the discretion of the Court or both.
9.	A person who abets (convinces or influences) the suicide of a child or an insane person,	Cognisable	Chapter XVI: Of Offences Affecting the Human Body	305	Death / (Imprisonment for life as per the court) or Imprisonment up to a term of 10 years and a fine as per the discretion of the court.
10.	A person who attempts to Murder a child	Cognisable	Chapter XVI: Of Offences Affecting the Human Body	307	Imprisonment up to 10 years or a fine, as per the discretion of the Court or both.
11.	A person who causes the miscarriage of a pregnant woman or the quick birth of a child and which is not in good faith.	Non-Cognisable Offences	Chapter XVI: Of Offences Affecting the Human Body [Of the causing of miscarriage, of injuries to unborn children, of the exposure of infants, and of the concealment of births]	312	1. For deliberate miscarriage of the woman: Imprisonment up to 3 years or a fine, or both. 2. For deliberate quick birth of child: Imprisonment up to 7 years and a fine as per the discretion of the court.

12.	Whosoever prevents the birth of the infant or causes it to die at birth (infanticide) and the act is not in good faith to protect the health of the mother (inclusive of): 1. Abortion, miscarriage, violently shaking or hitting the head of the infant by means of a pre-natal diagnosis. 2. Committing Infanticide.	-	Chapter XVI: Of Offences Affecting the Human Body [Of the causing of miscarriage, of injuries to unborn children, of the exposure of infants, and of the concealment of births]	315	Imprisonment up to 10 years or a fine, as per the discretion of the Court, or both
13.	Whosoever causes death of quick unborn child (foeticide) by an act that amounts to Culpable Homicide	Cognisable	Chapter XVI: Of Offences Affecting the Human Body [Of the causing of miscarriage, of injuries to unborn children, of the exposure of infants, and of the concealment of births]	316	Imprisonment up to 10 years or fine, as per the discretion of the Court, or both,
14.	Parent or any person who has the care of child who intentionally abandons or exposes a child under the age of 12.	Cognisable	Chapter XVI: Of Offences Affecting the Human Body [Of causing miscarriage, injuries to unborn children, of the exposure of infants, and of the concealment of births]	317	Imprisonment up to 7 years or fine, as per the discretion of the Court, or both.

15.	Whoever intentionally conceals/disposes the dead body of an infant who dies before or during its birth.	Cognisable	Chapter XVI: Of Offences Affecting the Human Body [Of causing miscarriage, of injuries to unborn children, of the exposure of infants, and of the concealment of births]	318	Imprisonment up to 2 years or fine, as per the discretion of the Court or both.
16.	Whosoever causes hurt / grievous hurt to a child by dangerous weapons or means.	Cognisable	Chapter XVI: Of Offences Affecting the Human Body [Of hurt]	324 and 326	1. For Hurt: Imprisonment up to a term of 3 years, or fine, or both; 2. For Grievous Hurt: Imprisonment up to a term of 10 years and a fine.
	Exception: The provision mentioned under Section (s) 334 which states that if the hurt/ grievous hurt has been caused on grave and sudden provocation and the hurt/ grievous hurt extends to someone else other than the person who provokes then,		Chapter XVI: Of Offences Affecting the Human Body [Of hurt]	334	Imprisonment for a period of 1 month, or a fine of Rs. 500, or both.
17.	Whosoever causes hurt/grievous hurt to a child to extort property or to constrain him to do an illegal act,	Cognisable	Chapter XVI: Of Offences Affecting the Human Body [Of hurt]	327 and 329	Imprisonment up to 10 years or a fine, as per the discretion of the Court, or both.

18.	Whosoever causes hurt by means of poison, or any intoxicating substance etc. to a child with an intent to commit or facilitate an offence,	Cognisable	Chapter XVI: Of Offences Affecting the Human Body [Of hurt]	328	Imprisonment up to 10 years or a fine, as per the discretion of the Court, or both.
19.	Whosoever causes hurt to a child in order to extort confession or restore property or satisfy any claim or demands, etc.	Cognisable	Chapter XVI: Of Offences Affecting the Human Body [Of hurt]	330 and 331	1. For Hurt: Imprisonment up to a term of 7 years, or fine or both; 2. For Grievous Hurt: Imprisonment up to a term of 10 years and fine.
20.	Whosoever causes hurt / grievous hurt to a child on grave and sudden provocation,	Cognisable	Chapter XVI: Of Offences Affecting the Human Body [Of hurt]	334 and 335	Imprisonment upto 1 month or fine upto Rs. 500, or both.
21.	Whosoever voluntarily obstructs a child from moving in any direction, which he is entitled to,	Cognisable	Chapter XVI: Of Offences Affecting the Human Body [Of hurt]	339 and 341	Imprisonment upto 1 month or fine upto Rs. 500, or both.
22	Whosoever wrongfully restrains a person beyond a certain limit (said to be known as confinement),	Cognisable	Chapter XVI: Of Offences Affecting the Human Body [Of hurt]	340 and 342	Imprisonment upto 1 year or fine Rs. 1000, or both
				343 (Confinement is beyond 3 days)	Imprisonment upto 2 years or fine or both.
23.	Whosoever wrongfully restrains a person beyond a certain limit (said to be known as confinement),	Cognisable	Chapter XVI: Of Offences Affecting the Human Body [Of hurt]	344 (Confinement is for 10 or more days)	Imprisonment upto 3 years and fine.

				345 (Confinement of a child for whose liberation writ has been issued)	Imprisonment upto a period of 2 years in addition to the period of imprisonment that the accused may be liable for under Chapter XVI of the IPC and an additional fine.
				346 (Intentional wrongful confinement of a child by the accused such that the confinement is not known to those who have interests over the child)	Imprisonment for 2 years in addition to any other punishment to which he may be liable for such wrongful confinement.
				347 (When confinement is to extort property or to constrain to commit an illegal act)	Imprisonment upto a period of 3 years and fine.
				348 (When such confinement is to extort confession or compel the restoration of a property)	Imprisonment upto a period of 3 years and fine.

24.	Whosoever uses criminal force to induce intentionally fear, annoyance injury or to a child and does so to commit an offence,	Non-Cognisable	Chapter XVI: Of Offences Affecting the Human Body [Of hurt]	350, 351 and 352 (Intentional use or the threat of the use of force on a child, without his consent, to commit any offence, knowing that use of such force will cause injury, fear or annoyance to the person)	Imprisonment upto 3 years or fine of Rs. 500, or both
				355 (Assault or use of criminal force with an intent to dishonour the child),	Imprisonment upto 2 years, or fine, or both.
				356 (Assault or use of criminal force with intent to commit theft),	Imprisonment upto 2 years or fine, or both.
				357 (Assault or criminal force in attempt to wrongfully confine the child),	Imprisonment upto 1 year or fine of Rs. 1000, or both
				358 (Assault or use of criminal force on Grave Provocation).	Imprisonment upto 1 year or fine of Rs. 200, or both.

25.	Whosoever uses criminal force, or utters words, gestures, or exhibits obscene objects in order to outrage the modesty (to molest) of a girl,	Cognisable	Chapter XVI: Of Offences Affecting the Human Body [Of hurt]	354	Imprisonment upto 2 years or fine, or both.
			Chapter XXII: Offences of Criminal Intimidation, Insult and Annoyance	509 (Includes types of Sexual Harassment that intrude the privacy of the girl – grabbing, hugging, patting, leering and other forms of touching)	Imprisonment upto 1 year or fine, or both.
26.	Whosoever takes away or entices a child (below 16 years in case of a boy and below 18 years in case of a girl) without the consent of the guardian for any illegal purpose,	Cognisable	Chapter XVI: Of Offences Affecting the Human Body [Of Kidnapping, Abduction and Forced Labour]	361 and 363	Imprisonment upto 7 years and fine.
		In the matter of Mr. Werner Wulf Ingo v. State of Goa (represented by CBI), through Public Prosecutor for CBI, the High Court of Bombay at Goa dealt with the committing of unnatural offences against children as well as taking away children without consent of the guardian. The accused/appellant was charged with entering into a conspiracy with Freddy Peats, who ran an orphanage and others, and taken two minors to commit unnatural offences on them. It was held that evidence proved that the two boys were taken without the permission of Freddy Peats if considering that they were under his guardianship and not their parents'. It was held that overall evidence by the prosecution proved that the boys were taken and then sexually abused even though the accused did not support the case of the prosecution, as they were paid by the accused/appellant.			

27.	Whosoever takes away or entices a child, (below 16 years in case of a boy and below 18 years in case of a girl), without consent of the guardian for any illegal purpose,	The point of lawful guardianship was further elaborated in the case of Parkash v. State of Haryana. The accused/ appellants were charged with kidnapping and attempted rape of a five year old girl. She was rescued by her grandmother who noticed her absence and while searching for her, heard her cries. The court held that the words 'takes or entices any minor' in Section 61 of the Indian Penal Code,1860 was important, therefore, the consent of the minor while being taken are wholly immaterial. The object of this section was to protect the rights and privileges of guardians having the lawful charge or custody of their minor wards. It need not be shown that the taking or enticing was by way of force or fraud. Persuasion by the accused to create willingness on part of the minor to be taken out of the keeping of the lawful guardian was sufficient. The appeal was thereby dismissed.				
28.	Whosoever kidnaps a child for purposes of begging, maiming, murdering, ransom and confinement of the child.	Cognisable	Chapter XVI: Of Offences Affecting the Human Body [Of Kidnapping, Abduction and Forced Labour]	363A (Taking custody of the child for purpose of begging)	Imprisonment upto 10 years and fine,
				363A (One who maims the child for the purpose of begging)	Imprisonment for life and fine,
				364 (Kidnapping in order to murder the child)	Imprisonment for life or rigorous imprisonment upto 10 years and fine.
				364 A (Kidnapping a child to detain, cause hurt or death or threatening to do so to get ransom)	Death penalty or Imprisonment for life and fine.

