

CHILD SEXUAL ABUSE and THE LAW

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Human Rights Law Network

Child Sexual Abuse and the Law

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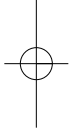
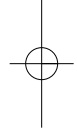
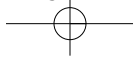
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A woman approached a Buddhist monk, and said: "When I was 12, my parents, who were very poor, sold me to a brothel and I have had to do this work ever since. I must beg your forgiveness for my sin."

The monk replied: "There is no need to beg forgiveness from me. It is I and the world who should beg your forgiveness, for we have not done enough to protect you. Please forgive me and the world for having failed to protect you."

The above is a story told by Mettanando Bhikkhu, a Buddhist monk from Thailand, and narrated by Dr. Peter Piot, Executive Director Joint United Nations Programme on HIV/AIDS (UNAIDS) in his keynote address at the World Congress Against Commercial Sexual Exploitation of Children.



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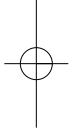
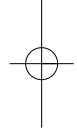
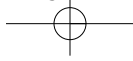
PREFACE

While I was assisting the public prosecutor in the prosecution of a child sexual abuse trial before the trial court in Bombay, I realised that the law and procedure was insufficient to bring justice to the victim. The entire system is weighted against the child victim. A girl aged 10 years had been raped by three youth between the age of 20 and 21 years. The trial started three years later. The 13-year-old girl was cross-examined for five days by the advocates for each of the accused in the presence of their clients. The girl child was humiliated, all attempts were made towards portraying that the sexual assault had never occurred and that she was a liar. The child witness, at her tender age, was unable to find words to voice her experience. This was looked upon as material omissions and contradictions.

A child is vulnerable to an onslaught from the state, society and family. A child-friendly and accessible judicial system is the only way through which a child can redress his/her grievances and attain some semblance of justice.

This book examines the law on child sexual abuse in India and recognises its inadequacies. Laws in other countries, mainly U.S.A. and Great Britain, have also been looked at. There is a need to adapt certain concepts from the foreign law and international instruments to make the Indian law child friendly, and provide genuine relief to the child. The author does not claim to have exhaustively studied foreign laws with regards to child sexual abuse, but an attempt has been made to identify certain child-friendly concepts.

I am grateful to Ms. Susan Karani who conscientiously assisted in researching this book, and has played a very important role in its writing. I also thank Mr. Sunil Dighe for his expert assistance, Ms. Dina Guha for proofing, and Mr. David Kauffman for editing and designing the book.



INTRODUCTION

The enactment of laws set values and norms for society. Laws embody the values of that particular era. Dynamic laws that change with the efflux of time are the most effective to redress a contemporaneous situation. Committed enforcement of laws can curtail a problem, which otherwise would grow unchecked. Judicial intervention, when used intelligently, is a powerful strategy to resolve a problem; it can be used as a solo strategy or as a support to other strategies.

Child protection laws have two main aims, firstly to protect and promote the welfare of the child, and secondly to prevent the abuse of other children in the community. Legal systems have failed in providing protection to children in cases of child abuse and exploitation. It is necessary to enact comprehensive laws on child abuse and prevention of cruelty to children. It is also necessary that governments be committed to enforce and implement such laws in order to provide genuine protection to children.

It has been said that 'a child who is poor in resources should be rich in law'. India has several child-related laws. The absence of political commitment is the main reason why children in India are not enjoying the benefit of the laws enacted to protect and promote their rights. Politicians and lawenforcers are known to support and protect brothel owners, pimps and traffickers in exchange for monetary consideration, and are therefore interested in subverting the law.

Legislation must recognise the decision-making capacity of children. Older children are in a position to understand and avail for themselves their rights. Imparting child rights education to children themselves will ensure that their rights are not trampled upon. From such an empowerment, a children's movement could emerge. The Young People's Liberation Movement in the United Kingdom is one such movement. All of its members are under 21 years of age, and, among other demands, are asking for the end of sexual, physical and emotional abuse of children.

Adequate legislation, better law enforcement, well co-ordinated international co-operation and educated communities are needed to

effectively combat child sexual abuse and exploitation. Laws should protect children, and punish the abusers and exploiters. Strong legislation is critical to discourage sexual abuse and exploitation of children. It is necessary to publicise prevailing laws on this subject. A clear message must be sent to the community that the law will be applied in all its severity.

Potential perpetrators of the offence will thus be cautioned that the commission of any such offence will be dealt with stringently. Penal action alone cannot comprehensively solve the problem. Reformation of abusers and exploiters must be undertaken while they are undergoing their sentence to ensure that the same situation does not arise once they are released and again in contact with children.

Conducting of training and awareness programmes on child rights is very important. The UN Committee on the Rights of the Child has suggested that training on child rights, including national and international laws, should be incorporated in the curriculum of professionals working with children, such as judges, police, doctors, social workers, teachers, etc. It is also necessary to educate the public on child rights issues; this will empower the person on the street to act in an informed manner in a child-related exigency.

Law, along with an attitudinal change, is crucial for the elimination of child abuse and exploitation. Cultural, social and economic values require to be fundamentally altered to give children their deserved dues. The government, local authorities and non-governmental organisations play a pivotal role to satisfy the needs of the family for support and assistance in caring for children. Non-governmental organisations are watch-dogs for ensuring that the government performs its duty towards children, and that the existing law does not merely remain on paper but is implemented to benefit those for whom it is enacted.

I. CHILD RIGHTS

Rights are protected by morality, or by the rule of law. The term 'rights' is often related with the term 'duty'. A child has rights, and the family, society and state have a corresponding obligation to protect these rights in order to allow the child to develop in a healthy manner.

1. WHO IS A CHILD?

Every Indian law has its own definition of the term 'child.'

Prior to the enactment of the Juvenile Justice Act 1986, each state had its separate children's act. Every children's act differed in its contents, including the definition of a child. In Maharashtra and Kerala, a boy child was a male under 16 years of age, while a girl child was a female under 14 years of age, whereas in Madhya Pradesh and Uttar Pradesh, both the boy child and the girl child were under 16 years of age. Under the Juvenile Justice Act, a juvenile boy is the one who has not attained the age of 16 years, and a juvenile girl is the one who has not attained the age of 18 years. The Women's and Children's Institution (Licensing) Act 1956 defines a child as a boy or a girl who has not attained 18 years of age.

A person who has not completed 14 years of age is a child under the Child Labour (Prohibition and Regulation) Act 1986. The definition of 'child' under this law is derived from Article 24 of the Constitution. The Constitution prohibits the employment of a child below 14 years in any factory, mine or any other hazardous employment. The Factories Act 1948 too does not allow a child under 14 years to work in a factory. The Mines (Amendment) Act 1983, recognising the dangers of working in a mine, does not allow a person below 18 years to work in a mine or any part thereof.

Under the Immoral Traffic (Prevention) Act 1986, a child means a person who has not completed the age of 16 years, and a minor means a person who has completed the age of 16 years but has not completed the age of 18 years. A person is deemed to have attained majority on completion of 18 years under the Indian Majority Act 1875. Though under the Child Marriage Restraint Act, 1929, a child means a person, who, if a male, has not completed 21 years of age, and if a female, has not completed 18 years of age.

It is necessary that these laws be amended to bring them in conformity with the Convention on the Rights of the Child. Article 1 of the Convention defines 'child' as,

'For the purposes of the present Convention, a child means every human being below the age of 18 years unless, under the law applicable to the child, majority is attained earlier.'

2. DO CHILDREN HAVE RIGHTS?

'Children are little people who need big rights.'

—Dr. Klaus Kenkel, Federal Minister of Foreign
Affairs, Germany

Do children have rights? It is a question that is often asked. The answer depends upon your definition of the term 'rights'. Rights are about empowering people, i.e., giving power to the vulnerable and marginalised to fight injustices. The previous model of rights was the one whereby rights were bestowed by the powerful on the less powerful, the granting of such rights generally depended upon the largesse of the grantor and often worked to the detriment of the grantee. There has been a change in this concept of rights.

There are different theories of rights as defined by different jurists. One concept recognises rights to be the inherent attributes of the human will. By this theory rights are defined as powers to determine the obligation of others by the exercise of the will of the right holder. Children do not have the capacity to claim rights, therefore under this theory you may infer that children do not have rights. Another concept of rights is closely linked with that of justice. A right is an interest, which is recognised and protected by law. Jherring defines right as a legally protected interest. Salmond defines it as an interest recognised and protected by rules of law. Thus, if you define rights as interests that are protected by laws, then children who definitely have interests must have rights. Though children cannot claim rights for themselves, they may exercise their rights by proxy, i.e. rights to be claimed by parents or guardians or other concerned adults on their behalf.

Children have distinctive rights, such as the right to receive primary education, the right to recreation, the right to adoption, etc. The Convention on the Rights of the Child was conceptualised to protect the distinctive rights of children; protection of other human rights were covered by previous international instruments such as the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights. The Convention on the Rights of the Child legitimises the concept of children's rights. The Convention is the first globally binding treaty protecting children's civil, political, economic, social and cultural rights during peacetime

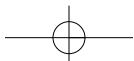
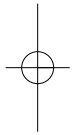
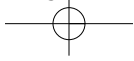
and armed conflict. It also recognises child rights as a political issue, which requires commitment from the state.

Human rights are those rights derived from the inherent dignity of being born a human being. These basic rights are essential to enable an individual to lead an adequate life. A child too has certain rights which are derived at birth, in fact even prior to birth. A girl child has a right to be born, therefore selective abortions are prohibited under the Indian law. The Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act 1994 prohibits the use of diagnostic techniques for the purpose of sex determination leading to female foeticide.

Children not only have human rights but also enjoy political rights. Political rights of children are those which ensure that children are able, if they so wish, to participate at various levels in the promotion, formulation and enactment of policies. The U.S. Supreme Court has recognised that children have and are entitled to exercise their political rights. In *Tinker vs. Des Moines School District*, the Supreme Court upheld the right of school students to protest against the Vietnam war by wearing black armbands. The Court held that school students cannot be punished for expressing their views even if they are political views, unless the school authority has reason to believe that such expression will substantially interfere with the work of the school or impinge upon the rights of other students.

Onara O'Neill, in a writing included in the book "Children, Rights, and the Law," has in a very convincing manner concluded that children have rights:

'Children easily become victims and if children had rights, redress would be possible. Rather than being powerless in the face of neglect, abuse, molestation and mere ignorance, they, like other oppressed groups, would have legitimate and enforceable claims against others. Although, children cannot claim their rights for themselves, others can intervene to enforce these rights. The lives of children is a public concern which can be met by promoting children's rights.'



II. CHILD SEXUAL ABUSE

The World Health Organisation estimates that 40 million children between 0 and 14 years of age suffer from abuse or neglect and require health or social care. Child abuse or neglect has been defined as acts, or failures to act, by parents or caretakers resulting in death, serious physical or emotional harm, sexual abuse or exploitation, or that present an imminent risk of serious harm. Child abuse is a violation of a child's dignity. Child sexual abuse can be defined as any use of children for sexual gratification of adults.

1. DEFINING CHILD SEXUAL ABUSE

Sexual abuse is sexual victimisation through a sexual encounter. Sexual encounter includes intercourse, anal-genital contact, fondling, or an encounter with an exhibitionist.

The Standing Committee on Sexually Abused Children (SCOSAC) (1984) has defined 'child sexual abuse' as follows:

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

The Children's Act 1989 of Great Britain defines 'sexual abuse' as the involvement of dependent, developmentally immature children and adolescents in sexual activity they do not truly comprehend, to which they are unable to give informed consent, or which violate social taboos concerning family roles.

An Australian report, commissioned by the Law Reform Commission of Victoria states that, 'sexual abuse refers to a variety of behaviour ranging from exhibitionism to intercourse, from intimate kissing and cuddling to pen-

etration with an object.' The penetration may be oral, vaginal or anal.

In Zimbabwe, child sexual abuse has been defined to include the touching or fondling of private parts, penetration against one's will or penetration of a child below the age of consent, looking in a suggestive way, teasing in a sexually suggestive manner, use of inappropriate language. The Children's Adoption and Protection Act defines 'neglect' as the failure to provide for the child's basic needs such as housing, nutritious food, adequate supervision as well as medical and psychological care.'

Child abuse was defined in the Indian context at the National Seminar on Child Abuse in India (1988), 'Child Abuse and Neglect (CAN) is the intentional, non-accidental injury, maltreatment of children by parents, caretakers, employers or others including those individuals representing government or non-governmental bodies which may lead to temporary or permanent impairment of their physical, mental, psycho-social development, disability or death.'

SAKSHI, an Indian organisation working on women and child rights has defined child sexual abuse as 'the physical or mental violation of a child with sexual intent, usually by an older person who is in some position of trust and/or power vis-a-vis the child'.

'A child (anyone under 16 years old) is sexually abused when another person, who is sexually mature, involves the child in any activity which the other person expects to lead to their sexual abuse,' – this is another definition of child sexual abuse.

Child sexual abuse includes incest, paedophilia, exhibitionism, molestation, rape, sexual intercourse, sexual sadism, child pornography, child prostitution. Children become victims of sexual abuse as a result of their age, naivete and relationship with the abusive adult. Physical violence is not always an ingredient of child sexual abuse. Child sexual abuse is not exclusive to any particular religion, class, age, educational background, etc - it runs through all stratas of society. The abuser is often a person the child trusts, and is therefore not in a position to voice his/her protest - the child is a helpless victim. Children are dependant upon adults, thus any sexual activity between them denotes an exploitation of power. A young child who does not resist an advance by an adult is regarded as having been abused because of the child's lack of knowledge of the meaning of sexual encounters.

The majority of child sexual abuse cases are discovered due to infection or injury suffered by the child. Children are often silent about sexual abuse as they are threatened by the abuser, bribed by the abuser, lack of words to relate what happened, anxiety about the response of adults, the incident is narrated to some person who does not believe them.

2. MYTHS ABOUT CHILD SEXUAL ABUSE

1. *Child sexual abuse takes place at the hands of strangers on the streets.*

Statistics reflect that a greater number of children are abused at home than in other settings. Generally, children are sexually abused by adults who are related to them, or known to them or their families, and the abuse occurs at the home of the perpetrator.

2. *Child sexual exploiters are monsters or psychopaths or mentally ill persons.*

Child sexual abusers or exploiters are not monsters. A child sexual abuser could be your 'nice' neighbour with whose children your daughter plays every evening. Child sexual exploiters attempt to justify their action in different ways; the children they abuse are not harmed by the abuse, the abused children were in any event sexually open and free, child prostitutes are desperate for money and therefore benefit from sexual contact with adults.

3. *Child abusers have been victims of child abuse themselves.*

Sexual abuse is about corruption, not all victims go on to become abusers. The victim, especially those living on the streets, often have sex without being informed about the consequences or make uninformed decisions based on socio-economic or peer pressure.

4. *Child sexual exploiters are distinct from prostitute users.*

Child sexual exploiters are mainly prostitute users and do not form a sub-group. The majority of prostituted children are integrated into the mainstream sexual industry which serves all those who purchase sex.

5. *'Seductive children' entice the perpetrator and enjoy the abuse.*

This is an adult perpetrator's perception. Not even the most extreme seductive behaviour can ever make the child responsible for the adult act of sexual abuse. It must be kept in mind that pre-pubescent children can never give informed consent. Sexual activity with children is performed for the satisfaction of sexual gratification of an adult and not in response to a child's needs. Financially helping starving children in return for sexual services is the justification voiced by tourists who sexually exploit children. The claim that a child was probably enjoying the sexual encounter if he/she did not stop the abuse or report it at the first instance is an absurd notion.

6. *Children do not transmit the AIDS virus.*

The assumption is that children are not HIV infected and do not spread AIDS. There is also a belief that having sex with a virgin child

is a cure for AIDS and other sexually transmitted diseases.

7. Reporting of child sexual abuse causes more harm than good.

This statement is incorrect and damaging. It is necessary to report cases of child abuse as it will act as a deterrent, and will also create a database of vulnerable children and child abusers. Child sexual abuse is not reported because it is stigmatising, and there is apprehension that the complex legal procedure will further traumatise the abused child. There is also fear that the perpetrator of the offence will seek revenge.

3. INTERVENTION IN CHILD SEXUAL ABUSE CASES

1. **Primary intervention:** focus is on preventing child abuse, e.g., educating the public.
2. **Secondary intervention:** reduction of the prevalence of abuse and neglect by early detection and intervention, e.g., detect high-risk families and help them to cope.
3. **Tertiary intervention:** focus on intervention in families after abuse has occurred and has been investigated.

4. SEXUAL ABUSE AND EXPLOITATION OF CHILDREN BY FAMILY

The Convention on the Rights of the Child describes the family as the fundamental group of society and the natural environment for the growth and well being of all its members and particularly children. The Convention grants children, rights which can be used against exploitation in families, schools, residential institutions, etc. Most importantly, the Convention segregates the rights of children from the rights of the family. It is the role of the family to nurture, care for and protect children, and the role of the state to provide adequate services and resources to enable the family to perform its role. Children have rights vis-a-vis the family and vis-a-vis the state.

While the definition of 'incest' and 'child sexual abuse' is the same, there is a significant difference between the two. Incest usually refers to the sexual abuse of a child within the family by a parent, sibling or relative. It also includes those who are close to the family or in whom the child has trust. A child is told to be wary of strangers and is therefore caught off-guard when advances are made by a relative, neighbour or family friend.

Voices from the Silent Zone: Women's Experiences of Incest and Childhood Sexual Abuse, the RAHI Findings, states that 'incest' or 'child sexual abuse' includes exploitative sexual activity, whether or not they involve physical contact, between a child and another person, who by virtue of his

power over the child due to age, strength, position, or relationship uses the child to meet his own sexual and emotional needs. The act though sexual in nature is also about the abuse of power and the betrayal of trust. A child's dependency needs for nurturance, touch, care, caressing, and the like are not the same as adult sexual desires. The adult or older person completely disregards the child's own developmental immaturity and inability to understand sexual behaviour. The act, therefore, is not only a gross violation of the child's body but also of the trust implicit in a care-giving relationship.

Sexual abuse within the family is generally not reported due to its stigmatising nature. Violent abuse has a greater chance of getting reported due to the physical injury caused to the child. A legal mechanism requires to be established whereby private households and parental behaviour is overt to new forms of surveillance thereby making the family more visible to social regulation. In cases of child sexual abuse and exploitation by a family or a guardian, it is necessary to have direct state intervention whereby the state takes over the responsibility to care for the child. There is an ambivalent attitude towards family members who exploit and abuse children sexually and a reluctance to impose sanctions on them. The state machinery justifies non-action in such cases on the grounds of privacy of the family.

Sexual exploitation of children by parents for money is on the increase. It is a must to develop foster care and adoption procedures, and institutional facilities for those children who are abused and exploited by the family. Access by abusive parents or guardians may be supervised or suspended in the interest of the child; there have been cases of abusive parents being deprived of custody of their child. The abused child could be placed in an institution or in the custody of a 'fit person' who is entrusted with the care of the child.

The prevailing Indian system treats the child as an offender rather than a victim, and the victim child is incarcerated in an institution. The endeavour must be to keep the child in familiar surroundings – in case of a protective parent, the abusive parent should be restrained by a court's injunction from entering the home. Adult relatives who are identified as capable of providing a safe and nurturing environment for the child should be preferred to an institution for placement of the child.

In India, the child's existence and future is controlled by the family and religion. Religious values concentrate on preventing tendencies of moral corruption; sexual exploitation of children is the worst of such corruption. Certain malpractices are known to take place in the name of religion with parental/family support; these malpractices amount to child sexual exploitation. Examples of such practices are the 'devdasi' custom of dedicating poor girl children from lower castes to goddesses, and parental power to give young girls in marriage to older men. These practices continue despite enactment of laws to curb them. The Karnataka Devdasis (Prohibition of Dedication) Act 1984 and the Andhra Pradesh (Prohibition of Dedication) Act

1988 prohibits the dedication of women or girls to any deity, temple or object of worship and any person who directly or indirectly supports this practice is punishable with imprisonment and/or fine. Nepal's Children Act, 1992, prohibits the dedication of girls ('devkis') to a deity. These laws recognise that in certain instances, it is necessary in public interest to put constraints on religious practices that perpetuate sexual abuse and exploitation of the girl child.

The object of the Child Marriage Restraint Act, 1929, is to restrain child marriage. It does not render a child marriage illegal or invalid. Child marriages are regarded as valid once solemnised, even if such marriages are in contravention of laws enacted to restrain child marriages. A parent or guardian who permits the solemnisation of a child marriage is punishable with simple imprisonment, which may extend to three months, as well as a fine. A male above 21 years of age who marries a female under 18 years of age is also liable for such punishment.

LAWS ON PARENTAL ABUSE OR EXPLOITATION

The provisions of substantive law on parental exploitation require to focus on preventing children, particularly those belonging to economically disadvantaged groups, from being placed at a risk by parental neglect and abuse and also to provide necessary social and economic support for low-income families and for child care.

The Criminal Code of Canada defines 'incest' as sexual intercourse between two people who by blood relationship are either parent and child, brother and sister, halfbrother and halvesister or grandparent and grandchild.

The Sri Lanka Penal Code Amendment Act 1995 makes incest an offence and it covers sexual abuse by step-parents, adoptive parents, and adoptive brothers and sisters. The permission of the Advocate General is necessary for prosecution. Incestuous rape of a girl under 16 years carries a minimum sentence of 15 years imprisonment.

The Commission of incest on a child is not a separate offence under the Indian Penal Code, though it often takes place. It is necessary to recognise incest as a separate offence and provide for it under the Indian law so that abuse within the family is dealt with effectively.

The arrogance of an abusive parent was reflected in the Karvi child sexual abuse case. Jagdish Pandey, a sales manager in the Dairy Department in Karvi, a town in Chitrakoot district of Uttar Pradesh had been sexually abusing his 11-year-old daughter for the past two years. When his wife, Ila, came to know of the abuse from her daughter and questioned him, she was violently attacked until she was forced to leave her matrimonial home along with her children. Women's organisations helped Ila in ensuring safety and rehabilitation of her children, and in filing complaints before the concerned machinery. Jagdish Pandey threatened the activists who were helping his estranged family, and before the Allahabad High Court made allegations

against them. Booklets containing slanderous allegations in respect of the antecedents and character of the activists were circulated.

Neither civil nor criminal sanctions can offer an adequate solution to abuse and violence within the home, or effectively deal with its consequences. A comprehensive approach involving different services and agencies is required. Facilities providing for temporary and permanent alternative accommodation are necessary to protect the child from further abuse.

The Children's Act, 1989, attempts to strike a balance between the role of the state, the responsibilities of the parents and the rights of children. Under the British system, parents who abuse or neglect children may be prosecuted. The law includes protective measures for obtaining emergency protection, and care and supervision orders. If children need protection from abuse, this Act can be used to injunct the abusive parent from entry into the residential home. **The Domestic Violence and Matrimonial Proceedings Act, 1976**, also protects women and children from violence at home. The police are authorised to arrest without a warrant if they have cause to believe that a restraining order has been violated, even if there has been no further violence. There is increasing evidence that child abuse and domestic violence are closely linked, child abuse and domestic violence quite often occur in the same family.

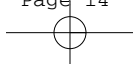
In *R vs. Bubb, R vs Hook* (1850) 14 JP 562, the court held that when parents are jointly charged but only one of them has committed the act of negligence, the other parent is equally guilty if he had seen what was going on.

5. CHILD SEXUAL ABUSE WITHIN CHILDCARE INSTITUTIONS

The Beijing Rules state that, 'the placement of a juvenile in an institution shall always be a disposition of last resort and for the minimum necessary period.'

The physical needs of a child, i.e., food, shelter and clothing may be met in an institution, but a child's psychological needs of love and stable individual relationships are not satisfied. Closed institutions that deny children and young people their liberty are viewed by them as a mode of punishment, and not as a means of protection. Charles Dickens in his novel *Oliver Twist* dealt with damage done to children through institutions. Non-institutional care and sponsorship programmes should be adopted by the state to ensure the healthy development of children. International law has de-prioritised institutionalisation because of its many adverse effects; institutionalisation alienates children from society, the focus should on reintegration and making them believe that they are valued members of society.

The term 'institution' indicates care provided within a home that is not



owned by the individual and where the locus of control lies beyond the individual living in that environment; also, the individual lives with others and there is often likely to be little or no choice as to who these other individuals are.

The different types of institutional abuse are:

1. abuse between individuals within the residential setting,
2. abuse arising due to the regime of the institution, and
3. abuse arising at a system level involving the broader social structure.

The Bombay High Court in *Krist Pereira vs. State of Maharashtra* has observed that,

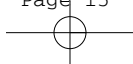
There is no administrative machinery to deal with cases of physical assaults and sexual abuse suffered by the inmates of these Homes. There are complaints of physical beating of the children by the care-takers, and sometime by older boys. It has been reported that in some Homes complaints have been received in respect of sexual abuse but there are no guidelines laid down to deal with such cases, and consequently, these cases remain unattended or no further action is taken by the authorities. Child abuse within institutions must be immediately investigated. The severity of the abuse is irrelevant as it is the duty of the institution to safeguard and protect the child's welfare at all times. It does not matter whether the abuse occurred accidentally or that mitigating circumstances were present.

Under Section 376 of the Indian Penal Code, rape committed by the management or staff of a children's institution on any inmate of the institution by taking advantage of his official position is more severely punishable.

'Section 376 (2) Whoever, -

- (a)
- (b)
- (c) being on the management or on the staff of a jail, remand home or other place of custody established by or under any law for the time being in force or of a woman's or children's institution takes advantage of his official position and commits rape on any inmate of such jail, remand home, place or institution; or
- (d)
- (e)
- (f)
- (g)

shall be punished with rigorous imprisonment for a term which shall not be less than ten years but which may be for life and shall also be liable to fine; Provided that the court may, for adequate and special reasons to be mentioned in



the judgment, impose a sentence of imprisonment of either description for a term of less than ten years.

Explanation 1.

Explanation 2. — "Women's or children's institution" means an institution, whether called an orphanage or a home for neglected women or children or a widows' home or by any other name, which is established and maintained for the reception and care of women or children.

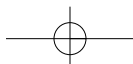
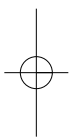
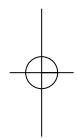
Explanation 3

Presumption under Section 114-A of the Indian Evidence Act 1872 will be attracted in case of rape committed by the management or staff of a woman's or children's institution upon a girl child who has attained the age of 16 years. Under this section, the Court is to presume that the victim did not consent to sexual intercourse if, in her evidence before the Court, she states that she did not so consent.

Recently, instances of child sexual abuse within the four walls of child-care institutions have come to light. Under law, the institution is directly liable for the commission of the offence and is also liable for damages. Those responsible for managing the childcare facility are also liable. In most cases, the management attempts to conceal the abuse and instead of punishing the abuser, transfers the victim child to another institution. The cover-up usually takes place as the members of the competent authority before whom the case is brought are also on managing committees of child care institutions and wish to protect the reputation of the institution.

Child abuse within childcare institutions does not often come to light, as the incarcerated children have no contact with the outside world. This was amply illustrated in the Jericho Hill School case. Jericho Hill School was a residential school in British Columbia for children who were hearing impaired. There prevailed in this school a 'culture of sexual abuse', which happened almost on a daily basis over a period of 30 years before it was exposed. There is no transparency and openness in the functioning of the institutions and children are at the mercy of the management and the staff. The Maharashtra Juvenile Justice Rules permits the superintendent of an institution to peruse any letter written by a child, and destroy the letter if the Superintendent feels fit to do so. This provision works to the detriment of the child as any complaint made by the child against the institution to a relative or friend will never reach such a person, and the child will be further victimised by the superintendent for having attempted to complain.

Children in childcare institutions are sometimes sexually abused by other children in the institution. It is the responsibility of the institution to take steps to ensure that this does not happen. It is the right of an institutionalised child to know if a child has abused others in order to keep himself/herself safe. Children known to have abused other children should never be placed



in an institution where there are no facilities to manage such behaviour.

To prevent the abuse of children within institutions, the institution should be open to outsiders. The Juvenile Justice Act therefore has a provision for institutions to be visited by non-officials. Visitors are to be appointed by the state government in respect of each child-care institution established under the Juvenile Justice Act. These visitors are to regularly visit the institution and submit a report to the chief inspector of the district. These visitors should be easily accessible to the children, and should bring to light the ill-treatment and deficiencies, if any, prevailing in the institution. The chief inspector on receiving complaints about a particular institution from a visitor or any other source must investigate such a complaint, and order the withdrawal of the certificate or recognition granted to such an institution. It is imperative that the law provide for the punishment of a visitor or chief inspector who deliberately does not take appropriate action to disclose an improper act committed by the management or staff of the institution.

There are statutory provisions under which the state government is to appoint advocates who are authorised to visit child-care institutions at regular intervals and meet with children. The state government either does not nominate these advocates or nominates advocates who are not genuinely interested to protect the rights of the child. The Maharashtra State (Visits to Jails and Homes for Children) Project Rules 1993 provides for the appointment of legal practitioners to visit childcare institutions and verify conditions in which children are kept and whether facilities for education or vocational training exist, whether any legal assistance has been provided to them, etc.

NON-INSTITUTIONAL CARE

The prevailing system of institutionalisation instead of safeguarding and protecting the child is adversely affecting the healthy development of children. It is essential to evolve alternative protective care systems, which enable a child to grow in a family environment. Further, children brought up in institutions are discharged on attaining a particular age and, as are not equipped with any skills, they are unable to fend for themselves.

Sponsorship programmes help to keep the child with the family. In India, due to poverty, many children are admitted to institutions with the hope that the child will receive a good education. The state should provide financial aid to such families so that the child is not deprived of a healthy development due to poverty. A system can be set-up by which misuse of the money so deployed can be checked and controlled.

Foster-care provides a haven to those children who are not safe in their own homes. Children may be reunited with their family, once the problems are resolved. If reuniting is not possible, children will continue to remain in fostercare till an adoptive family is found for permanent placement of the child in a family environment. Foster care is a temporary solution and not an

appropriate place for growing children.

In the U.S.A., the Foster Care Independence Act 1999 has been enacted for providing services to children who are removed from the purview of foster care due to age. On reaching 18 years, children in foster care lose the emotional, social and financial support that families provide. Many of these youth are not prepared to face life on their own – this legislation empowers youth leaving foster care with educational opportunities, access to health care, housing assistance, counselling and other services. This law covers youth upto 21 years.

Adoption is an option that is preferable to institutionalisation and foster care, therefore steps should be taken to ensure that adoption opportunities are increased. Every child deserves a safe, permanent family. The state must take constructive steps to remove barriers to adoption. In the U.S.A., tax incentives are given to families who adopt children. The Family and Medical Leave Act permits parents to take leave to be with a newly adopted child without the fear of losing their jobs.

In India there is no uniform law with regards to adoption. The Hindu Adoption and Maintenance Act 1956 deals with adoption among Hindus under this Act; only the father, mother or guardian of the child can place the child for adoption. Any Hindu male can adopt a child if he is of sound mind, and not a minor. A married Hindu male can adopt only with the consent of his wife. An unmarried Hindu female can adopt, but a married female can only be a consenting party to the adoption. At the time of adoption, the adoptive parent must not have a biological or adopted child of the same sex. The age difference between the adoptive parent and the adopted child must be at least 21 years of age.

Attempts to pass an Adoption of Children Bill has been made of different occasions in the past but to no avail. This Bill advocates a uniform law on adoption applicable to all Indians. Currently only Hindus can adopt, and hence members professing other religions who wanting to adopt a child can only take a child in guardianship under the Guardian and Wards Act, 1890.

INVESTIGATION REPORT: SEXUAL ASSAULT OF A DEAF-MUTE JUVENILE IN THE OBSERVATION HOME UMERKHADI (OHU) BY FORUMS AGAINST CHILD SEXUAL EXPLOITATION (FACSE)

The survivor is a 15-year-old neglected juvenile girl housed in OHU since two years and referred to as Billa #31. The offender is Shivaji Laxman Nanavare, a cook employed at the OHU. The nature of incident is sexual assault.

21st September 1997

The offender on the pretext of offering the survivor fruit, pushed her onto the kitchen floor and climbed on top of her. Three young girls witnessed the offender

on top of the survivor and reported the incident to the care-taker. The care-taker reported the incident to the matron, who in turn reported the same to the Deputy Superintendent.

22nd September 1997

The Superintendent of the OHU is informed of the incident. Medical examination of the survivor is carried out by the doctor on duty at the OHU. The findings of the medical examination, 'No abnormalities detected on systematic examination. The gynecological examination showed an old tear of the hymen, no evidence of injuries, abrasions or tears of the genitalia. Examination of the skin similarly revealed there was no evidence of injuries on the body of the girl.' The medical examination of the offender was not done nor were his clothes kept for forensic evidence.

24th September 1997

The offender is suspended from duty.

26th September 1997

The Acting Chairperson of the OHU interviews the survivor and the witnesses. The statements given by the witnesses reflect that the incident did occur.

1st October 1997

The Juvenile Welfare Board is officially informed by the Superintendent in writing of the incident. The Juvenile Welfare Board orders an enquiry into the incident and opines that the filing of a police complaint would be appropriate.

9th October 1997

The District Social Welfare Officer, Department of Child Welfare, receives an anonymous message in respect of the incident. He visits the OHU and speaks to the survivor.

10th October 1997

The Acting Chairperson of OHU grants permission for filing of police complaint. The police interrogate the survivor with the assistance of interpreters, and also interrogate the witnesses; no female constable is present during interrogation. The survivor expresses that twice earlier she was assaulted by the offender at OHU. The First Information Report is lodged and the offender is charged under Sections 354 and 376 of the Indian Penal Code which deals with outraging a woman's modesty and rape, respectively. At 11.00 p.m., the police take the survivor and the witnesses from the OHU in a police van.

11th October 1997

The police return the girls to the OHU and the offender is ultimately arrested.

The Juvenile Welfare Board has justified the 10-day delay in reporting this case to the police by stating that they had 'many other serious and urgent cases to deal with during the week after the incident took place.' It is essential to note that the Juvenile Welfare Board functions from the premises of the OHU.

The report reflects the following deficiencies in the handling of the matter by those concerned with the protection of the survivor;

1. The survivor who was deaf and mute had been in the OHU since two years but had not been taught communication or language skills.
2. The medical examination conducted by the in-house doctor was incomplete; although the doctor was investigating sexual assault, no attempt was made to collect any forensic evidence other than the survivor's clothes.
3. No attempt was made to help the survivor deal with the physical and emotional trauma of the sexual assault, which had been inflicted upon her not once but thrice. The child survivor did not receive care through qualified clinical psychologist.
4. The offender is kept on the same premises for 20 days after the knowledge of the offence.
5. OHU failed to provide the survivor with legal aid.

REPORT OF THE LAW COMMISSION OF CANADA ON PHYSICAL AND SEXUAL ABUSE WITHIN CHILD-CARE INSTITUTIONS

In 1997, the Minister of Justice of Canada asked the Law Commission of Canada to examine and report upon the physical and sexual abuse of children in childcare institutions. The report submitted indicated that as a rule, the types of institutions where abuse took place can be described as 'total institutions'. 'Total institutions' are institutions where every facet of children's lives are determined by those in charge, and contact with their families, their communities and the outside world is very limited. The children have no opportunity to voice their complaints about the treatment received. It was noticed that there was a failure by those in authority to effectively deal with complaints of abuse, even when the identity and activities of the perpetrators were well known. Official reaction demonstrated a great concern for protection of the institution rather than the well being of the children. Children who lived in such institutions experienced some measure of disconnection, powerlessness and degradation.

It is imperative that a comprehensive and effective system of redressal

be adopted, which meets the needs of the victim, uncovers the wrong, addresses the issue of accountability, and prevents further abuse. The goal is to satisfy the victim's need for retribution in respect of the harm done to him/her. The victim or the family should be made aware of all the redressal options available to them, along with their respective risks and benefits. The victim should play a participatory role in the retribution process. Once guilt has been established, the victim should be involved in determining the punishment.

Children are institutionalised with the consent of their families or guardians or by Courts for the supposed welfare of the child, but without any inputs from the child. The child has not participated in this decision making and perceives it as a punishment. The state should instead provide resources to support families so that children are able to live at home in security. Resources should also be utilised for the selection, training, supervising and monitoring of foster families.

REVIEW OF PUBLIC RESIDENTIAL CHILDCARE BY SIR WILLIAM UTTINGS

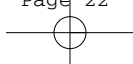
A review of public residential child-care in England, Wales and Scotland was done by Sir William Uttings and published in 1991. This review concluded that there was a decline in the standards of public residential childcare. It is recognised that investigations into allegations of abuse within foster care or residential settings differ significantly from investigations into allegations against parents or others in the child's own home. The review also looks into the reasons for failure to check child abuse within institutions. One of the main reasons is that social workers find themselves examining the actions of people regarded as co-workers or professional colleagues, and this may wittingly or unwittingly obstruct the investigation. The management of the institution where the abuse has taken place is also almost always reluctant to expose its failures or weaknesses and is unable to acknowledge the possibility of harmful misconduct by its employees.

6. MEASURES FOR CHECKING AND CONTROLLING ABUSE

The following measures should be incorporated under the law to check and control instances of child abuse within child-care institutions:

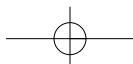
- 1 Licensing of child care facilities should be mandatory as it will result in a close monitoring by the licensing agency. The Women's and Children's Institution (Licensing) Act, 1956, was enacted to protect women and children from exploitation and the inhuman conditions that prevail in Indian institutions. No institution can be established without prior permission from the licensing authority established under

- this Act. The licence so granted can be revoked if the licensing authority is not satisfied with the management or supervision of the institution.
2. Children should have greater control over their lives. Children, parents/guardian and staff should be involved in the governance of the institution.
 3. It is necessary to screen persons providing services to children in child-care facilities. There should be a mandatory law that provides for screening of newly hired and current staff, both employed staff and volunteers. The Norwegian law makes it obligatory upon nursery school personnel to submit a police certificate of good conduct at the time of appointment.
 4. An appropriate staff-to-child ratio would enable the institution to do the good work of which they are capable. Staff vacancies should be filled. Outside consultants should be appointed for staff supervision.
 5. Open institutions should be encouraged rather than close or total institutions. Institutions should utilise community schools, vocational training centres, medical dispensaries, etc. for providing child-related services. Children should be taken for recreation to suitable spots outside the institution.
 6. Children in child-care institutions should be informed of their rights. The management and staff of the institution should receive child rights training. The staff should be made aware of children's problems and their behaviour pattern. The training should be conducted by a recognised training institution. Professionals should periodically visit the institution and impart appropriate training to the children and the staff.
 7. Children in childcare institutions should have easy access to an independent person or Ombudsman, before whom they can voice their complaints about treatment within the institution. Suitably screened outsiders should be appointed to provide leisure and creative activity; children could access them with their complaints.
 8. Regular inspections involving interviews with the children and parents/guardian will monitor the care provided in the institution and will also act as a disincentive to sex offenders.
 9. Visitors should be appointed to regularly visit the institution and conduct surprise checks. Children should have easy access to such per-



sons, as children may prefer to report any inappropriate incident to such independent persons.

10. Citizen groups should conduct social audits of childcare institutions in their area. This will improve the standard of care in institution. Citizen groups should, with the assistance of the media, highlight cases of child sexual abuse, concentrating on the institution rather than the sexual offender.
11. In case of child sexual abuse, the institution must launch a public inquiry or constitute a truth and reconciliation commission. Such action will reflect the bona fides of the institution.



III. CHILD SEXUAL EXPLOITATION

Child sexual exploitation involves power relations and social structures and is not the same as child sexual abuse. It adversely affects the child's mental and physical health and impairs development as well as exposing children to sexually transmitted diseases, including HIV/AIDS.

Attempts are made to excuse child sexual exploitation on the ground of extreme poverty, as well as other forms of social and economic realities. No economic reason can be an excuse when the lives of children are at stake, the state must intervene to ensure that children are not forced into exploitative situations because of poverty. Many children are forced to work on streets or in domestic services to supplement the family income; these children are vulnerable to sexual exploitation. Child sexual exploitation must be recognised for what it is, viz. a crime committed by depraved and irresponsible adult sexual behaviour, and the perpetrators of this crime should not be excused on the ground of psychological deficiency or abnormality.

Sexual exploiters include not only the 'users' but also the 'suppliers' viz., pimps, brothel owners, parents, etc., and the 'protectors' viz., government officials, local politicians, police, etc. It is difficult to abolish child sexual exploitation as different lobbies profit through the business of commercial sexual exploitation, e.g., brothel owners, traffickers, hoteliers, taxi companies, corrupt officials, etc.

Child sexual exploitation was previously under control as traditional cultures emphasised community responsibility for children; a child belonged to a community and not to an individual. There has been a gradual change in this perception; today a child is treated as a marketable commodity. Mr. Ran O'Grady, of ECPAT (End Child Prostitution in Asian Tourism) has in his keynote address at the World Congress Against Commercial Sexual Exploitation of Children, identified globalisation as one of the reasons for increase in child sexual exploitation.

'Children have become casualties on the march to a global society. Under the pressure of commercialism, children have changed from being subjects and are being made into objects. When global values are determined by television and commer-

cial market forces, children and young women end up becoming commodities to be bought and sold at whim. This must change. Children cannot be purchased like items at a supermarket. Children are not goods to be smuggled across borders to meet the demands for child sex from foreigners. Children have rights which must be respected and the UN Convention on the Rights of the Child, which almost all governments have signed, makes this clear. The world community must ensure that children everywhere enjoy their fundamental rights, free and secure from all forms of commercial sexual exploitation.'

1. CHILD PROSTITUTION

Prostitution is commonly defined as an activity where sexual acts are exchanged for payment. The payment need not be a monetary transaction but could be in kind, i.e., a place to stay, food to eat.

Child prostitution is a form of child sexual exploitation. The number of child prostitutes has been gradually increasing, and the age of child prostitutes has been decreasing. Poverty and ignorance are the major causes of this universal phenomenon. Creative ways of making families less vulnerable to being drawn into the sex trade must be explored. This could include income-generative programmes, education policies, or some other innovative means. The low esteem of female children is also a contributing factor to this phenomenon. The commercial exploitation of children for prostitution is a human rights violation and is an infringement of international human rights standards. A reluctant child who refuses to sell himself/ herself is the worst sufferer; he/she is gagged, beaten, terrorised and raped into submission.

The ongoing debate on prohibition of prostitution versus regulation of prostitution has no bearing on child prostitution – sexual exploitation of children must be recognised internationally as a contemporary form of slavery meriting a universal prohibitionist response.

Two of the main modes by which children are brought into prostitution are (i) abduction and trafficking, and (ii) children of prostitutes through their mothers pimps or brothel keepers. In urban areas, criminal gangs are increasingly on the hunt to lure young girls into prostitution, especially as they are advertised as posing a lesser AIDS risk to clients.

The Juvenile Justice Act assumes children of prostitutes are 'neglected juveniles' and the state is empowered to remove them from the environment and put them into juvenile homes. Mothers are reluctant to be separated from their children. Except in rare cases, the consent of the mother should be taken before separation; persuasive methods should be used whereby the mother is convinced that the child will be properly cared for and reintegrated into mainstream society. Prostitute mothers do have aspirations for their children and will opt for their children to pursue a viable alternative,

if convinced. Unfortunately, existing juvenile homes do not function as mid-way homes; children languish there for years and are ultimately flushed out into society without having acquired any skill. Juvenile homes should be part of a process, which prepares children for admission to an educational institution, and should offer trauma counselling, accelerated literacy and behaviour modification to enable the child to adjust into its subsequent setting.

A study on prostitution was initiated by the Government of India through the Central Social Welfare Board in 1991 in six metropolitan cities. The study showed that 30% of the prostitutes were below 20 years of age and that at the time of entry into prostitution, (i) 14.9% were below 15 years, (ii) 24.5% were between 16 and 18 years, (iii) 27.7% were between 19 and 21 years and (iv) 32.9% were 22 years and above. The main cause (44%) for entering prostitution was 'economic distress'.

The failure of the law to protect victims and punish pimps, procurers, brothel keepers and clients has resulted in an increase in the number of children involved in commercial sexual activity. Stricter enforcement of laws, stringent punishment to be awarded to pimps brothel keepers and mafia dons, trafficking in children to be made a non-bailable offence, sensitization and motivation of the police force, creation of a nodals agency with statutory powers and existing agencies to work in coordination, are the measures emphasised by the National Human Rights Commission in order to check child prostitution in the country.

The involvement of the community in exposing and ostracising persons indulging in or aiding and abetting child sex is very important as it will lead to the shifting of the stigma from the accuser to the accused.

A Central Advisory Committee has been constituted in pursuance of a Supreme Court order. This committee has stressed upon the need for a comprehensive rehabilitation package, which includes adequate housing facilities, free access to health and legal services, providing skill and vocational training to assure alternative vocations and income.

LAWS WITH REGARD TO CHILD PROSTITUTION

The Immoral Traffic (Prevention) Act, 1956, deals with prostitution and trafficking in India. This Act deals with trafficking for the purpose of engaging in sexual activity and not for any other reason, such as child labour. The salient features of this Act are set out later in the book.

The criminal statute in Sri Lanka considers a boy involved in prostitution as an offender rather than a victim of sexual exploitation.

The Child Law of 1993, the Suppression of Prostitution Act of 1949, and the Myanmar Penal Code all criminalise the prostitution, trafficking and sale of women, and pornography in any form in Myanmar.

The Children Act, 1992, of Nepal protects children against sexual exploitation and abuse. It prohibits engaging of children in immoral activities

and pornographic acts, and the publishing of material that is damaging to the child's character. Trafficking in persons within the country and outside is illegal.

2. CHILD TRAFFICKING

'Trafficking is the illicit and clandestine movements of persons across national borders, largely from developing countries, and some countries with economies in transition, with the end-goal of forcing women and girls into sexually or economically oppressive and exploitative situations for profit of recruiters, traffickers, and crime syndicates and other activities (e.g. forced domestic labour, false marriages, clandestine employment, and false adoption).'

United Nations General Assembly, 1994.

Trafficking is the recruitment and transportation of a person, within and across national borders, by means of deceit, violence or threat of violence, abuse of authority or dominant position for work or services, which may result in forced labour or slavery-like practices. Victims of trafficking are exploited and tortured for financial gain of their exploiters.

Without appropriate social measures, legislation, determined political will, strong law enforcement and awareness in society, it is unlikely that child prostitution and trafficking can be eradicated, especially from countries where the gap between the rich and the poor is wide, such as India and Thailand. Economic conditions have considerable influence over the destiny of children, especially for children in developing countries. The trafficking in and sale of children, child prostitution and child pornography constitute modern forms of slavery, which are incompatible with human rights and human dignity. Trafficking in persons is a perpetrated by organised and sophisticated criminal enterprises with assistance from officials seated in the countries of origin, transit and destination. Trafficking in persons is a trans-national crime and to deter international trafficking, it is necessary to send the message across that governments perceive trafficking as a serious offence and will stringently punish traffickers whilst protecting victims.

It is difficult to know the magnitude of the problem because of the secret nature of trafficking. It is estimated that there are about 1 million child prostitutes in Asia, 3 lakh in India, 2 lakh in Thailand, 1 lakh in the Philippines and 40,000 in Vietnam. International action is necessary to combat the sexual exploitation of children. The issue of child sexual exploitation cannot be solved by a single nation; action is required on the international platform along with the assistance of international agencies.

INTERPOL (International Criminal Police Organisation) plays an important role in checking trafficking of children. The main work of INTERPOL is law enforcement, prevention and training. It has established a Standing Working Party on Offences against Minors, which has identified areas of co-

operation, such as the appointment of contact agents in member countries to counter child exploitation, increased sharing of information via contact agents, victim assistance, preventive measures, etc.

LAWS WITH REGARDS TO TRAFFICKING

The Mann Act (1910) was enacted in the U.S.A. to prevent the transport of women across domestic state lines for sexual purposes. In 1986, this Act was amended to criminalise the transport of any person under the age of 18 years between states or abroad with the intent to engage the minor in sexual activity. This Act is the primary federal law that makes child prostitution a federal offence.

The Trafficking Victims Protection Act of 2000 has been introduced in the Senate to combat trafficking in persons, ensure just and effective punishment of traffickers and protect victims of trafficking who are predominantly women and children. An inter-agency task force is to be established to monitor and combat trafficking. Annual Country Reports are to be prepared; these reports are to include, among other information, a list of foreign countries that are countries of origin, transit or destination for a significant number of victims, description of the nature and extent of trafficking in each such country, the efforts taken by the government to combat trafficking. Interim reports are also to be prepared indicating the progress made by countries since the submission of the last Annual Country Report. The need for this enactment is the rapid expansion of the sex industry and the corresponding exploitation of women and children for prostitution, pornography, sex tourism and other commercial sexual services.

Sex tourism and labour migration are two major reasons for trafficking in Bangladesh. The Penal Code of Bangladesh contains provisions with regards to trafficking of children. Abduction, buying and selling of minors for the purpose of prostitution and compelling a person into unlawful compulsory labour are offences under the Code. The Woman and Child Repression (Special Provision) Act 1995 provides for deterrence on children and women repression, rape, kidnapping, trafficking and other offences through a maximum punishment of death penalty. A few of the relevant provisions of this law are:

1. anyone selling, renting or otherwise transporting a woman to a brothel, must prove that the woman was not taken there for immoral purpose; the presumption is that the woman was taken to the brothel for an immoral purpose;
2. anyone importing or exporting or buying or selling or renting or engaging in any other form of transportation of women, intending to transfer her to another for immoral purpose shall be punishable with 14 years imprisonment and a fine;

3. in the event of a brothel owner buying, selling, renting or otherwise keeping a woman, it shall be presumed that the woman is being kept for immoral purposes.

In the Philippines, police stations have a Child and Youth Relations section, which deals with cases of child abuse and other violations of child rights.

Under the Thai Penal Code procuring, seducing or luring a person (man or woman), with or without consent, for indecent acts in order to gratify the sexual desire of another person, is punishable by imprisonment for a term, which may extend up to 20 years. If the victim is a child (girl or boy) of less than 18 years of age, the punishment is more severe, depending upon the age of the victim. The punishment for a person who aids or abets such an offence is the same as that of the procurer. Trafficking or slavery, for labour exploitation, or for any other reason, is punishable with imprisonment for a term that may extend upto seven years. Under the Penal Code, rape or molestation of a child under 15 years of age, even with consent, is statutory rape or statutory molestation and the offender shall be separately punished for each act so committed. The offence of child sexual abuse is made a universal crime, i.e., the Thai court has jurisdiction over such offences committed by its citizens, irrespective of where the offence is committed, and the court can convict offenders if there is sufficient evidence.

The Prostitution Prevention and Suppression Act (1996) emphasises that prostitutes are not criminals but victims of poverty, social problems and organised crime. The Act concentrates on punishing procurers, brothel owners, mama sans, pimps, customers and parents who sell the children into prostitution. A procurer or trafficker, even if he or she has the consent of the victim, is liable for imprisonment that may extend upto 20 years. A brothel owner, pimp or mama sans is liable for imprisonment from 3 to 20 years. A parent who sells a child into prostitution is liable for imprisonment between 4 and 20 years, and the parent's guardianship may be revoked by the court. Under this law, prostitution is not illegal per se, but certain activities are prohibited, e.g., prostitutes are prohibited from causing a nuisance to the public by overtly soliciting people. A customer who buys sex from children under 18 years of age can be punished with imprisonment for a period between one and three years. If the child is under 15 years of age, the punishment is imprisonment between one and six years. The previous law targeted prostitutes as criminals who were to be fined and detained in close rehabilitation centres for two years, while procurers and brothel owners got away with light sentences. Instead of suppressing prostitution, it encouraged the spreading prostitution and converting it into a lucrative and sophisticated industry.

The Measures in the Prevention and Suppression of Trafficking in Women and Children Act 1997 replaced the Act of 1982. This act supplements the other Thai laws on trafficking. It protects children of both the sexes, and all persons involved in the planning and preparation of a trafficking

offence are accused of conspiracy to commit the offence. Officials are authorised to search premises and vehicles in order to facilitate the prevention and suppression of trafficking, and to assist victims. A suspected victim may be detained for questioning for a period extending up to 10 days; the purpose of this detention is to interrupt the trafficking process. The court is empowered to take the testimony of a victim immediately on being rescued from the offender.

A non-governmental organisation, Human Rights Vigilance Cambodia, conducted a survey, which reflected that 35% of the prostitutes were under 18 years of age, 86% of whom were sold, tricked or abducted into the sex trade. Most of the prostitutes are sold or deceived by someone offering them a job or inviting them to visit the city or paying a debt for medical treatment of members in the family.

Article 46 of the Constitution of Cambodia states that, 'the commerce of human beings, their exploitation by prostitution and obscenity, which affects the reputation of women shall be prohibited.' Under the Criminal Code of Cambodia, 'any person who procures, entices or leads away for the purpose of prostitution, or sexually exploits a minor, even with the consent of the minor, shall be liable to a term of imprisonment of two to six years.' The Law on the Suppression of the Kidnapping and Trafficking and Sales of Human Persons punishes with imprisonment for a period between 5 and 20 years any person who lures a human being in order to kidnap for the purpose of trafficking, sale or prostitution. This Act also punishes pimps, brothel owners and persons who share the benefits obtained from prostitution.

In Fiji, offenders convicted for offences against children face up to life imprisonment (the minimum sentence is 14 years) and a fine of up to \$34,000.

3. CHILD SEX TOURISM

Tourism has many economic benefits, but it is essential to encourage the right type of tourism. A foreign tourist is protected by anonymity in a foreign land and feels free to gratify all socially unacceptable desires and fantasies.

The World Tourism Organisation has defined sex tourism as 'trips organised with the primary purpose of effecting a commercial sexual relationship by the tourist with the residents at the destination.' Sex tourism is achieving global dimensions through information offered openly on the Internet. Concrete efforts are called for to stop organised sex tourism at the point of origin and destination. A number of travel agent associations from different countries, such as Australia, France, New Zealand, and Sweden have committed themselves in the fight against child sex tourism.

LAWS WITH REGARDS TO SEX TOURISM

The Sexual Offences (Conspiracy & Incitement) Act of United Kingdom received the Royal sanction in 1996. It penalises tour operators who organise travel abroad for child molesters and groups of child abused who plan trips together for the purpose of sexually abusing children. Under this Act, advertisements for such trips are also illegal.

U.S. law viz., the Violent Crime Control and Law Enforcement Act 1994 makes it a crime to travel to any foreign country with the intention of engaging in criminal sexual activity, including rape, molestation of children, prostitution and production of child pornography. The U.S. Child Sexual Abuse and Prevention Act 1994 prohibits U.S. residents from travelling overseas for the purpose of engaging in sex with a minor.

The Child Sex Tourism Act 1994 of Australia targets Australian paedophiles and organisers of overseas tours for the purpose of engaging in sexual activity with minors.

4. CHILD PORNOGRAPHY

Child pornography deals with the sexually explicit reproduction of a child's image. The Council of Europe defines child pornography as audio-visual material that uses children in a sexual context. INTERPOL defines it as the visual depiction of sexual exploitation of a child, focusing on the child's sexual behaviour or genitals. There is an international demand for the enactment of legislation, which bans the production, exhibition, distribution and possession of child pornography. It is important to frame specific legislation, which bans child pornography.

The following has been recommended by the U.S. Congress to comprehensively combat child pornography through legislation:

1. Mandatory reporting for child pornography should be incorporated into legislation.
2. Child pornography should not be protected by the freedom of speech laws.
3. The law should cover aspects for the financial restitution and counseling of children used in child pornography.
4. Enactment of forfeiture laws to seize the property of child pornographers.
5. Model criminal legislation for child pornography should be framed to assist countries that would like to introduce or improve such legislation.
6. Need to consider the manner in which pseudo-child pornography, e.g., computerised variation of child pornography, can be combated.
7. Legislation prohibiting the possession of child pornography should be enacted.
8. Amendment of criminal codes to facilitate international co-operation, as paedophilia is an international phenomenon.

9. Regularising and synchronising laws dealing with child pornography.

LAWS WITH REGARDS TO PORNOGRAPHY

In 1982, the US Supreme Court held that child pornography is directly related to abuse of children. Subsequently, the sale and distribution of child pornography has been banned.

Under the Australian Penal Code, it is prohibited to produce, deal with, purchase, or possess pornographic representations showing children under 14 years. The production and/or sale of such representation is punishable with imprisonment of up to one year, and its purchase and possession with imprisonment of up to six months.

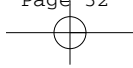
Section 292 of the Indian Penal Code penalises the sale, distribution, public exhibition and possession of an obscene book, a pamphlet, a paper, a drawing, a painting, a representation, a figure, or any other obscene object.

Section 293 punishes the person who does, or attempts to, sell, distribute, exhibit or circulate obscene objects to a person under 20 years of age. Under both of these sections, the punishment is more severe for the second and subsequent convictions. The performance of any obscene act in any public place or singing or uttering an obscene song or words, in or near any public place, is an offence under Section 294 of the Indian Penal Code. The Indian Penal Code does not specifically deal with pornographic material depicting children.

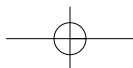
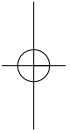
The Young Persons (Harmful Publications) Act 1956 was enacted in India to prohibit dissemination of certain publications harmful to young persons and thereby prevent the glorification of crime, violence and vice. A 'young person' means a person under 20 years of age. The term 'harmful publication' would include pornographic material, which tend to corrupt young persons.

5. NON-COMMERCIAL FORMS OF CHILD SEXUAL EXPLOITATION

Though early marriages may not be linked to commercial exploitation, they negate the rights of the girl child. In India, the Child Marriage Restraint Act 1929 prohibits child marriage. A child marriage, once solemnised is not invalid. The court has the power to restrain by an injunction a propose child marriage from being solemnised. Any person who disobeys such injunction order shall be punished with an imprisonment or a fine. Under this Act, a 'child marriage' is a marriage in which either of the contracting parties is a child, and a 'child' means a male who has not completed 21 years of age, or a female who has not completed 18 years of age. The parent, guardian, person solemnising the marriage, and a male above 21 years of age are punishable under this Act for permitting or conducting child marriage.



Traditional healers, or faith healers, claim that sex between a young girl and an adult male will improve the latter's business prospects or bring good luck. Sex with a young virgin is claimed to be a cure for HIV and other sexually transmitted diseases. To prevent these sexually exploitative traditional practices, the Zimbabwe Traditional Healers Association (ZINATHA) has outlined a code of practice for traditional healers. This code provides that traditional healers are responsible for the protection of children against abuse; a healer should not treat a child alone, nor should they prescribe sex with a minor as a form of treatment.



IV. EXTRA-TERRITORIAL JURISDICTION

The perpetrator of an offence in cases of sex tourism and trafficking of children for commercial sexual exploitation get away scot-free due to jurisdictional laws, as the victims and witnesses reside in a country different from that of the accused. Extra-territorial jurisdiction is necessary to punish such offenders.

1. SEXUAL ABUSE OR EXPLOITATION BY CITIZENS IN A FOREIGN LAND

There is an urgent need for legislation, which has extra-territorial jurisdiction to effectively tackle the problem of sex tourism and trafficking of children for commercial sexual exploitation. Child molesters take advantage of the difficulties that arise in cases of trans-boundary criminal prosecution. Jurisdictional lines should not come in the way of apprehending and convicting adults who prey upon children. The objective of this legislation is to apply domestic criminal laws to crimes committed by nationals in other territories.

In Germany, Australia and the USA, citizens who exploit children in other countries are by legislation made legally accountable for their actions within their own country. Belgium, Denmark, France, Japan, Norway, Sri Lanka, Sweden, Taiwan and New Zealand have also passed such laws. This is the concept of **extra-territorial jurisdiction**, i.e., punishment by local courts of their nationals, even if the offence is committed outside its territory. It is more convenient to bring to trial offences having extra-territorial jurisdiction if there is a treaty on mutual legal assistance between the two countries, viz. the country where the offence was committed and the country whose national committed the offence. Mutual Assistance Treaties facilitate and expedite the process; in the absence of such treaties, extra-territorial legislation and diplomatic channels are utilised. Arrangements should be made to extradite child molesters expeditiously even if there is no Mutual Assistance Treaty.

LAWS WITH REGARDS TO EXTRA-TERRITORIAL JURISDICTION

The Crimes (Child Sex Tourism) Amendment Act of 1994 is an Australian law, which prohibits sexual acts overseas with children under the age of 16 years. This Act criminalises sexual intercourse with a person under 16 years of age while outside Australia. Australian courts have adopted the procedure of a video-link evidence whereby the court is able to hear the evidence directly from witnesses who are in an overseas location.

Under the Swedish Penal Code, a Swedish citizen who has committed an offence outside of Sweden is liable under the Swedish law and can be tried by the Swedish court. The act must be an offence in Sweden and in the country where it was committed.

Section 188 of the Criminal Procedure Code refers to crimes committed outside India by Indian citizens. Such crimes are punishable in India the offence is punishable under the Indian law and if a sanction certified has been obtained from the central government.

'188. Offences committed outside India.- When an offence is committed outside India by a citizen of India, whether on the high seas or elsewhere, or by a person, not being such citizen, on any ship or aircraft registered in India, he may be dealt with in respect of such offence as if it had been committed at any place within India at which he may be found:

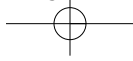
Provided that, notwithstanding anything in any of the preceding sections of this Chapter, no such offence shall be inquired into or tried in India except with previous sanction of the Central Government.'

Section 4 of the Indian Penal Code also deals with extra-territorial offences.

'4. Extension of Code to extra-territorial offences.- The provisions of this Code apply also to any offence committed by-

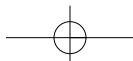
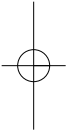
(1) any citizen of India in any place without and beyond India; any person on any ship or aircraft registered in India wherever it may be, Explanation.- In this section the word 'offence' includes every act committed outside India which, if committed in India, would be punishable under this Code.'

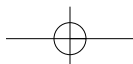
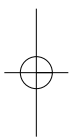
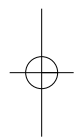
Extradition is the surrender by one state to another of a person who has been accused of having committed a crime which is justiciable in the other state. Extradition is a process between two states. Prima facie commission of an offence is all that is required by the court; the extradition of the offender is to be sought by the concerned states.



ROGATORY LETTERS

Rogatory letters are directions given by a judicial authority in one country to a judicial authority in another country, requesting it to proceed or carry out the instructions contained in the letter. Agreements between states provide for obligatory rather than optional co-operation in respect of rogatory letters.





V. INDIAN LAWS DEALING WITH CHILD SEXUAL ABUSE & EXPLOITATION

The "Crime in India 1997" reflects that, 'of all the victims of rape cases in 1997, children alone accounted 28.8 percent share.' The law, in dealing with child sexual abuse and exploitation, must highlight the nature of the offences, avoid minimisation of abusive acts and treat the abuses as criminal assault.

1. RAPE

In India there is no separate law with regards to sexual assault of children. The general law on rape contained in the Indian Penal Code covers child sexual abuse and assault:

'Section 375

Rape – A man is said to commit 'rape' who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the six following descriptions :-

Firstly. – Against her will.

Secondly. – Without her consent.

Thirdly. – With her consent, when her consent, has been obtained by putting her, or any person in whom she is interested, in fear of death or of hurt.

Fourthly. – With her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

Fifthly. – With her consent, when at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.

Sixthly. – With or without her consent, when she is under sixteen years of age.

Explanation – Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.

Explanation – Sexual intercourse by a man with his own wife, the wife not being under fifteen years of age, is not rape.'

Sexual intercourse by a man with a woman is essential to constitute 'rape'. The word 'man' denotes a male human being of any age, and the word 'female' denotes a female human being of any age. Rape of a boy victim would therefore not fall under the purview of 'rape' as defined under the Indian Penal Code.

The age of consent specified under Section 375 (6) was originally 10 years and has been gradually increased to 16 years. The age limit was increased from 10 years to 12 years by the Indian Criminal Law Amendment Act (X of 1891) for the following reasons;

'The limit at which the age of consent is now fixed (10 years) favours the premature consummation by adult husbands of marriages with children who have not reached the age of puberty, and thus, in the unanimous opinion of medical authorities, both produces grievous suffering and permanent injury to child-wives and promotes the physical deterioration of the community to which they belong.'

The age limit was again raised from 12 years to 14 years by the Inan Penal Code (Amendment) Act (XXIX of 1925) for the following reasons:

'Books of medical jurisprudence establish the fact that the age of puberty in India is attained by a girl upon her reaching the age of fourteen. Even though puberty may be reached at this age, it is obvious that girls are unfit for sexual cohabitation until they are older and more developed in physique and strength. The appalling infant mortality in the country is partially ascribed to early marriages and consummation which follows with immature girls. It is, therefore, not only for the protection of minor girls as also of their progeny that the age of consent should be raised to at least fourteen years.'

This age limit was later raised to sixteen years by the Code of Criminal Procedure (Amendment) Act, 1949 (XLII of 1949).

The punishment for rape is covered under Section 376 of the Indian Penal Code.

'376 Punishment for rape.- (1) Whoever, except in the cases provided for by subsection (2), commits rape shall be punished with imprisonment of either description for a term which shall not be less than seven years but which may be for life

or for a term which may extend to ten years and shall also be liable to a fine unless the woman raped is his own wife and is not under twelve years of age, in which case, he shall be punished with imprisonment of either description for a term which may extend to two years or with a fine or with both:

Provided that the court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment for a term of less than seven years.'

Punishment for rape of a woman under 12 years of age, gang rape, rape by management, staff of a remand home or children's institution or any inmate of the remand home or institution is more severe, meaning the rapist will be punished with rigorous imprisonment for a term, which shall not be less than 10 years, but which may be for life, and they shall also be liable to a fine.

To constitute the offence of rape, it is not necessary that there should be a complete penetration by the male organ with emission of semen and/or rupture of the hymen. To constitute rape, partial penetration is sufficient; the private parts of the accused should have entered the person of the victim, the extent of penetration does not matter.

A man cannot be held guilty of rape of his own wife if she is over 15 years of age. The laws on child sexual abuse are often in conflict with one another; sexual intercourse by a husband with a wife between 15 and 16 years of age does not amount to rape, whereas under section 375 of the Indian Penal Code, 16 years is the statutory rape age.

Consent to sexual intercourse must be freely given; consent given under fear, coercion, fraud, misrepresentation or misconception is no consent. Section 90 of the Indian Penal Code deals with consent known to be given under fear or misconception.

'90. Consent known to be given under fear or misconception. - A consent is not such a consent as is intended by any section of this Code, if the consent is given by a person under fear of injury, or under a misconception of fact, and if the person doing the act knows, or has reason to believe, that the consent was given in consequence of such fear or misconception; or

Consent of insane person. - If the consent is given by a person who, from unsoundness of mind, or intoxication, is unable to understand the nature and consequence of that to which he gives his consent; or

Consent of child. - Unless the contrary appears from the context, if the consent is given by a person who is under twelve years of age.'

Anything done by a person of unsound mind or an intoxicated person is not an offence. Section 84 of the Indian Penal Code is below;

'84. Act of a person of unsound mind. - Nothing is an offence which is done by a person who, at the time of doing it, by reason of unsoundness of mind, is incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law.'

Section 85 of the Indian Penal Code is reproduced below,

'85. Act of a person incapable of judgment by reason of intoxication caused against his will. - Nothing is an offence which is done by a person who at the time of doing it, is, by reason of intoxication, incapable of knowing the nature of the act, or that he is doing what is either wrong, or contrary to law provided that the thing which intoxicated him was administered to him without his knowledge or against his will.'

Voluntary drunkenness is no defence to a crime; a man cannot take advantage of his own wrong doing. Though if a man is made drunk without his knowledge or against his will, he will be excused of having committed the act.

2. STATUTORY RAPE

Statutory rape means rape irrespective of whether the victim had consented or not. It is necessary that the law specifies that sexual intercourse with a child under a defined age or a disabled child is rape, irrespective of consent. The age of statutory rape is based on an objective assessment of what can be considered an age at which a girl is mature enough to express consent to sexual intercourse and marriage. The subject of statutory rape is important in connection with teenage pregnancies and sexual offences against mentally disabled or physically disabled children.

The age of statutory rape in India is 16 years. In case of the victim being a girl of under 16 years, her consent is no defence. Once it is proved that the girl victim is under 16 years of age, it is irrelevant that no injury was detected on her private parts, that she was habituated to sexual intercourse, or that she had invited the accused to have sexual intercourse with her.

The age of statutory rape in Sri Lanka was 12 years, but it has been increased to 16 years by the Sri Lanka Penal Code Amendment Act 1995. Sixteen is the age of statutory rape under the law of Nepal and the Criminal Law Amendment Act of Zimbabwe. Under the Swedish Penal Code, the age of statutory rape is 15 years. Under the British law, the age of statutory rape for a girl is 16 years and that for a boy is 18 years.

3. SEXUAL ABUSE OF A BOY CHILD

Sexual intercourse between a man and a woman is essential to constitute rape. The perpetrator of the offence should necessarily be a man and the victim should be a woman, therefore, sexual abuse of a boy child does not fall under Section 375 of the Indian Penal Code. Section 377 of the Code, which deals with 'unnatural offences' covers sexual abuse of a boy child.

'377 Unnatural offences - Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal shall be punished with imprisonment or life, or with imprisonment for either description for a term which may extend to ten years, and shall also be liable to a fine.

Explanation – Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section.'

Sodomy amounts to 'carnal intercourse against the order of nature' as the natural object of carnal intercourse is supposed to be the possibility of conception. An attempt to thrust the penis into the anus of a male or a female would be punishable under this section. Carnal copulation, as the phrase has been used in the law relating to sodomy, means sexual intercourse, including such intercourse through the mouth.

Oral intercourse is punishable under Section 377. The Gujarat High Court has in *Lohana Vasantlal Devchand vs. The State* (A.I.R. 1968 Guj. 252) stated,

'In the instant case, there was an entry of a male penis in the orifice of the mouth of the victim. There was an enveloping of a visiting member by the visited organ. There was thus reciprocity, intercourse connotes reciprocity. It could, therefore be said without any doubt in my mind that the act in question will amount to an offence under Section 377 of the Indian Penal Code.'

The facts of this case were that a man had put his male organ in the mouth of a boy, and there was seminal discharge which the boy had vomited out.

In the *State of Kerela vs. Kundumkaran Govindan* (1969 Cr. L. J. 818) the High Court has held that, 'the act of committing intercourse between thighs is carnal intercourse against the order of nature. Therefore committing intercourse by inserting the male organ between the things of another is an unnatural offence.' Penetration of the male organ through tightly held thighs amount to penetration constituting an unnatural offence.

Section 377 of the Indian Penal Code is mostly used to harass homosexuals, the gay movement is demanding the repeal or amendment of this section. This is the only provision under the existing law by which sexual

abuse of a boy child is punishable. Dialogue between child rights and gay rights activists is necessary to arrive at a mutually agreeable solution.