29.	Whosoever kidnaps a child for purposes of begging, maiming, murdering, ransom and confinement of the child,	Cognisable	Chapter XVI: Of Offences Affecting Human Body [Of Kidnapping, Abduction and Forced Labour]	365 (Kidnapping of a child with an intent	Imprisonment upto 7 years and fine.
30.	Whosoever kidnaps a girl to compel or induce her to marry against her will to force or seduce her for illicit intercourse or induces any woman to go from any place with intent or knowledge that she will be forced or seduced into illicit intercourse,	Cognisable	Chapter XVI: Of Offences Affecting Human Body [Of Kidnapping, Abduction and Forced Labour]	366	Imprisonment upto 10 years and fine.
31.	Whosoever procures or imports a minor girl(s) for purposes of prostitution with an intent to force or subject her to illicit intercourse,	Cognisable	Chapter XVI: Of Offences Affecting Human Body [Of Kidnapping, Abduction and Forced Labour]	366 A (Procurement of minor girls for illicit intercourse) 366 B (Importing a girl from outside India or from Jammu and Kashmir for illicit intercourse) 367 (Kidnapping a child to subject him/her to hurt/grievous hurt or unnatural lust of any person)	Imprisonment upto 10 years and fine.

32.	Whosoever procures or imports a minor girl(s) for prostitution with an intent to force or subject her to illicit intercourse,	Cognisable	Chapter XVI: Of Offences Affecting the Human Body [Of Kidnapping, Abduction and Forced Labour]	368 (Concealment of the kidnapped child)	Punishment would be equivalent to that of the kidnapper.
		On the issue of wrongful confinement of minor girls to force them into prostitution, in the case of Mst. Bano alias Chidi Bano and Anr. v. State of Rajasthan, the High Court of Rajasthan held that confinement may be psychological and not necessarily physical. In this case, a girl who was a minor as shown by medical examination was sold to the appellants, who were prostitutes. She was taken from Agra to Mathura and kept in a room though without shutters and closed doors and there were no signs of restraint. Yet it was held that she was not voluntarily residing there as she was threatened and was living in a distant place away from her home. Thus, psychological conditions were created where a helpless girl could not dare to move out and hence was confined. The appellants were sentenced to 5 years of imprisonment under Section 366-A and 368.				
33.	Whosoever buys, sells, or disposes any child for slavery	Cognisable	Chapter XVI: Of Offences Affecting Human Body [Of Kidnapping, Abduction and Forced Labour]	370	Imprisonment upto 7 years and fine.
34.	Whosoever sells, lets to hire or buys, hires a girl under 18 for prostitution	Cognisable	Chapter XVI: Of Offences Affecting the Human Body [Of Kidnapping, Abduction and Forced Labour]	372 and 373	Imprisonment upto 10 years and fine.

35	Whosoever forces a child to do work against his will.	Cognisable	Chapter XVI: Of Offences Affecting the Human Body [Of Kidnapping, Abduction and Forced Labour]	374	Imprisonment upto 1 year, fine or both.
36.	Whosoever commits or attempts to commit rape and rape is inclusive of: 1. Gang rape of a girl under 12 years, 2. Rape of a pregnant woman, 3. Rape of a child in the custody of a public servant, hospital or an observation home by its staff.	Cognisable	Chapter XVI: Of Offences Affecting Human Body [Sexual Offences]	375, 376, 376A– D and 511	Imprisonment of 7 to 10 years or above 10 years and fine.
		The issue of rape of a minor was dealt with in the case of State of Rajasthan and Anr. v. Gopal and Anr. Meenakshi, a young girl of about seven years was raped and murdered on February 18, 2005 allegedly by the appellant. The accused was charged based on circumstantial evidence. The medical examiner was of the opinion that there was no recent intercourse. But quoting well established sources the Court held that the victim was subjected to monstrous sexual assault. As the appellant was only 22 years of age on the date of offence, the Court commuted the death penalty and sentenced him to life imprisonment and also directed that he should not be released, unless he served at least twenty years of imprisonment.			
37.	Whosoever extorts from a child by placing him under fear of hurt/grievous hurt or death to deliver any property, valuable, security etc.	Cognisable	Chapter XVII: Of Offences Against Property [Of Theft]	383, 384, 385, 386, and 387	Imprisonment upto 3 years or fine or both.
38.	Whosoever hurts a child in order to commit robbery	Cognisable	Chapter XVII: Of Offences Against Property [Of Theft]	394	Imprisonment for life or upto 10 years and fine.
39.	Whosoever of 5 or more persons, while committing a dacoity commits murder of a child,	Cognisable	Chapter XVII: Of Offences Against Property [Of Theft]	396	Death/life imprisonment, or rigorous imprisonment for 10 years and fine,

40.	Whosoever commits robbery or dacoity with an attempt to cause death or grievous hurt to a child,	Cognisable	Chapter XVII: Of Offences Against Property [Of Theft]	397	Imprisonment for not less than 7 years,
		The case State of Maharashtra v. Ankush Maruti Shinde and Ors. dealt with the issues of dacoity, gangrape and murder. Five members of a family including four minors were brutally murdered. One of the victims, a girl of fifteen years of age was also gang-raped before being killed. Six persons were accused of this gruesome crime. They were all unknown to the victims. They were charged mainly on basis of two witnesses who belonged to the same family who had survived. Three of the accused were convicted to death for murder. They were also convicted under Section 376(2)(g) of IPC. All six were convicted under Section 395, 396 and 397 of IPC by Bombay High Court.				
41.	Whosoever causes grievous hurt to a child whilst committing lurking house trespass or housebreaking,	Cognisable	Chapter XVII: Of Offences Against Property [Of Theft]	459	Imprisonment upto 10 years and fine,
42.	Whosoever bound by a lawful contract fails to attend to the wants and needs of a child.	Cognisable	Chapter XVII: Of Offences Against Property [Of Theft]	491	Imprisonment upto 3 months or a fine upto Rs. 200/- or both,

C. Provisions Protecting the Child in Criminal Procedure Code, 1973

Section 125

In the Criminal Procedure Code, 1973, Section 125 provides that whosoever having the charge of a child, having sufficient means refuses to provide basic necessities to the child is liable to the punishment as provided below:

Nature of Offence	Where to find in the Juvenile Justice Act?	Relevant Provisions	Punishment
Cognisable	Chapter IX: Order for Maintenance of Wives, Children and Parents	Section 125	Monthly payment upto an amount of Rs. 500/- as the magistrate may deem fit.

The issue of maintenance of children was dealt by the High Court of Delhi in *Kishan Dutt Verma S/o Shri B.D.Verma* v. *Baby Parul (minor) through Smt. Rajni Bala @ Sudha (mother)* [Along with FAO 89 of 2003].[1] Parul and Geetanshu were minors studying in school. Their mother filed petitions under Section 125 of the Criminal Procedure Code for their maintenance. Their father, who was a practising advocate, claimed to not having sufficient income, but wanted the children to be admitted in boarding school in Dehradun or Nainital which he claimed in his guardianship petition. The mother and the minor children had no independent source of income. The High Court assessed the father's income to be in the region of ten thousand rupees per month and he had no other liability to take care of. The Court granted the children maintenance of two-thousand rupees per month each to take care of their expenses to be paid by the 10th of each succeeding month. All arrears of maintenance had to be paid within three months to the Trial Court, otherwise interest was to be imposed.

Section 27

The Criminal Procedure Code, 1973 also provides for the jurisdiction of the Courts in cases dealing with juveniles, under Section 27. It provides as mentioned below:

> *"Any person who at the time of the commission of the offence not punishable with life imprisonment or death is produced before the court when he is of or below the age of 16 then he may be tried before the Chief Judicial Magistrate or by any court specially empowered under the Children Act, 1960 (60 of 1960), or any other law for the time being in force providing for the treatment, training and rehabilitation of youthful offenders."*

In the matter of *State by Basavapatna Police Station* v. *Harshad*,[2] the question of Section 27 of the

1. AIR 2004 Del 366.
2. 2005 Cri LJ 2357.

Criminal Procedure Code, 1973 vis-à-vis certain sections of the Juvenile Justice Act, 2000 were raised. The respondent was a juvenile who was charge-sheeted for several offences including murder. His case was forwarded to a Juvenile Justice Board and the Board committed the case to a Sessions Court. It was then transferred to a Fast Track Court wherein it was pending. The Presiding Officer of the Fast-Track Court directed the State to submit their views as to the exact legal position. The Court held that Section 27 of the Criminal Procedure Code, 1973 is not inconsistent with Section 6 of the Juvenile Justice Act, 2000. Since, a Juvenile Justice Board was already established for the jurisdiction of the respondent's case, the jurisdictions of the Sessions Court and Fast Track Court were barred.

CHAPTER III

CHILD AND USE OF DRUGS

Preventing Cultivation and Sale of Narcotic Drugs

Narcotic Drugs and Psychotropic Substances Act, 1985

The Narcotic Drugs and Psychotropic Substances Act, 1985 [hereinafter referred to as 'the Narcotic Act, 1985'] provides for a penalty for the use of children in cultivation, production, transport and sale of narcotics. It has been provided as under:

Nature of Offence	Where to find in the Narcotic Drugs and Psychotropic Substances Act, 1985?	Relevant Provisions	Punishment
-	Chapter IV: Offences and Penalties	Section 27 (a)	Imprisonment from 10–20 years and fine from Rs. 1–2 lakh.