4. ATTEMPT TO RAPE

Section 511 of the Indian Penal Code provides punishment for attempting to commit an offence punishable with imprisonment for life or other imprisonment. Whoever attempts to commit an offence punishable with imprisonment of life, or to cause such an offence to be committed, and in such attempt does any act towards the commission of the offence, shall be punishable with imprisonment of any description provided for the offence, for a term that may extend to one-half of the imprisonment for life or one-half of the longest term of imprisonment provided for that offence, or with such fine as is provided for the offence, or with both.

An attempt to ravish a girl is punishable under Section 376 read with 511 when penetration has not taken place.

In *U.S. Vs. Hadley* it was held that,

'There was sufficient evidence of defendant's intent to engage in a sexual act with a minor to support his conviction for attempted aggravated sexual abuse; defendant asked minor to sit on his lap while defendant was driving and tried to get minor to remove his pants, minor felt defendant getting an erection while minor was sitting on defendant's lap, and similar sexual abuse had occurred a month before.'

5. OTHER PROVISIONS OF THE IPC ON CHILD SEXUAL ABUSE/EXPLOITATION

The following provisions of the Indian Penal Code cover the offence of child sexual abuse and/or child sexual exploitation. Unfortunately, these provisions are not applied by the police whilst raiding brothels; hence, brothel keepers, pimps and users go scot-free. The user of a child prostitute is liable for rape under section 376 of the Indian Penal Code, but one never hears of them being so arrested.

Section 343 of the Indian Penal Code deals with **wrongful confinement for three or more day for three or more days.**

'Whoever wrongfully confines any person for three days or more, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.'

Wrongful confinement of a person means to prevent such person from proceeding beyond certain limits.

Section 354 of the Indian Penal Code deals with assault or criminal

force to a woman with intent to outrage her modesty.

'Whoever assaults or uses criminal force to any woman, intending to outrage or knowing it to be likely that he will thereby outrage her modesty, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.'

To constitute an offence under this section, the victim should be a woman. Section 10 of the Indian Penal Code defines the word 'woman' as denoting a female human being of any age. The contention that a six-year-old girl is too young to have modesty has been struck down by the courts in view of the definition of the word 'woman' under the Indian Penal Code.

There must be intention or knowledge that the act will outrage a woman's modesty, but what constitutes an outrage to a woman's modesty is nowhere stated. The Supreme Court has held that when any act done to or in the presence of a woman is clearly suggestive of sex according to the common notions of mankind that act will fall under this section (All 1967 SC 63). The culpable intention of the accused is the crux of the matter, the absence of any reaction from the woman will not alter the nature of the offence. Both man and woman can be held guilty of the offence of assaulting or using criminal force to any woman. The pronoun 'he' used in this section should be read with section 8 of the Indian Penal Code, which states that, 'the pronoun "he" and its derivatives are used of any person whether male or female.'

Section 366 of the Indian Penal Code deals with kidnapping, abducting or inducing a woman to compel her marriage, etc.

'Whoever kidnaps or abducts any woman with intent that she may be compelled, or knowing it to be likely that she will be compelled, to marry any person against her will, or in order that she may be forced or seduced to illicit intercourse, or knowing it to be likely that she will be forced or seduced to illicit intercourse, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine; and whoever, by means of criminal intimidation as defined in this Code or of abuse of authority or any other method of compulsion, induces any woman to go from any place with intent that she may be, or knowing that it is likely that she will be, forced or seduced to illicit intercourse with another person shall also be punishable as aforesaid.'

If the woman is under 16 years of age, her consent or intention is immaterial. The main object of this section is to protect girls under 16 years of age and prevent persons taking improper advantage of their youth and innocence.

Section 366A of the Indian Penal Code deals with **procurement of a minor girl**.

'Whoever, by any means whatsoever, induces any minor girl under the age of eighteen years to go from any place or to do any act with intent that such girl may be, or knowing that it is likely that she will be, forced or seduced to illicit intercourse with another person shall be punishable with imprisonment which may extend to ten years and shall also be liable to fine.'

To constitute an offence under this section, it is necessary to prove that the girl was under 18 years of age, that the girl was induced to go from one place to another or to do a particular act, that the accused induced the girl, and that the intention of the accused was the forcing or seducing of the girl to illicit intercourse with another person.

Section 366B of the Indian Penal Code deals with **importation of girl from a foreign country.**

'Whoever imports into India from any country outside India or from the State of Jammu and Kashmir any girl under the age of twenty-one years with intent that she may be, or knowing it to be likely that she will be, forced or seduced to illicit intercourse with another person, shall be punishable with imprisonment which may extend to ten years and shall also be liable to fine.'

Section 366A and this section were added pursuant to the International Convention for the Suppression of the Traffic in Women and Children.

Section 367 of the Indian Penal Code deals with kidnapping or abducting in order to subject a person to grievous hurt, slavery, etc.

'Whoever kidnaps or abducts any person in order that such person may be subjected, or may be so disposed of as to be put in danger of being subject to grievous hurt, or slavery, or to the unnatural lust of any person, or knowing it to be likely that such person will be so subjected or disposed of, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.'

Kidnappings are of two kinds under the Indian Penal Code, (i) kidnapping from India, i.e. conveying a person beyond the limits of India without consent and (ii) kidnapping from lawful guardianship, i.e., enticing a male under 16 years of age and female under 18 years of age out of the keeping of the lawful guardian. Abduction means inducing of any person to go from any place by the use of force or any deceitful means. The wrongful concealment of a kidnapped or abducted person is also an offence under the Indian Penal Code.

Section 372 of the Indian Penal Code deals with **selling minors for purposes of prostitution.**

'Whoever sells, lets to hire, or otherwise disposes of any person under the age of eighteen years with intent that such person shall at any age be employed or used for the purpose of prostitution or illicit intercourse with any person or for any unlawful and immoral purpose, or knowing it to be likely that such person will at any age be employed or used for any such purpose, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Explanation I. - When a female under the age of eighteen years is sold, let for hire, or otherwise disposed of to a prostitute or to any person who keeps or manages a brothel, the person so disposing of such female shall, until the contrary is proved, be presumed to have disposed of her with the intent that she shall be used for the purpose of prostitution.

Explanation II. - For the purposes of this section "illicit intercourse" means sexual intercourse between persons not united by marriage or by any union or tie which, though not amounting to a marriage is recognised by the personal law or custom of the community to which they belong or, where they belong to different to different communities, of both such communities, as constituting between them a quasi-marital relation.'

The intention of the offender is the use or employment of a person under 18 years of age for the purpose of prostitution or illicit intercourse or for any unlawful or immoral purpose. This section punishes the person who sells such a person and Section 373 punishes the person who buys such a person.

Section 373 of the Indian Penal Code deals with buying minors for the purpose of prostitution, etc.

'Whoever buys, hires or otherwise obtains possession of any person under the age of eighteen years with the intent that such person shall at any age be employed or used for the purpose of prostitution or illicit intercourse with any person or for any unlawful and immoral purpose, or knowing it to be likely that such person will at any age be employed or used for any such purpose, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Explanation I. -Any prostitute or any person keeping or managing a brothel, who buys, hires or otherwise obtains possession of a female under the age of eighteen years shall, until the contrary is proved, be presumed to have obtained possession

of such female with the intent that she shall be used for the purpose of prostitution.

Explanation II. - "Illicit intercourse" has the same meaning as in section 372.'

The term 'possession' denotes control over the person whose possession is obtained; a single act of sexual intercourse does not indicate possession under this section. The purpose of possession is prostitution or illicit intercourse.

6. CHILD WITNESSES

Section 118 of the Indian Evidence Act 1872 deals with 'child witnesses'.

'Section 118. Who may testify. —All persons shall be competent to testify unless the Court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind. Explanation.—A lunatic is not incompetent to testify, unless he is prevented by his lunacy from understanding the questions put to him and giving rational answers to them.'

A child is competent to testify if she/he can understand the questions asked of her/him and can give rational answers to the questions that are asked. A child under 12 years need not give evidence on oath, as the child may not understand the nature of an oath or the consequences of falsehood.

7. THE JUVENILE JUSTICE ACT (1986)

The Juvenile Justice Act (1986) was enacted to bring about uniformity in the juvenile justice system throughout India. Prior to this enactment, each state had its separate Children's Act and the provisions contained in these Acts differed from state to state. The preamble of the Act states:

'An Act to provide for the care, protection, treatment, development and rehabilitation of neglected or delinquent juveniles and for the adjudication of certain matters relating to, and disposition of, delinquent juveniles.'

On reading the preamble, it appears that this Act will comprehensively deal with child sexual abuse. In reality, it barely covers the subject.

Under the Juvenile Justice Act, a sexually abused child would fall under the definition of a 'neglected juvenile'. The term 'neglected juvenile' includes

a juvenile who is likely to be abused or exploited for immoral or illegal purposes or unconscionable gain.

Unfortunately, the Act does not provide for the special needs required for the treatment of a sexually abused child. Child rights activists are demanding that a category 'victim child' be incorporated in the Juvenile Justice Act, whereas there is another view that the inclusion of the category 'victim child' would further victimise an abused child. What is required is provisions in the law to ensure the fulfilment of the needs of a victim child so that the sexual abuse does not leave an indelible mark on the child and prevent his/her healthy development.

Section 41 of the Juvenile Justice Act, indirectly and in a limited manner deals with child sexual abuse.

'41 punishment for cruelty to juvenile-(1) Whoever, having the actual charge of, or control over, a juvenile, assaults, abandons, exposes or willfully neglects the juvenile or causes or procures him to be assaulted, abandoned, exposed or neglected in a manner likely to cause such juvenile unnecessary mental or physical suffering shall be punishable with imprisonment for a term which may extend to six months, or with fine, or with both.

(2) No court shall take cognizance of an offence punishable under sub-section (1) unless the complaint is filed with the previous sanction of the State Government or an officer authorised by it in this behalf.'

⇒ Under section 41 of the Juvenile Justice Act, the offender should be a person who has the charge of or control over a juvenile, and who exposes such juvenile to abuse.

This section does not cover sexual abuse at the hands of a stranger. It merely covers assault by a person having charge of, or control over a juvenile, or willful neglect by such person which results in abuse.

⇒ The abuse is unnecessary mental or physical suffering.

It does not specifically mention sexual abuse.

⇒ The punishment is a term of imprisonment, which may extend to six months, a fine, or both.

The punishment is very minimal as it does not specifically cover cases of sexual abuse. Ironically, the punishment for withholding a child's earnings is greater than the punishment for cruelty. Section 44 deals with the exploitation of juvenile employees and states that whoever withholds the earnings of a juvenile shall be punishable with imprisonment which may extend to three years and shall also be liable to a fine.

⇒ Sanction of the state government is necessary prior to filing a

complaint under section 41. The state government has designated the Juvenile Welfare Board to grant such a sanction. In case of a juvenile not having a parent/guardian within the jurisdiction of the Juvenile Welfare Board, the Juvenile Welfare Board grants a sanction for prosecution only if the child is remanded to the observation home as a neglected juvenile.

Due to section 41 (2) several offenders are not prosecuted. A victim child traumatised by sexual abuse, will undergo further traumatisation if incarcerated in an observation home, therefore in the best interest of the child the offender is allowed to go unpunished. An eight years old girl working as a domestic worker in Bombay was physically abused by her employer, but no action could be taken against the employer as the police would initiate prosecution only if she were produced before the Juvenile Welfare Board and put into an observation home. The girl had come to Bombay from a village in Bihar, her father was serving a prison sentence for having killed her mother. The girl having no one to care for her in Bihar was compelled to take this job in Bombay. Her employer used to beat her and she was covered with cigarette butt marks. A neighbour brought the girl to an organisation working with domestic workers. The organisation contacted the police and the Juvenile Welfare Board, but both refused to take cognizance if the girl child was not remanded to a place of safety, viz. the observation home. The girl child was comfortable with the organisation and it would not have been in the best interest of the child to remove her from the care of the organisation. Ultimately with the assistance of the police, the employer was made to pay a sum for the education of the child. The organisation took care of the child till the father was released. She was reunited with her father on her request.

Under the Juvenile Justice Act, a victim of child sexual abuse who does not have a parent or guardian within the jurisdiction of the Juvenile Welfare Board is required to be kept in a 'place of safety,' 'fit institution,' or with a 'fit person'. A 'place of safety' is for the temporary reception of the juvenile. Previously, the Juvenile Welfare Board interpreted a 'place of safety' to mean the observation home, but due to protests by child rights activists, orders are now being passed for a victim child to remain in the care of the organisation producing the child before the Juvenile Welfare Board.

The Juvenile Welfare Board must be satisfied that such an organisation can be entrusted with the care and custody of the juvenile. The Juvenile Welfare Board should supervise such a placement with the assistance of probation officers. Probation officers are appointed by the state government; one of their duties is to regularly visit the juvenile and supervise that proper care is being taken by the person or organisation or institution entrusted with the care and custody of the juvenile. The probation officer is in a position to ensure that the child is not ill-treated or misused by his/her caretaker.

8. THE IMMORAL TRAFFIC (PREVENTION) ACT 1956

In India, a woman prostitute doing business on her own is exempt from legal censure except in certain circumstances, but organised prostitution is illegal. However, the police target the single-woman prostitute, as brothel keepers and pimps pay 'haftas' or periodic bribes to the police as protection money. Brothel keepers and pimps who are arrested are immediately released on bail to return to their extortion and exploitation.

The Suppression of Immoral Traffic in Women and Girls Act 1956 (SITA) was enacted in pursuance of the International Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others. SITA was not able to deal with the problem of immoral traffic effectively, therefore there was a demand for enlarging the scope of the Act. The main amendments made to the Act in relation to children are as follows:

- (a) the name of the Act was changed to 'The Immoral Traffic (Prevention) Act' and it brings within its purview all persons, whether male or female, who are exploited sexually for commercial purpose;
- (b) offences involving children and minors are made more stringent by enhancing the period of imprisonment when offences are committed against them; and
- (c) women and girls are to be interrogated by women police officers and where that is not possible, interrogation should take place only in the presence of a woman social worker.

Under the Immoral Traffic (Prevention) Act (ITPA), a 'child' means a person who has not completed the age of 16 years, and a 'minor' mean a person who has completed the age of 16 years but not complete the age of 18 years.

Whoever procures, induces or takes a person for the sake of prostitution is punishable on conviction with rigorous imprisonment for a term of not less than three years and not more than seven years and also with a fine, which may extend to Rs.2,000. If the person in respect of whom such an offence is committed is a child, the punishment shall extend to rigorous imprisonment for a term of not less than seven years but may extend to life, and if the person is a minor, the punishment shall extend to rigorous imprisonment for a term not less than 7 years and not more than 14 years.

Where any person is found with a child in a brothel, it shall be presumed, unless the contrary is proved, that he has detained such a child in the brothel. If a child or minor found in a brothel, upon medical examination, is detected to have been sexually abused, it shall be presumed, unless the con-

trary is proved, that the child or minor has been detained for the purpose of prostitution.

When a brothel is raided and children or minors are rescued, the magistrate may cause an investigation to be made by a recognised welfare institution or organisation to satisfy himself about the capacity or genuineness of the parents, guardian or husband to care for the child or minor.

9. GUARDIANSHIP & WARDSHIP

The court may appoint any person as the guardian of the person and of a minor child. A guardianship application may be made by a parent, or a relative, if the parents are dead. A relative or a local authority may file a Guardianship Petition if the parents are unfit to take care of the child.

During natural calamities, such as earthquakes or floods, a large number of children are orphaned. In such event, the administrative head of the district is appointed as a guardian by a government order to ensure that the ex-gratia payment offered to the child is not misused by relatives.

The Guardian and Wards Act, 1890, empowers the court to appoint a guardian for the person and/or property of a minor when it is satisfied that such an application is for the welfare of the minor. When the court appoints a guardian, the minor will attain majority on attaining 21 years of age; otherwise the age of majority under this Act is 18 years. The court may pass an order for the temporary custody and protection of the person and/or property of the minor as it thinks fit. Whilst appointing a guardian, the court may consider the preference of the minor, if the minor is old enough to form an intelligent preference. The guardian may be disinvested of guardianship for abuse of his trust, or failure or incapacity to perform his duties, or for ill-treatment or neglect of his ward.

The Hindu Minority and Guardianship Act, 1956, is the law relating to the minority and guardianship among Hindus. The provisions of this Act clearly denote that the welfare of the child is sacred and not the sanctity of parental rights.

10. CONSTITUTION OF INDIA

All laws are based on the principles contained in the Constitution. Any law that does not abide with the spirit of the Constitution is liable to be struck down by the high courts or the Supreme Court. The Constitution of India contains provisions, which directly or indirectly deal with children; child-related laws are framed in pursuance of these provisions.

The **Directive Principles** contained under the Constitution of India lay down principles to be applied by the state for governance of the country and at the time of drafting laws.

Article 38 requires the state to secure a social order for the promotion

of the welfare of the people.

'(1) The State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of the national life.

(2) The State shall, in particular, strive to minimise the inequalities of income, and endeavour to eliminate inequalities in status facilities and opportunities, not only amongst individuals but also amongst groups of people residing in different areas or engaged in different vocations.'

Article 39 (e) and (f) deals with the exploitation of children. The state is to direct its policy towards securing –

'(e) that the health and strength of workers, men and women, and the tender age of children are not abused and that citizens are not forced by economic necessity to enter avocations unsuited to their age and strength;

(f) that children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment'

Fundamental Rights are enforceable against the state and local authorities, and also against laws and executive actions, which are in violation of these rights. Fundamental rights are justiciable, and a writ petition may be filed before the Supreme Court or the high court in the even of their violation.

Article 14 of the Constitution guarantees equal protection of the laws, i.e., the right to equal treatment in similar circumstances. A law can be struck down as ultra vires the Constitution if it does not adhere to this principle.

Article 15 (3) is an exception, it permits the state from making special provisions for women and children. Article 15 (3) has been tested before the courts, the courts have upheld the validity of special provisions favouring women and children. In *Yusuf Abdul Aziz Vs. State of Bombay & Anr. (A.I.R. 1954 S.C. 321)*, the Supreme Court has held that,

Article 14 is general and must be read with the other provisions which set out the ambit of fundamental rights. Sex is a sound classification and although there can be no discrimination in general on that ground, the Constitution itself provides for special provisions in the case of women and children.'

Thus a law granting certain favours and benefits to children cannot be struck down as unconstitutional.

Article 19 (1) (c) provides citizens with a right to freedom of speech and

expression, and to form associations or unions.

Child labour is rampant in India; the Child Labour (Prohibition and Regulation) Act, 1986, and the Factories Act, 1948, legitimises and regulates the working of children in certain employment. Despite these laws permitting children to work, children are not allowed to unionise. This stand is supported by many organisations working with children on the ground that unionisation will give sanctity to child labour. The other view is that as the present law does not prohibit children from working, they should be allowed to form unions and protect their rights as workmen. The Human Rights Watch - Children's Rights Project - Human Rights Watch/Asia supports the latter stand. They have recommended to the Government of India the following :-

'Amend the Trade Union Act to allow children to form and participate in trade unions. The convention on the Rights of the Child, which India has ratified, guarantees children the right of freedom and association.'

Article 21 deals with the right to life and personal liberty:

'No person shall be deprived of his life or personal liberty except according to Procedure established by law'

The Supreme Court has interpreted this article in a wide manner to protect and promote the economic, social and cultural rights of people. Article 21 covers the right to enjoy the bare necessities of life, the right to food and clean potable water, the right to housing, the right to a decent environment, the right to a speedy trial, etc.

Article 23(1) prohibits the trafficking of human beings and forced labour. Sub-section (1) of Article 23:

'Traffic in human beings and begar, and other similar forms of forced labour are prohibited and any contravention of this provision shall be an offence punishable in accordance with law.'

Article 24 prohibits the employment of a child below the age of 14 years in any factory, mine, or any other hazardous employment.

The question raised by groups in different parts of the country is whether child prostitution can be called employment or labour. There is a strong lobby that protests the use of such terminology, they are of the opinion that perceiving child prostitution as labour or employment legitimises a heinous crime.

11. LETTERS PATENT FOR THE HIGH COURTS OF BOMBAY, CALCUTTA AND MADRAS

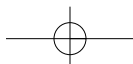
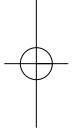
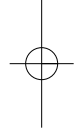
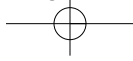
Letters Patent for the High Courts of Bombay, Calcutta and Madras were framed in the early nineteenth century. It gives the High Courts 'the power and authority with respect to the persons and estates of infants, idiots, and lunatics' within their jurisdiction. Under Letters Patent, the High Court is empowered to deal with matters protecting the interests of children.

12. FAMILY COURTS

The Family Courts Act, 1984, provides for the establishment of family courts, with a view to promote conciliation in, and secure speedy settlement of disputes relating to marriage and family affairs, and for matters connected therewith. Family courts are to be established by state governments in consultation with respective high courts. Judges of family courts are to be appointed by state governments in concurrence with respective high courts. The family court has the jurisdiction to deal with matters concerning custody, guardianship and maintenance of children.

13. NATIONAL POLICY FOR CHILDREN

The Government of India adopted the National Policy for Child on 22 August 1974. The policy emphasises that the state is to provide adequate services to children, to ensure their full physical, mental and social development, and for them to enable them to enjoy optimum conditions for their balanced growth. This policy states that 'Children shall be protected against neglect, cruelty and exploitation' and that the state will provide necessary legislative and administrative support to achieve the aims set out in the policy.



VI. LEGAL PROCEEDINGS AND PROCEDURES IN CASES OF CHILD SEXUAL ABUSE

There are three types of possible legal intervention in cases of child sexual abuse, viz. (i) care proceedings, (ii) civil proceedings and (iii) criminal proceedings. Care proceedings are initiated for the well being of the child and civil proceedings for damages/compensation to the child for the physical and mental injury caused by the abuse. Criminal proceedings prosecute the abuser for the offence committed. Criminal prosecution is rarely undertaken due to the accompanying stigma, as well as the belief that the judicial system humiliates the victim and fails to punish the offender.

1. CRIMINAL PROCEEDINGS VS. CIVIL PROCEEDINGS

Previously, child abuse cases were prosecuted on the grounds of 'public interest', but now public interest is weighed against the possibility of causing further harm to the child. 'Public interest' in this context refers to the potential risk of the sexual abuser sexually abusing other children if s/he is not punished. The interest of the child prevails over the public interest whilst dealing with an abuser. Child protection, rather than punishing the offender, should be the ultimate aim.

Criminal, civil and care proceedings may be heard by courts simultaneously, as the relief claimed in each of these proceedings is distinct.

CRIMINAL PROCEEDINGS

The criminal law procedure could have a traumatic effect on a child; professionals are questioning the desirability of prosecution in cases on child abuse. Child protection proceedings in juvenile courts are preferred to criminal prosecution in cases of abuse within a family. The Criminal Law Revision Committee (1984), United Kingdom, took the view that the intervention of the criminal justice system should be limited as far as possible in cases of abuse within the family. A welfare approach is seen by many as a more effective

and humane response to child abuse; protection of the child rather than blame is the principle to be followed.

There are strong arguments put forward by those in favour of criminal prosecution, the main amongst them being:

1. The experience of the victim child is vindicated, and the child has no doubts left that the perpetrator has committed an offence.
2. Successful prosecution will relieve the victim child of guilt, the child will recognise that he/she is not culpable and it is vulnerability that has involved him/her in such a situation.
3. May help to break the cycle of abuse, abused children have a higher likelihood of being abusive parents.

The evidence required by criminal courts is proof beyond reasonable doubt that the defendant committed the offence, civil courts work to a lesser standard of proof. Criminal courts focus on the conduct of the defendant whereas civil courts focus on the interest of the child.

The state initiates criminal prosecution in cases of child sexual abuse against the offender. The prosecution is conducted by the public prosecutor.

Under the British law, i.e.; the Children and Young Persons Act, 'any person who is at least 16 years old with custody, charge, or care of any child or young person under that age, who willfully causes or procures that child to suffer assault, ill-treatment, neglect, abandonment, or exposure in a manner likely to cause the child unnecessary suffering or injury, will be liable to criminal prosecution.'

CIVIL PROCEEDINGS

Civil proceedings are filed (i) to determine the future of the child, i.e.; to consider whether the child has been abused, and if so, what should be done for his/her welfare, (ii) for damages, i.e., an amount to be paid to the child for harm or injury caused to the child due to the abuse. Cases falling within the first instance are under the purview of care proceedings, i.e., within the jurisdiction of the Juvenile Welfare Board.

Civil proceedings do not seek to establish the guilt or innocence of an accused beyond all reasonable doubt.

The burden of proof is the responsibility on a party to prove allegations. In civil proceedings it is for the applicant to satisfy the court that a prima facie case exists against the abuser.

CONCURRENT CRIMINAL PROCEEDINGS AND CIVIL/CARE PROCEEDINGS

Arguments in favour of adjourning criminal proceedings, pending hear-

ing and final disposal of care proceedings can no longer be sustained. The guiding principle in care proceedings is the paramountcy of the welfare of the child. Delays are to be avoided in litigation relating to children.

Care proceedings cannot be withdrawn without leave of the court; the court grants such leave only if the entire matter has been heard or the guardian ad-litem representing the child has been consulted.

Criminal and civil proceedings may run concurrently as the relief claimed differ. Punishment of the offender is the aim of criminal prosecution, and the protection of the child or damages for injury to the child is the aim of civil proceedings.

2. PUBLIC INTEREST LITIGATION (PIL)

PIL may be filed by a non-governmental organisation or an individual against the state and any other party to protect and promote the rights of children. A PIL can be filed before the Supreme Court or the high court under its writ jurisdiction. Writ jurisdiction is conferred upon the Supreme Court by Article 32 of the Constitution; an individual or an organisation has the right to move the Supreme Court for enforcement of fundamental rights, and the Supreme Court has the power to issue directions or orders or writs for the enforcement of any such right. Article 226 of the Constitution confers such powers upon high courts.

The petitioner, i.e., the party who files a PIL may be an organisation or an individual who brings to the notice of the court the violation of child rights. Though the petitioner is aware that a right has been violated, he may not have the necessary machinery at his disposal to enable him to collect all relevant particulars. The court, therefore, usually at the first instance appoints a commissioner to investigate the allegations made in the petition prior to passing any directions or order. The commissioner is required to submit a report to the court on completion of his investigation, and the court will act on the findings of the report. The commissioner so appointed may be an officer of the court or an expert in that particular field. The court usually passes an order in concurrence with the report of the commissioner, though there have been cases where an order has been passed in variance of the report.

A PIL may also be filed for the proper implementation of a child-related law or scheme, or for the quashing of any law or scheme, which adversely affects the rights of children. A letter sent to the Chief Justice of the High Court or Supreme Court about the violation of child rights, or a newspaper article indicating the same, may be converted into a 'suo-motu' petition by the court. Suo-motu means that the court has taken cognizance of a particular case on its own without a petition being moved by a party. The court may appoint an advocate as 'amicus curae' to advise the court to protect and further the rights of children.

PIL's have resulted in passing of progressive child related judgements

by different courts; removal of children from hazardous employment with economic assistance to facilitate education, improve the condition in childcare institutions, provide compensation to a child sexually abused in an institution, etc.

3. MEDIA

Media plays a very important role in focusing on the problem of child sexual abuse and exploitation. The 'best interest of the child' should be the test of appropriateness in the work of media. Often the interest of the child and the interest of the government varies, no control or pressure from the government should affect the manner in which media portrays children's issues.

A child too must have access to media so that his/her voice is heard. A child has a right to participate; for effective utilisation of such rights, there should be informed participation. A child has the right to know the information published and transmitted by media. Magazines and films are tools for educating children about their rights. Media should also be used for dissemination of prevailing laws and sentences passed by courts in cases of child sexual abuse and exploitation; this will act as a deterrent to potential abusers and exploiters of children.

Section 36 of the Juvenile Justice Act deals with the prohibition of the publication of names, etc., of juveniles involved in any proceeding under the Act.

'(1) No report in any news paper, magazine or news-sheet of any inquiry regarding a juvenile under this Act shall disclose the name, address or school or any other particulars calculated to lead to the identification of the juvenile nor shall any picture of any such juvenile be published.

Provided that for reasons to be recorded in writing, the authority holding the inquiry may permit such disclosure, if in its opinion such disclosure is in the interest of the justice.

(2) Any person contravening the provisions of sub-section (1) shall be punishable With fine which may extend to one thousand rupees.'

The bar is on the disclosure of the identity of the child, to avoid harm being caused by publicity. Nothing prevents media from reporting the particulars of a court case or inquiry, or any appalling situation in which children find themselves due to apathy on the part of adults, society or the state. Reporting of cases of child abuse and exploitation is in the public interest and should in no manner be curtailed. In fact media reports have on many occasions brought child rights violations to the notice of the public and courts, resulting in the filing of a PIL or the court taking suo-motu action in the interest of children.

4. FILING OF A SUIT BY OR AGAINST A MINOR

Order XXXII of the Civil Procedure Code 1908 deals with suits by or against minors. A suit is to be instituted in the minors name by 'the next of friend of the minor'. Where the defendant is a minor, the court appoints a guardian ad-litem to protect the interest of the minor. Whilst appointing a guardian ad-litem, the court is to ensure that the interest of the proposed guardian is not opposed to that of the minor.

Any person who knows that a crime has been committed may register a complaint with the police station. Criminal proceedings in respect of a cognisable offence are initiated by the state, and an aggrieved party may move the criminal court in respect of a non-cognisable offence.

A petition may be filed by an individual or an organisation before the Supreme Court or a high court to direct the government to perform its duties towards children to ensure them their fundamental rights. The parent, guardian or friend could also file such a petition.

Under the British law, a parent or guardian conducts the proceedings on behalf of the child except in certain cases. A 'separate representation order' is generally passed in cases where the parent or guardian has initiated proceedings on the ground that the child is beyond the parent's or guardian's control, or the child objects to the parents or guardian conducting the case on his/her behalf, or there is conflict of interest between the child and parents or guardian. Once the child has been made a subject of a separate representation order, the court will appoint a guardian ad-litem to safeguard the interests of the child.

5. PROOF OF AGE

Proof of age is important in cases of rape and child prostitution. A certificate is the best proof of age but often is not available due to inadequate facilities for the registration of the birth. In the absence of a birth certificate, courts have to obtain forensic evidence, and its conclusions are based on medical evidence, such as height and teeth. If a medical testimony of the age is to be considered conclusive, an 'ossification test' is necessary. A sure indication of the age is not possible even through an ossification test, there may be a difference of about two years and it may be plus-minus either side.

Legislation on birth registration was enacted in India in 1969. The Registration of Births and Deaths Act 1969 resulted in a uniform practice of the registration of births throughout the country. Prior to the enactment of this Act, certain states had separate legislation with regards to registration of births and deaths whilst other states had enabling provisions in their Municipal Acts/Panchayat Acts. In case of a birth in a hospital, the medical officer of the hospital is to register births before the registrar. In the case of a

birth at home, the head of the family or a relative has to register the birth before the Registrar. The registrar is appointed by the state government. The registrar is duty bound to supply the informant with the extract of the birth register free of charge. In Bombay, births are to be registered with the Municipal Ward Office within whose jurisdiction the hospital or home is situated.

'The only conclusive piece of evidence, may be the birth certificate, unfortunately, in this country such a document is not ordinarily available. The Court or the jury has to base its conclusions upon all the facts and circumstances disclosed on examining all the physical features of the person whose age is in question, in conjunction with such oral evidence as may be available.' (A.I.R. 1958 S.C. 143 : Sidheswar Ganguly Vs. State of West Bengal).

Proof of age is also essential for admission to schools, but in such case an affidavit of a parent, a relative or a friend indicating knowledge of the birth date will suffice.

VII. CRIMINAL PROCEDURE CODE

The Criminal Procedure Code lays down the law relating to criminal procedure. Certain provisions in the code relate to children. Unfortunately, the code is not child friendly, and certain fundamental changes are necessary to ensure appropriate relief to victims of child abuse.

1. PROVISIONS RELATING TO CHILDREN

Section 27 of the Criminal Procedure Code deals with **jurisdiction in the case of juveniles**.

'Any offence not punishable with death or imprisonment of life, committed by any person who at the date when he appears or is brought before the Court is under the age of sixteen years, may be tried by the Court of a Chief Judicial Magistrate, or by any Court specially empowered under the Children Act, (60 of 1960), or any other law for the time being in force providing for the treatment, training and rehabilitation of youthful offenders.'

After the enactment of the Juvenile Justice Act, a Juvenile court has jurisdiction to try any juvenile; a juvenile cannot be punished with death or imprisonment.

Section 43, sub-section (1) and (2) of the Criminal Procedure Code deal with **arrest by private persons and procedures on such arrest**.

(1) Any private person may arrest or cause to be arrested any person who in his presence commits a non-bailable and cognizable offence, or any proclaimed offender, and, without unnecessary delay, shall make over or cause to be made over any person so arrested to a police officer, or in the absence of a police officer, take such person or cause him to be taken in custody at the nearest police station.

(2) If there is reason to believe that such person comes under the provisions of Section 41, a police officer shall re-arrest him.'

This section empowers a citizen to make an arrest. After the arrest, the citizen must present the offender to the nearest police station. Section 41 deals with making an arrest without a warrant by the police. A citizen can make an arrest to prevent the trafficking of children, or commission of sexual abuse. **Section 125** of the Criminal Procedure Code deals with the **order for maintenance of wives, children and parents.**

Any person who has sufficient means is duty bound to maintain his legitimate or illegitimate minor child, and a legitimate or illegitimate child who has attained majority but is unable to maintain himself/herself by reason of physical or mental disability or injury. A married minor daughter is entitled to maintenance from her father, if her husband is not possessed of sufficient means. An application under this section is to be made before a judicial magistrate of the first class. With the enactment of the family courts Act and the establishment of family courts, such applications are now maintainable before the Family Courts. The father is bound to maintain the child even though the child's mother may also be in a position to maintain the child.

The object of this section is to prevent destitution and vagrancy. Maintenance includes reasonable requirements to enable a person to live in an adequate manner and not mere sustenance. Whilst determining the amount of maintenance, the means of the person ordered to pay maintenance will be considered. The upper limit of the maintenance amount has been fixed by the code at Rs. 500 per month, but certain states such as Maharashtra have increased the limit.

The Hindu Adoption and Maintenance Act 1956 provides for maintenance among Hindus. A 'minor' under this Act is a person who has not completed 18 years of age, and 'maintenance's includes provision for food, clothing, residence, education, medical treatment and reason expense of marriage in the case of a daughter.

Section 160 of the Criminal Procedure Code deals with a **police officer's power to require attendance of witnesses.**

- (1) Any police officer making an investigation under this Chapter may, by order in writing, require the attendance before himself of any person being within the limits of his own or any adjoining station who, from the information given or otherwise, appears to be acquainted with the facts and circumstances of the case; and such person shall attend as so required; Provided that no male person under the age of fifteen years or woman shall be required to attend at any place other than the place in which such male person or woman resides.
- (2) The State Government may, by rules made in this behalf, provide for the payment by the police officer of the reasonable expenses of every person, attending under sub-section (1) at any place other than his residence.'

The order to attend must be in writing and should contain the date, time

and place of attendance. A male under 15 years of age and a woman cannot be summoned to a police station for the purpose of investigation. The person is to be examined orally and the examination may be reduced into writing by the police officer at the time of examination. The person making the statement is not required to sign it.

If the complaint is against a police officer, the person may refuse to give a statement to a police officer and demand that the same be recorded by a magistrate. A demand must also be made for the investigation to be conducted by a police officer of equivalent or higher rank than that of the erring police officer.

Section 437 of the Criminal Procedure Code deals with **when bail may be taken in the case of a non-bailable offence**. By the proviso to section 437(1), a person under 16 years of age or a woman who has committed a non-bailable offence may be released on bail.

- (1) when any person accused of, or suspected of, the commission of a non-bailable offence is arrested or detained without warrant by an officer in charge of a police station or appears or is brought before a Court other than the High Court or Court of Session, he may be released on bail, but
 - (i) such person shall not be so released if there appear reasonable grounds for believing that he has been guilty of an offence punishable with death or imprisonment for life;
 - (ii) such person shall not be so released if such offence is a cognizable offence and he had been previously convicted of an offence punishable with death, imprisonment for life or imprisonment for seven years or more, or he had been previously convicted on two or more occasions of a non-bailable and cognizable offence:

Provided that the Court may direct that a person referred to in clause (i) or clause (ii) be released on bail if such person is under the age of sixteen years or is a woman or is sick or infirm;

Provided further that the Court may also direct that a person referred to in clause (ii) be released on bail if it is satisfied that it is just and proper so to for any other special reason;

Provided also that the mere fact that an accused person may be required for being identified by witnesses during investigation shall not be sufficient ground for refusing to grant bail if he is otherwise entitled to be released on bail and gives an undertaking that he shall comply with such directions as may be given by the Court.

2. BAILABLE AND NON-BAILABLE OFFENCES

Section 2 (a) of the Criminal Procedure Code defines 'bailable offence' and 'non-bailable offence':

' "bailable offence" means an offence which is shown as bailable in the First Schedule, or which is made bailable by any other law for the time being in force; and "non-bailable" offence means any other offence.'

A bailable offence is an offence where bail may be asked as of right. In bailable offences, the offender is generally released on bail by the police themselves. The offender in a bailable offence may be discharged on personal bond, i.e., on his executing a bond without sureties.

The court is empowered to grant bail in the case of non-bailable offences. It is obligatory for the court to record its reasons for granting or not granting bail in a non-bailable offence. The prosecutrix, through the public prosecutor, is entitled to oppose the bail application.

Before an accused is released on bail, a bond is to be executed by one or more sureties. By executing the bond, the surety undertakes to secure attendance of the accused, and if the accused does not attend, the sureties money is forfeited. The court may impose conditions upon the accused whilst granting bail in order to ensure that (i) such person attends court, or (ii) such a person does not commit an offence similar to the offence of which he is accused or suspected, or (iii) otherwise in the interest of justice. Conditions are imposed for the purpose of proper and fair investigation and for securing a fair trial. Conditions can subsequently be modified or set aside. Imposition of conditions that cannot be complied with amounts to refusal of bail.

The court has powers to cancel bail, if the accused misuses the liberty wanted to him. A complainant can make an application before the court for the cancellation of the bail granted to the accused.

Offences under sections 343, 366, 366A, 366B, 367, 372, 376 and 377 of the Indian Penal Code are non-bailable. An offence committed under section 354 of the Indian Penal Code is bailable.

Under section 18 of the Juvenile Justice Act, a juvenile accused of a bailable or non-bailable offence is to be released on bail with or without surety. The juvenile may not be so released if it appears that the release will bring the juvenile into association with known criminals, or expose the juvenile to moral danger, or would defeat the ends of justice. In the event of the juvenile not being released on bail, the juvenile court will 'pending the inquiry' order the juvenile to remain in an observation home or place of safety.

3. COGNIZABLE AND NON-COGNIZABLE OFFENSES

Section 2 (c) of the Criminal Procedure Code defines 'cognizable

offence' and section 2 (1) defines 'non-cognizable offence':

"cognizable offence" means an offence for which, and "cognizable case" means a 'case in which, a police officer may, in accordance with the First Schedule or under any other law for the time being in force, arrest without warrant'.

A police officer may arrest without an order from a magistrate or a warrant, any person who has been concerned in or is likely to commit cognizable offence, and may interpose for the purpose of preventing the commission of a cognizable offence. Any officer in charge of a police station may without an order of a magistrate, investigate a cognizable case within his jurisdiction after sending a report of the same to the magistrate empowered to take cognizance of such an offence.

"non-cognizable offence" means an offence for which, and "non-cognizable case" means a case in which, a police officer, has no authority to arrest without warrant'.

No police officer is empowered to investigate a non-cognizable case without the order of a magistrate. The police officer is required to enter in a book, which is to be kept at the concerned police station, any information received with regards to commission of a non-cognizable offence. If the case involves two or more offences of which at least one is cognizable, the case is deemed to be a cognizable case.

Offences under sections 343, 354, 366, 366A, 366B, 367, 372, 373, 376 and 377 of the Indian Penal Code are cognizable.

4. FIRST INFORMATION REPORT (FIR)

FIR is the first statement lodged in a police station that a cognisable offence has been committed. Section 154 of the Criminal Procedure Code deals with the lodging of an FIR.

'154. Information in cognizable cases -

1. Every information relating to the commission of a cognizable offence, if given orally to an officer in charge of a police station, shall be reduced to writing by him or under his direction, and be read over to the informant; and every such information, whether given in writing or reduced to writing as aforesaid, shall be signed by the person giving it, and the substance thereof shall be entered in a book to be kept by such officer in such form as the State Government prescribe in this behalf.
2. A copy of the information as recorded under sub-section (1) shall be given forthwith, free of cost, to the informant.

3. Any person aggrieved by a refusal on the part of an officer in charge of a police station to record the information referred to in sub-section (1) may send the substance of such information, in writing and by post, to the Superintendent of Police concerned who, if satisfied that such information discloses the commission of a cognizable offence, either investigate the case himself or direct an investigation to be made by any police officer subordinate to him, in the manner provided by this Code, and such officer shall have all the powers of an officer in charge of a police station in relation to that offence.'

A FIR is usually lodged at the earliest opportunity, and is the first description of the alleged crime. It shows the material on the basis of which the investigation commenced, without any embellishments or chance for fabrication. The object of the FIR is to set the criminal law for punishing the guilty in motion. The informant need not have personal knowledge of commission of the crime. Any person, including a representative of a non-governmental organisation may lodge a FIR on obtaining knowledge that a crime has been committed.

ESSENTIALS OF A FIR

1. The information must be given to the officer in charge of a police station who may record it himself or depute some other police officer to record the information.
2. The information must relate to the commission of an offence, and must be given in detail with all the relevant particulars. If a complaint is vague, it will not throw sufficient light on the gravity of the situation.
3. It would facilitate matters if the information is given in writing;
 - (i) important information will not be inadvertently excluded,
 - (ii) the police officer will be compelled to accept it.

The informant should have signed the writing. Take an acknowledgement of receipt from the police station on your copy of the writing. The acknowledgement will prove that you have submitted the writing to the concerned police station.

4. If the information is given orally, it must be reduced in writing by the police officer, read over to the informant, and signed by the informant. A copy of the FIR should be given to the informant free of cost.
5. The information may be given by a person aggrieved by the commission of the offence or by someone on his/her behalf, or by any other person who has knowledge of the commission of such offence.
6. It does not matter if the particulars are not known, such as the name of the offender or the circumstances leading to the commission of the offence; the police are required to investigate the case and not the informant. All the information known to the informant should be given to facili-

tate the investigation.

7. The information so recorded must be entered in a book to be kept at the police station.

8. If the concerned police officer fails to record the information, or improperly records it, or refuses to accept the written information, send the information in writing to the superintendent of police or assistant commissioner of police. Copies or the same should be sent to the commissioner of police, deputy commissioner of police and officer in charge of the concerned police station.

9. After the lodging of an FIR, if the investigating machinery is not set into motion, different strategies may be employed to pressure the police into action. Written and oral representations before high-ranking police officers, demonstrations outside the concerned police station, media coverage of non-action on the part of the police, etc., are some of the strategies that could be employed. A writ petition may be filed before the high court for a direction to the concerned police station to forthwith investigate the matter.

5. CASE STUDIES

ABUSE OF A CHILD DOMESTIC WORKER

The steps to be taken on coming to know of a child domestic worker being abused by the employer.

1. Lodge a FIR in writing, preferably with the police station within whose jurisdiction the child works. The FIR should contain the name and age of the child, name and address of the employer, manner in which such information was obtained, nature of abuse, etc., if known. Collect a copy of the FIR.
2. Ensure that the police forthwith go to the residence of the employer to take custody of the child. Go along with the police to take custody of the child to prevent further traumatising of the child.
3. Get the child medically examined at a government hospital. Both external and internal examination should be conducted.
4. Ensure that the child is immediately presented before the Juvenile Welfare Board. Make an application to be appointed as a 'fit person' under the Juvenile Justice Act, and take custody of the child.
5. Contact the parent or guardian of the child, if any. The Juvenile welfare Board is to verify the suitability of the parent or guardian to keep custody of the child. If the parent or guardian is found to be suitable, the child will then be handed over to the parent or guardian.
6. If the child has no suitable parent or guardian, the child should

remain with the 'fit person', or if the 'fit person' is not in a position to keep permanent custody of the child, the child should be transferred to a 'fit institution' by the Juvenile Welfare Board. The 'fit person' or 'fit institution' on receiving the child is responsible for his/her welfare.

7. Ensure that a criminal case is filed against the employer with regards to the abuse.

Maintain a good rapport with the public prosecutor. Appoint a watching advocate in the event that the public prosecutor is not handling the matter in a proper manner.

SEXUAL ABUSE OF BOY CHILD BY HIS FATHER

The steps to be taken on coming to know of sexual abuse of a boy child by the father.

Step numbers 1 and 3 mentioned in the previous case must be carried out.

1. Convince the mother to file an FIR.
2. Ensure that the father is immediately arrested and removed from the residential setting, and criminal proceedings are initiated.
3. Feed the public prosecutor with relevant information to oppose the bail application if filed by the father, or appoint an advocate to represent the mother.
4. If the father is released on bail, obtain an injunction from the court restraining the father from entering the home. The father should not have access to the child, or should have supervised access to the child.
5. If the mother is not able to maintain the child and the father refuses to provide maintenance, file a maintenance application. It is the duty of the father to maintain the mother and child.

VIII. MEDICAL EXAMINATIONS AND PRACTITIONERS

Medical examinations by a sensitive medical practitioner is necessary for successful prosecution.

1. MEDICAL EXAMINATIONS IN CASES OF CHILD SEXUAL ABUSE

A victim of child sexual abuse should immediately be made to undergo a medical examination preferably at a government hospital. A lot will depend on the result of the medical examination for proving sexual abuse.

The role of the medical professional is very important in the case of child sexual abuse. The mandate of the medical professional is to examine the victim and gather information that will protect and/or validate the traumatised child. The medical practitioner should keep this in mind as sometimes the interest of the child is at odds with the interest of the state.

The main principle is that the medical examination should be carried as soon as possible. The medical practitioner must record the name of the persons who referred and accompanied the child for the medical examination. Multiple interviewing of the abused child should be avoided, therefore the history should be taken through an informed third party. There should be careful documentation of the physical findings; photographs should be taken whenever possible. The physical examination pay special attention to genital and anal areas.

If the child refuses to undergo a medical examination, it is necessary to weigh the pros and cons of the decision made by the child; the child may be referred to a therapist for clarification of issues that is making the child uncooperative. An examination using sedation should only be do when in the best interest of the child.

Medical professionals in government hospitals should be trained handle cases of child abuse. They should be given intensive training with periodic reviews. They should also be familiar with the law in respect of child abuse, and be in a position to relate with the court.

2. CONFIDENTIALITY AND CHILD ABUSE

The General Medical Council (United Kingdom) has expressed that if a doctor has reason to believe that a child has been physically or sexually abused, it is the duty of the doctor to disclose such information to a third party. The interests of the child is of paramount importance and will override the general rule of confidentiality.

The Code of Ethics adopted by the British Association of Social Workers in 1986 states,

'They will respect the privacy of clients and others with whom they come into contact and confidential information gained in their relationships with them. They will divulge such information only with the consent of the client (or informant) except where there is clear evidence of serious danger to the client, worker, other persons or the community or in other circumstances judged exceptional, on the basis of professional consideration and consultation.'

In child protection cases, the degree of confidentiality will be governed by the need to protect the child. It should be made clear to the informant that confidentiality may not be maintained if withholding of information will prejudice the welfare of the child.

3. CONSENT FOR MEDICAL DIAGNOSIS OR TREATMENT

In non-emergency cases, the consent of the person having parental responsibility must be granted. If the child is competent to make his/her own decision, the doctor may also accept the consent from the child. In emergency cases, the doctor may also accept the consent from the child. In emergency cases, the doctor may rely on his/her own judgement if those in a position to give consent are not available. When a doctor considers a treatment necessary, and those having parental responsibility refuse to grant consent, the high court may use its power to act in the best interest of the child and may order treatment. If a child brought to a doctor under orders of the court, refuses to undergo medical examination or treatment, the examination or treatment should not be proceeded with and the matter should be referred to the court for further directions. The consent may in certain cases be given by the local authority.

HIV testing should not be done without obtaining appropriate consent, and without pre-test counselling of the child/ parents/ guardian.

IX. VICTIMS OF CHILD SEXUAL ABUSE AND THE LAW

A victim of child sexual abuse is further victimised by the legal procedure. A child-friendly procedure is imperative to ensure the reporting of child sexual abuse cases.

1. PROSECUTION OF CHILD SEXUAL ABUSE

Cases of child sexual abuse are often not reported as it is felt that reporting may result in further trauma for the child victim and subsequent retaliatory action from the abuser. The repeated questioning of the child victim by the law enforcing agency and other professionals, such as doctors, psychologists, legal practitioners, etc., and the delay in the legal and investigative procedures is a deterrent to reporting cases of child sexual abuse.

The decision to prosecute a child abuse case depends on whether there is sufficient substantial evidence, whether it is in the public interest the proceedings should be initiated against a particular offender, and whether it is in the interest of the child victim that proceedings should be initiated.

It is imperative that child-friendly procedures be incorporated in the law to minimise trauma and encourage reporting of child sexual abuse cases. The court should inform the child of the general nature of the proceedings and the grounds upon which the case is filed, in a manner suitable to the age and understanding of the child.

The law relating to child protection should ideally be separate from the law relating to criminal offenses against children. The legal framework for protection of children should ensure that reasonable cause, to suspect a child is or is likely to be abused or harmed is sufficient to initiate an investigation. To wait for the offence to occur will cause irreparable damage to the child.

The legal issues involved in child abuse can be categorised into (i) evaluation of evidence of abuse, (ii) emergency procedures to protect the child, (iii) available legal procedures, (iv) the child's evidence, (v) long-term remedies.

2. EVIDENCE

TV LINK COURTS AND CHILD INTERVIEWS

The main legal problems arising in using video-taped interviews of children are the admissibility of such interviews as evidence, and the reliability of such evidence. The right to confrontation requires the defendant to see the witnesses and vice versa. The rationale for this requirement is that it forces the witness to tell the truth and accords fundamental fairness in addition to allowing cross-examination. In *Coy vs. Iowa*, 487 U.S. 1012 (1988), the Court held that there could be exceptions to this rule where it is needed to further an important public policy such as the protection of children.

Children should be permitted to give evidence by TV, link if the offence charged is a sexual offence or an offence of violence or an offence of cruelty. Cross-examination should also be conducted through TV link or close circuit video camera so that the victim does not have to face the abuser. The child may be accompanied by a psychologist or social worker in another room; in such a case, the question is addressed to the psychologist or social worker who then repeats and explains the question to the child. Under the Israeli judicial system, a specially trained and skilled interviewer is the person who interprets the child's narrative and presents it before the court – it is the interpreter and not the child who gives evidence and is cross-examined.

In *Maryland vs. Craig*, 497 U.S. 805 (1990), a close circuit TV was used at the stage of recording the testimony of a child witness who was alleged to be a victim of child abuse; the child was under serious emotional distress and found it difficult to communicate. The Supreme Court of U.S.A. has held that, 'the State's interest in the physical and psychological well-being of child abuse victims may be sufficiently important to outweigh a defendant's right to face to face confrontation since the State has a compelling interest in protecting minor victims of sex crimes from further trauma and embarrassment.' Some believe that TV link courts lessen the impact of the child's testimony on the jury.

The manner in which the evidence is taken through TV Link Courts is as follows:

- (1) the child witness, prosecutor and defence counsel withdraw to a separate room, while the judge and the defendant remain in the court room,
- (2) the child witness is examined and cross-examined in this separate room, while a video monitor records and displays the testimony to those in the court room, and
- (3) the child witness cannot see the defendant but the defendant remains in electronic communication with his counsel and can view the proceedings; objections can be made and ruled on as if the witness is testifying in the court room.

In India, the child victim faces the accused during the trial and is grilled by the advocates of the accused. To minimise the trauma, it is necessary to use a screen to separate the child from the accused; the questions in examination-in-chief and cross-examination should be addressed to the judge, who in turn will question the child.

LEGAL INTERVIEWING OF CHILDREN

Different strategies may be utilised in different circumstances to obtain appropriate response from the child.

- (1) Open questions, i.e., questions that allow children to narrate their own point of view,
- (2) Closed questions, i.e., questions that can be answered only with a 'yes' or 'no',
- (3) Choice questions, i.e., suggests one of the two given possibilities,
- (4) Hypothetical questions, i.e., raises a topic introduced by the interviewer.

SPECIAL PROVISIONS FOR CHILD VICTIM

Under the British law, viz. the Criminal Justice Act 1988 and 1991 children who are able to give a coherent account of their abuse may be witnesses in criminal proceedings. The examination-in-chief of an abused child will be in the form of a pre-recorded video, made as early as possible in the investigation. The cross-examination is to be conducted at the trial stage and will usually take place through live link video system. Children under 17 years are permitted to give evidence by TV video link in trials for sexual offences.

The Crown Court Rules state that child witnesses under 14 years of age may have a support person with them in the witness room when the video link is in operation. The presence of a support person for the child witness has been endorsed in the United Kingdom by the Court of Appeal in *R. vs. X, Y, and Z*. This decision also upheld the use of screens to prevent child witnesses from seeing or being seen by the defendant as children are not able to speak when openly confronted by the abuser. The Magistrate's Courts Act states that a child should not normally be called as a witness for the prosecution, and that any statement made in writing by that child should be treated as admissible in evidence in any matter in which his/her oral testimony would be admissible.

The American law permits a supportive adult to be with the child victim at the time of examination and cross-examination to assist the child, e.g., explain the question to the child.

Under the French Civil Code, the child is heard by the Judge in the presence of a lawyer or any other person of the child's choice.

The law of Israel provides for questioning of a child by special youth examiners who are professionally trained. Such testimony is admissible though the minor may have not testified before a court.

In the case of sexual abuse of street children, the case usually fails as the victim child may not be found at the time of trial. Therefore, it is necessary that the prosecutor be permitted to take deposition of the victim before the offender is prosecuted, and the court should keep the victim testimony in its possession.

HEARSAY EVIDENCE

The general rule of law is that statements by persons other than the testifying witness are inadmissible as evidence. The rationale for this rule is that facts are best proved by the person who underwent the experience or saw it happen.

In U.S.A., United Kingdom and New Zealand, trial proceedings in respect of cases of child sexual abuse are an exception to the strict hearsay admission rules. This is necessary as often child victims are not able to speak about the sexual assault and therefore it is necessary to treat as admissible, evidence of a parent, teacher, doctor or any other person to whom the child had confided about the offence soon after it was committed.

The Children's Act 1989 states that 'the Lord Chancellor may by order make provision for the admissibility of evidence which would otherwise be inadmissible under any rule of law relating to hearsay. This Act further empowers the Lord Chancellor to make provision for the admissibility of evidence in civil proceedings in connection with the upbringing, maintenance, or welfare of the child, which would otherwise be inadmissible under the hearsay rule. The Children (Admissibility of Evidence) Order 1990 lays down the circumstances under which hearsay evidence may be admitted in children's cases.

'2. (1) In civil proceedings before the High Court or a county court, evidence given in connection with the upbringing, maintenance or welfare of the child, shall be admissible notwithstanding any rule of law relating to hearsay.

(2) In civil proceedings before a juvenile court;

(a) a statement made by a child,

(b) a statement made by a person concerned with or having control of a child, that he has assaulted, neglected, or ill-treated the child

(c) a statement included in any report made by a guardian ad litem under rule 25(3)(a) of the Magistrates' Court (Children and Young Persons) Rules 1988, or by a local authority under section 9 of the Children and Young Persons Act 1969 shall be admissible as evidence in connection with the upbringing, maintenance or welfare of a child notwithstanding any rule relating to hearsay.'

Under the Texan law, an out-of-court statement of a child witness is admissible without producing the child for cross-examination if, the totality of the circumstances tender the statement reliable, and the facts of a particular case indicate that the use of out-of-court testimony is necessary to protect the child.

CORROBORATION OF TESTIMONY OF CHILD WITNESS

The testimony need not be corroborated. Where the child witness herself is a victim of rape and the injuries indicate that an attempt was made to rape her, she is the best person to tell as to who the person was who attempted to rape her.

The corroboration of the victim's version is not necessary in India.

The English criminal justice system no longer requires the corroboration of a child's evidence. In *R vs. McInnes* (1989) *Guardian*, the court held that, 'Corroboration was not limited to direct evidence of independent witnesses. It was often provided by a combination of pieces of circumstantial evidence which together tended to show that the accused committed the crime.' In this case, circumstantial evidence was that the girl child was able to describe in detail the inside of the car of the accused, the accused was charged with enticing a seven-year-old girl into his car and sexually assaulting her.

3. DELAYED DISCOVERY STATUTE

A provision requires to be incorporated under the law to extend the limitation period for survivors of child sexual abuse. Extension of statute of limitation ensures that crimes against children can be prosecuted even several years after the offence has occurred. The period of limitation runs from attaining majority, or from the victim becoming aware of the incident that had occurred during childhood. Victims of child sexual abuse often suffer from repressed memory or post-traumatic stress disorder; the law perceives these as constituting 'insanity' and therefore the victim is disabled from seeking legal redress in such condition. The period of limitation will run in such cases once the disability is removed.

The California Code of Civil Procedure states that an action for liability will lie against any persons or entity who owed a duty of due care to the victim, where a wrongful or negligent act by that person or entity was a cause of the childhood sexual abuse resulting in injury. The delayed discovery statute is to be applied to perpetrators of the offence as well as liable third parties.

The Alaskan law allows a criminal prosecution for sexual offences to be commenced at any time when the victim was under 18 years when the offence was committed. The law prevailing in New Hampshire allows a criminal prosecution to be brought up to 22 years after the victim has reached 18

years of age.

Child activists are demanding that a minor child should be permitted to sue by himself/herself any person, including a parent or guardian for having committed an offence.

4. PROTECTION OF THE VICTIM

The following should be incorporated in law:

1. power to enter and inspect premises where a child is living and thought to be at risk, including the right to interview and examine the child;
2. child assessment order for the production of a child at a clinic for medical examination;
3. warrant to search for or remove a child;
4. emergency protection order;
5. a police officer's right of entry without warrant to save life or limbs;
6. Child Support Trust Account should be established. A state agency assesses the amount to be paid by the liable parent, collects the money from the wages of such a parent and deposits it in the account; the Department of Social Security withdraws the amount and pays it to the custodian, (Australian law).

5. ASSISTANCE TO THE VICTIM

PAYMENT OF COMPENSATION

It is essential that compensation be paid to the victim as in many cases the harm suffered limits their ability for education and earning a living. Sums of money may be awarded as compensation to the victim in both civil and criminal proceedings. The payment of compensation is in addition to penal sentences; it is hoped that this will result in a decrease in the number of cases that are settled out of Court. Out of Court settlements were being resorted to in cases of child sexual abuse as the victim would be ensured of a monetary package for rehabilitation; unfortunately the abuser would go unpunished.

Section 357 of the Criminal Procedure Code (India) deals with payment of compensation. Under this provision the fine imposed by the court may be directed to be paid wholly or in part to any person as compensation for any loss or injury caused by the offence, when compensation is in the opinion of the court recoverable by such a person in a civil court. Compensation paid in criminal proceedings corresponds to damages in a civil suit; compensation is related to the wrong committed by the perpetrator whereas damages is related to the injury caused to the victim by the commission of an offence.

The Criminal Injuries Compensation Board (the Children's Act 1989 - United Kingdom) offers payment of compensation to victims of child abuse upon the fulfillment of certain conditions, e.g., must have sustained physical injury caused by a crime of violence; the injury should be of a physical or mental nature and includes shock or psychological disturbance.

The Supreme Court in the Delhi Domestic Working Women's Forum case, (1995) 1 SCC 14 held that the Criminal Injuries Compensation Board be set up and compensation be awarded by the court or the Board to rape victims on conviction, whether or not a conviction has taken place.

ASSISTANCE TO VICTIMS

The Juvenile Justice Coalition and the Victim Assistance Programme have been established under the American law to assist victims of child sexual abuse. The Juvenile Justice Coalition includes service providers, mental health professionals, lawyers, doctors and youth workers; they assist the child in dealing with legal procedures. The Victim Assistance programme assists sexually abused children after indictment has been obtained.

STATE FUNDING OF PROGRAMMES

The U.S.A. has programmes that fund states and other grantees to meet their responsibilities for the prevention and intervention in cases of child abuse and neglect, e.g., the Child Abuse and Neglect Programme, Community-based Family Resource and Support Grants.

6. IN-CAMERA PROCEEDINGS

An in-camera proceeding is when a trial is conducted by excluding the public or any particular person. The option of 'in-camera' proceedings in trials involving children must be exercised by the child and not thrust on every child. Sometimes open trials are more helpful for the child; open trials are more accountable and reports of such trials form public opinion for the child.

The rule under Indian law is that court proceedings should be conducted under public scrutiny to create confidence in people about the fairness, objectivity and impartiality of the administration of justice, and it also acts as a check against judicial arbitrariness. But the court, in its discretion, can conduct a in-camera trial to pursue fair administration of justice.

Order XVIII Rule 14 of the Code of Civil Procedure 1908 lays down the rule with regards to the examination of a witness:

'Witness to be examined in open Court-The evidence of the witnesses in attendance shall be taken orally in open Court in the presence and under the personal direction and Superintendence of the Judge.'

Section 153B of the Code of Civil Procedure provides for in-camera trials:

'Place of trial to be deemed to be open Court.-The place in which any Civil Court is held for the purpose of trying any suit shall be deemed to be an open Court, to which the public generally may have access so far as the same can conveniently contain them.

Provided that the presiding Judge may, if he thinks fit, order at any stage of any inquiry into or trial of any particular case, that the public generally, or any particular person, shall not have access to, or be or remain in, the room or building used by the Court.'

The Code of Criminal Procedure 1973 states that courts should function as an open court with access to the public. All persons have a right to be present in a court subject to there being sufficient accommodation.

'327. Court to be open.

(1) The place in which any Criminal Court is held for the purpose of inquiring into or trying any offence shall be deemed to be an open Court, to which the public generally may have access, so far as the same can conveniently contain them:

Provided that the presiding Judge or Magistrate may, if he thinks fit, order at any stage of any inquiry into or trial of, any particular case, that the public generally, or any particular person, shall not have access to, or be or remain in, the room or building used by the Court.

(2) Notwithstanding anything contained in sub-section (1), the inquiry into or trial of rape or an offence under section 376, section 376-A, section 376-B, section 376-C or section 376-D of the Indian Penal Code (45 of 1860) shall be conducted in camera: Provided that the presiding judge may, if he thinks fit, or on an application made by either of the parties, allow any particular person to have access to, or be remain in, the room or building used by the Court.

(3) Where any proceedings are held under sub-section (2), it shall not be lawful for any person to print or publish any matter in relation to any such proceedings, except with the previous permission of the Court.'

A trial of rape must be conducted in-camera. The proviso confers a discretion by which the presence of the public or any particular person may be prohibited at the time of trial. The court must record its reasons for the exclusion of the public or any particular person from attending the trial.

The Family Courts Act 1984 provides for proceedings to be held in-camera if the family court or either party so desires.

The British law (The magistrates' courts Act 1980) has provisions for a

Magistrates' Court to sit in private for proceedings to be conducted under the Children's Act 1989 in respect of a child.

In *Globe Newspaper Co. vs. Superior Court for the County of Norfolk*, 457 U.S. 596 (1982), the Court stated that spectators should be removed whenever their presence intimidates the child to the point that the child is unable to testify. The law does not automatically require the judge to remove all spectators during the child's testimony in a sexual victimisation case; if circumstances so require in a particular case, a judge may remove spectators.

7. EXPEDITIOUS HEARINGS

Delay in child abuse prosecutions can have a devastating effect on the child as it prolongs the child's trauma and the child interprets such delay as a sign that no importance is placed on the offence.

It is necessary to have a law to expedite prosecution of child abuse cases. The British government in 1988 had formulated a policy to expedite prosecution of child abuse cases; this policy was elevated to a statutory level by the amendment of the Criminal Justice Act, 1991.

Child sexual abuse cases should be given fixed dates for trial and heard expeditiously. The police should promptly investigate cases of child abuse to minimise the time before the case is heard in court.

8. CHILDREN AS WITNESSES

- (i) Explicitly tell the child that the interviewer does not know what occurred.
- (ii) Give the child unambiguous and comprehensible instructions at the start of the interview.
- (iii) Instruct the child to say 'I don't know' if unsure of an answer to a question.
- (iv) Avoid repeating questions as it confuses the child.
- (v) The child should be interviewed on home ground.
- (vi) Leading questions may be asked of a child and should be allowed.
- (vii) A supportive adult should accompany the child and should be allowed to explain to the child a question not understood by the child.

9. REHABILITATION OF VICTIMS

Once the court proceedings are over, rehabilitation is of low priority; children feel they are dumped by the system after completion of the court process. The rehabilitation of child victims and their reintegration into mainstream society should be comprehensively covered by legislation. There is a need to increase support services available to children who suffer or have

suffered from sexual abuse or exploitation. Support services include health-care, counselling, legal assistance, residential facilities, etc.

Child participation in rehabilitation programmes should be encouraged. In Ethiopia, prostituted children have been trained to function as paralegals. In Brazil, exploited children act in plays depicting the horrors of the sex trade. In the Philippines, abused children are trained as child counsellors and educators. In South Africa, victim children take care of babies orphaned by AIDS.

Under the Juvenile Justice Act 1986, it is the duty of a probation officer to establish linkages with voluntary organisations to facilitate rehabilitation of juveniles. The Act and Rules framed thereunder provide for establishment of after-care organisations to help a released juvenile overcome his/her mental, social and economic difficulties, to assist such juvenile in functioning as a self-dependant and self-reliant socially useful citizen, and to assist in the complete and final readjustment, resettlement and rehabilitation of juveniles.

Protective homes are to be established under the Immoral Traffic (prevention) Act 1956. A Protective home is an institution where persons in need of care and protection are kept. A rescued child or minor is placed in an institution established or recognised under the Juvenile Justice Act. These institutions should have adequate facilities for the integration of the rescued person into the mainstream society.

For a comprehensive rehabilitation package, it is necessary to

1. Establish mental health centers, drop-in centers, outreach projects, independent or transitional living programmes and youth service programmes, which are easily accessible to children and youth;
2. Persuade and motivate victims of commercial sexual exploitation to join mainstream society and assist in reintegrating them into society to enable them to lead a dignified life;
3. Children of women victims who are above six years of age should be shifted to institutional care as they are vulnerable to exploitation;
4. Assist non-governmental organisations to establish child development and care centres that provide educational facilities, vocational training, etc., to enable children to be self sufficient;
5. Appoint well-qualified and specially trained staff, including child psychiatrists to man child care institutions.

X. CHILD-RELATED CONCEPTS TO BE INCORPORATED INTO INDIAN LAW

There are certain concepts that have been incorporated in foreign laws whose inclusions help in preventing and comprehensively dealing with cases of child sexual abuse. Concepts relevant to the Indian situation could be adopted to effectively deal with child sexual abuse in the country.

1. MANDATORY REPORTING

Laws of mandatory reporting impose a legal duty on the public and professionals to report incidents of child abuse. Mandatory regulations for monitoring and reporting cases of child abuse, e.g., reporting by hospitals, educational institutions, etc., will make these authorities accountable. The reporter is required to report to the law enforcement agency or a designated child protection agency an incident of, or apprehension of child abuse; these agencies are to investigate these reports. Mandatory reporting also forms a database of child sexual abuse cases and helps in researching this offence.

Certain professionals in the course of their work are likely to come across cases of child sexual abuse, it is essential that they report these cases to check and prevent further abuse. General practitioners, as family doctors, work closely with families and are therefore in a position to identify an abused child or a child at risk of abuse. Hospital staff meet children in the course of their duties; they should be alert to indications of child abuse and should be trained to identify such cases. Teachers and school staff are in constant contact with children; they are in a position to observe external signs of abuse, including changes in behaviour or failure to develop. Educational institutions should be alert in identifying and reporting sexual abuse at the hands of staff members.

The Child Abuse Act 1990 of U.S.A. for the first time imposed mandatory reporting of suspected child abuse cases arising under Federal jurisdiction. An investigative agency has been designated by the attorney general to receive and investigate reports. Different states had enacted reporting laws

by the mid-seventies.

In Malaysia, the Child Protection Act 1991 makes it mandatory for a medical officer to notify a protector if there are reasonable grounds to believe that a child is being abused. The medical officer may be liable to pay a fine for not complying with this rule.

Laws and regulations with regards to mandatory reporting are not effectively functioning because the reporter apprehends defamatory action at the hands of the alleged abuser. The law should contain provisions that protects the reporter who has acted in good faith, e.g., the name of the reporter should not be disclosed. Though United Kingdom does not have a mandatory reporting law, the House of Lords in *D vs. National Society for Prevention of Cruelty to Children* (1988) has held that the identity of the informant should not be disclosed as it would prevent other informants coming forward, which would be contrary to public interest. In this case, an informant had filed a complaint before the Society about the alleged ill-treatment of a 14-month-old girl by her parents. The mother's health was badly affected by the investigation and she sued the society for negligence. The society refused to divulge the identity of the informant and the House of Lords supported the society's decision.

In India, there is no law for mandatory reporting of child sexual abuse cases. Presently, a case is reported to the police. It is strongly felt that a multidisciplinary team be constituted before any mandatory reporting law is formulated. The reporting must be done before this team whose members are experts in the field of children and sensitive to their needs.

The Kathmandu Commitment on Ending Violence against women and Girls in South Asia (1997) deals with the development and enforcement of a professional code of ethics that will prevent and respond to the problem of gender-based violence.

- ☞ As **legal professionals** and those involved in the formulation and enforcement of laws, we shall advocate and contribute to the reform of discriminatory laws and to the sensitive and effective enforcement of law, promoting awareness of the law and its proactive use in countering violence against women and girls.
- ☞ As **medical professionals**, we shall advocate and work towards increasing awareness and recognition among all health personnel, about acts of violence against women and children and to take appropriate, preventive, curative, rehabilitative medico-legal action.
- ☞ As **educators**, we shall advocate and work towards education for equality, non-violence and peace, support research and training on gender violence, legal literacy, develop gender sensitive curriculum and pedagogical training.
- ☞ As **media professionals**, we shall endeavour to portray and report on issues pertaining to violence against women and girls sensitively, vividly and honestly, keeping in mind that the victim should not be further victimised through our

reportage, create awareness on gender issues and the need for social action against all forms of gender violence.