The issue of a juvenile found transporting 'narcotic' substances, tried under the special Narcotic Drugs and Psychotropic Substances Court was dealt by the Delhi High Court in Mohd. Irshad @ Shiv Raj v. State of N.C.T. Delhi.[1] The case pertained to an alleged recovery having been made from the juvenile, an offence under Sections 21/29 of the Narcotic Act, 1985. The lower Court of the Special Judge disallowed the contention that the accused being a juvenile should be tried by the Juvenile Justice Board. The Delhi High Court while dealing with the Juvenile Justice Act, 2000 and the Narcotic Act, 1985, stated that both are special laws. So, even if it is assumed that the non obstinate clauses in both the enactments are of equal dimension (which they are not), the Juvenile Justice Act being the later law would prevail over the Narcotic Act, 1985. The Court also read Section 18(2) which makes it a mandatory duty of the Juvenile Justice Board to direct separate trials for the juvenile and the other person. This made it clear that a juvenile can be tried only under the Juvenile Justice Act, 2000 and that is before the Juvenile Justice Board. Thus, the High Court set aside the order of the Special Judge and directed that the matters pertaining to the trial of the juvenile should be handed over to the Juvenile Justice Board.

1. 1314 (2006) DLT 507.

CHAPTER IV

CHILD AS LABOUR

A. Child labour: Marketing life-destroying trade

B. Prevention of Child Labour

A. Child labour: Marketing Life-Destroying Trade

Shashank Shekhar

Poverty drives people to desperate measures. And in dire situations, children become one of two things: a source of income or a drain on the income. According to the census conducted in year 2001, the number of child labour in India was 12.7 million. As per another estimate of the government, currently there are about 20 million child labourers in India, while other non-governmental agencies claim this figure to be about 50 million. The 2006 Amendment Act of the Child Labour (Prohibition and Regulation) Act 1986 has included employment of children as domestic workers or servants, in dhabas (roadside eateries), restaurants, hotels, motel, tea shops, resorts, spas or other recreational centers in the 'Prohibited Occupations' category. This has immensely added to the number of child labourers in the country. It is really unfortunate that even after more than half a century of independence; we are still grappling with the problem of child labour. The problem not only violates the fundamental rights of child, but it also perpetuates child abuse – physical, mental and economic exploitation.

Going through the legislative history in dealing with the issue of child labour, it has been found that the legislative intent was always half-hearted in dealing with the problem. Our consecutive governments never thought of elimination or eradication of child labour. It has also been felt that the social and economic factors have always out-played and out-smarted the lawmaking intent. The major reasons for failure of legislative measures to eliminate child labour have been identified as poverty, population explosion, illiteracy, lack of educational facilities, migration from rural to urban areas, mindset as children being source of income, non-existence of provisions for compulsory education, complete failure of the governments in dispensing their duties as a welfare state etc.

The preamble of the Child Labour (Prohibition and Regulation) Act, 1986 while dealing with Statement of Objects and Reasons states:

a) Ban on employment of children, that is, those who have not completed their fourteenth year in specified occupation and processes,

b) Lay down a procedure to decide modifications to the schedule of banned occupations or processes,

c) Regulate the conditions of work of children in employments where they are not prohibited from working,

d) Lay down enhanced penalties for employment of children in violation of the provisions of this Act and other acts which forbid the employment of children,

e) To bring uniformity in the definition of "Child" in related laws.

When we test the validity of the Child Labour Act on the touchstone of constitutional provisions, we find the basic outline of the Act in violation of Fundamental Rights of children as well as Directive Principles of the State Policy. In 86th Amendment in the Constitution, Article 21A is incorporated in the fundamental rights. Child labourers are not only deprived of their right to education, but also their right to live with dignity. For all child rights activists, the real concern is that child labour deprives the child of his/her childhood, the most precious phase of life. The moot question which remains to be answered by one and all including societal stakeholders is that when the childhood is a picture of deprivation, exploitation and abuse, how can we expect of a healthy and responsible adulthood? The question relates to the principle of "Inter generational Equity". No country can develop to its fullest strength when its children are deprived of the opportunity to grow into adults with freedom and dignity.

While going through the provisions of the Child Labour (Prohibition & Regulation) Act, 1986, it is amply clear that children below 14 years of age are prohibited from employment in certain occupations and processes under section 3. However, children below 14 years of age can be employed in other occupations and processes, which are not prohibitive in nature, provided their employment is regulated under provisions of the Act. It is, however, relevant to point out that the Act regulates the working of children below 14 years of age in certain occupations and processes, in a way perpetuating child labour and depriving the children of their right to equality, right to life with dignity, right to education and most predominantly their right to childhood. On the contrary, a child should be declared a 'national asset'. However, it is relevant to point out that as per the provisions of Section 3, the prohibition of employment of children is not applicable to any workshop wherein any process, whether prohibitive or not, is carried on by the employer with the aid of his family or to any school established by or receiving assistance or recognition from the government. This provision of Section 3 has opened a floodgate for employment of children even in the prohibitive processes being carried out in a workshop.

It is further pertinent to note, that according to Section 67 of the Factories Act, no child 14 years of age shall be required or allowed to work in any factory. However, a child under this Act means a person who has not completed fifteenth year of age. There are contradictory provisions of law and as far as Child Labour (Prohibition & Regulation) Act 1986 is concerned, even Section 3 of the Act consists of contradictory provisions. The section on one hand prohibits employment of children below 14 years of age to work in certain prohibitive occupations and processes, while on the other hand allowed the same under certain terms and conditions. The Act also fails to define the term 'child labour'. Penalties under Section 14 of the Act are too small and ineffective to have any deterrent effect.

The problem is further compounded by very small, or it can be said, negligible percentage of convictions in the child labour related cases. The Child Labour (Prohibition and Regulation) Act, 1986 is a cold step towards solving the child exploitation. Child labour should be absolutely prohibited till the age of 14 years and preferably up to the age of 18 years. It is essential to point out that a working child / child labour falls into the category of 'child in need of care and protection' till he/she attains 18 years of age under the Juvenile Justice (Care & Protection of Children) Act, 2000.

The objective of the Juvenile Justice (Care & Protection of Children) Act, 2000 is to rescue, rehabili-

tate and reintegrate children into society. A child labour, whether a bonded labourer or not, below the age of 18 years is a subject of the Juvenile Justice Act. These children shall be taken care of by the institutions provided under the Act. A rescued child labour being freed from a hazardous occupation should be produced before the concerned child welfare committee (CWC) and should be kept in the children's home for their immediate care and rehabilitation. I strongly believe that the management committee of the children's home should draw a 'rehabilitation package' for each rescued child labour and the same should be handed over to the concerned CWC or child protection unit of the home district of that child. Child protection unit as provided under Section 62A of the Act has to play a pivotal role in rehabilitation and reintegration of the child labour. The CPU is statutorily empowered to coordinate with various official and non-official agencies for such children. A package from 'rescue to rehabilitation and reintegration' of a child labour involves many institutions and governmental agencies like, CWCs, labour department, police, welfare department, education department, NGOs, children's homes etc. In most of the cases, it has been found that there is, absolute lack of coordination among them.

The rehabilitation package should be prepared keeping in view the order of the Supreme Court in *M.C. Mehta* v. *State of Tamil Nadu and Ors.*[1] Main features of the directions of the Apex Court in its judgment dated December 10, 1996 are as under:

a) Survey for identification of working children,

b) Withdrawal of children working in hazardous industry and ensuring their education in appropriate institutions,

c) Contribution of Rs 20,000 per child to be paid by the offending employers to a welfare fund to be established for this purpose,

d) Employment to one adult member of the family of the child so withdrawn from work and if that is not possible a contribution of Rs 5,000 to the welfare fund to be set up by the state government,

e) Financial assistance to the families of the children so withdrawn to be paid out of the interest earnings on the corpus of Rs 20,000- 25,000 deposited in the welfare fund as long as the child is actually sent to the school,

f) Regulating hours of work for children working in non-hazardous occupations so that their working time span do not exceed six hours per day, and education for at least two hours is ensured. The entire expenditure on education is to be borne by the employer concerned.

Keeping in view the problem of child labour, we find that the Act specially meant for child labour do not address to the problem prudently. The Act has in a way legalised child labour in certain fields, including prohibitive processes. The time has come that the child labour in any form shall be prohibited with alacrity, determination and positive bent of mind. Child labour is a scar on the face of a developed nation and our dream of being a developed nation by 2020 shall never be achieved, until we do not find an effective and long-term solution to the menace of child labour or lost childhood.

1. Writ Petition (Civil) No. 465/1986.

The overall scenario with respect to child labour and child rights compels me to ponder, whether we have been able to realise the true meaning of Tagore's poem, 'Where the mind is without fear'.

"*Where the mind is without fear and the head is held high*
Where the knowledge is free
Where the world has not been broken up into fragments….
My Father let my Country awake."

I wish and I pray that we will be able to this greatest apathy to child rights which ultimately culminates into the violation of all kinds of human rights.

B. Prevention of Child Labour

I. Child Labour

[Provisions under the Child Labour (Prohibition and Regulation) Act, 1986]

Nature of Offence	Where to find in the said Act?	Relevant Provisions	Punishment
Cognisable	Part II: Prohibition of Employment of Children in certain occupations and processes Part IV: Miscellaneous.....	Section 3 and 14 and the Schedule	1. Imprisonment of not less than 3 months which may extend to 1 year, or fine of Rs. 10,000 which may be extended to Rs. 20,000 or both
Nature of Offence	Where to find in the said Act?	Relevant Provisions	Punishment
Cognisable	.....Schedule: Part A - Occupations & Part B – Processes)		2. In case of a repeated offence: Imprisonment of a minimum of 6 months which may extend to a maximum of 2 years.

■ In the matter of *Hayat Khan S/o Mahaboob Khan Shivalli* v. *The Deputy Labour Commissioner, the Deputy Inspector and the Village Account*,[1] the issue of child labour was dealt with by the High Court of Karnataka. The appellant-petitioner ran a motorcycle repair shop. The second respondent inspected his shop and registered a case for contravention under Section 3 of the Child Labour (Prohibition and Regulation) Act, 1986 and issued a show cause notice. The first respondent passed an order imposing compensation of Rs. 20,000 to the District Child Labour and Rehabilitation Fund. It was argued that unless the appellant is held guilty of the offence by the jurisdictional Magistrate, fixing the liability to pay the compensation was not valid. But it was held that the rules of evidence do not strictly apply in child labour cases. The compensation had to be deposited.