- ⇒ We **writers**, recognising that we cannot be expected to write according to a certain agenda, but also realising the power of the word and the consequences of reinforcing gender stereotypes through writings, commit ourselves to the creation of a gender violence free society and heighten awareness, through our writings, of the issues of gender violence and the value system which sustains it.
- ⇒ We the **performing artists and cultural activists**, commit ourselves to promote the values of a gender violence free society and bring about attitudinal changes through our work. We also commit ourselves to forcefully resist any attempts to place restrictions on freedom of cultural expression, especially of women and cultural workers, placed by the governments or other pressure groups in any country of the region.
- ⇒ We **men**, realising that no sustainable change can take place unless we give up the entrenched ideas of male superiority, commit ourselves to devising new role models of masculinity. We shall endeavour to 'take off the armour' and move towards becoming a more developed and complete being. We urge international bodies to focus on and explore the destructive consequences of patriarchy.

2. MULTIDISCIPLINARY TEAM

Multidisciplinary teams require to be constituted for two purposes viz. (1) for reporting cases of child sexual abuse, and (2) for conducting case conferences and joint interviews of the child victim.

A multidisciplinary team should be constituted and be effectively functioning prior to enacting laws of mandatory reporting. If a multidisciplinary team is not established, the reporter is in a dilemma as to whom he/she should report the case to. Reporting to the police or a law enforcing agency may not be in the best interest of the child. Legal professionals, social service providers, medical practitioners, mental health professionals, police personnel, should all work together towards assisting the child in tackling the problem by jointly assessing the situation.

A multidisciplinary team should jointly interview the abused child so that the child does not have to repeatedly relive his/her trauma. Joint interviews with the police and social workers should be held to reduce the number of interviews. Uncoordinated approaches can lead to greater damage and trauma than the original abuse. Any professional intervention must aim at avoiding secondary damage before addressing the task of treating the primary damage. Primary damage is the abuse itself. Secondary damage happens most often in conflicts between the legal system and the child's protective

psychological needs. Case conferences and pre-interview meetings should be held by professionals in child sexual abuse cases to chart the future course of action. Conflicts could arise amongst the professionals themselves and these should be handled sensitively; it is necessary to acknowledge the conflict, identify the nature of the conflict and pass a conflict resolution. The team members should share information and responsibility for effective investigation and prosecution of the case and also for identifying the victim child's needed services.

Christina Lyon and Peter de Cruz in their book, "Child Abuse" have dealt with the different levels of multidisciplinary working and the dangers of superficial inter-agency cooperation. There are three levels of multidisciplinary working and coordination in child abuse:

1. Ad-hoc cooperation: contact over telephone, face-to-face discussions, letters between front-line staff on specific issues.
2. Systematic case coordination: i.e., occurring in case conferences and other formal meetings concerning a particular case.
3. Programme coordination: including inter-agency arrangements at more senior levels to coordinate systems, procedures, policies, etc.

The dangers of superficial inter-agency cooperation are as follows:

1. A few dominant or 'leading' professionals who work closely with each other may unwittingly exclude the participation of others in the field.
2. Inter-disciplinary working may create an environment in which individual errors are shielded or even condoned. It must be recognised that no amount of professional cooperation can replace the need for skills, knowledge and experience with which to cope with the problem.
3. There are a vast number of agencies and organisations working in the field of child protection; this in a practical sense does not help the task of a unified form of cooperation.

CASE CONFERENCES

Case conferences provide a platform for exchange of information between professionals, allow for discussion and formulation of an action plan for the protection of the child. The legal department of a local authority should be present at case conferences conducted by multidisciplinary teams to advise on legal complexities.

1. A case conference should focus on the child and ensure that the child's interest supercedes the interest of any other person, including parents in case of conflicting interests.
2. The purpose for holding the case conference should be clarified, and all those necessary for fulfilling such purpose should be invited.
3. A plan should be formulated at the case conference. Dissenting views

and reservations should be recorded and it is essential to make arrangements for the future review of the plan.

4. Decisions taken at the case conference must be sent to the investigating agency; the investigating agency should act in accordance therewith.

Parents may be invited a matter be present at a case conference, but they cannot attend as of right. Parents/child-caretakers and children of sufficient age should be kept informed of what is happening at every stage of an investigation.

In *R vs. United Kingdom* (1988) 2 FLR 445, the European Court of Human Rights held that the United Kingdom was in breach of Articles 6 and 8 of the European Convention of Human Rights, the government had failed to involve the parents in decision making with regards to children in care.

3. CITIZEN'S REVIEW PANEL

Under the Child Abuse Prevention and Treatment (Amendment) Act 1996, citizen's review panels are to be constituted to examine policies and procedures and specific cases in respect of child sexual abuse, and issue public reports.

It is important that citizens get involved to protect the rights of children; children often are not aware of their rights or if aware, are not in a position to agitate for their implementation.

Citizens must demand accountability from the state and children's organisations; their involvement will prevent the abuse of children who are at the mercy of the state or children's organisations. Social audits should be conducted by citizens to monitor the conditions of child care facilities, such as institutions, health care centres, schools, creches.

4. CHILD PROTECTION REGISTER

Under the British law, a child protection register is to be maintained by the Social Services Department. This register contains the names of children who have been abused or are considered to be at a high risk of abuse. It is concerned with the future protection of a child rather than past abuse. The names of family members, and anyone else posing a threat to the child, are also to be entered in the register.

5. GUARDIAN AD-LITEM

A guardian ad-litem is appointed by the court to safeguard children's interests. A guardian ad-litem is usually a court-appointed advocate who has

the requisite expertise. Though a trained volunteer could also be appointed guardian ad-litem. The court should appoint a guardian ad-litem early in the proceedings so that he/she can play an active role in advising the court about what is in the best interest of the child. A guardian ad-litem should take assistance from experts to ensure that the interest of the child is protected.

The duties of a guardian ad-litem are categorised below:

1. **Investigation:** The guardian ad-litem should investigate circumstances relevant to the proceedings, and for such purpose, interview persons, inspect records and obtain professional assistance.
2. **Promotion of Child's Best Interests:** The main duty of the guardian ad-litem is to safeguard and promote the child's best interests until the child attains adulthood. The guardian ad-litem is to take into account the wishes and feelings of the child, having regard to his/her age and understanding, and to ensure that these are made known to the court.
3. **Instructing Legal Practitioner:** If a legal practitioner is not already appointed, to appoint and instruct a legal practitioner to represent the child. The guardian ad-litem and the legal practitioner must work closely. In case of disagreement between the guardian ad-litem and the legal practitioner, the legal practitioner will take the relevant instructions from the child, and the guardian ad-litem may portray his own views to the court. In the United Kingdom, there is a national panel of solicitors who are specially qualified to represent children in child care proceedings.
4. **Submit Reports to the Court:** The guardian ad-litem is to submit a report in writing to the court, to assist the court in arriving at its decision. It is an independent report that the court will consider only once the case is proved. The guardian ad-litem is to be given an opportunity to give evidence even prior to proving of the case, if he has certain information, which could be of importance.

Under the Child Abuse Prevention and Treatment (Amendment) Act 1996, the guardian ad-litem is appointed to provide first-hand clear understanding of the situation, present the needs of the child to the court and make suggestions to the court about the best interest of the child.

The Children's Act 1989 provides for the court to appoint a guardian ad-litem from a panel of persons to safeguard the child's interest.

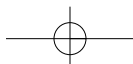
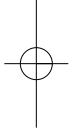
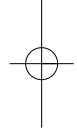
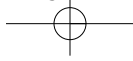
6. OMBUDSMAN

An ombudsman is a watchdog and guardian of children's rights. The function of the office of the ombudsman is to raise public awareness and change opinions and attitudes in a manner so as to improve children's status

at homes and in the society. An ombudsman's office should be easily approachable to children with their complaints and suggestions. Certain countries like Norway have appointed an ombudsman to protect and promote the rights of children.

- (1) The Ombudsman must serve as a voice for children. The Ombudsman's office must transmit the views of children to policy makers, make the needs and rights of children known to the public, and ensure that children's views are considered in any decision-making process.
- (2) The office of the Ombudsman must be autonomous and independent of the political administration, and should not be affiliated to any political organisation.
- (3) It must be easily accessible to the public, including children.

The main purpose of establishing an ombudsman's office is to promote the rights of children vis-a-vis public and private authorities, and monitor the development of conditions that nurture children. An ombudsman's office may be constituted as a statutory office, or in countries where a large number of non-governmental organisations are working with children, a particular organisation may be earmarked by the parliament to work towards promoting and policing the rights of children.



XI. THE JUVENILE OFFENDER

The Juvenile Justice Act deals with the treatment of a juvenile offender. The close scrutiny of the juvenile justice system will reflect total noncompliance with the Beijing Rules (1985) and the Rules for Protection of Juveniles Deprived of Their Liberty (1990).

1. JUVENILE OFFENDER

Under Section 82 of the Indian Penal Code, nothing is an offence which is done by a child under seven years of age. At that age, a child cannot distinguish between right and wrong, and therefore cannot be held guilty for having committed a crime.

Section 83 of the Indian Penal Code states,

'Nothing is an offence which is done by a child above seven years of age and under twelve, who has not attained sufficient maturity of understanding to judge the nature and consequences of his conduct on that occasion.'

In the case of a juvenile offender between 7 and 12 years of age, non-attainment of maturity will require to be specifically pleaded and proved. After the age of 12, the defence of immaturity of understanding is not permitted. Thus, under the Indian Penal Code, anyone over 12 years of age is to be treated as an adult.

Under Article 22 of the Constitution, every person who is arrested and detained in custody is mandatorily to be produced before a magistrate within 24 hours of such arrest.

The Juvenile Justice Act has a similar provision, but a juvenile's production before the competent authority does not generally take place within the stipulated time as the competent authority does not sit on a daily basis in most districts. This may result in the incarceration of a juvenile for an unnecessary longer period.

The Juvenile Justice Act deals with delinquent juveniles, i.e., juveniles who have committed an offence. A delinquent juvenile is to be tried in a juvenile court. In the event of a juvenile found guilty, the order passed should be therapeutic rather than punitive. On conviction, a juvenile is to be sent to a

special home; special homes are to provide juveniles with accommodation and facilities for education, vocational training and rehabilitation. After-care organisations are to be established for the care of juveniles on discharge from special homes. If the parents or guardian of the juvenile can be contacted, the juvenile should be released on bail pending inquiry. A juvenile cannot be sentenced to death or imprisonment, nor can he/she be incarcerated in a police station or jail, nor can he/she be charged with or tried for an offence together with a person who is not a juvenile.

Under the Probation and Offenders Act 1958, courts have been given the power to release certain offenders on probation for good conduct or on due admonition. The courts have been taking recourse to the provision of this law in case of youth offenders; it is imperative that they be provided with an opportunity to reform themselves, especially if there is no history of past convictions. The courts are required to ordinarily release a person under 21 years of age after due admonition or on probation if found to be guilty of an offence punishable with imprisonment, not being life imprisonment or death. It is the probation officer's duty to supervise probationers.

Under the Children and Young Persons Act of United Kingdom, if someone wishes to file a complaint against a juvenile, prior notice must be given to the local authority within whose jurisdiction the juvenile resides or the offence was committed. In case of child sexual abuse where there is sufficient evidence to launch prosecution, the juvenile may be cautioned if he has admitted the offence.

2. THE UNITED NATIONS MINIMUM RULES FOR THE ADMINISTRATION OF JUVENILE JUSTICE (THE BEIJING RULES OF 1985)

The 'General Principles' of the Beijing Rules are reproduced below.

GENERAL PRINCIPLES

1. Fundamental perspectives
 - 1.1 Member States shall seek, in conformity with their respective general interests, to further the well-being of the juvenile and her or his family.
 - 1.2 Member States shall endeavour to develop conditions that will ensure for the juvenile a meaningful life in the community, which during that period in life when she or he is most susceptible to deviant behavior, will foster a process of personal development and education that is as free from crime and delinquency as possible.
 - 1.3 Sufficient attention shall be given to positive measures that involve the full mobilization of all possible resources, including the family, volunteers and

other community groups, as well as schools and other community institutions, for the purpose of promoting the well-being of the juvenile, with a view to reducing the need for intervention under the law, and of effectively, fairly and humanely dealing with the juvenile in conflict with the law.

- 1.4 Juvenile justice shall be conceived as an integral part of the national development process of each country, within a comprehensive framework of social justice for all juveniles, thus, at the same time, contributing to the protection of the young and the maintenance of a peaceful order in society.
- 1.5 These Rules shall be implemented in the context of economic, social and cultural conditions prevailing in each Member State.
- 1.6 Juvenile justice services shall be systematically developed and coordinated with a view to improving and sustaining the competence of personnel involved in the services, including their methods, approaches and attitudes.

2. Scope of the Rules and definitions used

2.1 The following Standard Minimum Rules shall be applied to juvenile offenders impartially, without distinction of any kind, for example as to race, color, sex, language, religion, political or other opinions, national or social origin, property, birth or other status.

2.2 For purposes of these Rules, the following definitions shall be applied by the Member States in a manner which is compatible with their respective legal systems and concepts:

- (a) A juvenile is a child or young person who, under the respective legal systems, may be dealt with for an offense in a manner which is different from an adult;
- (b) An offense is any behavior (act or omission) that is punishable by law under the respective legal system;
- (c) A juvenile offender is a child or young person who is alleged to have committed or who has been found to have committed an offense.

2.3 Efforts shall be made to establish, in each national jurisdiction, a set of laws, rules and provisions specifically applicable to juvenile offenders and institutions and bodies entrusted with the functions of the administration of juvenile justice and designed:

- (a) To meet the varying needs of juvenile offenders, while protecting their basic rights;
- (b) To meet the needs of society;
- (c) To implement the following rules thoroughly and fairly.

3. Extension of the Rules

3.1 The relevant provisions of the Rules shall be applied not only to juvenile offenders but also to juveniles who may be proceeded against for any specific

behavior that would not be punishable if committed by an adult.

- 3.2 Efforts shall be made to extend the principles embodied in the Rules to all juveniles who are dealt with in welfare and care proceedings.
- 3.3 Efforts shall also be made to extend the principles embodied in the Rules to young adult offenders.

4. Age of criminal responsibility

- 4.1 In those legal systems recognising the concept of the age of criminal responsibility for juveniles, the beginning of that age shall not be fixed at too low an age level, bearing in mind the facts of emotional, mental and intellectual maturity.

5. Aims of juvenile justice

- 5.1 The juvenile justice system shall emphasise the well-being of the juvenile and shall ensure that any reaction to juvenile offenders shall always be in proportion to the circumstances of both the offenders and the offense.

6. Scope of discretion

- 6.1 In view of the varying special needs of juveniles as well as the variety of measures available, appropriate scope for discretion shall be allowed at all stages of proceedings and at the different levels of juvenile justice administration, including investigation, prosecution, adjudication and the follow-up of dispositions.
- 6.2 Efforts shall be made, however, to ensure sufficient accountability at all stages and levels in the exercise of any such discretion.
- 6.3 Those who exercise discretion shall be specially qualified or trained to exercise it judiciously and in accordance with their functions and mandates.

7. Rights of juveniles

- 7.1 Basic procedural safeguards such as the presumption of innocence, the right to be notified of the charges, the right to remain silent, the right to counsel, the right to the presence of a parent or guardian, the right to confront and cross-examine witnesses and the right to appeal to a higher authority shall be guaranteed at all stages of proceedings.

8. Protection of privacy

- 8.1 The juvenile's right to privacy shall be respected at all stages in order to avoid harm being caused to her or him by undue publicity or by the process of labeling.

8.2 In principle, no information that may lead to the identification of a juvenile offender shall be published.'

The Beijing Rules also deal with investigation and prosecution, adjudication and disposition, non-institutional, institutional treatment, and research, planning, policy formulation and evaluation. These provisions are summarised below.

Investigation and Prosecution

1. Parents or guardian of the juvenile to be immediately notified of the apprehension of a juvenile or be notified within the shortest possible time.
2. A judge or competent authority to consider the release of the juvenile without any delay.
3. Law enforcement agencies to respect the legal status of the juvenile, promote the well-being of the juvenile and avoid harm to him/her.
4. No formal trial by the competent authority in case of a juvenile offender. The police, the prosecution or other agencies to dispose of cases at their discretion without recourse to formal hearings.
5. To utilise community programmes, such as temporary supervision and guidance, restitution, and compensation to victims, for disposal of juvenile cases. Such diversion to be adopted with consent of the juvenile or his/her parents or guardian.
6. Police officers frequently dealing with juveniles to receive special instructions and training; special police units to be established for such purpose in large cities.
7. Detention pending trial to be used as a last resort and for the shortest possible time. Other alternative measures should be employed, such as close supervision, placement with a family, etc.
8. Juveniles under detention pending trial to be kept and detained separately from adults. While in detention, juveniles to receive care, protection and all necessary individual assistance – social, educational, vocational, psychological, medical and physical – that they may require in view of their age, sex and personality.

Adjudication and Disposition

1. Competent authority to deal with the case of a juvenile offender according to the principles of a fair and just trial. The proceedings to be (a) conducive to the best interest of the juvenile, and (b) conducted in an atmosphere of understanding with free participation of the juvenile.
2. The juvenile to be represented by a legal adviser or provided with free legal aid. The parents or guardian to participate in the proceedings in the interest of the juvenile, except if the competent authority reasons

- otherwise.
3. Prior to the passing of sentence, the background and circumstances in which the juvenile is living or the circumstances under which the offence is committed be considered to facilitate judicious adjudication of the case.
 4. Adjudication by the competent authority to be guided by the following principles:
 - (a) proportionate to the circumstances and gravity of offence, and to the needs of the juvenile and the society;
 - (b) restrictions on the personal liberty of the juvenile shall be limited to the minimum;
 - (c) deprivation of personal liberty to be imposed only in cases involving violence against another person or of persistence in committing other serious offences and to which there is no other appropriate response;
 - (d) the well-being of the juvenile shall be the guiding factor in consideration of his/her case.
 5. Capital punishment not to be imposed for any crime committed by a juvenile nor to be subjected to corporal punishment.
 6. Institutionalisation to be a last resort. Competent authority to employ any or combination of different disposition measures to avoid institutionalisation, such as probation; care, guidance and supervision orders; community service orders; financial penalties, compensation and restitution; orders to participate in group counseling and similar activities; orders concerning foster care, living communities or other educational settings; etc.
 7. No juvenile to be removed from parental supervision, except in necessary circumstances.
 8. A matter concerning a juvenile to be handled expeditiously and without any unnecessary delay.
 9. Records of juveniles to be kept strictly confidential and closed from third parties, and not to be used against the same offender in adult proceedings.
 10. Professional education, in-service training, refresher courses, etc., for establishing and maintaining professional competence of professionals dealing with juvenile cases. Appointment of juvenile justice personnel must reflect the diversity of juveniles and ensure fair representation of women and minorities.

Non-Institutional Treatment

1. Provide necessary assistance to juveniles for facilitation of the rehabilitative process, such as lodging, education or vocational training, employment. Volunteers, voluntary organisations, local institutions and other community resources to be mobilised for effective rehabili-

tation of the juvenile within the family unit or in a community setting.

Institutional Treatment

1. Objective of training and treatment of juveniles placed in institutions is to provide care, protection, education and vocational skills, to enable them to assume socially constructive and productive roles in the society.
2. Institutionalised juveniles to receive for their wholesome development, care, protection and all necessary assistance – social, educational, vocational, psychological, medical and physical. Inter-ministerial and inter-departmental cooperation to be fostered for the purpose of providing adequate academic and vocational training to institutionalised juveniles to ensure they do not leave the institution with an educational disadvantage. Fair and similar treatment to both male and female offenders.
3. In the interest and well-being of the institutionalised juvenile, the parents or guardian must have a right of access.
4. Conditional release from an institution to be resorted to by the competent authority to the greatest possible extent and at the earliest possible time. Juveniles so released to be assisted and supervised by an appropriate authority and receive full support by the community.
5. Services of half-way houses, educational homes, day-time training centres, etc., to be utilised for proper reintegration of the juvenile into the society.

Research, Planning, Policy Formulation and Evaluation

1. Organise and promote research as a basis for effective planning and policy formulation, such as trends, problems and causes of juvenile delinquency and crime.
2. Mechanisms to be built into the juvenile justice administration to collect and analyse relevant data and information for assessment, improvement and reform of the administration.
3. Delivery of services in juvenile justice administration to be systematically planned and implemented as an integral part of national development efforts.

3. UN RULES FOR THE PROTECTION OF JUVENILES DEPRIVED OF THEIR LIBERTY (1990)

The fundamental perspective of these rules are based on those contained in the Beijing Rules. It specifies that juveniles should be deprived of their liberty only in accordance with the principles and procedures set forth in the Beijing Rules, and that deprivation of the liberty of a juvenile should be a disposition of last resort and for the minimum necessary period and should

be limited to exceptional cases.

The provisions contained in the United Nations Rules for the Protection of Juveniles Deprived of their liberty are summarised below.

Scope and Application of the Rules

1. '(a) A juvenile is every person under the age of 18. The age limit below which it should not be permitted to deprive a child of his or her liberty should be determined by law;
- (b) The deprivation of liberty means any form of detention or imprisonment or the placement of a person in a public or private custodial setting, from which this person is not permitted to leave at will, by order of any judicial administrative or other public authority.'
2. The deprivation of liberty to be in a manner that respects the human rights of juveniles and guarantees them the benefit of meaningful activities and programmes, which promote and sustain their health and self respect, and develop skills and potential to assist them as members of the society.
3. Juveniles deprived of their liberty not to be denied civil, economic, political, social or cultural rights under national and international law.
4. The competent authority to protect the individual rights of juveniles, in respect of detention, and a duly constituted body to visit juveniles to secure social integration.

Juveniles under Arrest or Awaiting Trial

1. Untried juveniles to be presumed innocent and to be so treated. Detention before trial to be avoided and alternative measures to be applied. Preventive detention to be used in exceptional cases; juvenile courts and investigative bodies to expeditiously process such matters. Untried detainees to be separated from convicted juveniles.
2. Juveniles have a right to legal counsel and may apply for free legal aid. Opportunities for regular communication with legal advisers in privacy and confidentiality.
3. Juveniles to be provided with opportunities to pursue work with remuneration and to continue their education or training.
4. Juveniles to receive materials for their leisure and recreation.

The Management of Juvenile Facilities

1. Records: Records and documents to be kept in a confidential individual file, which is accessible to an appropriate third party on behalf of the juvenile. Upon release, the records to be sealed and later expunged. Juvenile to be detained only under an order of a judicial, administrative or other public authority, and the details of such order

- to be entered in a register.
2. Admission, registration, movement and transfer: Information with regards to the juvenile, such as the identity of the juvenile, reasons for commitment, the date and time of admission, transfer and release, physical and mental health problems, etc., should be kept at the place of detention, and to be provided to the parents, guardian or closest relative of the juvenile. The juvenile on admission to be furnished with or explained the rules governing the detention facility, and the regulations and procedures prevailing therein, such as the method of seeking information or making complaint, etc., Juveniles to be transported at the cost of the administration and in a comfortable manner. Arbitrary transfer from one facility to another is prohibited.
 3. Classification and placement: On admission, each juvenile to be interviewed and a psychological and social report, and medical report to be prepared. When special rehabilitative treatment is required, a specific plan to be prepared in respect of the same. The most appropriate placement for the juvenile within the facility to be determined in accordance with the reports and planned treatment. Detention of juvenile to take place under conditions that take into account particular needs, status and special requirements, and which ensure protection from harmful influences and risk situations. Juveniles to be separated from adults in detention facilities, unless they are members of the same family or the juvenile and the adult are brought together for a special programme for the benefit of the juvenile. Open detention facilities with no or minimal security to be established for juveniles; these facilities to be small scale and integrated into the social, economic and cultural environment of the community.
 4. Physical environment and accommodation: Physical environment and accommodation in detention facilities should be such that they meet all the requirements of health and human dignity. The design of the facility should promote privacy, physical exercise leisure-time activities, etc. Sleeping, sanitation, clothing, food water, etc., should result in the physical and psychological well-being of the juvenile.
 5. Education, vocational training and work: Education facilities suited to the needs of the juvenile to be provided as far as possible outside the detention facility in community schools. Juveniles who are illiterate or have cognitive or learning difficulties to receive special education. In-house education to be provided by qualified teachers through programmes, integrated with the education system of the country. Diplomas or educational certificates awarded to juveniles while in detention not to indicate in any manner that the juvenile was institutionalised. Vocational training of the juvenile's choice to be provided to prepare the juvenile for future employment. Wherever possible, the juvenile to be provided with the opportunity to perform remunerated

labour within the local community. The work, if provided within the detention facility should be of such nature so as to prepare the juvenile for normal occupational life. Every juvenile who performs work to be paid equitable remuneration. Part of the earnings of a juvenile to be set aside to constitute a savings fund to be handed over to the juvenile on his/her release, the remainder of the earnings to be used by the juvenile to purchase articles for his/her own use or to send to his/her family or to indemnify the person injured by his/her offence. The earnings of the juvenile not to be utilised as profit of detention facility.

6. Recreation: Every juvenile to be given time daily for free exercise in the open air, at which time recreational and physical training is to be provided with the aid of appropriate installations and equipment. Facilities for remedial physical education and therapy to be available under supervision for juveniles needing it. Additional time to be provided daily for leisure activities, which could be devoted, if the juvenile so wishes, to arts and crafts skill development.
7. Religion: Juveniles in a detention facility to be allowed to satisfy the needs of his/her religious and spiritual life and have possession of the books or items of religious observance and instruction, and attend services or meetings held in the detention facility or by conducting his/her own service. Every juvenile to have the right to receive visits from a qualified representative of any religion, as well as the right not to participate in religious services and freely decline religious education, counseling or indoctrination.
8. Medical care: Juveniles in a detention facility to receive adequate medical care, both preventive and remedial, including dental, ophthalmological and mental health care, as well as pharmaceutical products and special diets as medically indicated. The medical care to be provided through the health services of the community. Every juvenile to be examined by a physician upon admission for recording of any evidence of ill-treatment and identifying any physical or mental condition requiring medical attention. Medical services to be utilised to detect substance abuse or other condition that may hinder the integration of the juvenile into the society. If a medical officer has reason to believe that the physical or mental health of a juvenile has been or will be injuriously affected by continued detention, the same to be reported to the director of the detention facility and the independent authority responsible for safeguarding the well-being of the juvenile. A juvenile suffering from mental illness to be treated in a specialised institution. Medicines to be administered by qualified medical personnel only for necessary medical treatment, and not with a view to elicit information or confession, or as punishment, or as a means of restraint, or as testers in the experimental use of drugs and treatment.

9. Notification of illness, injury and death: The family or guardian of the juvenile has the right to be informed of the state of health of the juvenile on request and in the event of any important changes in the health of the juvenile. The family or guardian of the juvenile to be informed about the death, illness requiring transfer of the juvenile to an outside medical facility, or a condition requiring clinical care within the institution for more than 48 hours. Upon the death of a juvenile during the period of deprivation of liberty, the nearest relative has the right to inspect the death certificate, see the body and determine the method of disposal of the body. An independent inquiry to be conducted in respect of the cause of death, the report of which to be made accessible to the nearest relative. This inquiry to also be conducted in cases when the death of a juvenile occurs within six months of his/her release from the detention facility and there is reason to believe that the death is related to the period of detention.
A juvenile to be informed of the death, serious illness or injury of any immediate family member, and be permitted to attend the funeral or visit a critically ill relative.
10. Contacts with wider community: Every means to be provided to ensure that juveniles have adequate contact with the outside world. This serves two purposes, (i) ensures the juvenile's right to fair and humane treatment, and (ii) prepares juvenile for his/ her return to society. Juveniles to be permitted to communicate with families, friends and other persons or representatives of reputed organisations, to make home visits, and to leave detention facility for educational, vocational or other important reasons. Juveniles should be provided with opportunities to keep themselves informed regularly of the news by reading newspapers, periodicals or publications, through radio and television programmes, and films.
11. Limitations of physical restraint and the use of force: Instruments of restraint and force to be used in exceptional cases, i.e., to prevent the juvenile from inflicting self injury, injury to others or serious destruction of property, and after having exhausted all other control methods and in a manner authorised and specified by law and regulation. Such instruments not to be used to cause humiliation or degradation to the juvenile. The carrying and use of weapons by personnel to be prohibited in any facility where children are detained.
12. Disciplinary procedures:
 - (a) Disciplinary measures to be consistent with the upholding of the inherent dignity of the juvenile and the fundamental objective of institutional care, viz., instilling a sense of justice, self respect and respect for the basic rights of every person.
 - (b) All disciplinary measures amounting to cruel, inhuman or degrading treatment to be prohibited, including corporal punishment, reduc-

tion in diet, denial of contact with family members. Collective disciplinary action to be prohibited.

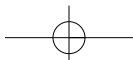
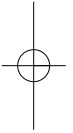
(c) Norms to be established with regards to (i) conduct that constitutes a disciplinary offence, (ii) type and duration of disciplinary sanctions that may be inflicted, (iii) the authority competent to impose such sanctions and (iv) the authority competent to consider appeals. These norms to be established in accordance with the terms of the law and regulation in force.

(d) Misconduct to be promptly presented before the competent authority for thorough examination; the competent authority to decide the matter without undue delay. The juvenile to be given a proper opportunity of presenting his/her defence. No juvenile to be responsible for disciplinary functions except in supervision of specified social, educational or sports activities, or in self-government programmes.

13. Inspection and complaints: Qualified inspectors or a duly constituted authority not belonging to the administration of the facility to be empowered to conduct inspections on a regular basis and to undertake unannounced inspections. Inspectors to have unrestricted access to juveniles in a detention facility and to staff and records of such a facility. Qualified medical officers to be part of the inspection team to evaluate the conditions of institutional life that affect the physical and mental health of juveniles. A Report on the findings to be submitted after inspection. Any fact discovered regarding violation of the rights of juveniles to be communicated to the competent authority for investigation and prosecution. A juvenile to be provided with opportunities to make requests or complaints to the director of the detention facility or his authorised representative, and to a judicial authority or other proper authority without censorship as to the substance of the request or complaint. The juvenile to be permitted assistance from a family member, a legal counselor or humanitarian groups for making or the complaint. The juvenile to be informed of the response to his complaint as soon as possible. An independent office to be established to receive and investigate complaints made by juveniles deprived of their liberty.
14. Return to the community: Arrangements to be designed to assist juveniles to return to society, family life, education or employment after release. The competent authority to ensure services to assist juveniles to re-establish themselves in society and to lessen prejudice against such juveniles. The services so identified are to provide juveniles with suitable residence, employment, clothing and sufficient means to maintain himself/herself in order to facilitate successful reintegration. The representatives of agencies providing such services to have access to juveniles in detention with a view to assist them in their return to the community.

Personnel

1. Personnel to be qualified and include a sufficient number of specialists, such as educators, vocational instructors, counselors, social workers, psychiatrists, psychologists on a permanent basis. Services of part-time and volunteer workers to be availed of in necessary circumstances.
2. To provide for careful selection and recruitment of every grade and type of personnel.
3. Personnel to be appointed as professional officers with adequate remuneration to attract and retain suitable persons. Personnel to be constantly motivated to fulfill their duties and obligations in a humane, committed, professional, fair and efficient manner.
4. To take steps to encourage cooperation among various services and different categories of staff engaged in the care of juveniles as well as between staff and administration.
5. Regular training to personnel to enable them to carry out their responsibilities effectively, particularly training in child psychology, child welfare and international standards and norms of human rights and the rights of the child.
6. Personnel of detention facility to respect and protect the human dignity and fundamental human rights of all juveniles.
 - (a) Not to inflict, instigate or tolerate any act of torture or any form of harsh, cruel, inhuman or degrading treatment, punishment, correction or discipline under any pretext or circumstances whatsoever.
 - (b) To combat any act of corruption and report it immediately to the competent authority.
 - (c) To respect the present rules and report its violation to the appropriate authority.
 - (d) To protect the physical and mental health of juveniles, including protection from physical, sexual and emotional abuse and exploitation.
 - (e) To respect the right of juveniles to privacy and safeguard all confidential matters concerning juveniles and their family gathered in their professional capacity.
 - (f) To minimise any differences between life inside and outside the detention facility, which tend to lessen due respect for the dignity of juveniles as human beings.



XII. JUDGEMENTS ON CHILD SEXUAL ABUSE, EXPLOITATION, AND RELATED MATTERS

1. ATTITUDE OF COURTS

It is essential for courts to send a clear message that child sexual abuse and exploitation will not be tolerated and that the perpetrator of the offence will be appropriately punished. Courts have generally risen to this challenge by passing judgements that protect and promote child rights.

Courts have on certain occasions neglected to provide adequate and substantial relief to the child victim. Judges sometimes take a lenient approach towards cases of child abuse; cases are often settled or compounded with payment of minimal compensation to the child. Concern for the adult offender, even in cases of grave sexual abuse, results in suspension of sentences for child rape and violence. Many members of the judiciary are not aware of the laws and international instruments relating to sexual exploitation or if aware, they do not know how to use them.

The prejudice of a judge is reflected in an order passed by a trial court in Punjab (India) whilst dealing with the gang rape of a girl victim under 16 years of age.

'The more probability is that (Prosecutrix) was a girl of loose character. She wanted to dupe her parents that she resided for one night at the house other maternal uncle, but for reasons best known to her, she did not do so and she preferred to give company to some persons.' : 1996 SCC (Cr.) 316 /AIR 1996 SC 1393.

The Supreme Court in *State of Punjab vs. Gurrmt Singh* 197 [1996 SCC (Cr.) 316/AIR 1996 SC 1393] deprecated the above statement by stating the following;

'We must express our strong disapproval of the approach of the trial Court and its causing a stigma on the character of the prosecutrix. The observations lack sobriety expected of a Judge. Such like stigmas have the potential of not only discouraging an even otherwise reluctant victim of sexual assault to bring forth complaint

for trial of criminals, thereby making the society to suffer by letting the criminal escape even a trial.'

The acquittal of an Austrian paedophile by the Supreme Court of Thailand reflects the manner in which 'murderers' are released because of mere technicalities. Rosano Baluyut, a Thai girl and street child, 12 years of age, died in 1987 because an Austrian paedophile inserted an electric vibrator into her vagina which broke inside her. Subsequently she was raped and the vibrator entered her uterus. The Austrian physician was initially sentenced to life imprisonment, but was released two years later by the Supreme Court. Though the Supreme Court came to a finding that the Austrian abused street children, it acquitted the Austrian on grounds of reasonable doubt concerning the evidence.

2. JUDGEMENTS

A few leading Indian and English judgements on child sexual abuse and exploitation, and other related matters are cited below. The entire judgement has not been reproduced – the law journal along with the legal issue dealt with has been cited for easy reference.

A. RAPE

AIR 1957 ORISSA 78 - GHANASHYAM MISRA VS. THE STATE

The high court in this case has enhanced the sentence as the perpetrator the offence had taken advantage of the teacher-student relationship he shared with the victim.

'The victim is a young girl of 10 years, and the culprit an adult of 39 years. He was her school teacher and he took advantage of his position by inducing her to come inside the school room and committed such an atrocious act, the consequence of which might as well be the complete ruin of the future life of the girl. I am unable to find any extenuating circumstance in his favour. I would, therefore while maintaining the conviction of the prosecutrix under Section 376 IPC enhance the sentence to 7 years rigorous imprisonment. The sentence of fine of Rs.200 and the order for payment of compensation to the father of the girl are both maintained.'

(1977) 3 ALLER 527 - R vs. TAYLOR & ORS.