■ In the case of *M.C. Mehta* v. *State of Tamil Nadu and Ors.*,[2] the question before the court was as to why child labour has continued despite statutory enactments - poverty is basic reason which compels parents of child despite their unwillingness to get the child employed. The court observed that Article 45 mandates compulsory education for all children until they completed age of 14 years, it also required to be free and that the State Government should see that adult member of family whose child is in employment in factory or mine or in other hazardous work gets job anywhere in lieu of child. It held that labour inspector shall have to see that working hours of child are not more than four to six hours a day and it receives education at least for two hours each day; entire cost of

1. ILR 2007 KAR 2832.
2. AIR 1997 SC 699.

education to be borne by employer.

■ In the case of *Bandhua Mukti Morcha* v. *Union of India*,[3] the organization of Bandhua Mukti Morcha filed a Public Interest Litigation in the Supreme Court of India. Information regarding criminal cases against carpet manufacturers employing children and scheme for rehabilitation of such children awaited from State of Uttar Pradesh was provided to the court. It was realised that the State of Uttar Pradesh has not yet filed the lists setting out the particulars of the criminal cases which have been filed against the carpet manufacturers for child labour and are pending trial in courts, even though the State Government was directed to do so. The Court directed the Secretary to the Government of Uttar Pradesh, Labour Department to remain present in court to answer why the directions given by that Court have not yet been carried out.

■ The issue of jurisdiction of an inspector appointed under Child Labour (Prohibition and Regulation) Act, 1986 ['hereinafter referred to as 'the Child Labour Act, 1986'] was discussed in the case of *Anant Construction Co.* v. *Govt. Labour Officer & Inspector*,[4] the point raised in the appeal before the Supreme Court was whether the Inspector appointed under the Child Labour Act, 1986 had the power to pass an order holding that the labour employed by the appellant were below the age-limit prescribed under it and also to direct the appellant to pay compensation. The jurisdiction of the inspector to file a complaint with regard to any offence under the Act does not extend to trying of the complaint [reference to Section 16 of the Child Labour Act, 1986 and Rule 17 of the Child Labour (Prohibition and Regulation) Rules, 1988].

II. Night Work For Children In Plantations

[Provisions under the Plantation Labour Act, 1951]

Name of the Provision	Nature of Offence	Where to find in the said Act?	Relevant Provisions (Sections)	Punishment
If an employer makes a child to work in plantations longer than 7 a.m. to 6 p.m. without the permission of the State Government...	-	Chapter V: Hours and Limitations of Employment	25 read with 35 and 37	Imprisonment upto a maximum of 3 months or fine upto a maximum of Rs. 500/- or both On a subsequent offence: Imprisonment upto a period of 6 months or a fine upto Rs. 1000/- or both

3. 1986 Supp SCC 553.
4. (2006) 9 SCC 225.

III. Employment Of Children Below 18 In Mines

[Provision under the Mines Act, 1952]

Name of the Provision	Nature of Offence	Where to find in the said Act?	Relevant Provisions (Sections)	Punishment
If an employer makes children below 18 years (16 years for apprentices and trainees under supervision) to work in mines	-	Chapter VI: Hours and Limitation of Employment Chapter IX: Penalties and Procedure	40 read with 68	Fine upto a maximum of Rs. 500/-

■ Hon'ble Karnataka High Court dealt with the issue of strengthening the current legislations that have been enforced to prevent child labour in the case of *A Srirama Babu* v. *The Chief Secretary to the Government of Karnataka, Bangalore and Ors.*.[5] The Court took cognizance of the fact that there are prominent legislations that abate the menace of child labour, but haven't been effective because they provide too many loopholes. The court cited the example that Section 15 of the Child Labour Act, 1986 which stated that all punishments under:

1. Section 67 of the Factories Act, 1986
   (employing of a child under fourteen years of age)
2. Section 40 of the Mines Act, 1952
   (employment of workers under eighteen years of age and apprentices under sixteen years of age)
3. Section 109 of the Merchant Shipping Act, 1958
   (employment of children under 15 years of age)
4. Section 21 of the Motor Transport Workers Act, 1961
   (employment of a child who is less than 14 years of age)

would be punishable under Section 14 of the Child Labour Act, 1986. The Court stated that such a provision was inadequate and directed the State Government to amend the law such that the punishment within the enactment itself should also be given, in addition to the provision under Section 14. The Court issued further directions to the state government with the binding of guidelines to abate Child Labour in the state of Karnataka.

5. ILR 1997 KAR 2269.

IV. Employment Of Children Below 15 In Ships

[Provisions Under: The Merchant Shipping Act, 1958]

Name of the Provision	Nature of Offence	Where to find in the said Act?	Relevant Provisions (Sections)	Punishment
If any employer makes a child below 15 years work or carried to sea to work in capacity	-	Chapter VII: Seamen and Apprentices Employment of Young Persons Part XVI: Penalties and Provisions	109 read with 436 (2) (25)	Fine upto Rs. 50

V. Employing Children Below 14 Years As Apprentice

[Provisions Under: The Apprentice Act, 1961]

Name of the Provision	Nature of Offence	Where to find in the said Act?	Relevant Provisions (Sections)	Punishment
If an employer makes a child below 14 years work in apprenticeship training in any designated trade	-	Chapter II: Apprentices and their Training Chapter III: Authorities	3 read with 30 (1)	Imprisonment upto 6 months or fine, or both

VI. Employing A Child In Motor Transport Works

[Provisions Under The Motor Transport Workers Act, 1961]

Name of the Provision	Nature of Offence	Where to find in the said Act?	Relevant Provisions (Sections)	Punishment
If any person employs children/ adolescents except those who fulfil the criteria established under law, i.e.: A child below 14 years shouldn't work, An adolescent over 14 may work if he possesses a certificate of fitness with reference to him as mentioned under Section 23.	-	Chapter VI: Employment of Young Persons, Chapter VII: Penalties and Procedure,	21 read with 22 and 31 read with 33	Imprisonment upto 3 months or fine upto Rs. 500/- or both and Rs. 75/- per day for continuing contravention.

VII. Employing Children In Beedi & Cigar Works

[Provisions Under The Beedi & Cigar Workers (Conditions of Employment) Act, 1966]

Name of the Provision	Nature of Offence	Where to find in the said Act?	Relevant Provisions (Sections)	Punishment
If any person employs children or adolescents (except those who may be allowed by law) in any Beedi & Cigar Work industry,	-	Prohibition of Employment of Children & General Penalty for Offence,	24[7] and 25[8] read with 33	For the first offence: Fine upto Rs. 250/- For the subsequent contravention: Imprisonment from 1 – 6 months or Fine from Rs. 100/- – Rs. 500/-

■ In *Rajangam, Secretary, District Beedi Workers' Union* v. *State of T.N.*,[6] there was a complaint made about manipulation of records regarding employment of child labour and non-implementation of the Beedi and Cigar Workers (Conditions of Employment) Act, 1966. A social organization was requested to investigate and file a report with the court. Following this, two schemes were formulated. The court directed the Tamil Nadu State Legal Aid and the Advisory Board to supervise implementation of the two schemes. It further held that tobacco manufacturing has health hazards. Child labour in this trade should, therefore, be prohibited as far as possible and employment of child labour should be stopped either immediately, or in a phased manner to be decided by the State Government, but within a period not exceeding three years from now.

VIII. Pledging The Labour Of A Child

[Provisions Under The Children (Pledging of Labour) Act, 1933]

Sl. No.	Name of the Provision	Relevant Provisions (Section)	Punishment
1	An agreement to pledge the labour of a child	3	-
2	The parents who pledge the labour of their child	4	Fine upto Rs. 50
3	Whoever makes an agreement with the parent/ guardian to pledge the labour of a child	5	Fine upto Rs. 200
4	Whoever knowing that the labour of the child has been pledged and yet employs a child whose labour has been pledged	6	Fine upto Rs. 200

■ This public interest petition *Union for Civil Liberties (PUCL)* v. *Union of India*,[7] is based on the report given by a non-governmental organisation called "Campaign against Child Labour". According to

6. (1992) 1 SCC 221.
7. (1998) 8 SCC 485.

the said report, one Rajput used to travel to Madurai in Tamil Nadu for the purpose of procuring child labour by paying a paltry sum ranging between Rs 500 to Rs 1500 to the poor parents. The children aged below 15 years so procured were forced into bonded labour. The court directed compensation to be paid to the victims and their families by the accused.