This is a leading English case for sentencing for unlawful intercourse with a girl under 16 years of age. The court of appeal (criminal division) laid down the following guidelines;

1. The offence known as having unlawful sexual intercourse with a girl under 16 covers a wide spectrum of guilt, and accordingly the penalties appropriate to the offence will vary in different cases.
2. Where a youth has what starts of as a virtuous friendship and ends with sexual intercourse, it would normally be inappropriate to pass a punitive sentence.
3. Where a youth seeks out a girl of loose morals and has sexual intercourse with her, a fine would usually be appropriate, but where a man in his twenties or older seeks out such a girl, he may expect a stiffer fine or, if the girl is under 15, a short period of imprisonment.
4. Where the offender deliberately sets out to seduce a girl under 16, the appropriate sentence would be detention in the case of a young man, or imprisonment in the case of someone older.
5. A man in a supervisory capacity who abuses his position of trust for sexual gratification merits a sentence of imprisonment somewhere near the maximum term of two years

(1979) 2 SCC 143 / AIR 1979 SC 185 - TUKARAM & ANR. VS. THE STATE OF MAHARASHTRA (MATHURA CASE)

Mathura, a girl aged between 14 and 16 years was raped and her private parts fondled by two policemen attached to Desai Gunj Police Station where she had gone along with others for recording of a statement. The sessions court held that the prosecution had failed to prove its case, and that Mathura was 'a shocking liar' whose testimony 'is riddled with falsehood and improbabilities' and that 'of her own free will, she had surrendered her body to a police constable'. The medical examination showed old injuries on the hymen, and no semen stains were traced.

An appeal was preferred, and the high court whilst convicting the accused observed that,

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

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

**1980 CRLJ 1380 - GORAKH DAJI GHADGE Vs.
THE STATE OF MAHARASHTRA**

This is a case where a father has raped his 13-year-old daughter in their home. The Bombay High Court has held that seminal emission is not necessary to establish rape; what is necessary is that there must be penetration. The High Court has also dealt with the father-daughter relationship.

'In the present case, we have a sordid episode of a father, whose sacred duty is to ensure the welfare of his own child, subjecting his own, daughter, Kusum, who is of the tender age of 13 years to the heinous offence of rape. Crimes in which women are victims need to be severely dealt with and in extreme cases such as this when the accused, who is the father of the victim girl has thought it fit to deflower his own daughter of tender years to gratify his lust, then only a deterrent sentence can meet the ends of justice.'

**1981 SCC (CRI) 208 – HARPAL SINGH & ANR. VS.
STATE OF HIMACHAI PRADESH**

The delay in filing of a first information report in case of rape of a 16-year-old girl was condoned by the Supreme Court for the following reasons:

'The complainant had given reasonable explanation for lodging it (FIR) after ten days of occurrence. She stated that as honour of the family was involved, its members had to decide whether to take the matter to the Court or not. It is not uncommon that such considerations delay action on the part of the near relations of a young girl who is raped.'

1987 CRLJ 557 - IMRATLAL Vs. STATE OF MADHYA PRADESH

This case involved the rape of a girl aged 12 years and the question before the court was whether corroboration was essential for conviction.

'The law on the point is settled that a conviction of an accused can be based solely on the evidence of the prosecutrix if her evidence is worthy of credence. The rule of corroboration is not a rule of law. It is only a rule of prudence. Insistence

on corroboration is advisable but it is not compulsory in the eye of law. The nature and extent of corroboration too varies from case to case. If the narration of the prosecutrix is natural, if the evidence of the prosecutrix inspires confidence in the mind of the Judge and if the circumstantial and other evidence even slightly supports the case of the prosecutrix, then there arises no necessity of any corroboration of her statement. In the conspectus of the circumstances, it is the totality, which has to be accepted. There seems to be no reason to reject the testimony of the prosecutrix, which stands well corroborated by the first information report and the medical evidence.'

This judgement also deals with the absence of sperm on the vaginal slides.

'For proving an offence, it is not necessary that the accused, who commits rape, must discharge semen inside the vagina after penetration, and spermatozoa cannot be discovered unless and until there is discharge of that nature.'

The judgement further states that when an offence of rape is proved, that too on girls of very tender age and innocent behaviour, the sentence of imprisonment should be imposed with severity.

I (1992) CCR 141 (SC) - GAGAN BIHARI SAMAL & ANR. Vs. STATE OF ORISSA

The Supreme Court in this judgement has held that corroboration is not necessary in rape cases. The court has relied upon previous judgements passed by the court.

'6. In cases of rape, generally it is difficult to find any corroborative witness except the victim. It has been observed by this Court in *Bharwada Bhoginbhai v. The State of Gujarat* AIR SC 753 as follows:

"Corroboration is not the sine qua non for a conviction in a rape case. In the Indian setting, refusal to act on the testimony of a victim of sexual assault in the absence of corroboration as a rule, is adding insult to injury. Why should the evidence of a girl or the woman who complains of rape or sexual molestation be viewed with the aid of spectacles fitted with lenses tinged with doubt, disbelief, or suspicion? To do so is to justify the charge of male chauvinism in a male dominated society.

A girl or woman in the tradition bound non-permissive society of India would be extremely reluctant even to admit that only incident which is likely to reflect her chastity had ever occurred. She would be conscious of the danger of being

ostracised by the society or being looked down upon by the society including her own family members, relatives, friends, and neighbours. She would face the risk of losing the love and respect of her own husband and near relatives, and of her matrimonial home and happiness being shattered. If she is unmarried, she would apprehend that it would be difficult to secure an alliance with a suitable match from a respectable or an acceptable family. In view of these and similar factors, the victims and their relatives are not too keen to bring the culprit to the book. And when in the face of these factors the crime is brought to light there is a built-in assurance that the charge is genuine rather than fabricated."

7. The above observation has been made by this Court relying on the earlier observations made by this Court in *Rameshwar v. The State of Rajasthan* 1952 SCR 377 at pg. 386 with regard to the corroboration of a girl's testimony and version. Vivian Bose, J. who spoke for the court observed as follows:

"The rule, which according to the cases has hardened into one of law, is not that corroboration is essential before there can be a conviction but that the necessity of corroboration, as a matter of prudence, except where the circumstances make it safe to dispense with it, must be present in the mind of the judge. The only rule of law is that this rule of prudence must be present to the mind of the judge or jury as the case may be and be understood and appreciated by him or them. There is no rule of practice that there must, in every case, be corroboration before a conviction can be allowed to stand."

1994SCC (CR) 1585 - STATE OF UTTAR PRADESH VS. BABUL NATH

In this case, the Supreme Court has dealt with the explanation to Section 375 of IPC, i.e., penetration. The Supreme Court has held that,

'To constitute the offence of rape neither Section 375 of IPC nor the Explanation attached thereto require that there should necessarily be complete penetration of the penis into the private part of the victim prosecutrix. In other words to constitute the offence of rape it is not at all necessary that there should be complete penetration of the male organ with emission of sperm and rupture of hymen. Even partial or slightest penetration of the male organ within the labia majora or the vulva or pudenda with or without any emission of semen or even an attempt at penetration into the private part of the vagina would be quite enough for the purpose of Section 375 and 376 of IPC. That being so it is quite possible to commit legally the offence of rape even without causing any injury to the genitals or leaving any seminal stains.'

[Note: 'Vagina' is the canal in the female, from the vulva to the cervix uteri, that receives the penis in copulation. 'Vulva' is the external genital of the female, including the mons pubis, labia majora and minora, clitoris, and vestibule of the vagina.]

**(1995) 1 SCC 14-DELHI DOMESTIC WORKING WOMEN'S FORUM
Vs. UNION OF INDIA & ORS.**

By this judgement, the state was ordered to set up the Criminal Injuries Compensation Board as rape victims frequently incur substantial financial loss. The compensation is to be awarded by the court or the Criminal Injuries Compensation Board on the conviction of the offender, whether or not a conviction has taken place. The Union of India was directed to formulate a scheme 'to wipe out the tears of such unfortunate victims.'

The judgement also directed that anonymity of rape victims be maintained and they be provided with legal representation. Legal assistance should be provided at the police station to guide and support the victim who will be in a distressed state. A list of advocates willing to so act should be kept at the police station.

1996 SCC (CR) 316 – STATE OF PUNJAB Vs. GURMIT SINGH

This case is with regards to the gang rape of a girl victim under 16 years of age. The Supreme Court in this case has conclusively settled the following questions of law;

1. Courts cannot overlook the fact that in cases of sexual offences delay in the lodging of an FIR can be due to a variety of reasons, partly the reluctance of the prosecutrix and her family members to go to the police and complain about an incident that concerns the reputation of the prosecutrix and the honour of her family.
2. There is no requirement of law to insist upon corroboration of the statement of the prosecutrix for conviction of an accused. Corroborative evidence is not an imperative component of judicial credence in every case of rape.
3. Whilst dealing with the importance of in-camera trial in rape cases, the Supreme Court observed as under,

'Trial in camera would not only be in keeping with the self-respect of the victim of crime and in tune with the legislative intent but is also likely to improve the quality of the evidence of a prosecutrix because she would not be so hesitant or bashful to depose frankly as she may be in an open Court, under the gaze of the public'

4. The Supreme Court has in this judgment stated,

'Wherever possible it may be worth considering whether it would not be more desirable that the cases of sexual assault on females are tried by lady Judges, wherever available, so that the prosecutrix can make her statement with greater ease and assist the Courts to properly discharge their duties without allowing the truth to be sacrificed at the altar of rigid technicalities while appreciating evidence in such cases. The court should as far as possible avoid disclosing the name of the prosecutrix in their orders to save further embarrassment to the victim of sex crime. The anonymity of the victim of the crime must be maintained throughout'

5. With regards to badgering of the girl victim during cross-examination, the Supreme Court observed as under;

'The provisions of Evidence Act regarding relevancy of facts notwithstanding, some defence Counsel adopt the strategy of continual questioning of the prosecutrix as to the details of the rape. The victim is required to repeat again and again the details of the rape incident not so much as to bring out the facts on record or to test her credibility but to test her story for inconsistencies with a view to attempt to twist the interpretation of events given by her so as to make them inconsistent with her allegations. The Court, therefore, should not sit as a silent spectator while the victim of crime is being cross-examined by the defence. It must effectively control the recording of evidence in the Court. While every latitude should be given to the accused to test the veracity of the prosecutrix and the credibility of her version through cross-examination, the Court must also ensure that cross-examination is not made a means of harassment for causing humiliation to the victim of crime. A victim of rape, it must be remembered, has already undergone a traumatic experience and if she is made to repeat again and again in unfamiliar surroundings, what she has been subjected to, she may be too ashamed and even nervous or confused to speak and her silence or a confused stray sentence may be wrongly interpreted as "discrepancies and contradictions" in her evidence.'

**AIR 1996 SC 2987 - STATE OF RAJASTHAN Vs.
RAM NARAIN & ORS.**

A girl aged between 15 and 17 years was enticed by the accused and taken at knife point to another village. She was wrongly confined in a house and raped by the first accused. The age of the first accused was 18 years. The high court held that justice would be met in the case the sentence was reduced to the period of 1.5 months, which period of imprisonment the accused had already undergone pending trial.

The Supreme Court set aside the judgement of the high court, upheld the conviction of the first accused, and sentenced him to undergo rigorous imprisonment for a period of five years under Section 376 of the Indian Penal Code and a fine of Rs. 2,000/-.

With regards to corroboration of testimony, the court observed, 'From her evidence, we find intrinsic truth, and her to be a truthful witness. No corroboration to her evidence is needed.'

**AIR 1997 SC 3986 - STATE OF MAHARASHTRA Vs.
RAJENDRA JAWANMAL GANDHI**

The evidence showed that the 12-year-old girl had not actually been raped, it was an attempt to commit rape. The sessions judge, Satara, convicted the accused under section 376 of the Indian Penal Code and sentenced him to undergo rigorous imprisonment for seven years and to pay a fine of Rs. 5,000/-, in default of payment of the fine to undergo further rigorous imprisonment for six months.

The high court reversed the conviction under Section 376 and convicted the accused under Section 354 of the Indian Penal Code. The accused was sentenced to suffer the rigorous imprisonment that he had already undergone, viz. 33 days and a fine of Rs. 40,000/-, in default of payment to undergo further rigorous imprisonment for three months.

The Supreme Court held that the accused was guilty of attempt to commit rape, and convicted the accused for an offence under Section 376 read with Section 511 of the Indian Penal Code. The accused was sentenced to undergo rigorous imprisonment for five years and to pay a fine of Rs. 40,000/-.

The Supreme Court stated in this judgement that,

'the message is loud and clear that no person who commits or attempts to commit rape shall escape punishment... A heinous crime has been committed and the accused must suffer for his consequence. A rapist not only violates the victim's personal integrity but leaves indelible marks on the very soul of the helpless female.'

**(1997) 4 SCC 393 - STATE OF MAHARASHTRA VS.
PRIYA SHARAN MAHARAJ & ORS.**

Kripalu Maharaj who claimed to be a spiritual teacher, with the assistance of his disciples used to entice young girls and have sexual intercourse with them against their wish. The present case is concerned with three girls who were so treated by Kripalu Maharaj, one of these girls was 14 years of age. The charges framed against the Respondents by the additional sessions judge were quashed by the high court with the following observations;

'In this case, there is unreasonable, inordinate or extraordinary delay in leveling allegations of physical molestation or rape committed, by all the three prosecutrix against a saintly man of 69 years of age who renounced the world and became engrossed in spiritual world... It also does not stand to reason that a saintly man who has thousands/millions of disciples all over India, direct his own disciple and in their presence will commit sexual intercourse with the pracharak of his cult.'

The Supreme Court set aside the judgement of the High Court and directed the Sessions Court to proceed with the trial in accordance with the law.

SESSIONS CASE NO. 83 OF 1998 –THE STATE (DONGRI POLICE STATION) Vs. SHIVAJI LAXMAN NANAWARE

The accused was a cook with the observation home at Umerkhadi, Bombay, and was charged under Section 376(2)(c) of the Indian Penal Code for having committed rape on a deaf and mute minor inmate of the home. The accused pleaded 'not guilty' but did not lead any evidence. The defence of the accused was recorded under Section 313 of the Criminal Procedure Code and he was cross-examined, both were of total denial.

The age of the minor girl was deduced by medical experts as 14 or 15 years. Though the report of the medical examination did not suggest that rape had occurred, the clothes showed blood and semen stains.

The accused was convicted under Section 376(2)(c) of IPC and sentenced to suffer rigorous imprisonment for 10 years and a fine of Rs. 20,000/-. In default of payment of fine, simple imprisonment for a further two years. The amount of the fine was to be given to the victim girl as a means of compensation.

Section 376(2)(c) of the Indian Penal Code deals with rape being committed by the management or staff of a children's institution.

Section 313 of the Criminal Procedure Code deals with the power of the court to generally question and examine the accused. This examination is not conducted under oath but the statement may be taken into consideration in the trial.

MAJLIS MANCH Vs. STATE OF MAHARASHTRA & ORS. (CRIMINAL WRIT PETITION NO. 585 OF 2000 – BOMBAY HIGH COURT)

This petition is with regards to the rape of a nine-year-old deaf and mute girl institutionalised in or the observation home at Umerkhadi, Bombay. The state government was managing the observation home at that time. The medical examination indicated, 'skin injury mark, bite mark on right cheek and multiple abrasion marks over skin, buttocks and both legs'. The medical

examination mentioned the possibility of violent sexual assault, injuries being caused during sexual assault, and that teeth bite marks were of the adult sexual assailant.

By its interim order, the court directed the removal of the victim girl from the observation home to the Bal Asha Trust. The girl was in a serious condition and required medical aid and good nutrition, therefore the court directed the state government to deposit a sum of Rs. 50,000/- with the Bal Asha Trust.

AIR 2000 SC 2231 - STATE OF KARNATAKA Vs. MANJANNA

This case is with regards to the rape of a girl whose age was 15 years and 6 months, and the refusal by Hosadgura Hospital to medically examine the prosecutrix as she had not been referred by the police. The Supreme Court observed,

'18. Before parting with the case, we wish to put on record our disapproval of the refusal of some Government hospital doctors, particularly in rural areas, where hospitals are few and far between, to conduct any medical examination of a rape victim unless the case of rape is referred by the police. Such a refusal to conduct the medical examination necessarily results in a delay in the ultimate examination of the victim, by which time the evidence of the rape may have been washed away by the complainant herself or be otherwise lost. It is expected that the State/appellant will ensure that such situation does not recur in the future.'

(2000) 4 SCC 75 - STATE OF KARNATAKA Vs. KRISHNAPPA

This case is with regards to the rape of an 8-year-old girl by a 49-year-old man. The accused ascertained from the mother of the victim that her husband was not at home, then asked the mother to sleep with him. The mother and the victim tried to run away, but the victim was caught by the accused and raped.

The trial court imposed a sentence of 10 years rigorous imprisonment and fine of Rs. 3,000/-, in default of payment of fine, to further undergo six months of rigorous imprisonment, for the offence under Section 376 of the Indian Penal code. The accused preferred an appeal against the conviction and the sentence before the high court. The high court though accepting the findings reduced the sentence to four years on the ground that the accused (i) had an old mother, wife and children dependant on him, (ii) was an unsophisticated and illiterate citizen belonging to a weaker section of society, and (iii) had committed the offence in a state of intoxication.

The Supreme Court enhanced the sentence to 10 years rigorous impris-

onment and maintained the sentence of fine together with the default clause as imposed by the trial court. The Supreme Court whilst enhancing the sentence has observed,

'The socio-economic status, religion, race, caste or creed of the accused or the victim are irrelevant considerations in sentencing policy. Protection of society and deterring the criminal is the avowed object of law and that is required to be achieved by imposing an appropriate sentence. The sentencing courts are expected to consider all relevant facts and circumstances bearing on the question of sentence and proceed to impose a sentence commensurate with the gravity of the offence. Courts must hear the loud cry for justice by the society in cases of the heinous crime of rape on innocent helpless girls of tender years, as in this case, and respond by imposition of proper sentence.'

B. SEXUAL ABUSE OF CHILDREN IN JAIL

AIR 1982 SC 806 – MUNNA & ORS. Vs. STATE OF UTTAR PRADESH & Ors.

This petition is in respect of juvenile under-trials in the Kanpur Central Jail and allegations of sexual exploitation of these juveniles by adult prisoners. The petition was based on a news report, which stated that 'young boys of 10 to 14 years' were being 'supplied to convicts for their delectation', and that a boy named Munna who 'after the way he was used, he was unable to sit'.

The sessions judge was appointed to visit the jail and inquire into the matter. The sessions judge was unable to meet the juvenile detainees mentioned in the petition as they had been released within a few days of publication of the news report and the filing of the petition.

The Court directed that magistrates must strictly follow the provisions contained in the Uttar Pradesh Children Act 1951 and should be extremely careful to see that no person apparently below the age of 16 years is sent to jail. A juvenile must be detained in children's homes or other place of safety set up by the government for detention of persons under 16 years.

C. CHILD RELATED COURT PROCEEDINGS

AIR 1986 SC 1773 - SHEELA BARSE Vs. UNION OF INDIA

In this petition, the Supreme Court held that the investigation by the police and the trial of the children accused of an offence should be expedited.

'We fail to see why investigation into offences alleged to have been committed by children cannot be completed quickly and equally why can the trial not take place within a reasonable time after filing of the charge-sheet. Really speaking, the trial of children must take place in the Juvenile Courts and not in the regular criminal courts.'

This judgement also recommended the enactment of a children's act by the central government to bring about uniformity with regard to the various provisions relating to children. It was directed that this children's act should contain not only provisions for investigation and trial of offences against children, but should also contain mandatory provisions for ensuring social, economic and psychological rehabilitation of children who are either accused of offences or are abandoned or destitute or lost. The implementation of this proposed act in all earnestness has been emphasised, with a rider that the justification of non-implementation on the ground of a lack of finances cannot be accepted.

(1991) 2 65 CA – R Vs. B : COUNTY COUNCIL, EX PARTE P

A 17-year-old stepchild made serious allegations of sexual abuse against the father and as a result, the father was arrested and charged with criminal offences. The local authority obtained place of safety orders for the girl and the other children and also instituted care proceedings. The local authority made an application that it did not intend to call the abused child to give evidence because of the likely harmful effect on her. The local authority proposed to rely on a written statement made by the girl to the police and oral statements made by her to a child psychiatrist, both of which could be admitted in care proceedings under the Children (Admissibility of Hearsay Evidence) Order 1990, under which hearsay evidence could be admitted in civil proceedings in connection with the upbringing, maintenance or welfare of a child. The father applied for issuance of a witness summons. This application of the father was dismissed on the following grounds, amongst others:

'Although technically a child was a compellable witness in care proceedings and a summons could be issued under s 97 of the 1980 Act to procure the attendance at Court of a child who was a competent but unwilling witness, notwithstanding that he or she was a party to the proceedings, the use of s 97 summons was inappropriate to procure the attendance of a child in care proceedings and the Courts power to compel a reluctant witness to give evidence was entirely unsuited to a child in view of the procedure under the 1990 Order. Accordingly, the Court should be very cautious in exercising its discretion to require the attendance of a child and should not issue a summons if to do so would be inimical to the welfare of the child

or if its effect on the child would outweigh the legitimate interest of the person seeking the summons or if the application was made with the object of intimidating the child or to procure the attendance of a child whom the applicant for the summons wished to cross-examine.'

R. Vs. X, R Vs. Y, R Vs. Z (1989) THE TIMES

In this English case, the use of a screen to shield a child witness the court was held not to be unfairly prejudicial or unfair to the defendants. The purpose of the screen is to prevent the child from seeing and being seen from the dock, the counsels were in a position to see the child. The court while passing judgement observed that, the necessity of trying to ensure that the child would be able to give evidence outweighed any possible prejudice to the defendants by the erection of the screen.

(1993) 1 393 CT. QBD-R Vs. BIRMINGHAM JUVENILE COURT & ORS., EX PARTE S & ANR.

This judgement emphasises the need to expedite child care proceedings in the interest of the child and the parents. The local authority immediately on the birth of a baby girl sought and obtained a place of safety order as the father was guilty of scheduled offences some years ago. The probability that the girl child's proper development would be avoidably prevented or neglected was the ground upon which the safety order was sought. An interim care order in favour of the local authority was passed despite opposition from the parents. The maximum period for which an interim care order can be made is 28-days under the Children and Young Persons Act 1969. It is intended that the case should be heard at the adjourned hearing, although provision is made for subsequent adjournments. The reason for the 28 day maximum period is clear: children, particularly young children put down roots quickly and time is running against the parents. The local authority should be ready to proceed with the case when the interim care order has expired.

The Court held that care proceedings are to be dealt with expedition, and, generally, if the parents are ready for them to proceed, the local authority who started the proceeding ought to be ready too. It is in the interest of the child that a decision about the future of the child be made as soon as possible. Further, time is running against the parents and delay may prejudice their interests as well as the interests of the child. The judgement also held that care proceedings are not analogous to bail applications, even if some of the same practices apply; in care proceedings the welfare of the child is of paramount consideration.

D. EXCLUSION OF AN ABUSIVE PARENT FROM THE HOME**(1979) 1 169 CA -RENNICK Vs. RENNIC**

This judgement deals with the exclusion of a violent husband from the matrimonial home in order to satisfy the children's needs.

The parties to this litigation were husband and wife. The couple had five children between the ages of 4 and 11. The husband drank excessively throughout the marriage; he behaved in a violent and abusive manner towards the wife and during bouts of drink had tried to strangle her. Ultimately, the wife was compelled to leave her matrimonial home and shift to her mother's home along with the children. The mother's home was very small and they lived in a cramped condition. The wife applied for an injunction under the Domestic Violence and Matrimonial Proceedings Act 1976 excluding the husband from the matrimonial home.

The court held that in determining such an application involving children, the interests of the children were paramount. The children's needs were such that they required the matrimonial home, and there being no suggestion that the father was capable of taking charge of the children himself, it followed that the mother had to go back with them. In the circumstances it would be wrong to suggest that the wife should be required to return to the matrimonial home and take a chance with the husband. Therefore, the wife's application for an injunction excluding the husband from the matrimonial home was granted. The order further directed that the husband should not return to the matrimonial home except with the consent of the wife, or for the purpose of access to the children. The court granted liberty to the husband to apply for an order that he may be permitted to return to live with the family after giving reasonable notice to the wife.

**AFRA FERNANDES VS. ANTHONY FERNANDES (M.J. SUIT
No. 3624 OF 1994 - BOMBAY HIGH COURT)**

This petition was filed by an Indian Christian wife under the matrimonial jurisdiction of the high court for judicial separation under Section 22 of the Indian Divorce Act 1869. The 17-year-old daughter who was ill-treated and sexually abused by the respondent gave evidence with regards to the abuse. The family was residing in the matrimonial home, which stood in the name of the respondent.

The court granted judicial separation, and restrained the respondent from selling or creating third parties in respect of the matrimonial home. The respondent was also restrained by an injunction from entering the matrimonial home.

E. CONDITIONS OF CHILD CARE INSTITUTIONS**AIR 1987 SC 656-SHEELA BARSE Vs. THE SECRETARY,
CHILDREN AID SOCIETY & ORS.**

This petition was filed in respect of improper functioning of child care institutions maintained and managed by the Children Aid Society. Whilst passing directions and disposing of the petition, the Supreme Court observed as follows,

'11. In recent years, children and their problems have been receiving attention both of the Government as also of the society but we must say that the problems are of such enormous magnitude that all that has been done till now is not sufficient. If there be no proper growth of children of today, the future of the country will be dark. It is the obligation of every generation to bring up children who will be citizens of tomorrow in a proper way. Today's children will be the leaders of tomorrow who will hold the countries banner high and maintain the prestige of the Nation. If a child goes wrong for want of proper attention, training and guidance, it will indeed be a deficiency of the society and of the Government of the day. A problem child is indeed a negative factor. Every society must, therefore, devote full attention to ensure that children are properly cared for and brought up in a proper atmosphere where they could receive adequate training, education and guidance in order that they may be able to have their rightful place in the society when they grow up.'

**AIR 1988 SC 1782 - VIKRAM DEO SINGH TOMAR VS.
STATE OF BIHAR**

A letter with regards to the appalling conditions prevailing in a "care home" in Patna (Bihar) was converted into a writ petition, and the district judge, Patna, was directed to visit the "care home" whose condition was alleged to be inhuman and whose inmates were allegedly ill-treated. The report of the district judge, Patna, reflected the allegations made in the letter.

The Supreme Court held that 'it is incumbent upon the State when assigning women and children to these establishments, euphemistically described as "care homes", to provide at least the minimum conditions ensuring human dignity.'

The court ordered the state government to provide suitable alternative accommodation expeditiously for housing the inmates of the present "care home". Pending construction of the new structure, the present "care home" was ordered to be renovated and provided with necessary facilities, such as adequate water, electricity, bathrooms and toilets, suitable furniture, etc.

**KRIST PEREIRA VS. THE STATE OF MAHARASHTRA & ORS.
(CRIMINAL WRIT PETITION No. 1107 OF 1996
-BOMBAY HIGH COURT)**

This petition was heard by the Bombay High Court under its criminal writ jurisdiction. The death of a three-year-old boy child in the Bhiwandi Remand Home gave rise to the filing of this petition. The court constituted an experts committee to examine the conditions in different juvenile homes, remand homes, children homes, special homes in the State of Maharashtra. The experts committee visited 21 homes and submitted their reports to the court. The reports contained details with regards to the administration and management of the remand homes, juvenile homes and other homes and facilities provided to the inmates of these homes, and the working of the Juvenile Welfare Boards, juvenile courts, the role of the police. The reports 'submitted by the experts committee are extremely distressing and they reveal pathetic conditions prevailing in the various homes in the state.' The court has observed and directed the following in its judgement,

'8. After going through the reports, we are satisfied that the working of the Homes in the State is totally unsatisfactory. We are constrained to observe that the juveniles are housed in the Homes without any sense of improving their lot. The prevailing conditions disclose that the Homes only provide some shelter and nothing else. There is hardly any attempt to educate and rehabilitate juveniles by providing them proper schooling or modern vocational training. We feel that urgent steps are required to be taken to improve the conditions of the various Homes in the State. In the past also this Court noted with anguish pathetic conditions in the Homes and has issued directions from time to time. The experience has shown that those directions are not properly heeded to and have remained on paper only. Having noted the above conditions, we feel that it is absolutely necessary to find out a solution on a long term basis and with that object in view, we hereby constitute a State Committee consisting of a retired Judge of this Court, two Secretaries, including the Secretary of the Women and Child Welfare Department and another Secretary to be nominated by the Government and three experts/social workers in the field, out of whom two shall be the female members. We may hasten to add that we are appointing this Committee with full concurrence of the state government with an express understanding that this Committee shall function on permanent basis...'

The state committee is to ensure appropriate appointments to the Juvenile Welfare Boards, visitors board, advisory boards, social workers and duty counsellors; such appointments are to be made with prior consultation of the state committee to ensure the proper functioning of the juvenile justice

system without any political interference.

The Court further directed that,

1. the State government establish Juvenile Homes in all the districts of the State;
2. the State government establish additional Special Homes in the State;
3. after-care organisations to be established in different areas;
4. district level rehabilitation committees to be established in every district for assistance in providing jobs to juveniles, this committee to consist of the Collector of the district, Managing Director of the MIDC, representative from district Industries Officer, Zilla Mahila Bal Kalyan Officer and Superintendent of after-care organisation, if any;
5. the state government to fill up all the vacancies in the Juvenile Welfare Boards and the Advisory Boards within three months;
6. the State government to appoint at least one social worker for each Juvenile Court within three months;
7. the State government to appoint Duty Counselors within three months to make regular visits to institutions established under the Juvenile Justice Act as provided under the Maharashtra State (Visits to Jails and Homes for Children) Project Rules 1993;
8. the State government to appoint Visitors to visit the institution at least once every three months and submit a report to the State Committee;
9. the State government to regularly pay honorarium to the members of the Juvenile Welfare Board and the other Boards, Duty Counselors and social workers;
10. the State government to provide the Juvenile Welfare Boards with facilities such as staff, telephone, typewriter, stationery, etc.;
11. posts of sweepers, watchmen, caretakers and clerks to be sanctioned wherever necessary; in case of any problem with regard to creation of permanent staff, staff on casual basis to be made available for these posts and deserted women in the locality to be given the jobs of cooks and sweepers on temporary basis;
12. power to be given to the Superintendent of the institutions to immediately suspend an erring staff member guilty of misbehavior or misconduct;
13. to immediately initiate a departmental inquiry in case of a staff member found to have committed a serious misconduct, like misbehavior in drunken condition or causing physical harm to the inmates of the Homes;
14. the Competent Authority to be given the power to transfer existing staff to other Homes;
15. the State government to ensure that all the Homes are provided with clean and proper toilets and bathrooms, repairs of toilets and bath-

- rooms to be carried out on priority basis;
16. the kitchens in all the Homes to be provided with cooking gas facility, and adequate and nutritious food to be served to the children;
 17. if an institution is unable to provide education and vocational facilities within the institution, the institution to utilise such facilities available outside the institution in that particular region, and the cost of transportation to be included in the budget;
 18. the Rotary Clubs to be involved for the purpose of providing teachers to impart educational and modern vocational training, and recreation facilities for the inmates of the Homes. In this behalf the Superintendent of every Home shall contact Mr. S.G. Kapadia, 135 Great Western Building, 2nd floor, 23 Meadows Street, Fort, Mumbai-400 023 who has agreed to coordinate with the local Rotary Clubs and has also assured to procure basic requirements like tooth-brushes, undergarments, shoes, umbrellas, etc. for the inmates of the Homes;
 19. each inmate of the Home to be provided with at least two pairs of uniforms/dresses every year;
 20. children in all the Observation Homes to be taken for outings at least once in a month and for that purpose, if necessary, the concerned Rotary Club to be contacted;
 21. Annual Cultural meet and Sports meet to be held for institutionalised children;
 22. the income generated by the inmate of the Homes through work for gain to be utilised in accordance with Rule 23 of the Juvenile Justice Rules;
 23. the State government to organise training programmes for the staff members of the various Homes, at least once a year, and the staff members to be permitted to attend such training programmes organised by TISS, Rotary Club, UNICEF;
 24. a staff member not to be assigned two posts, e.g. that of Superintendent as well as Probation Officer;
 25. the State government to increase the amount of honorarium paid to the doctors who visit the Homes, and ensure that such services are made available at least thrice a week;
 26. initial medical examination of the children to be conducted immediately or at least within 48 hours of admission to ensure segregation of juveniles suffering from any communicable diseases and immediate medical treatment to sick juveniles;
 27. facilities be provided for segregation within the institution of children suffering from communicable diseases; in appropriate cases such children to be transferred to Government hospitals;
 28. the Superintendent or person in-charge of the Home to strictly follow Rule 26 (3) (g), (h) and (i) of the Juvenile Justice Rules in case of

- death of an inmate, Rule 26 (3) (a) to (f) in case of unnatural death (the State Committee to be given intimation of natural and unnatural deaths within 48 hours) and Rule 26 (2) in case of escape; in case of non-adherence of any of these rules, disciplinary action to be taken against the concerned erring officers;
29. the Superintendent to inform the State Committee on admission of mentally or physically handicapped children, these children to be admitted in special institutions established for such handicap;
 30. the institution to provide for children with special needs;
 31. the State Committee to make appropriate recommendations to the State government and the concerned Homes with regards to children who are admitted to these Homes merely on account of poverty or failure in examination or child being uncontrollable, etc. and for those who have been residing in the Homes for a long time;
 32. the Superintendents to ensure that the grant of Rs. 500/- per month per inmate of the Home is utilised only on food, clothing and other requirements of the inmates and not on administrative expenses;
 33. the State Committee to look into the problems faced by the Homes in providing escort to the inmates who are required to be repatriated and make appropriate recommendations to the state government in this behalf;
 34. the notifications regarding appointments of the Presiding Officers of Juvenile Courts to be made by designation and not by name;
 35. the State government to establish Juvenile Courts in Bhusawal and Chalisgaon; the State Committee to make appropriate recommendations for establishment of additional Juvenile Courts;
 36. the State government to establish separate agency under the control of Juvenile Welfare Boards and Juvenile Courts for service of summons, warrants, notices;
 37. the State government to take a decision within three months regarding abolition of court-fees on applications made before Juvenile Welfare Boards and Juvenile Courts;
 38. the Director General of Police to issue directions to all police stations not to appear before Juvenile Courts in uniform and not to tie juveniles with rope while bringing them to Court;
 39. the State government to establish separate juvenile cells in each district to deal with cases involving juveniles;
 40. the Registrar of this Court to write to District Judges to submit to this Court within six weeks information relating to the cases pending before Juvenile Courts and the manner in which such cases can be expedited and the pendency cleared;
 41. all District Judges to issue appropriate directions to the concerned Juvenile Courts to take effective steps for disposal of pending cases;
 42. the District Judges every three months to check disposal of matters

- before Juvenile Courts and look into reasons for prolonged pendency;
43. Juvenile Courts to hold their sittings in the Observation Home and not in Courts;
 44. the High Court to incorporate the subject of juvenile law in workshops held for judicial officers;
 45. TISS to prepare a programme for training of Magistrates in respect of juveniles, and such programme to be incorporated in the Judge's Training Institute at Nagpur, called JOTI, and the Director of JOTI to extend co-operation in this behalf.