IX. Employment Of Children In Factories

[Provisions Under The Factories Act, 1948]

Sl. No.	Name of the Provision	Where to find in the said Act?	Relevant Provisions (Section)	Punishment
1.	Employment of adolescents to clean, lubricate or move machinery,	Chapter IV: Safety	22 (2): If any employer allows any young person to clean, lubricate or adjust a machine in motion of its accessories or accessories of an adjacent machine, if it is likely to expose the adolescent to any injury then the employer would be held liable,	Fine upto Rs. 1000
2.	Employment of adolescents to operate dangerous machines,	Chapter IV: Safety	23: No young person may be employed to operate a dangerous machine unless he is trained to operate it and is under sufficient supervision,	-
3.	Prohibition of employment of children where cotton openers are at work,	Chapter IV: Safety	27: No child shall be employed in a factory for pressing cotton and where cotton openers are at work, unless precautions are ascertained by the Inspector and are put into writing that the children may be employed,	-
4	Prohibition for the employment of children	Chapter VII: Employment of Young Persons	67: No child under 14 shall be employed in a factory,	-
5.	Condition for the Employment of Adolescents in factories,	Chapter VII: Employment of Young Persons	68: All the adolescents who have been employed are allowed to work only if: A certificate of fitness (as per the provision of Section 69) of the adolescent is in the possession of the manager of the factory. The adolescent carries a token with reference to the certificate.	-

6.	Working hours for children in a factory,	Chapter VII: Employment of Young Persons	Section 71 No adolescent who has been allowed to work in a factory shall work for more than 4 ½ hours in a day. No adolescent shall be asked to work at night, i.e. from 10p.m. to 6a.m.	-
7	Notices should be put up for the time periods of children who are allowed/ required to work in the factory,	Chapter VII: Employment of Young Persons	Section 72	-
8.	All factories should maintain registers of all the child workers who have been employed in the factory,	Chapter VII: Employment of Young Persons	73: The manager of every factory in which children are employed shall maintain a register of child workers to be available to the Inspector at all times as during working hours or when any work is being carried on a factory.	-
9.	Penalty for permitting Double Employment of Children	Chapter X: Penalty and Procedure	99: If a child works in a factory on any day on which he has already been working in another factory, the parent or guardian of the child or the person having custody of or control over him or obtaining any direct benefit from his wages, shall be punishable.	-

■ While dealing with the issue of punishment for a factory owner employing child labours in case of *State of Gujarat v. Bhupendrakumar Jagjivandas Patel*,[8] the Gujarat High Court stated that the provisions under Section 93 and 67 of the Factories Act, 1948 provide discretion to the Court to impose a minimum fine. However, while interpreting the Child Labour Act, 1986 that court stated that the punishments of Section 14 of the Act would be applicable to Section 67 of the Factories Act, 1948 and would override the punishment under Section 93 of the Factories Act, 1948. As such, the Gujarat High Court imposed a minimum penalty of Rs. 10,000 on the accused.

8. MANU/GJ/0974/2001.

X. Wages To A Child Who Has Been Employed

[Provisions Under The Minimum Wages Act, 1948]

Name of the Provision	Nature of Offence	Where to find in the said Act?	Relevant Provisions (Section)	Punishment
Payment of wages lesser than the prescribed minimum wages to a child,	-	-	22	Imprisonment upto 6 months or a fine of Rs. 500 or both.

CHAPTER V

CHILDREN AND THEIR TRAFFICKING

A. Combating Child-Trafficking

B. Prohibition of Immoral Trafficking and Exploitation of Children

A. Combating Child-Trafficking

Roma Debabrata[1]

Human-trafficking has been recognised worldwide as an organised crime generating huge illegal flesh trade globally, with an alarming number of children being trafficked. They are coerced, forced and sold for commercial sexual exploitation, domestic work, bonded labour and for other types of profiteering work, which is in a gross violation of human rights.

Trafficking involves a web of hidden, profitable, efficient and expanding human trade network and movement of people between the countries of origin, transit and destination. It is widely associated with violence, force, threat, deprivation of freedom of movement, loss of identity, deceit and debt bondage. Magnitude of the illicit trade becomes manifold, because the legal framework to prevent trafficking, protect victims and penalise the perpetrators is inadequate; moreover, the enforcement of existing law is ineffective. A large number of children are trafficked for various exploitative jobs, particularly for commercial sexual purposes.

At present, there is no single definition of the term 'child'. Under the Child Labour (Protection & Regulation) Act, 1986, a child is one who has not completed 14 years of age, but under the Juvenile Justice Act, a child is up to 18 years of age. The convention on the Rights of the child (CRC) says anyone below 18 years of age is to be considered a child. According to a study 'Trafficking in Women and Children in India'[2] among the 510 victims, 12.9 percent could not recollect the age at which they were trafficked. While 37.8 percent were 10 years of age or under when they were pushed into the illegal trade, 41.7 percent were in the age group of 11-14 years and 7.6 percent were between 15-17 years of age. This shows that more than three-fourth of the respondents were trafficked when they were less than 15 years of age. Apparently vulnerability to trafficking is inversely proportional to age.

The women and children are traded as commodities in the global market via internet and computer technologies. The reason is that it is faster, easier and cheaper. Women and child-trafficking is mainly poverty-driven but also fanned by other reasons like low status of female children in the family and society, lack of education, less exposure and fear of social stigma.

Trafficking of children is an issue of global dimension requiring urgent and concerted responses. A holistic approach is essential to address the political, economic, social and legal aspect of this organised crime. The focus should be on preventive strategies -- addressing the issue of poverty, more access to education, employment-related training, job opportunity, vigilance on borders, and community mobilisation on general awareness on gender equality.

To combat child-trafficking, it is very important that law enforcement should be made more effective. The provision of ITPA is to broaden up to other forms of trafficking, like-bonded labour, domestic

1. Ms Roma Debabrata is Associate Professor, Miranda House, University of Delhi.
2. Trafficking in Women and Children in India, 2005.

labour, begging etc. Due to complex nature of human-trafficking syndicate, only multi-faceted approach can work. Both preventive and curative actions are needed.

India signed the *Geneva Convention on Immoral trafficking of women and Children in 1956,* after which the Suppression of Immoral Trafficking Act (SITA) was enacted. With this, a number of raids were conducted at various places by police. However, the unplanned way in which they were carried out resulted in victims of trafficking turning hostile and the whole exercise yielded no desired results.

There are a number of national and international laws that attempt to prevent trafficking and regulate human movement. Article 23 of the Constitution prohibits trafficking in human beings, begging, other forms of forced labour and states that any contravention of this provision shall be an offence punishable in accordance with law. *Article 39* of the Constitution of India, a directive principle of state policy, directs the state to ensure that children are not abused or forced due to economic burden to vocations unsuited to their age and strength, and are given opportunities to develop in a healthy manner and that childhood and youth are protected against exploitation and against moral and material abandonment.

Despite a constitutional mandate, there is only one national law in the country framed specifically to deal with trafficking, which is *"The Immoral Traffic (Prevention) Act, 1956(amended in 1986). The Act* spells out comprehensive provisions for rescue, protection and corrective treatment for women in prostitution.

But with our long experience of working in anti-trafficking movement, we observed that with ineffective implementation of existing laws, in a huge country like India, it is not possible to combat trafficking without active participation of civil society. The whole package of rescue, legal redressal for victims and legal procedure against criminals, restoration/repatriation of survivors and meaningful empowerment resulting proper rehabilitation for trafficked survivors is a useful preventive strategy in combating human-trafficking.

We have seen a sizable number of rescued children who were either re-trafficked or not traceable because of rejection from the community, family and non-availability of sensitive rehabilitation mode. In fact, successful rehabilitation package works as effective preventive mechanism, victim-friendly speedy judicial system for conviction of perpetrators also work as preventive methodology.

Trafficking in persons makes these missing millions, who become nameless, faceless, and very difficult to be located since most of them are non-traceable forever. The magnitude of the problem is very high as millions of children are abused and trafficked globally every year. There are an increasing number of children under the age of 16 years in brothels bold enough to create an alarming trend of decreased age for children trafficked for commercial sexual exploitation in sex industry.

Moreover, the reliable data is limited on the number of trafficked women and children about their place of origin and destination areas. Ethnic minorities, backward sections, scheduled caste or tribes, hill tribes, refugees and illegal migrants are easy prey for this extremely organised crime business.

The challenges we face

Connivance among lower level law enforcement agents and criminals who hamper rescue operation.

Lack of sensitisation and high work-pressure which makes trafficking issue a less prioritised item in police charter.

Inadequate witness protection system makes it difficult to convict the perpetrators.

Lengthy and victim unfriendly judicial process is deterrent for pursuing the cases against highly organised criminals.

Almost non-existent rehabilitation package.

Social stigma is a big contributor in suppression of a survivor's voice.

Family rejection and lack of social support contribute heavily in re-trafficking or further marginalisation of victims.

Conclusion

We need a multi-stakeholder response to fight the organised crime of human-trafficking and, therefore, need to take a holistic approach for addressing prevention as well as prosecution and sustainable rehabilitation of the victims of illicit trade.

B. Prohibition of Immoral Trafficking and Exploitation of Children

Sl. No.	Name of the Provision	Nature of Offence	Relevant Provisions (Sections)	Punishment
1	Punishment for living on the earnings of prostitution of a child or a minor,	Non- Cognisable	4(1)	Imprisonment from 7 – 10 years
2	Procuring or influencing or kidnapping of a child for the purposes of prostitution,	Non- Cognisable	5(1) and (2)	Imprisonment from 7 – 14 years and a fine upto Rs. 2000/-
3	Detention of a child against the will of the child,	-	6	Imprisonment upto 7 – 10 years and fine,
4	Seduction of a child in custody,	-	9 [Any person who causes, abets or aid has the charge, custody or care of the child seduces the child for prostitution]	Imprisonment for life, or rigorous imprisonment from 7 – 10 years and fine.

■ The issue of immoral trafficking of a minor girl was dealt by the Supreme Court in the case of *State of Maharashtra and Anr.* v. *Mohd. Sajid Husain etc*.[1] A girl lodged an FIR telling how she was driven to the flesh trade by one of the accused. She also made several statements later implicating the respondents in this case. High Court had allowed application of anticipatory bail of the eight respondents on grounds that the girl was a major and had given her consent to sex. Medical examination suggested her age to be between fourteen to sixteen years. Hence, her consent was immaterial. Therefore, the decision of the High Court was reversed. The Court also stated that the victims of immoral trafficking who are lured, coerced or threatened should be protected.

■ In the case of *Kamaljeet Singh* v. *State*,[2] appellant and his associate were charged with supplying girls for prostitution in five star hotels in various cities under Sections 4 and 5 of the Immoral Traffic (Prevention) Act, 1956 [hereinafter referred to as the 'Immoral Traffic Act, 1956']. The appellant contended that offences under Sections 4, 5 and 8 of the Immoral Traffic Act, 1956 were not made out in the absence of an allegation in the F.I.R. that the girls were abused or sexually exploited so as to force them to offer their body for promiscuous sexual intercourse. However, the findings of the

1. AIR 2008 SC 155.
2. 148 (2008) DLT 170.

learned Special Judge was that there is sufficient material for framing of charges against the accused persons under various provisions of the Immoral Traffic Act, 1956 and it was held that the activity of appellant was a case of 'continuing unlawful activity' by an 'organised crime syndicate' with a wide network for illegal trafficking and prostitution and the appeal was dismissed.