PRERANA VS. STATE OF MAHARASHTRA (WRIT PETITION NO. 1332 OF 1999 - BOMBAY HIGH COURT)

This petition was filed by a non-governmental organisation working for the welfare and development of women and children who are victims of commercial sexual exploitation. This petition sought directions to the state government in respect of Kasturba Sadan, a rescue home established by the state government for such victims. The petition alleged that the living conditions of the inmates of Kasturba Sadan are absolutely appalling, i.e., insufficient and dirty toilets with inadequate water supply, institution housed in a dilapidated structure, no indoor or outdoor recreation facilities, no medical facilities for sick inmates, sub-standard quality of food, no professional counselling for the inmates, etc.

A commissioner was appointed by the court to visit Kasturba Sadan and submit a report. The commissioner's report supported the contentions made by the petitioner, and stated inter alia as under:

'I directly went to the barracks and I noticed that both the halls were very untidy and dirty. Dirty clothes, half eaten chappaties and bits of paper were lying on the floor. Whole place was stinking and was emitting foul smell and repulsive odour. I found the place unhygienic and unhealthy for living purposes. When I inquired with the inmates as to how the place was not clean, they informed me that earlier, last week they were told to clean the place since somebody was expected to visit. They said that if the place gets dirty, they themselves clean the same. I talked to two of those 30 inmates who were brought in March 1999. One of them gave her name as 'Baby Krishna Gawda' and the other gave her name as 'Razia Saiyed Aziz'. Both of them and other inmates informed me that though the food is given to them twice a day, the same is half cooked and many of them throw away the same. They informed me that the quality of the food which was given earlier was bad compared to the food which is given since last one week.

The non-vegetarian food does not have any taste and they are unable to eat

the same. According to the inmates the said place is very dirty and was full of mosquitoes and rats, when I checked the kitchen, I noticed that the kitchen floor was dirty. The vegetable basket contained decayed onions and other vegetables.'

The petitioner prepared a draft scheme for the rehabilitation centre pursuant to directions issued by the court. The court observed that the respondent's response to the draft scheme was lukewarm and they did not seem interested in taking any positive steps for the rehabilitation of sex workers and particularly in the context of child sex workers.

In agreement with the respondent, the court passed an order constituting a Monitoring and Guidance Committee under the deputy secretary, Woman and Child Department, and whose members consist of representatives of non-governmental organisations specialising in different fields. This committee has been authorised to supervise the functioning of the rehabilitation home, to visit the home, to look into the accounts of the home to ensure that the monies are spent in accordance with the scheme, and all other things for proper implementation of the scheme and proper rehabilitation of the girls. The court further directed that,

1. A new building to be constructed as a rehabilitation centre on a priority basis within a period of two years.
2. Shramik Vidyapeeth, a semi-government organisation specialised in vocational training to be engaged initially for 50 inmates on a six-monthly basis to provide vocational training, to inmates.
3. Pratham to be consulted and involved in the education programme of the inmates, i.e., to guide education classes/bridge courses.
4. Committed Communities Development Trust, a trust well reputed in the field of counseling and community work, to start counselling work in the home at the earliest and train the staff.
5. The respondent to procure the equipment for recreation purpose, such as ladies' bicycles, board games, swings, skipping ropes, badminton facilities, books.
6. Annapurna has been appointed to provide meals and supervise the cooking and to purchase vegetables and non-vegetarian items.
7. CEHAT, a trust that specialises in health issues to supervise and monitor the health aspect of the home and its inmates.
8. The state government to carry out minor essential repairs to the toilets and kitchen of the existing structure within two months and fill up staff vacancies as expeditiously as possible and preferably within six months.
9. The Monitoring and Guidance Committee to submit a report to the court within three months.

F. COMMERCIAL SEXUAL EXPLOITATION OF CHILDREN**AIR 1990 SC 1413 - VISHAL TEET VS. UNION OF INDIA**

This public interest litigation was filed by an advocate directing the CBI to institute an enquiry against those police officers under whose jurisdiction the flesh trade and devdasi/jogin trade flourish. Though this relief of the petitioner was not granted, the court did pass orders in respect of the rescue and rehabilitation of young children and girls forced into the 'flesh trade'. The Supreme Court while passing orders referred to Articles 23(1) and 39(e) and (f) of the Constitution and the Declaration on the Rights of the Child (1959). The court has emphasised the need for severe and speedy legal action against all erring persons, such as pimps, brokers and brothel keepers.

The court directed the central government, all state governments and governments of Union Territories to constitute advisory committees, whose members should include experts and social and voluntary organisations. The advisory committees are to make suggestions on (i) measures to be taken to eradicate child prostitution and (ii) social welfare programmes to be implemented for the care, protection, treatment, development and rehabilitation of children and girls rescued from brothels. The court also directed the governments to establish rehabilitative homes manned by qualified and trained staff.

1997 (4) BOM.CR 171 – THE PUBLIC AT LARGE VS. STATE OF MAHARASHTRA & ORS.

This petition arose due to suo moto notice taken by the court of a newspaper article, which indicated that minor girls were illegally confined and forced to be sex workers. The respondents were directed by the court to show cause as to why action had not been taken under Sections 336 and 366 of the Indian Penal Code, and Sections 5 and 6 of the Suppression of Immoral Traffic in Women and Girls Act 1956.

The court passed directions as under :-

- (i) To frame proper Scheme so that the women including minors who are procured for sexual slavery are released from the confinement of their procurers;
- (ii) For implementing this scheme, a proper Cell, also involving social workers, be created so that by regular checking minors and others can be released and rehabilitated in the society; and
- (iii) Considering the spread of the dreaded disease of AIDS, the State of Maharashtra is directed to frame proper scheme with the active assistance of the Municipal Corporation of Greater Bombay for carrying out HIV tests for the willing sex workers, so that the disease may not spread like a wild fire in the city.'

On the basis of the directions passed by the court, raids were carried out and about 473 minor girls and child sex workers were rescued by the police and kept in the custody of juvenile homes, etc. The respondents pointed out in their affidavit that a majority of the girls had come to Bombay from the neighbouring states of Karnataka, Kerala, Tamil Nadu, Andhra Pradesh, etc., and North Eastern states, e.g., Assam, etc. and countries like Nepal and Bangladesh.

The court constituted a committee for the rehabilitation of the rescued girls. The rescued girls were sent back to their respective states. Consensus was arrived at between the respondents and social workers as under:

- a) There was unanimity on the point that the rescued girls should not be subjected to HIV test.
- b) If HIV tests have already been carried out on some of the girls, their identity should not be disclosed and they should not be informed of the result of the test.
- c) All the rescued girls must be subjected to medical examination for finding out their age and also for treatment if they are suffering from any other diseases.
- d) If the girls are found to be adult and are not covered by the Juvenile Act and if they do not desire to remain in the present institutes, they may be allowed to leave the said Homes.
- e) Rehabilitation of these girls is possible if they are segregated in groups of 10 or 15 and counseling work is done.'

The respondents were directed to evolve a long-term policy so that minors are not sent to brothel house by deception, fraud or misrepresentation and to provide residential accommodation to girls rescued from the brothel house so that they could be rehabilitated into society after proper counselling.

Medical examination of the rescued girls revealed that, 70% were HIV positive and the remaining 30% suffered from other venereal diseases.

A report was also submitted by the Department of Crime and Administration, Tata Institute of Social Sciences called 'PRAYAS', which suggested that raids on a large scale should not be conducted but that raids on a small scale should be conducted to enable better rehabilitation.

The court directed the committee to visit all the institutions twice a month to find out the problems faced by rescued girls and sort out the same. The court, whilst referring to a newspaper article with regards to rehabilitation of rescued girls, observed that,

'On occasions, some social workers and also Government are taking action for releasing the bonded labourers but up till now, no serious action is being taken by the Government for rescuing the bonded prostitutes who are kept in the hell on

earth for no fault of theirs. May be that in some cases, poverty might have driven the parents or guardians to sell their minor girls. May be, in some other cases, they might have been lured by unscrupulous elements to come to Mumbai and fall in the trap. As per the said report, the girls are kept in a brothel and in beginning they get severe punishments from eunuchs. Teenagers are required to entertain as many as 15 to 20 men on a single day. Only those who could entertain above 15 persons were treated well and were given incentives. If they were not in a position to entertain a certain number of persons, they were beaten and were tortured. In brothel houses they are under constant state of fear psychosis.'

The Court further observed that,

'22. No doubt in recent years both the Government of India and the State Government have been paying some attention and confronting the issue of child prostitution. However, if the number of girls who are lured into the sex trade every year is an indication the effort has not succeeded. The Directorate of Health Services, Government of Maharashtra, has recognised that in the State of Maharashtra there are about 30,000 girls in the sex trade. Most of them are in the city of Mumbai and other cities and a large number of them are children or minors.

23. Hence, the entire approach to this problem is required to be changed. We have to consider that minor girls and young women who are forcibly thrown into this trade are also daughters and sisters of someone. Apart from this, we have to consider that they are also human beings and they are required to be treated as such in a civilised society. The Government of India has set up the National Commission for Women. The National Commission has prepared a report on Societal Violence on Women & Children in Prostitution. The said report gives an insight into the problems of women working and children forced into the sex trade. Instead of keeping that report on desk, it is high time that the country takes note of the suggestions and serious steps are taken to prevent the exploitation of women, more so of young children who are victims of the economic deprivation. In this Golden Jubilee year of a free and democratic India, we owe them that much.'

The court concluded by passing the following directions;

'V. Directions

32. Hence, in conclusion, we issue the following directions:-

(1) The various directions given by the interim orders, if not complied with, should be complied with and acted upon periodically.

(2) The Respondents-State Government to see that strict vigilance is maintained in the areas where sex workers normally operate and to rescue the child sex workers. Further, adequate steps should be taken to see that those who indulge in trafficking of women should be suitably punished. For this purpose, appropriate directions should be issued to the investigating agencies to take immediate steps. Sometimes it is noticed that a Police Officer who detects this type of activity does not take immediate action on the ground that such duty is assigned to some other Officer. In our view, this is not the proper approach because all Police Officers are bound to prevent, to take immediate action in those cases where cognisable offences are committed. It is true that they may not investigate those cases but can certainly report them to the proper officer and during such time take preventive measures. Section 107 of the Indian Penal Code provides that a "person abets the doing of a thing who intentionally aids, by any act or illegal omission, the doing of that things."

(3) It is high time that the State Government should take serious steps :-

- a) to prevent forcible pushing of women and young girls into prostitution;
- b) to prevent trafficking in women i.e. buying and selling of young girls. These girls may be victims of kidnapping, they may be victims of various deprivation, they may be victims of circumstances beyond their control. For this purpose, regular raids should be carried out in the area where sex workers operate. On numerous occasions it is reported in newspapers that persons from social organisations who dare to rescue these girls are manhandled, beaten or threatened. To prevent such situation, for the time being the government must have a Squad of Police Officers who can take immediate action.

(4) The State Government to set up an Advisory Committee, if not already set up within 4 weeks from today in terms of Direction No.2 of paragraph 15 of the Judgment of the Apex Court in the case of Vishal Jeet (supra) to comply with the objects set out therein and to further take steps to implement the suggestion made by the Advisory Committee.

(5) To set up homes for rehabilitation of rescued sex workers including children so as to enable these rescued sex workers to acquire alternative skills in order to enable them to have alternative source of employment. It is also to be noted that when the girls were rescued, it was difficult for the State Authorities to help them. The State was not having any infrastructure to meet such a situation. It is true that in Mumbai City premises are very costly, but in the periphery of the City, the State Government can certainly provide such facility, more so when it is throughout claimed that Maharashtra State is a much more industrialised, developed and civilised state. In such a State, 473 rescued girls were not properly accommodated and no steps could be taken to rehabilitate them for want of premises and they were required to be sent to their respective home States. This type of situation

arises only because of lack of interest on the part of the concerned authorities in implementing the decision of the Supreme Court in the case of Vishal Jeet (Supra). If the problem is looked at from the angle that these young girls are also daughters and sisters of someone and that they are also required to be treated as human beings, then the State authorities can easily find out a solution to the problem. During the course of hearing, we have noted that there are no adequate facilities available in the State of Maharashtra, particularly in Mumbai, where these rescued girls could be rehabilitated or kept for some period for bringing them out of the clutches of unscrupulous elements who deal in trafficking of women. Adequate training facilities are also not available and it appears that serious thought is not given to this problem by the State Government. In a civilised State, it is the duty of the State to take preventive measures to eradicate child prostitution without giving room for any complaint of culpable indifference. One should not forget that these rescued girls are also fellow human beings who require some support and treatment for getting out of the immoral activities.

(6) Regularly carry out AIDS Awareness Programme in the areas where sex workers normally operate.

(7) The State Government is also directed to submit periodical reports, by taking out Notices of Motion, either through the learned Advocate-General or the learned Government Pleader, stating what steps are taken pursuant to the aforesaid directions and how many girls are rescued from the clutches of middlemen, whether medical treatment is given and whether rehabilitation facilities are made available to them. Even recent newspaper reports indicate that pimps or middlemen are raising their muscle strength to prevent NGOs from receiving legally confined girls.

(8) The State Government is further directed to place before this Court the compliance report of these directions.'

G. ADOPTION

AIR 1984 SC 469 - LAXMIKANT PANDEY VS. UNION OF INDIA

This judgement laid down the requirements to be followed when a foreigner takes an Indian child into adoption. Such applications are to be sponsored by a social or child welfare agency recognised or licensed by the government of the country in which the foreigner is resident. No application by a foreigner for taking a child into adoption should be directly entertained by any social or welfare agency in India working in the area of inter-country adoption or by any institution or centre or home to which children are committed by the juvenile court.

The main reasons for these guidelines was to reduce or eliminate the possibility of profiteering and trafficking in children and to identify a suitable

parent for taking the child into adoption.

The judgement recommends that preferably children below the age of three should be offered for inter-country adoption. In case of children above the age of seven, their wish should be ascertained before they are given for adoption.

H. LEADING CASES ON CHILD SEXUAL EXPLOITATION

STATE VS. FREDDY PEATS & QRS.

Freddy Peats was charged with three foreigners from Sweden, Australia and New Zealand for hatching a criminal conspiracy to procure minor male children for the purpose of sexual exploitation. An orphanage in Goa run by Freddy Peats acted as a front for these unlawful activities. Between the period 1980 and 1991, 27 boy children were subjected to perverse sexual activities in the orphanage. Freddy Peats is presently undergoing a life sentence.

The judgement was delivered by the addl. sessions judge at Margao on 15 March 1996. This judgement was upheld in appeal by the Bombay High Court, Goa Bench, on 2 April 2000.

Freddy Peats was running an orphanage called 'Gurukul' in Goa. The unregistered orphanage used to house about 15 to 20 boys, the majority of whom were under 12 years of age. All these boys were in the most vulnerable situation, most of them were from broken homes and their families did not have the monetary means to care for them. Freddy Peats who describes himself as an 'elderly Anglo-Indian' used to sleep naked at night along with the boys and used to kiss them and play with their penises. He used to have oral and anal sex with the boys. The boys were sent along with foreigners for the purpose of sex. The boys were photographed in the sexual act and in other obscene manner; these photographs were produced before the court. In many of the photographs, Freddy Peats could be identified as the abuser. Many of the photograph depicted acts of sadism and showed the boys crying with agony writ large on their faces. The legal proceedings were initiated by a father of a boy who was abused by Freddy Peats.

The trial was held in-camera, the main reason being that there would be extreme embarrassment for the witnesses to depose in public in open court. The court recorded that Freddy Peats was injecting the testicles of the boys and photographing the boys in naked poses. The accused admitted that the boys used to sleep naked, that he used to sleep naked in another room, that certain boys used to sleep with him in his room, that foreigners used to visit him and that he had medicines and syringes in his room.

The prosecution established its case against Freddy Peats by rendering unshakeable proof in respect of the charges framed against him under the Indian Penal Code, the Juvenile Justice Act, the Indian Post Office Act the Drugs and Cosmetics Act and the Immoral Traffic (Prevention) Act. The

report of the forensic science laboratory denoted that intoxicants were being injected into the testicles of the victim boys. The prosecution also proved that the accused had kept the boys in wrongful confinement and had committed unnatural offences, as he had voluntarily had carnal intercourse, both oral and anal, against the order of nature, with these young boys. It was also proved that the accused was receiving money from foreigners in return for sexual activities with the boys.

Freddy Peats had been charged under (i) Sections 342 of the Indian Penal Code, (ii) Sections 355, 328, 337 and 323 of the Indian Penal Code, and Section 43 of the Juvenile Justice Act, (iii) Sections 292 and 293 of the Indian Penal Code, (iv) Section 377 of the Indian Penal Code, (v) Sections 4, 5, 6 and 9 of the Immoral Traffic (Prevention) Act, (vi) Section 20 of the Indian Post Office Act, (vii) Sections 21 and 27 of the Narcotic Drugs and Psychotropic Substances Act, and Section 27 of the Drugs and Cosmetics Act.

The court awarded the maximum sentence due to the gravity of the crime.

'342. After having personally heard the victim boys in this Court and assessed the merits backing the testimony which is overwhelming on record with absolute corroboration almost verbatim inter se and almost illustrated in each one of those photographs, coupled with the various admissions and the scheming silence of the accused no. 1, I am of the opinion with an unshakable belief that the accused no. 1 deserved no leniency at all of any nature of whatsoever. The quantum of sentence certainly be proportionate to the gravity of the crime. A case of this nature is very rare be booked. The one in the hand must be exhaustively utilised to the betterment of the society at large, in order that there would not at all be any repetition in the days to come. In this case, the worst enemy of the accused no. 1 is none else than himself I uphold the submission of the Ld. Public Prosecutor that the accused no. 1 for what all he did must draw the maximum.'

'ORDER

On the first Head, the accused no.1 is convicted and sentenced under Section 342 of the Indian Penal Code to undergo Rigorous Imprisonment for a period of six months for each one of the five counts, though the sentences to run concurrently.

On the second Head, the accused no.1 is convicted and sentenced cumulatively for each one of the offences under sections 355, 328, 337 and 323 of the Indian Penal Code and section 43 of the Juvenile Justice Act, 1986, to undergo Rigorous Imprisonment for a period of ten years, and also to pay a fine of Rs.200/- (Rupees

Two Hundred Only), in default to undergo Simple Imprisonment for a month for each one of the five counts, though the substantive sentences shall run concurrently.

On the third Head, the accused no.1 is convicted and sentenced cumulatively for the offences under Sections 292 and 293 of the Indian Penal Code to undergo Rigorous Imprisonment for a period of two years, and also to pay a fine of Rs.200/- (Rupees Two Hundred Only), in default to undergo Simple Imprisonment for a month for each one of the five counts, though the substantive sentences shall run concurrently.

On the fourth Head, the accused no.1 is convicted and sentenced for the offence under Section 20 of the Indian Post Office Act, 1888 to undergo Rigorous Imprisonment for a period of six months.

On the fifth Head, the accused no.1 is convicted and sentenced for the offence under Section 377 of the Indian Penal Code to undergo Imprisonment for Life for each one of the five counts, though the sentence shall run concurrently.

On the sixth Head, the accused no.1 is convicted and sentenced cumulatively for each of the offences under sections 4, 5, 6 and 9 of the Immoral Traffic (Preventive) Act, 1956 to undergo Rigorous Imprisonment for a period of seven years, and also to pay a fine of Rs.200/- (Rupees Two Hundred Only), in default to undergo Simple Imprisonment for a month for each one of the three counts, though the substantive sentences shall run concurrently.

On the seventh Head, the accused no. 1 is convicted and sentenced for the offence under Section 27 of the Drugs and Cosmetics Act, 1940 to undergo Rigorous Imprisonment for a period of five years, and also to pay a fine of Rs.10,000/-(Rupees Ten Thousand Only), in default to undergo fifteen months of Simple Imprisonment.

The substantive sentences imposed on the accused no.1 on each one of the Heads as above shall run concurrently.

It is further ordered that, under the peculiar circumstances, the entire muddamal in this case shall be kept in a sealed condition with the Nazir of this Court for their future requirement, if any, as the C.B.I is investigating the matter on a different facet.

The pre-trial detention of the accused no.1 from 3-4-1991 till 15-5-1991 shall be set off against this substantive sentences.

PRONOUNCED IN THE OPEN COURT

The provision of the law under which Freddy Peats was sentenced is given in brief hereunder:

Section 342 of the Indian Penal Code deals with punishment for wrongful confinement.

Section 355 of the Indian Penal Code deals with the assault or criminal force with an intent to dishonour a person, otherwise than on grave provocation.

Section 328 of the Indian Penal Code deals with causing hurt by means of poison, stupefying, intoxicating or unwholesome drug with an intent to commit an offence.

Section 337 of the Indian Penal Code deals with causing hurt by an act endangering life or personal safety of others.

Section 323 of the Indian Penal Code deals with the punishment for voluntarily causing hurt.

Section 43 of the Juvenile Justice Act deals with the penalty for giving intoxicating liquor or narcotic drug or psychotropic substance to a juvenile.

Section 292 of the Indian Penal Code deals with the sale, hire, distribution public exhibition, etc., of obscene book, pamphlet, paper, writing, drawing, etc.

Section 293 of the Indian Penal Code deals with the sale, hire, distribution exhibition, etc., to any person under the age of 20 years or any such obscene object as referred in Section 292.

Section 20 of the Indian Post Office Act deals with the prohibition of transmission by post of anything indecent such as obscene photographs.

Section 377 of the Indian Penal Code deals with the commission of unnatural offences.

Section 4 of the Immoral Traffic (Prevention) Act deals with the punishment for living on the earnings of prostitution.

Section 5 of the Immoral Traffic (Prevention) Act deals with the procuring, inducing or taking a person for the sake of prostitution.

Section 6 of the Immoral Traffic (Prevention) Act deals with the detaining of a person in premises where prostitution is carried on.

Section 9 of the Immoral Traffic (Prevention) Act deals with the seduction of a person in custody.

Section 27 of the Drugs and Cosmetics Act deals with the manufacture for the sale or for distribution, etc., of adulterous or spurious drug, which is likely to cause grievous hurt, or of drugs without a valid licence.

THE BRINKMAN HELMUT CASE

The accused is a German national charged under Section 363, 373 and 377 of the Indian Penal Code. The victim boy is under 15 years of age; he had left his home in Nagpur to come to Bombay to better his prospects and was working as a 'boot polish' boy. He had previously been involved in sexual activity for money. The boy was brought from Bombay to Goa by the accused without the knowledge of his parents for unlawful and immoral purposes. The boy was sexually abused and exploited by the accused. The boy child gave a detailed statement to the police and the special magistrate. As no birth certificate or school leaving certificate was produced, an ossification test was done, which determined the age of the boy was between 14 and 15 years. Semen was found the anal swabs of the victim boy and the accused, though the medical examination did not disclose any recent sexual activity.

The accused was acquitted by the sessions court of the offence punishable under Section 363 of the Indian Penal Code, but was held guilty under Sections 373 and 377 of the Indian Penal Code. The accused was sentenced to one year rigorous imprisonment under Section 373 and to five year rigorous imprisonment under Section 377, both sentences were to run consecutively and the period during which the accused was in custody was to be set off against the substantive sentence.

An appeal was filed by the accused and was allowed by the high court; the judgement of the trial court was set aside and the accused was set free. The main reason for the reversal of the order was that the medical examination did not denote carnal intercourse against the order of nature and there was a discrepancy about the age of the minor boy as there was no authentic proof of age such as a birth certificate, school leaving certificate. The high court further held that the victim boy was an accomplice in commission of the crime and therefore corroboration of his the statement was necessary.

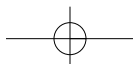
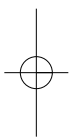
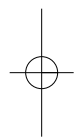
Section 362 of the Indian Penal Code deals with abduction.

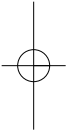
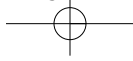


Section 363 of the Indian Penal Code deals with the punishment for kidnaping, imprisonment for a term extending to seven years and fine.

Section 373 deals with the buying of a minor for the purpose of prostitution.

Section 377 of the Indian Penal Code deals with the commission of unnatural offences.





XIII. THE NEED FOR LEGISLATION ON CHILD SEXUAL ABUSE

The Supreme Court in *Sakshi vs. Union of India & Ors.* has recognised the need to enact a new law or amend existing laws to comprehensively deal with the issue of child sexual abuse.

1. '(1999) 6 SUPREME COURT CASES 591

SAKSHI (PETITIONERS)

v.

UNION OF INDIA & ORS. (RESPONDENTS)

ORDER

1. The attention of the Court was drawn to existing Sections 375/376 of the Indian Penal Code and various other sections and it was pointed out that the interpretation being placed by the courts on those sections cannot be said to be in tune with the current state of affairs existing in the society, particularly in the matter of sexual abuse of children
2. On 13-1 -1998, after an affidavit had been filed by Mrs. G. Mukherjee, Director, Ministry of Home Affairs stating that the Government of India had commenced the process for 'examination of the issues raised in this writ petition' by referring the Matter to the Law Commission and that the report/recommendation of the Law Commission relating to amendment of the Indian Penal Code were awaited, we requested the Law Commission, in view of the importance of the matter, to examine the issues raised in the petition and to intimate to this Court its view and proposed action to be taken in that behalf.
3. The 156th Report of the Law Commission has been submitted to the Government of India on 30-8-1997. The Law Commission referred to the same Report and an affidavit was filed in this Court by an Additional Law Officer of the Law Commission

wherein it was pointed out that the 156th Report of the Law Commission of India on amendments of the Indian Penal Code has been laid on the table of both Houses of Parliament on 8-6-1998 and 9-6-1998 and that the issues raised in the writ petition had been considered therein. Reference was invited to Chapter IX Part V entitled 'Child Sexual Abuse' and to the observations of the Law Commission in para 9.59 of that Report in that behalf.

4. Mr. F.S. Nariman, learned Senior Counsel submits that what was contained in the 156th Report of the Law Commission was known to the petitioners, but since according to him that Report did not deal with the precise issues raised in the writ petition, a request was made to seek further consideration of the issues by the Law Commission and the Government of India. The submission appears to be correct. The Report had been submitted by the Law Commission prior to the issues being referred to it. The Report of the Law Commission does not in terms deal with various aspects of the issues as raised in the writ petition.
5. At our suggestion, a note containing precise issues involved in the writ petition as well as other connected issues have now been drawn up by the petitioners and filed in this Court supported by an affidavit of Dr. Hemlata, Project Coordinator, Sakshi.
6. We have perused the issues, as submitted for consideration by the petitioners and find prima facie that the 156th Report of the Law Commission does not deal with most of the issues raised herein. The issues are important and concern sexual abuse of the child. Keeping in view the rise in crime and the growing menace of sexual abuse of the child, we consider it appropriate to once again request the Law Commission to examine the issues submitted by the petitioners and examine the feasibility of making recommendations for amendment of the Indian Penal Code or deal with the same in any other manner so as to plug the loopholes.
7. A copy of the 'precise issues' together with the appendix and the affidavit shall be sent to the Secretary, Law Commission with a request to him to place the same before the Hon'ble Chairman of the Law Commission for his consideration. The Law Commission may if so advised, call upon the petitioner to assist it in whatever manner it considers it appropriate. The issues, it appears to us, do need a thorough examination.
8. We are adjourning the matter by three months and hope that the Law Commission would be able to devote its attention to the issues raised in the submission note in the meanwhile.

9. List after three months for directions.'

2. LAW COMMISSION OF INDIA: 172ND REPORT (MARCH 2000)

Pursuant to the order passed by the Supreme Court in *Sakshi Vs. Union of India & Ors.*, the Law Commission of India has reviewed the laws with regards to child sexual abuse, and recommended amendments in consultation with Sakshi and other organisations.

REVIEW OF RAPE LAWS

RECOMMENDATIONS OF THE LAW COMMISSION

The 156th Report of the Law Commission stated that penile/ oral penetration is covered under Section 377 of the Indian Penal Code and finger/object penetration into vagina or anus is covered under Section 354 of the Indian Penal Code, the amendment proposed was a more severe punishment.

- (1) The present Report has recommended the broadening of the meaning of penetration to include not only vaginal penetration, but also anal and oral penetration as well as penetration by any part of the body or object. The expansion of the term 'penetration' is necessary as in the majority of child sexual abuse cases the penetration is other than penile/vaginal, nevertheless it causes lasting psychic damage to the child.
- (2) The present Report has recommended the insertion of Section 376E, i e 'Unlawful Sexual Contact'. The purpose of this section is to substitute the offence of rape under Section 375 of the Indian Penal Code with the offence of 'sexual assault', including all kinds of penetration in the vagina anus or urethra of another, whether by a part of the body or an object.'
- (3) The present Report has recommended the deletion of Section 377 of the Indian Penal Code as unnecessary in view of the aforesaid provisions.
- (4) The present Report has recommended the amendment of Section 509 of the Indian Penal Code by providing higher punishment where the offence is committed with sexual intent. The prevailing Section 509 is reproduced hereunder;

'509. Word, gesture or act intended to insult the modesty of a woman -

Whoever, intending to insult the modesty of any woman, utters any word, makes any sound or gesture, or exhibits any object, intending that such word or sound shall be heard, or that such gesture or object shall be seen, by such woman, or intrudes upon the privacy of such woman, shall be punished with simple imprisonment for a term which may extend to one year, or with fine, or with both.'

RECOMMENDATIONS OF SAKSHI, IFSHA (INTERVENTIONS FOR SUPPORT HEALING AND AWARENESS), AIDWA (ALL INDIA DEMOCRATIC WOMEN'S ASSOCIATION) AND NCW (NATIONAL COMMISSION FOR WOMEN)

1. The age of the person assaulted, referred to in clause 'sixthly' of Section 375 of the Indian Penal Code, in Explanation (2) to Section 375, and in section 376 (1) i.e. where the age of the wife is referred to, should be raised to 16 years.
2. A provision to be inserted to the effect that if the person gives his/her age, the Court shall presume the age to be so.
3. The definition of sexual assault under Section 375 of the Indian Penal Code should contain an Explanation with regards to penetration; penetration shall mean penetration to any extent whatsoever, inasmuch the penetration is never complete in the case of children.
4. Forced sexual intercourse by a husband with a wife should equally be treated as an offence just as any physical violence by a husband against a wife is treated as an offence, therefore Explanation to Section 375 and 376A of the Indian Penal Code should be deleted and Section 376 (1) should be accordingly modified.
5. 'A person holding possession of trust' as mentioned in Section 376 (1) of the draft Recommendations of the Law Commission should be explained, the said Explanation shall include the father/step-father, brother/step-brother, teacher, instructor, guardian and the like.
6. Consent should be defined to mean 'unequivocal voluntary agreement'.
7. A new offence to be created by appropriately amending Section 166 of the Indian Penal Code; it should be made an offence for a public servant to disobey a direction of law prohibiting the summoning of a woman or minor at any place other than her/his place of choice, and

for a public servant to disobey any direction of law with respect to the manner in which the investigation concerning a minor is to be conducted. The prevailing Section 166 is reproduced hereunder;

'166. Public servant disobeying law, with intent to cause injury to any person - Whoever, being a public servant, knowingly disobeys any direction of the law as to the way in which he is to conduct himself as such public servant, intending to cause, or knowing it to be likely that he will, by such disobedience, cause injury to any person, shall be punished with simple imprisonment for a term which may extend to one year, or with fine, or with both.'

PROPOSED AMENDMENTS TO THE INDIAN PENAL CODE

1. Substitution of the prevailing Section 375 of the Indian Penal Code as follows;

'375. Sexual Assault: Sexual assault means -

- (a) penetrating the vagina (which term shall include the labia majora), the anus or urethra of any person with -
 - i) any part of the body of another person or
 - ii) an object manipulated by another person except where such penetration is carried out for proper hygienic or medical purposes;
- (b) manipulating any part of the body of another person so as to cause penetration of the vagina (which term shall include the labia majora), the anus or the urethra of the offender by any part of the other person's body;
- (c) introducing any part of the penis of a person into the mouth of another person;
- (d) engaging in cunnilingus or fellatio; or
- (e) continuing sexual assault as defined in clauses (a) to (d) above in circumstances falling under any of the six following descriptions:

First – Against the other person's will.

Secondly – Without the other person's consent.

Thirdly – With the other person's consent when such consent has been obtained by putting such other person or any person in whom such other person is interested, in fear of death or hurt.

Fourthly – Where the other person is a female, with her consent, when the man knows that he is not the husband of such other person and that her consent is given because she believes that the offender is another man to whom she is or believes herself to be lawfully married.

Fifthly – With the consent of the other person, when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administra-

tion by the offender personally or through another of any stupefying or unwholesome substance, the other person is unable to understand the nature and consequences of that to which such other person gives consent.

Sixthly – With or without the other person's consent, when such other person is under sixteen years of age.

Explanation: Penetration to any extent is penetration for the purposes of this section.

Explanation: Sexual intercourse by a man with his own wife, the wife not being under sixteen years of age, is not sexual assault.'

2. Recasting of Section 376 of the Indian Penal Code as follows;

'376. Punishment for sexual assault - (1) Whoever, except in the case provided for by sub-section (2), commits sexual assault shall be punished with imprisonment of either description for a term which shall not be less than seven years but which may be for life or for a term which may extend to ten years and shall also be liable to fine unless the person subjected to sexual assault is his own wife and is not under sixteen years of age, in which case, he shall be punished with imprisonment of either description for a term which may extend to three years and shall also be liable to fine.

If the sexual assault is committed by a person in a position of trust or authority towards the person assaulted or by a near relative of the person assaulted, he/she shall be punished with rigorous imprisonment for a term which shall not be less than ten years but which may extend to life imprisonment and shall also be liable to fine.

Provided that the Court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment for a term of less than minimum punishment prescribed in this sub-section.

(2) Whoever, -

(a) being a police officer commits sexual assault-

- (i) within the limits of the police station to which he is appointed; or
- (ii) in the premises of any station house whether or not situated in the police station to which he is appointed; or
- (iii) on a person in his custody or in the custody of a police officer subordinate to him; or

(b) being a public servant, takes advantage of his official position and commits sexual assault on a person in his custody as such public servant or in the custody of a public servant subordinate to him; or

(c) being on the management or on the staff of a jail, remand home or other place

of custody established by or under any law for the time being in force or of a woman's or children's institution takes advantage of his official position and commits sexual assault on any inmate of such jail, remand home, place or institution;
or

(d) being on the management or on the staff of a hospital, takes advantage of his official position and commits sexual assault on a person in that hospital; or

(e) commits sexual assault on a woman knowing her to be pregnant; or

(f) commits sexual assault on a person when such person is under sixteen years of age; or

(g) commits gang sexual assault, shall be punished with rigorous imprisonment for a term which shall not be less than ten years but which may be for life and shall also be liable to fine:

Provided that the court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment of either description for a term of less than ten years.

Explanation 1. — Where a person is subjected to sexual assault by one or more in a group of persons acting in furtherance of their common intention, each of the persons shall be deemed to have committed gang sexual assault within the meaning of this sub-section.

Explanation 2. — "Women's or children's institution" means an institution, whether called an orphanage or a home for neglected women or children or a widows' home or an institution called by any other name, which is established and maintained for the reception and care of women or children.

Explanation 3. — "Hospital" means the precincts of the hospital and includes the precincts of any institution for the reception and treatment of persons during convalescence or of persons requiring medical attention rehabilitation.'

1. Modification of Sections 376A, 376B, 376C and 376D of the Indian Penal Code as follows;

'376A. Sexual assault by the husband upon his wife during separation.

— Whoever commits sexual assault upon his wife, who is living separately from him under a decree of separation or under any custom or usage, without her consent, shall be punished with imprisonment of either description for a term which shall not be less than two years and which may extend to seven years and shall also be liable to fine.'

'376B. Sexual intercourse by public servant with person in his custody.