■ In the matter of *Public at Large* v. *State of Maharashtra and Ors*.,[3] it was about a news item which was published disclosing shocking and alarming state of affairs of sex workers. The report indicated that minor girls were illegally confined and were forced to be sex workers. This is a *suomoto* writ petition where the court issued Interim directions for framing schemes so that women including minors who are procured for sexual slavery are released from the confinement of their procurers. Thereafter, raids were conducted and minor girls were rescued from various brothels. The rescued girls were, thereafter, kept in juvenile homes. On medical tests, it was found that 70% rescued girls were HIV positive and remaining 30% were suffering from venereal diseases. In all 457 girls were rescued from such confinement. The court stated that these rescued girls are required to be protected from sexual exploitation and are to be properly rehabilitated. It further stated that the confinement of the girls in brothel is not only illegal and unconstitutional, but is also against basic human rights. The court then issued directions to the State Government for rehabilitation of these girls and for setting up committee etc. It issued further directions to submit periodical reports.

3. 1997 (4) Bom CR 171.

CHAPTER VI

CHILD AND MARRIAGE

Child Marriages (Provision under the Prohibition of Child Marriage Act, 2006)

Child Marriages (Provision Under the Prohibition of Child Marriage Act, 2006)

I. Pre- Act Of 2006

The law as under the Child Marriage Restraint Act, 1929 was discussed in the case of *Gajara Naran Bhura* v. *Kanbi Kunverbai Parbat*.[1] It was a dispute related to grant of maintenance to plaintiff wife. The maintenance was denied on ground that the marriage was solemnized in contravention provisions of Child Marriage Restraint Act, 1929 [hereinafter referred to as 'Child Marriage Act, 1929'], as plaintiff was below 18 years.

The court stated that in no circumstances, marriage between persons who or one of whom fall within definition of 'child' the Child Marriage Act, 1929 is *void ab initio*. Such a marriage is voidable under some circumstances provided in Act of 1955 at the instance of the wife. The judge stated that a marriage solemnised between two Hindus who are of the age which makes one of them punishable under the Child Marriage Act, 1929 does not render the marriage itself invalid or void, thus, the plaintiff is entitled to get maintenance.

II. The Act Of 2006

Sl. No.	Name of the Provision	Nature of Offence	Relevant Provisions (Section)	Punishment
1	Offence of an adult male marrying a child,	Cognisable	9	Rigorous Imprisonment which may extend to 2 years or fine upto Rs 1 lakh or both,
2	Whosoever commits the offence of solemnizing a child marriage,	Cognisable	10	Rigorous Imprisonment which may extend to 2 years or fine upto Rs. 1 lakh or both unless proven by the accused that he had reasons to believe that it was not a child marriage,

1. AIR 1997 Guj 185.

3	Whoever is the guardian or parent or a person who has the charge of the child concerned in the child-marriage or any person whether in his/her lawful/unlawful capacity promotes the marriage.	Cognisable	11	Rigorous Imprisonment which may extend to 2 years or fine upto Rs. 1 lakh or both, provided that no woman is punishable with imprison-ment.

CHAPTER VII

CHILD AND EDUCATION

A. Right to Education for Children with Disabilities

B. A Regressive Legislation for School Education in Progressive Child (Human) Rights Age

A. Right to Education for Children with Disabilities

Rajive Raturi

(With reference to the RTE/ PWDA and harmonising it with the UNCRPD)

The United Nations Convention on Rights of Persons with Disabilities (UNCRPD), the first Human Rights Treaty of the 21st century that became operative in May 2008, breathes recognition into the rights of about 70 million persons with disabilities, including children with disabilities in India.

The CRPD views persons with disabilities as subjects with human rights and fundamental freedoms who have the capacity of asserting and securing their rights. It is premised on the potential, skills, merit, abilities and contributions of persons with disabilities, and is all encompassing in nature. It views persons with disabilities as part of humanity and human diversity, and upholds the opinion that disability results from interaction of impairment with various barriers which hinder participation in society on an equal basis with others. Hence, the need for identifying and eliminating barriers and ensuring non-discrimination and equality of opportunity, introducing affirmative action, reasonable accommodation, and universal and inclusive design of environments, goods, services and facilities etc.

Since India has signed and ratified the Convention, it is now obligated to bring its legal framework in conformity with the principles and values of the Convention which will mark a paradigm shift in how disability is viewed in India.

Education of children with disabilities falls under the purview of the Ministry of Social Justice and Empowerment, and is governed by the principal statute on disability -- the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act of 1995.

The existing statute in the chapter on education requires appropriate government and local authorities to ensure that every child with a disability has access to free education in an appropriate environment till the age of 18 years, integration of children with disabilities in mainstream schools and also establishment of special schools equipped with vocational training facilities for those in need. The statute also allows for the formulation of schemes providing non-formal education to children with disabilities by training available manpower in rural areas, imparting education through open school/ universities and conducting classes through interactive electronic media.

The statute also requires initiation of research by governmental and non-governmental agencies for designing and developing new assistive devices, teaching aids and development of special teaching material. Development of human resources for integrated and special schools and the drawing up of a comprehensive education scheme to provide for transport facilities, removal of architectural barriers in educational institutions, granting of scholarships to children with disabilities, supply of books

and uniforms free of cost and suitable modifications in the curriculum and examination system are also required to be in place as per the needs of the children with disabilities.

This statute visualises education of children with disabilities as a school-based programmatic activity which is dependent on availability of resources, and is largely driven by a concessional approach that is very group specific. So, the statute states that the examination system will be modified, and mathematics will be eliminated for the benefit of children with blindness, and other modifications in the curriculum are also suggested so that deaf children will be taught only one language. The Act does not recognise that deaf are a linguistic minority and the need is for sign language as a medium of communication of the deaf. Moreover, children with intellectual and developmental disabilities have unique needs with regard to information processing and critical elements of a functional education system addressing these needs are missing. Also methodologies of testing developmentally disabled are not in place. The fault also his in infrastructure, curriculum, testing norms and certification rendering the present education system completely meaningless.

Article 24 of the UNCRPD on education states:

1. State parties recognise the right of persons with disabilities to education. With a view to realising this right without discrimination and on the basis of equal opportunity, state parties shall ensure an inclusive education system at all levels and lifelong learning directed to:

a) Full development of human potential and sense of dignity and self-worth, and the strengthening of respect for human rights, fundamental freedoms and human diversity;

b) Development by persons with disabilities of their personality, talents and creativity, as well as their mental and physical abilities, to their fullest potential;

c) Enabling persons with disabilities to participate effectively in a free society.

2. In realising this right, state parties shall ensure that:

a) Persons with disabilities are not excluded from the general education system, and that children with disabilities are not excluded from free and compulsory primary education, or from secondary education, on the basis of disability;

b) Persons with disabilities can access an inclusive, qualitative and free primary education and secondary education on an equal basis with others in the communities in which they live;

c) Reasonable accommodation of the individual's requirements is provided;

d) Persons with disabilities receive the support required, within the general education system to facilitate their effective education;

e) Effective individualised support measures are provided in environments that maximise academic and social development, consistent with the goal of full inclusion.

3. State parties shall enable persons with disabilities to learn life and social development skills to facilitate their full and equal participation in education and as members of the community. To this

end, state parties shall take appropriate measures, including:

a) Facilitating the learning of Braille, alternative script, augmentative and alternative modes, means and formats of communication and orientation and mobility skills, and facilitating peer support and mentoring;

b) Facilitating the learning of sign language and the promotion of the linguistic identity of the deaf community;

c) Ensuring that the education of persons, and in particular children, who are blind, deaf or deaf-blind, is delivered in the most appropriate languages and modes and means of communication for the individual, and in environments which maximise academic and social development.

4. In order to ensure the realisation of this right, state parties shall take appropriate measures to employ teachers, including teachers with disabilities, who are qualified in sign language and/or Braille, and to train professionals and staff who work at all levels of education. Such training shall incorporate disability awareness and the use of appropriate augmentative and alternative modes, means and formats of communication, educational techniques and materials to support persons with disabilities.

5. State parties shall ensure that persons with disabilities are able to access general tertiary education, vocational training, adult education and life-long learning without discrimination and on an equal basis with others. To this end, state parties shall ensure that reasonable accommodation is provided to persons with disabilities.

The UNCRPD marks a paradigm shift in the approach towards education of children with disabilities and visualises an inclusive education system at all levels and life-long learning indicating that education of disabled goes beyond the school system.

If we are to realise this mandate of the Convention, then it is important for us to move away from the present concessional and programmatic approach of education to an inclusive system that ensures reasonable accommodation of an individual's requirement and provides for effective individualised support measures in the education system. This can only be brought about by deepening our understanding of the fact that disability is an evolving concept, that due respect needs to be given for the evolving capacities of children with disabilities as also respect for their right to preserve their identities.

Whilst the UNCRPD clearly visualises an inclusive education system with provisions of reasonable accommodation, it is silent on the presence of special schools. Advocates for inclusive education strongly maintain that the concept of special schools has no place in a system geared for total inclusion, but experts opine that an interpretative reading of Article 24 (3c) of the Convention leaves space for such institutions, if they provide environments which maximise academic and social development specially for the blind, deaf and deaf-blind.

Ministerial actions have been initiated towards bringing about law reform and the civil society, too,

has started parallel processes. Dialogues have been initiated with the PMO and the MSJE in last a few months for harmonising Indian disability laws with the UN Convention. Consistent pressure from various groups have made the government detract from its original position of bringing amendments to the PWD Act in the budget session, and from media reports it appears the government is now contemplating a new law altogether.

In the backdrop of the demand of 'inclusion' which the CRPD promises, it is also important to critique the Right to Education Act. Having ratified the UNCRPD two years ago, which places an obligation on the government to draft new laws and amend existing ones in harmony with the UNCRPD, the HRD Minister went ahead and got the Right to Education Bill passed in both the Houses of Parliament and got it become a law of the land in August 2009 followed by its enforcement in April 2010. The new Act continues to relegate education of children with disabilities to the MSJE, and does not address disabled as a marginalised community, effectively barring them from the benefits of this new law, much against the demands that education of children with disabilities has to be necessarily shifted under the MHRD and away from the MSJE.

Protests from the sector from across the country and representations made to the PMO and MHRD have prevailed upon the Minister of HRD who has sought to amend the RTE Act to include hitherto unaddressed intellectual and developmental disabilities, in addition to the disabilities as defined under the Persons with Disabilities Act.[1]

The government's flagship programme, 'Sarva Shiksha Abhiyan' which is to universalise elementary education by 2010 provides for improving human capabilities of all children, including children with disabilities in an inclusive environment. It is also important to critique this programme as a recent study conducted by the All India Confederation of the Blind (AICB), covering 200 blind students in class IV and V studying in government schools under SSA spread across 10 states of the country, revealed very poor subject knowledge of students, lack of assistive aids and equipments including mobility aids, lack of basic resources, huge drop-out rates from the lower primary class to the higher primary class, inexperienced teachers, and untrained special educators.[2]

Whether education of children with disabilities is addressed under the New Persons with Disabilities Act proposed by the government, or the amended Right to Education Act or as a separate code for education of disabled, it is important for the legislative framework to address some critical issues:

1. In recognition of the fact that access to education is delayed for children with disabilities, access to free education should be extended till the age of 21 years,
2. In recognition of evolving capacities of children with disabilities, education is needed to move away from the concessional approach and promote and facilitate teaching of subjects to enable capability development,
3. Ensure availability of latest and most advanced technology at affordable costs to children with disabilities,

1. Reported in the *Times of India* dated April 24, 2010.
2. Reported in the *Times of India* dated March 13, 2010.

4. Provide reading material in accessible formats,
5. Recognise that deaf are a linguistic minority and that sign language will be used as a medium of instruction for education of the hearing and speech impaired,
6. All schools to use display of text/ large print/ accessible multimedia/ audio equipments/human readers and alternative and augmentative modes, means and formats of communication,
7. All interviews, group discussions at higher levels of education must adopt facilitative processes, like-use of sign language instructors, assistive and augmentative devices for communication,
8. Responsibility to ensure development and introduction of assessment tools, course curriculum and certification etc into mainstream schools for those with intellectual and developmental disabilities,
9. Recognition of multiple intelligence as an alternate assessment tool for children with intellectual disabilities
10. Alternative curriculums in the nature of subject divisioning, applicable after class X to be introduced at every level in mainstream schools, so that when children with intellectual, cognitive or developmental disability are unable to continue with the course curriculum of a particular grade, they can go into a bifurcated stream adapted to their level and capability,
11. Identification of nature of the accommodation required by children with mental illness and other disabilities and provide this accommodation in the education system, as this would vary from individual to individual,
12. Provision of special assistance to children with mental illness and other disabilities requiring this to help navigate social spheres,
13. Children with mental illness, developmental, cognitive and intellectual disabilities are enabled to learn life and social development skills,
14. Recognition of the fact that adolescence is turbulent for a number of children living with mental illness which disrupts their educational careers and the need for reintegration schemes ensuring to persons with disabilities access to general tertiary education, vocational training, adult education and lifelong learning,
15. In order to ensure that persons, especially children living with mental illness, realise their right to education, it is important that the obligation of reasonable accommodation and individualised treatment is explicitly incorporated in the Act,
16. It is also imperative that education for children with disabilities moves beyond school-based education.

Manpower development needs to be addressed in any legislative framework and these are as noted:

i) All schools to be equipped with teachers who are conversant in Indian sign language/ Braille/ tactile communication/multimedia,

ii) All teacher training courses like B.Ed. and TTC etc., shall contain compulsory modules on sign language, Braille, tactile communication etc. B.Ed. training course should include components of special education,

iii) An illustrative list of different carders of manpower and human resources to be enumerated in the Act,

iv) Indication of training and certification processes,

v) Creation of proper career paths. Positive approach towards inclusion should be imbibed within the staff members starting from the head of the institute to the ancillary.

Refresher course to revise previously done concepts and introduce innovations in teaching techniques should be conducted annually.

B. A Regressive Legislation for School Education in Progressive Child (Human) Rights Age*

Dr. Niranjanaradhya VP

The masses in India, especially from the subaltern and downtrodden communities, have been struggling and demanding for more than one and a quarter century, beginning from Jyothirao Phule in his representation to the Education Commission under the chairmanship of Sir William Hunter in October 1882 to this date, 'freeand compulsory education' as a basic right of every child in this country.

After achieving independence from the foreign servitude in 1947, the process of building a new India on values foreseen during the freedom struggle formulated the people's mandate and, thus, became the guiding vision for drafting the Constitution of a new-born India. According to Granville Austin, "Indian founding fathers and mothers established in the Constitution both the nation's ideals and the institutions and processes for achieving them. The ideals were national unity, integrity, democratic and equitable society. The new society was to be achieved through a socio-economic revolution persuaded with the democratic spirit using constitutional, democratic institutions".

One would agree and endorse Austin's view of the ideals and consciences that guided the process of Constitution making in blending the ideals and aspirations of freedom struggle. However, the founding fathers of the Constitution have failed to provide due share to children of India in general, and right to education as a 'fundamental right' in the Constitution. As a result, the peoples' demand for free and compulsory education [hereinafter referred as 'FCE'], which echoed throughout the course of freedom struggle as one of the prominent demands, did not translate into a fundamental right in the Constitution of India. The children who had been denied education since ages were further deprived of an opportunity of having the fundamental right to education at the time of making of the Constitution.

Nevertheless, the vision and inseparable linkage between the provision of education and other related provisions in the draft Constitution propounded by Dr. BR Ambedkar during the constituent assembly debates are something noteworthy at this point. After shifting the FCE provisions from fundamental rights to non-justiciable right, draft Article 36 was taken for debate in the Constituent Assembly on November 23, 1948. While debating the Article, there were two amendments proposed; one of the members (Pandit Laksmi Kanta Maitra: West Bengal–General) proposed that the reference to free primary education be deleted, so that it does not contradict the reference to until a child completes

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the age of 14 years. Another member (Naziruddin Ahmad: West Bengal–Muslim) contended that in view of the expected resource crunch the reference to the age of 14 years be reduced to the age of ten years and the commitment of the state be limited to only primary education.

Ambedkar, responding to the proposed amendments, opined: "I accept the amendment proposed by my friend Mr. Maitra which suggests the deletion of the words 'every citizen entitled to free primary education'. But I am not prepared to accept the amendment of my friend Mr. Naziruddin Ahmad. He seems to think that the objective of the rest of the clause in Article 36 is restricted to free primary education. But that is not so. The clause as it stands after the amendment is that every child shall be kept in an educational institution under training, until the child is of 14 years. If my honourable friend, Mr. Naziruddin Ahmad had referred to Article 18 which forms part of the fundamental rights, he would have noticed that a provision is made in that Article to forbid any child being employed below the age of 14. Obviously, if the child is not to be employed below the said age, the child must be kept occupied in some educational institution. That is the object of Article 36 and that is why I say the word 'primary' is quite inappropriate in the particular clause and I, therefore, oppose his amendment." Finally, Article 36, as amended, was included in the Constitution as Article 45.

Article 45 in the Constitution reads as,

> "*The State shall endeavour to provide, within a period of ten years from the commencement of this Constitution, free and compulsory education to all children, until they complete the age of 14 years*".

There have been many occasions where the age limit for prohibition of child labour was considered to be raised from 14 years to 16 years, though none of the attempts got materialised. In contrast, one of the prominent demands of the child rights groups in India today is to increase the age of child from present 0-14 years to 18 years to fall in line with the international legal instruments, particularly the United Nations Convention on Rights of Children.

It is evident from the foregoing analysis that there were different perspectives during the constituent assembly debates on issues pertaining to children, especially making education a fundamental right, the length and scope of FCE, increasing the age etc. But, as I have already mentioned, the Constituent Assembly as a whole failed to provide justice to children in general and a child's right to education as a 'fundamental right' in particular. This is, in fact, a great injustice to children in the very beginning of nation building. However, none of these developments delimited or diluted the overall constitutional vision on right to education which was an integral part of the Constitution in its true spirit.

Yet, the constitutional aspiration of providing free and compulsory education to all children until the age of 14 within 10 years from the commencement of the Constitution remains elusive, even after six decades of independence and framing of the Constitution. Deploring the State's failure in this regard, the famous Gandhian and former member of the Planning Commission Dr LC Jain, in one of his articles, wrote that the 'State shall endeavour to provide' in the Article 45 of the Constitution. Our founding fathers did not call upon children to endeavour to obtain education from the State as a matter of their right. At least, up to the age of 14, the duty was cast squarely on the State in unequivocal terms. It was also not left to the State to fulfill this duty at leisure or to drag its implementation over

an indefinite period. The State was mandated to provide education 'within a period of ten years from the commencement of the Constitution i.e. by 1960".

Furthermore, the Government of India pronounced the National Policy on Education in the year 1968 through a resolution issued on the basis of the report of the Education Commission. In the policy, the government committed itself to take strenuous efforts to equalise educational opportunities. Elaborating further, the policy document states, "To promote social cohesion and national integration, the Common School System (CSS) as recommended by the Education Commission should be adopted" (Para 4).

Later in 1986, the Congress led by the then Prime Minister late Rajiv Gandhi had enunciated the concept of national system of education in its National Policy on Education as "the concept of a national system of education implies that, up to a given level, all students, irrespective of caste, creed, location or sex, have access to education of a comparable quality. To achieve this, the Government will initiate appropriately funded programmes. Effective measures will be taken in the direction of the Common School System recommended in the 1968 Policy". (Para 3.2)

The fortitude of the struggle, particularly after the 90s, owing to the 'Rights' based approach, was further lucid, unambiguous and solidified to ensure quality care, protection, early childhood care and equitable quality school education to all children in accordance with the values enshrined in the Constitution of India, and in consonance with the United Nations Convention on the Rights of the Child (UNCRC) ratified by the Indian State in December 1992.

The struggle was further intensified in the past one and a half decades especially after the historic Supreme Court judgment in the case of *Unnikrishnan* v. *State of Andhra Pradesh* in 1993 where the honourable Supreme Court declared the right to education as a 'fundamental right' of every child until the age of 14 years.

Contrary to all these developments, the Indian government led by the National Congress Party and its allies (in fact, led by Sonia Gandhi who is supposed to be following the footsteps of late Rajiv Gandhi) buried the dream of creating a national system of education on the lines of the Common School System as per the policy commitment in the 1968, 1986 and 1992 (modified) education policies and in its place enacted a legislation that continues to perpetuate inequality, discrimination and segregation in the school education system in India. Further, the Right of Children to Free and Compulsory Education Act, 2009 paves the way for privatisation and commercialisation of education by introducing the modern voucher system of reimbursing money for the private schools to educate poor children. The biggest paradox in the process of enacting this farcical legislation was that Ms Sonia Gandhi was a silent spectator in the Parliament when Minister for HRD, Mr. Kapil Sibal was reversing the agenda of the Indian Constitution in general and the policy commitment made by late Rajiv Gandhi on the core values of the Constitution social justice and equity by misleading the Indian Parliament.

This is a great shock for the millions of people, particularly the progressive intelligentsia who have been projecting the Congress as a progressive and secular political force in the country. What is more ironic is that the ruling Congress-led government's turning a deaf ear to the best interest of the children in general and children belonging to subaltern communities in particular has betrayed the

dream of building a system of education on the lines of a Common School System as promised by one of the tallest leaders of the Congress, late Rajiv Gandhi in the Parliament.

I don't hesitate to call this as a historical blunder committed by the Congress leadership and which misled the Parliament to commit a crime against the Indian child population by missing a rare and great political opportunity to create a national system of education based on the core principles of equality, social justice and equity as enshrined in the Indian Constitution; a product of freedom struggle and embodiment of peoples' aspirations.

Contrary to this, the Indian State, which is predominantly insensitive to children in general and right to education in particular, made all efforts to legitimise inferior quality education, for the vast majority of children coming from the poorest strata of the society. As a policy, the State deliberately encouraged high fee charging private institutions to cater to the meager needs of children coming from the upper strata of the society. Thus, the Indian state sowed the seeds of segregation, disparity and discrimination in the area of school education. It is both, breach of law and the policy recommendations of the most celebrated Education Commission of India.

The present system is self-evident to demonstrate unacceptable discrimination practised by the Indian State in the field of school education. In fact, the present legislation brings further segregation within the system, and continues to divide the Indian children on basis of class, caste, gender and social status. One could see the following segregation pattern in the current education system in India:

1. The schools that are affiliated to international boards cater to the needs of the highly privileged classes,
2. The schools that are affiliated to the Indian Council for Secondary Education (ICSE) cater to the needs of rich intelligentsia, political and business class,
3. The schools that are affiliated to the Central Board of Secondary Education (CBSE) cater to the needs of bureaucrats and upper middle class,
4. The schools that are affiliated and recognised by the state boards as private English medium schools cater to the needs of the children coming from the middle class,
5. The schools run and aided by the state caters to the needs of lower middle class/poor masses, and
6. The NFE centers and Education Guarantee Scheme (EGS) under Sarva Shiksha Abhiyan (SSA) cater to the needs of the marginalised and pauperised class.

It is appalling to see that the future citizens of India have already been divided and fragmented on the basis of their background. Can anybody else divide India better than this?

The story doesn't end here. The neo-liberal market forces, which joined politicians and couple of individuals and organisations belonging to the non-governmental sectors, have decided to destroy the public education system. The classic example in hand is the Right of Children to Free and Compulsory

Education Act, 2009 (Education Act, 2009). India in many forums constantly self-congratulates itself for being the biggest democracy, the Indian State, despite the powerful resistance from the civil society organisations unilaterally introduced and passed the Right of Children to Free and Compulsory Education Bill, 2009 in the Parliament without any public debate.

It is the failure personified on part of the Indian State that it did not host the Education Bill on its website for public debate in the age of information technology. Organising public debates in different parts of country owing to the diversity of this great nation is a far cry. However, this bill has received assent of the President on August 26, 2009 and got officially published in the Gazette of India on August 27, 2009.The expediency in notifying the Education Act, 2009 is a clear reflection of lack of social initiative towards progress by the Indian State.

It is important to list out some of the basic flaws of the Right of Children to Free and Compulsory Education Act, 2009 for the benefit of readers. They are as follow:

1. The Education Act, 2009 dilutes the notion of child's fundamental Right to Education and reduces the same into a statutory coercive right,
2. The Education Act, 2009 violates the principles of equality and social justice as enshrined in the Constitution,
3. The Education Act distorts the harmonious reading of Article 21 and Right to Education as pronounced by the Supreme Court in the case of *Unnikrishnan* v. *State of Andhra Pradesh* in 1993,
4. The Act also deprives children below six years of age of their right to Early Childhood Care, Development and Education,
5. The Education Act denies the children in the 14-18 years age group essential support for transition from elementary stage to secondary/ senior secondary stage in consonance with the United Nations Convention on the Rights of the Child,
6. The Education Act negates the commitment of the 1968, 1986 and 1992 policies to undertake measures to achieve the Common School System (CSS) through genuine neighborhood schools,
7. The Education Act shifts the constitutional obligation of the Central Government to state governments and shifts the same on Panchayat Raj institutions and school management committees without providing adequate resources,
8. The Education Act perpetuates and legitimises the existing segregations and disparities in the school education system,
9. The Education Act further promotes privatisation-cum-commercialisation of school education,
10. The Education Act has conveniently dropped some of the apparently progressive provisions in the earlier drafts of the Bill.

The Indian State has completely given up all the values enshrined in the Constitution of India to build a society based on equality and social justice. Thus, the Indian State made a paradigm shift from the

Nehruvian values of building strong people-centered, publicly financed social institutions to cater to the basic needs and entitlements of its citizens.

A careful observation and analysis of the past in relation to achieving the goal of universalising equitable quality education reveal that the Indian State has been deliberately suppressing people's voice on the issue and continues to make undemocratic and unilateral decisions without respecting the aspirations of the masses. In fact, the tendency of abdicating the constitutional mandate and encouraging commercialisation and privatisation of basic education has further increased after 90s. Finally, having fully wedded to neo-liberal ideology, the neo-liberal Indian State has reduced the right into a mere farcical law that could bulldoze the basic tenets of equality, equity and social justice as embodied in the Constitution.

The only option left at this point is to intensify our struggle to resist the efforts of the neo-liberal State to lease or franchise public education either through an enactment or the much, hyped Public Private Partnership (PPP) that leads education to a profiteering commodity against the very basic principle of 'social good'. Our struggle should demand for a 'common school system' that ensures equality, equity and social justice as a prerequisite to rebuild a new India on the principles and values embodied in the Constitution.

To conclude, despite vehement opposition from the civil rights movements, the Right of Children to Free and Compulsory Education Act, 2009 has come into effect. As anticipated, on the one hand, a number of federal states have expressed their inability to implement the Act due to lack of financial resources, and the private minority institutions have challenged the legislation both in the Supreme Court and high courts on the other hand. In fact, Uttar Pradesh Chief Minister Mayawati, in her letter to Prime Minister Manmohan Singh, categorically said, "Her government is not in a position to bear the financial burden and the state does not have the required infrastructure to implement the Act as of now, or in the near future."

The above response in a way is the answer from the federal states to the undemocratic and unilateral process followed by the Centre in enacting the legislation without taking states into confidence. The Centre did not respect the concurrent responsibility of the Centre and states on education as envisaged in the Constitution.

Though the Right of Children to Free and Compulsory Education Act, 2009 looks like a triumph for the ruling political class for the time being as part of vote bank politics, it is a big setback for the civil rights groups and social movements who have been campaigning for fundamental Right to Education in the post UNCRC regime. It calls for serious introspection to build a new movement nothing less than the second freedom struggle with renewed energy to resist the neo-liberal regime both within and outside in order to build a new India based on social justice, equity and sustainable development. The need of the hour is to protect the integrity and sovereignty of the Indian republic from the onslaught of neo-liberal and greedy market forces.

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India has the largest number of children in the world. More than one-third of country's population is below 18 years. Approximately 40% of the population (around 440 million) constitutes of children. Millions of children in India grow up uncared for, condemned to miserable conditions. They live in abject poverty without medical treatment, education or food. The innocent childhood that should be protected and allowed to grow at its own pace, is often at stake. Despite grand policy announcements and new legislations, the effect in practice is dismal. Child-slavery is rampant, violence against children endemic and the right to education though now established by 86th amendment in the Constitution of India (which declares it to be a Fundamental Right under Article 21) and further the Right of Children to Free and Compulsory Education Act, 2009; exists only on paper.

The status of children in India is very alarming. A look at some of the figures makes it evident. India has the highest rate of neo-natal deaths (around 35%), and 40% of child malnutrition in the developing world. There is a constant reduction in the number of girls as in the 0-6 age group; there are 927 girls for every 1000 boys. Moreover, 46% of children from Scheduled Tribes and 38% from Scheduled Castes background are out of school. Further, there are a great number of high school dropouts, especially among girls. There is a high rate of child-marriage, which adds to the lack of education among children; 37% of literate & 51% of illiterate girls are married below 15 years of age, while 10% of literate & 15% of illiterate boys married are below 18 years of age. A large number of children are labourers and at the same time there is a large number of sexually-abused children.

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