— Whoever, being a public servant, takes advantage of his/her official position and induces or seduces any person, who is in his/her custody as such public servant or in the custody of a public servant subordinate to him, to have sexual intercourse with him/her, such sexual intercourse not amounting to the offence of sexual assault, shall be punished with imprisonment of either description for a term which shall not be less than five years and which may extend to ten years and shall also be liable to fine.

Provided that the court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment for a term of less than five years.

Explanation: "Sexual intercourse" in this section and Sections 376C and 376D shall mean any of the acts mentioned in clauses (a) to (e) of section 375.

Explanation to section 375 shall also be applicable.'

'376C. Sexual intercourse by superintendent of jail, remand home, etc. -Whoever, being the superintendent or manager of a jail, remand home or other place of custody established by or under any law for the time being in force or of a women's or children's institution takes advantage of his/her official position and induces or seduces any inmate of such jail, remand home, place or institution to have sexual intercourse with him/her, such sexual intercourse not amounting to the offence of sexual assault, shall be punished with imprisonment of either description for a term which shall not be less than five years and which may extend to ten years and shall also be liable to fine.

Provided that the court may, for adequate and special reasons to be mentioned in the judgment impose a sentence of imprisonment for term less then five years.

Explanation 1. — "Superintendent" in relation to a jail, remand home or other place of custody or a women's or children's institution includes a person holding any other office in such jail, remand home, place or institution by virtue of which he/she can exercise any authority or control over its inmates.

Explanation 2. — The expression "women's or children's institution" shall have the same meaning as in Explanation 2 to sub-section (2) of section 376.'

'376D. Sexual intercourse by any member of the management or staff of a hospi-

tal with any woman in that hospital. Whoever, being on the management of a hospital or being on the staff of a hospital takes advantage of his/her position and has sexual intercourse with any person in that hospital, such sexual intercourse not amounting to the offence of sexual assault, shall be punished with imprisonment of either description for a term which shall not be less than five years and which may extend to ten years and shall also be liable to fine.

Provided that the court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment for a term of less than five years.

Explanation: The expression "hospital" shall have the same meaning as in Explanation 3 to sub-section (2) of section 376.'

2. Insertion of Section 376E to the Indian Penal Code;

'376E. Unlawful sexual contact.-

(1) Whoever, with sexual intent, touches, directly or indirectly, with a part of the body or with an object, any part of the body of another person, not being the spouse of another person, without the consent of such other person, shall be punished with simple imprisonment for a term which may extend to two years or with fine or with both.

(2) Whoever, with sexual intent, invites, counsels or incites a young person to touch, directly or indirectly, with a part of the body or with an object, the body of any person, including the body of the person who so invites, counsels or incites, or touches, with sexual intent, directly or indirectly, with a part of the body or with an object any part of the body of a young person, shall be punished with imprisonment of either description which may extend to three years and shall also be liable to fine.

(3) Whoever being in a position of trust or authority towards a young person or is a person with whom the young person is in a relationship of dependency, touches, directly or indirectly, with sexual intent, with a part of the body or with an object, any part of the body of such young person shall be punished with imprisonment of either description which may extend to seven years and shall also be liable to fine. *Explanation:* "Young person" in this sub-section and sub-section (2) means a person below the age of sixteen years."

3. Deletion of Section 377 of the Indian Penal Code.

4. Amendment of Section 509 of the Indian Penal Code as follows;

'509. Word, gesture or act intended to insult the modesty of a woman. –Whoever,

intending to insult the modesty of any woman, utters any word, makes any sound or gesture, or exhibits any object intending that such word or sound shall be heard, or that such gesture or object shall be seen, by such woman, or intrudes upon the privacy of such woman, shall be punished with simple imprisonment for a term which may extend to three years and shall also be liable to fine.'

5. Insertion of Section 166A to the Indian Penal Code;

'166A. Whoever, being a public servant -

(a) knowingly disobeys any direction of the law prohibiting him from requiring the attendance at any place of any person for the purpose of investigation into an offence or other matter, or

(b) knowingly disobeys any other direction of the law regulating the manner in which he shall conduct such investigation, to the prejudice of any person, shall be punished with imprisonment for a term which may extend to one year or with fine or with both.'

REVIEW OF CRIMINAL PROCEDURE CODE

RECOMMENDATIONS OF THE LAW COMMISSION

The law commission suggested that unless simultaneous changes were not effected in relevant provisions of the Criminal Procedure Code the purpose underlying the changes made in the Indian Penal Code may not be fully served.

RECOMMENDATIONS OF SAKSHI, IFSHA, AIDWA AND NCW

1. The statement of a girl victim below 12 years of age should be recorded by a woman police officer or by a woman belonging to an organisation interested in the cause of women or children.
2. The present proviso to sub-section (1) of Section 160 of the Criminal Procedure Code to be modified. The prevailing Section 160 (1) is reproduced hereunder;
'Any police officer making an investigation under this Chapter may, by order in writing require the attendance before himself of any person being within the limits of his own or any adjoining station who, from the information given or otherwise, appears to be acquainted with the facts and circumstances of the case, and such person shall attend as so required;

Provided that no male person under the age of fifteen years or woman shall be required to attend at any place other than the place in which such male person or woman resides.'

The modification raises the age of the male person to 16 years and requires such persons to be questioned at their homes or other place of their choice.

3. Insertion of a new sub-section to Section 160 whereby the statement of a male person under the age of 16 years or a female during the course of investigation is recorded in the presence of a relative, friend or social worker of the person's choice.
4. A Insertion of a new section, viz. Section 164A whereby police personnel are required to get a victim of sexual assault medically examined as soon as such case is reported, and for the medical practitioner to prepare a report setting out various specified particulars.
5. Specific provisions with regards to medical examination of the victim to be inserted.
6. One of the conditions imposed by the court while granting bail to a person accused of sexual assault should be that such a person shall not be in the proximity of the person assaulted.
7. There should be no interference with or disturbance of the natural habitat of the person sexually assaulted by or through the criminal justice process.
8. The investigation and trial of sexual offences should be time bound and completed within six months.
9. The expression 'social worker' should be defined to mean a woman interested in or working for the cause of women and/or children and who is familiar with issues of violence against women and children.

PROPOSED AMENDMENTS TO THE CRIMINAL PROCEDURE CODE

1. Insertion of sub-sections (3) and (4) to Section 160 of the Criminal Procedure Code;

'(3) Where under this chapter, the statement of a female is to be recorded either

as first information of an offence or in the course of an investigation into an offence and she is a person against whom offence under section 354, 375, 376A, 376B, 376C, 376D, 376E or 509 of the Indian Penal Code is alleged to have been committed or attempted, the statement shall be recorded by a female police officer and in case a female police officer is not available, by a female government servant available in the vicinity and in case a female government servant is also not available, by a female authorised by an organisation interested in the welfare of women or children.

(4) Where in any case none of the alternatives mentioned in subsection (3) can be followed for the reason that no female police officer or female government servant or a female authorised by an organisation interested in the welfare of women and children is available, the officer in charge of the police station shall, after recording the reasons in writing, proceed with the recording of the statement of such female victim in the presence of a relative of the victim.'

2. Substitution of the proviso to sub-section (1) of Section 160 of the Criminal Procedure Code as follows;

'Provided that no male person under the age of 16 years or woman shall be required to attend at any place other than the place in which such male person or woman resides. While recording the statement, a relative or a friend or a social worker of the choice of the person whose statement is being recorded shall be allowed to remain present. The relative, friend or social worker so allowed to be present shall not interfere with the recording of statement in any manner whatsoever.'

3. Insertion of Section 164A to the Criminal Procedure Code;

'164A. (1) Where, during the stage when any offence under section 376, section 376A, section 376B, section 376C, section 376D or section 376E is under investigation and it is proposed to get the victim examined by a medical expert, such examination shall be conducted by a registered medical practitioner, with the consent of the victim or of (some person competent to give such consent on his/her behalf. In all cases, the victim should be sent for such examination without any delay.

Provided that if the victim happens to be a female, the medical examination shall be conducted by a female medical officer, as far as possible.

(2) The registered medical practitioner to whom the victim is forwarded shall without delay examine the person and prepare a report specifically recording the result of his examination and giving the following details:

- (i) the name and address of the victim and the person by whom he/she was brought,
 - (ii) the age of the victim,
 - (iii) marks of injuries, if any, on the person of the victim,
 - (iv) general mental condition of the victim, and
 - (v) other material particulars, in reasonable detail.
- (3) The report shall state precisely the reasons for each conclusion arrived at.
- (4) The report shall specifically record that the consent of the victim or of some person competent to give such consent on his/her behalf to such examination had been obtained.
- (5) The exact time of commencement and completion of the examination shall also be noted in the report, and the registered medical practitioner shall without delay, forward the report to the investigating officer, who shall forward it to the Magistrate referred to in section 173 as part of the documents referred to in clause (a) of sub-section (5) of that section.
- (6) Nothing in this section shall be construed as rendering lawful any examination without the consent of the victim or any person competent to give such consent on his/her behalf.'

4. Insertion of Section 53A to the Criminal Procedure Code;

- '53A. (1) When a person accused of any of the offences under sections 376, 376A, 376B, 376C, 376D or 376E or of an attempt to commit any of the said offences, is arrested and an examination of his/ her person is to be made under this section, he/she shall be sent without delay to the registered medical practitioner by whom he/she is to be examined.
- (2) The registered medical practitioner conducting such examination shall without delay examine such person and prepare a report specifically recording the result of his examination and giving the following particulars:
- (i) the name and address of the accused and the person by whom he was brought,
 - (ii) the age of the accused,
 - (iii) marks of injury, if any, on the person of the accused, and
 - (iv) other material particulars in reasonable detail.
- (3) The report shall state precisely the reasons for each conclusion arrived at.
- (4) The exact time of commencement and completion of the examination shall also be noted in the report, and the registered medical practitioner shall, without delay, forward the report to the investigating officer, who shall forward it to the Magistrate referred to in section 173 as part of the documents referred to in clause (a) of sub-section (5) of that section.'

5. Insertion of Section 198B to the Criminal Procedure Code;

'Prosecution of offences under sub-sections (2) and (3) of section 376E of the Indian Penal Code. -

No court shall take cognizance of an offence punishable under sub-sections (2) and (3) of section 376E of the Indian Penal Code (45 of 1860) except upon a police report of facts which constitute such offence or upon a complaint made by the person aggrieved by the offence or by his/her father, mother, brother, sister or by his/her father's or mother's brother or sister or, by any other person related to him/her by blood or adoption, if so permitted by the court.'

6. Other consequential amendments.

REVIEW OF EVIDENCE ACT

RECOMMENDATIONS OF THE LAW COMMISSION

To give effect to the amendments in the Indian Penal Code, the commission has suggested that changes be made in the Evidence Act.

RECOMMENDATIONS OF SAKSHI, IFSHA, AIDWA AND NCW

1. A new section viz. section 114B to be introduced. The court shall presume that a victim of an aggravated sexual assault under sections 376A to 376D of the Indian Penal Code did not consent to it, if the person so assaulted states before the court that he/she did not consent.
2. Section 155 (4) should be deleted. Under this section, the person accused of rape or attempt to ravish is permitted to prove that the prosecutrix was of generally immoral character.
3. A new clause viz. clause (4) to be inserted to Section 146, wherein it is expressly stated that in a prosecution for sexual assault, it shall not be permissible to adduce evidence or to put questions in cross-examination of the person assaulted about his/her previous sexual history, character or conduct, whether to establish consent or otherwise.
4. The absence of a medical report shall not be a factor against the complainant or person assaulted.
5. A provision to be incorporated whereby a minor who has been assaulted sexually should not be required to give his/her evidence in the presence of the accused as it would traumatise the minor.

6. The testimony of a child who is subjected to sexual assault should be recorded at the earliest opportunity by a judge or a magistrate in the presence of a friend, relative or social worker whom the minor trusts. It is necessary to provide for videotape or circuit television. The cross-examination should be conducted by the judge to whom the questions are handed over by the advocate for the accused.
7. All cases of sexual assault should be tried by special courts, which should be manned by judges, prosecutors and counselors specially trained or sensitised to issues of sexual assault.

PROPOSED AMENDMENTS TO THE EVIDENCE ACT

1. Modification to section 114A of the Evidence Act. The prevailing section is reproduced below;

'114A. Presumptions as to absence of consent in certain prosecutions for rape. —In a prosecution for rape under clause (a) or clause (b) or clause (c) or clause (d) or clause (e) or clause (g) of sub-section (2) of section 376 of the Indian Penal Code (45 of 1860), where sexual intercourse by the accused is proved and the question is whether it was without consent of the woman alleged to have been raped and she states in her evidence before the court that she did not consent, the court shall presume that she did not consent.'

The modified sections reads as under;

'114A. Presumption as to absence of consent in certain prosecutions for sexual assault - In a prosecution for sexual assault under clause (a) or clause (b) or clause (c) or clause (d) or clause (e) or clause (g) of sub-section (2) of section 376 of the Indian Penal Code (45 of 1860) where sexual intercourse by the accused is proved and the question is whether it was without the consent of the other person alleged to have been sexually assaulted and such other person states in his/her evidence before the court that he/she did not consent the court shall presume that he/she did not consent. .

Explanation: "Sexual intercourse" in this section and sections 376C and 376D shall mean any of the acts mentioned in clauses (a) to (e) of section 375. Explanation to section 375 shall also be applicable."

2. Clause (4) of Section 155 of the Evidence Act to be deleted.
3. Insertion of Section 53A to the Evidence Act;

'53A. In a prosecution for an offence under section 376,376A, 376B, 376C, 376D or 376E or for attempt to commit any such offence, where the question of consent is in issue, evidence of the character of the victim or of his/her previous sexual experience with any person shall not be relevant on the issue of such consent or the quality of consent'

4. Insertion of clause (4) to Section 146 of the Evidence Act;

'(4) In a prosecution for an offence under section 376,376A, 376B, 376C, 376D or 376E or for attempt to commit any such offence, where the question of consent is in issue, it shall not be permissible to adduce evidence or to put questions in the cross-examination of the victim as to his/her general immoral character, or as to his/her previous sexual experience with any person for proving such consent or the quality of consent.'

5. The law commission has also, whilst recognising the importance of the child victim not seeing the accused, upheld the right of the accused to listen to the testimony of the victim and instruct his advocate during cross-examination. The providing of a screen on request of the prosecution has been suggested. Further, a proviso has been recommended to Section 273 of the Criminal Procedure Code. Section 273 along with the suggested proviso is reproduced below;

'273. Evidence to be taken in presence of accused. - Except as otherwise expressly provided, all evidence taken in the course of the trial or other proceeding shall be taken in the presence of the accused or, when his personal attendance is dispensed with, in presence of his pleader.

Provided where the evidence of a person below sixteen years who is alleged to have been subjected to sexual assault or any other sexual offence, is to be recorded, the court may, take appropriate measures to ensure that such person is not confronted by the accused while at the same time ensuring the right of cross-examination of the accused.

Explanation. - In this section, "accused" includes a person in relation to whom any proceeding under Chapter VIII has been commenced under this Code.'

XIV. AMERICAN AND BRITISH LAWS ON CHILD ABUSE AND EXPLOITATION

Several laws have been enacted in the U.S.A. and the United Kingdom to prevent and treat cases of child sexual abuse/exploitation. The Indian law could benefit by incorporating certain provisions of these laws, especially those provisions relating to the establishment of multidisciplinary teams, aggravated sexual abuse and providing of grants for programmes dealing with investigations and prosecutions of child sexual abuse cases. The salient features of some of these American and British laws are mentioned below.

1. AMERICAN LAW

The American law recognises the importance of a multidisciplinary team to review the functioning of the investigative machinery and endeavours to shift the focus from the conduct of the victim to the conduct of the accused. Courts are empowered to pass orders to monetarily make good for the injury sustained by the victim.

A. CHILD ABUSE AND TREATMENT ACT

Under the Child Abuse Prevention and Treatment Act, the term 'child' mean a person who has not attained the lesser of-

- (a) the age of 18; or
- (b) except in the case of sexual abuse, the age specified by the child protection law of the state in which the child resides.

The term 'child abuse and neglect' means the physical or mental injury, sexual abuse or exploitation, negligent treatment, or maltreatment of a child by a person who is responsible for the child's welfare, under circumstances, which indicate that the child's health or welfare is harmed or threatened thereby, as determined in accordance with regulations prescribed by the secretary. The term 'Secretary' means the secretary of Health and Human

Services.

'Sexual abuse' includes-

- (a) the employment, use, persuasion, inducement, enticement or coercion of any child to engaging, or assist any other person to engage in, any sexually explicit conduct or simulation of such conduct for the purpose of producing a visual depiction of such conduct; or
- (b) the rape, molestation, prostitution, or other form of sexual exploitation of children, or incest with children.

The term 'care' means the provision of care, treatment, education, training, instruction, supervision or recreation to children, the elderly or individuals with disabilities.

The salient features of this Act are in brief stated below.

1. A National Center on Child Abuse and Neglect is to be established by the secretary of Health and Human Services. The staff appointed for the centre shall have experience on issues relating to child abuse and neglect; the secretary has to justify the hiring of any staff member not having the requisite qualifications. The centre is to conduct research on the causes, prevention, identification, treatment and cultural distinctions of child abuse and neglect, appropriate judicial procedure in respect of cases of child abuse. The centre is also to provide technical assistance to public and non-profit private agencies and organisations.
2. The secretary has to appoint an advisory board on child abuse and neglect. The members of the board are to be appointed from the general public; they should be knowledgeable in child abuse and neglect prevention, intervention, treatment or research and should represent law, psychology, social services, medicine, state and local government, teachers, etc. The board is to make recommendations for specific changes in federal laws and programmes, specific changes needed to improve national data collection, coordinating federal child abuse and neglect activities to prevent duplication and ensure efficient allocation of resources and programme effectiveness.
3. An inter-agency task force on child abuse and neglect is to be established by the secretary. The task force is to have representation from federal agencies having responsibility for programmes and activities relating to child abuse and neglect. The main duty of the task force shall be to coordinate efforts with respect to child abuse prevention and treatment programmes, encourage the development by other

federal agencies of activities relating to child abuse prevention and treatment, prepare a comprehensive plan for coordinating the goals, objectives and activities of all federal agencies and organisations which are responsible for programmes and activities related to child abuse and neglect.

4. A national clearinghouse for information relating to child abuse is to be established by the secretary through the National Center on Child Abuse and Neglect. The director of the clearinghouse shall (a) maintain, coordinate and disseminate information on all programmes with respect to the prevention, identification and treatment of child abuse, (b) maintain and disseminate information relating to the incidence of cases of child abuse and neglect.
5. (i) The secretary shall make grants to public agencies or non-profit private organisations for demonstration or service programmes and projects designed to prevent, identify and treat child abuse and neglect. All such projects shall be evaluated for their effectiveness.
(ii) The secretary shall make grants to the states, based on the population of children under the age of 18 years in each state, for purposes of assisting the states in improving the child protective service system by creating and improving the use of multidisciplinary teams to enhance investigations, improve legal preparation and representation, etc. Each state applying for such grant shall have a law relating to child abuse and neglect.
(iii) The secretary shall provide training and technical assistance programmes to assist states in developing, implementing or operating programmes and procedures to prevent, identify and treat child abuse and neglect.
6. Grants are to be sanctioned to private and public agencies and organisations to establish 'crisis nurseries' for children who are abused and neglected, are at a high risk of abuse and neglect, or who are in families receiving child protective services. Such service shall be provided without a fee for a maximum period of 30 days in any year. Crisis nurseries shall also refer cases to support services.
7. The administrator of the Office of Juvenile Justice and Delinquency Prevention is to conduct a study on convicted child abuse offenders to determine percentage of convicted child abuse offenders who more than one conviction for an offence involving child abuse, the percentage of convicted child abuse offenders who have been convicted of an offence involving child abuse in more than one state and the extent to which and the manner in which instances of child abuse form a

basis for conviction for crimes other than child abuse crimes.

8. An effective procedure is to be set-up to enable the conducting of a nationwide background check for the purpose of determining whether a child provider has been convicted of a crime that bears upon the provider's fitness to have the responsibility for the safety and well-being of children.

B. GRANTS TO THE STATES FOR PROGRAMMES RELATING TO INVESTIGATION AND PROSECUTION OF CHILD ABUSE AND NEGLECT CASES

The secretary, acting through the centre and in consultation with the attorney general, is authorised to make grants to states for the purpose of assisting states in developing, establishing and operating programmes designed to improve –

- (1) the handling of child abuse and neglect cases, particularly cases of child sexual abuse and exploitation, in a manner which limits additional trauma to the child victim;
- (2) the handling of cases of suspected child abuse or neglect-related fatalities; and
- (3) the investigation and prosecution of cases of child abuse and neglect, particularly child sexual abuse and exploitation.

A state requesting assistance under this section shall establish, or designate and maintain a state multidisciplinary task force on children's justice composed of professionals with knowledge and experience relating to the criminal justice system and issues of child physical abuse and exploitation, and child maltreatment-related fatalities.

This State multidisciplinary task force shall include-

- (a) individuals representing the law enforcement community;
- (b) judges and attorneys involved in both civil and criminal court proceedings related to child abuse and neglect (including individuals involved with the defence as well as the prosecution of such cases);
- (c) child advocates, including both attorneys for children and, where such programmes are in operation, court appointed special advocates;
- (d) health and mental health professionals;
- (e) individuals representing child protective service agencies;
- (f) individuals experienced in working with children with disabilities;
- (g) parents; and
- (h) representatives of parents' groups.

The state multidisciplinary task force is required to-

- (1) review and evaluate state investigative, administrative and both civil and criminal judicial handling of cases of child abuse and neglect, particularly child sexual abuse and exploitation, as well as cases involving suspected child maltreatment-related fatalities and cases involving a potential combination of jurisdictions, such as interstate, federal state and state tribal;
- (2) make policy and training recommendations for
 - (a) investigative, administrative and judicial handling of cases of child abuse and neglect, particularly child sexual abuse and exploitation, as well as cases involving suspected child maltreatment-related fatalities and cases involving a potential combination of jurisdictions, such as interstate, federal state and state tribal, in a manner that reduces the additional trauma to the child victim and the victim's family and which also ensures procedural fairness to the accused;
 - (b) experimental, model and demonstration programmes for testing innovative approaches and techniques that may improve the prompt and successful resolution of civil and criminal court proceedings or enhance the effectiveness of judicial and administrative action in child abuse and neglect cases, particularly child sexual abuse and exploitation cases, including the enhancement of performance of court-appointed attorneys and guardians ad litem for children, and which also ensures procedural fairness to the accused; and
 - (c) reform of state laws, ordinances, regulations, protocols and procedures to provide comprehensive protection for children from abuse, particularly child sexual abuse and exploitation, while ensuring fairness to all affected persons.

C. SAFE HAVENS FOR CHILDREN ACT (1997)

This Act has been enacted to protect children from the trauma of witnessing or experiencing violence, sexual abuse, neglect, abduction, rape, or death during parent-child visitation and visitation exchanges. The need for this law was based on Congress' findings that indicated, among other factors, the following:

- A. Family violence often escalates following separation and divorce; child custody and visitation arrangements have become the new setting for continuation of abuse.
- B. Approximately, 90 percent of children in homes in which their mothers are abused, witness the abuse. Children who witness domestic violence may themselves become victims and exhibit more aggressive, anti-social, fearful and inhibited behaviours. Such children display more anxiety, aggression and temperamental problems.
- C. 50 to 70 percent of men who abuse their spouses or partners also abuse their children.

This Act deals with establishing and operating supervised visitation centres for the purpose of facilitating supervised visitation and visitation exchange.

D. JUVENILE JUSTICE AND DELINQUENCY PREVENTION ACT

This Act aims at protecting the child from dangers 'on the street'. The focus is on the removal of the child from the street to a more protected environment such as a shelter or foster home and the ultimate returning of the child to a place in the mainstream society. Unfortunately, child sexual abuse in child care institutions at the hands of child carers is on the increase. The dilemma is the 'dangers on the street' versus the 'dangers within the institution.'

E. PROTECTION OF CHILDREN FROM SEXUAL PREDATORS ACT (1998)

This Act deals with aggravated sexual abuse, i.e., knowingly causing another person to engage in a sexual act through force or threat. The purpose of the Act is to modernise and reform federal rape provisions by defining offences so that the focus of the trial is upon the conduct of the defendant, instead of upon the conduct or the state of mind of the victim.

The Act contains specific provisions with regards to children. Aggravated sexual abuse:

'With children - Whoever crosses a State line with intent to engage in a sexual act with a person who has not attained the age of 12 years, or in the special maritime and territorial jurisdiction of the United States or in a Federal prison, knowingly engages in a sexual act with another person who has not attained the age of 12 years, or knowingly engages in a sexual act under the circumstances described in subsections (a) and (b) with another person who has attained the age of 12 years but has attained the age of 16 years (and is at least 4 years younger than the Person so engaging), or attempts to do so, shall be fined under this title, imprisoned for any term of years or life, or both. If the defendant has previously been convicted of another Federal offense under this subsection, or of a State offense that would have been an offense under either such provision had the offense occurred in a Federal prison, unless the death penalty is imposed, the defendant shall be sentenced to life in prison.'

Sub-sections (a) and (b) mention different instances of aggravated sexual abuse, e.g., by using force, by threatening or placing a person in fear that another person will be subjected to death, serious bodily injury or kidnapping,

renders a person unconscious and thereby engages in a sexual act with such person, drugs/intoxicates a person and thereafter engages in a sexual act with such person.

There is no need for the prosecution to prove that the defendant had knowledge that the victim who was engaged in the sexual act had not attained 12 years of age. Such defence is provided to those accused of engaging in sexual acts with minors older than 12 years.

Sexual abuse is not a lesser included offence of aggravated sexual abuse; aggravated sexual abuse requires actual use of force, whereas sexual abuse does not (U.S. vs. Dia, D.Ariz. 1993, 826 F.Supp.1237, affirmed 39 F.3d.1189).

Sexual abuse of a minor or ward:

- a) Of a minor.-Whoever, in the special maritime and territorial jurisdiction of the United States or in a Federal prison, knowingly engages in a sexual act with another person who
 - 1) has attained the age of 12 years but has not attained the age of 16 years and
 - 2) is at least four years younger than the person so engaging; or attempts to do so, shall be fined under this title, imprisoned not more than 15 years or both.
- b) Of a ward - Whoever, in the special maritime and territorial jurisdiction of the United States or in a Federal prison, knowingly engages in a sexual act with another person who is-
 - 1) in official detention; and
 - 2) under the custodial, supervisory, or disciplinary authority of the person so engaging;
 - 3) Or attempts to do so, shall be fined under this title, imprisoned not more than one year, or both.

DEFENSES:

In a prosecution under this section, it is a defence, which the defendant must establish by a preponderance of the evidence that the defendant, reasonably believed that the other person had attained the age of 16 years.

In a prosecution under this section, it is a defence, which the defendant must establish by a preponderance of the evidence, that the persons engaging in the sexual act were at that time married to each other.

State of mind proof requirement: In a prosecution under this section, the government need not prove that the defendant knew-

- a. the age of the other person engaging in the sexual act; or
- b. that the requisite age difference existed between the person so engaging.

The court shall pass an order of restitution, i.e., direct the defendant to pay to the victim an amount equal to the victim's loss. The victim's loss is calculated by the court and includes medical services relating to physical, psychological or psychiatric care, physical and occupational therapy or rehabilitation, attorney's fees, etc. This restitutional order is over and above any civil or criminal penalty and does not depend upon the economic circumstance of the defendant, or that the victim is entitled to receive compensation from the proceeds of insurance or some other source.

SEXUAL EXPLOITATION AND OTHER ABUSE OF CHILDREN:

This chapter of the Act deals with the depiction of minors engaging in sexually explicit conduct. The use of children in the production of sexually explicit material, including photographs, films, videos, computer images and other visual depictions is a form of sexual abuse that can result in physical and/or psychological harm to children.

'Minor' means any person under the age of 18 years.

'Sexually explicit conduct' means actual or simulated-

- a. sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex;
- b. bestiality;
- c. masturbation;
- d. sadistic or masochistic abuse; or
- e. lascivious exhibition of the genitals or pubic area of any person.

'Visual depiction' includes undeveloped film and videotape, and data stored on a computer disk, or by electronic means that is capable of conversion into a visual image.

Any parent, legal guardian or person having the custody/control of a minor, or any person who uses, entices or coerces a minor to engage in or who has a minor assist any other person to engage in any sexually explicit conduct for the purpose of producing any visual depiction of such conduct shall be punishable with fine or imprisonment between 10 years and 20 years or both. In case of prior conviction for the same offence, the punishment is more stringent and imprisonment could extend to life. The material so found is forfeited to the U.S.A. The selling or buying of children for the above purpose is also an offence. Each sexually explicit photograph of children amounts to separate and distinct sexual exploitation of children, even if photographs depict the same children and were produced in the same photography session.

The transport or shipping of any visual depiction of a minor engaging in sexually explicit conduct in interstate or foreign commerce, or receiving or

distributing such material is an offence and is punishable with fine or imprisonment of not more than 15 years or both.

Any minor who suffers personal injury may file proceedings in the appropriate district court and recover the actual damages sustained, which shall not be less than \$50,000. Such suit has to be filed within a period of six years from occurrence of the cause of action, and in case of a victim under legal disability, not later than three years after the disability has been removed.

Whoever knowingly persuades, induces, entices or coerces any who has not attained the age of 18 years to engage in prostitution or any sexual activity for which any person can be charged with a criminal offence, or attempts to do so, shall be punishable with fine or with imprisonment for not more than 15 years or with both.

A person who travels in interstate commerce, or conspires to do or a U.S.A. citizen or an alien admitted for permanent residence in the U.S.A. who travels in foreign commerce, or conspires to do so, for the purpose of engaging in any sexual act with a person under 18 years of age, shall be punishable with fine or with imprisonment for not more than 15 years or with both, and the offence shall be treated in the same manner as though the sexual act had occurred within the special maritime and territorial jurisdiction of the U.S.A.

Sending by mail or any other means from within the special maritime and territorial jurisdiction of the U.S.A., information about an individual who has not attained 16 years of age, with the intention to entice, encourage, offer or solicit any person to engage in an any sexual activity, or attempts to do so, shall be punishable with a fine or imprisonment of not more than five years or both.

2. BRITISH LAW

The British law provides for temporary removal of the child from the care of parents, guardians, or care providers to assess the situation. In case of abuse, the local authority may acquire parental responsibility or the child.

A. THE CHILDREN ACT (1989)

The Children Act is a British act and emphasises that child's welfare shall be of paramount consideration. It attempts to strike a balance between the role of the state, responsibilities of parents and the rights of a child. The main principles to be kept in mind by courts whilst dealing with children are as follows :

1. The child's welfare shall be of paramount consideration.
2. Any delay in the proceedings is likely to prejudice the welfare of the child.
3. Courts should pay regards to ascertainable wishes and feelings of the

child, and the needs of the child.

'Parental responsibility' means all the rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to the child and his/her property. Both the parents have parental responsibilities and they continue even after divorce. Every mother of a child and a father married to the child's mother at the time of birth or subsequently has responsibility for the child. Unmarried fathers do not automatically have parental responsibility for the child, but may acquire it (i) by written agreement with the child's mother in a Parental Responsibility Agreement, (ii) through a court order for parental responsibility if the mother refuses to execute a Parental Responsibility Agreement and (iii) parental responsibility may be given to a father along with a residence order. Parental responsibility granted by agreement or court may be revoked in the interest and welfare of the child. If the parents are dead or unfit, others may acquire guardianship or parental responsibility along with a residence order. A local authority may acquire parental responsibility for a child under a care order. More than one person may have parental responsibility of the child.

Children and young people cannot be kept in police custody for longer than 72 hours. The police have a duty to notify the local authority that a child in its area is in police protection, and also to so inform the child's parents or those who hold parental responsibility for the child. The court may pass a care and supervision order placing a child in the care of a local authority or probation officer, if the court is satisfied that a child is suffering or is likely to suffer significant harm and that the harm or likelihood to harm is attributable to the care given to the child or likely to be given to the child, which is not such care that would be reasonable for a parent to give to the child. 'Harm' means ill-treatment or the impairment of health or development. 'Ill-treatment' includes sexual abuse and forms of ill-treatment that are not physical.

A care and supervision order can be passed in respect of a child who has not attained 17 years of age. In case of a care and supervision order being passed, the local authority has the parental responsibility of the child. The local authority has no right to give the child for adoption or appoint a guardian for the child. The local authority shall allow the child reasonable contact with parents or guardians, except if the denial of contact with parents or guardians is decided upon as a matter of urgency and does not last for more than seven days.

An interim care or supervision order can be passed by the court. During the pendency of the interim order, the court may pass appropriate directions with regard to medical and psychiatric or other assessment of the child. The child may refuse to submit to the examination or assessment, if the child is of sufficient understanding to make an informed decision. The court is to appoint a guardian ad litem to safeguard the interests of the child. The guardian ad litem is to be appointed from a panel of persons that has been

constituted by the secretary of state.

A child assessment order is passed when there is reasonable cause to suspect that the child is suffering or is likely to suffer significant harm. An assessment of the manner in which the child has been treated is necessary to determine whether or not the child is suffering or is likely to suffer significant harm. The child assessment order cannot exceed seven days and notice is to be given to the parent, any person having parental responsibility, any person caring for the child and the child. The person in control of the child is duty bound to produce the child before any person named in the order and comply with other directions passed by the court.

An emergency protection order may be passed if there is reason to believe that the child is likely to suffer significant harm if he remains in the place where he is being accommodated, or if enquiries in respect of a child's welfare are being frustrated by access to the child being unreasonably refused. On passing an emergency protection order, the court may direct the medical or psychiatric or other examination of the child. A child of sufficient understanding to make an informed decision, may refuse to submit to the examination. An emergency protection order shall be in effect for a period not exceeding eight days and may be extended by a further period of seven days. The police may take custody of a child and later apply for an emergency protection order.

Local authorities are duty bound to investigate, if they have a reasonable cause to suspect that a child is being subjected to or is likely to be subjected abuse. The local authority in consultation with other agencies will determine the action to be taken in respect of the child. The action so determined should be concerned with the long-term protection and well-being of the child. The only way a parent, foster parent or guardian can challenge the actions of a local authority is by applying for judicial review. In judicial review, the court is required to rule on the procedural propriety of the case, i.e., whether the decision-making process was properly carried out. In the event of the court deciding that the local authority acted improperly, the court cannot reverse the order but can only remit the matter back to the local authority for passing of an order in a proper manner.

A child can only be accommodated in a registered children's home. It is the duty of the person managing the home to safeguard and promote the child's welfare. The secretary of the state is to ensure that regular inspection of *children's homes* are conducted.

Women's Aid Federation (England) have in their position paper cited that the Children Act does not take into account *domestic violence*. The Act assumes that parents are reasonable and responsible, that fathers should be substantially involved in children's lives after divorce or separation and that parents should arrive at amicable child-care decisions through joint negotiation even after separation. There is a presumption in the legislation that a child should ideally not have to be shifted from his/her home. Judicial orders

have been passed under which the child remains in the same residential setting, though the mother has been compelled to leave her home due to violence. This results in an alarming situation in which the child is left alone with a violent man. It is necessary that child welfare officers and professionals working with abused children also receive appropriate training on domestic violence and its implications on children.

B. THE SEXUAL OFFENCES ACT (1956)

Under the Sexual Offences Act 1956, it is an offence for a person to commit buggery with another person unless both parties are over the age of 18 and the act takes place in private. A man who has sex with a boy under the age of 14 has no legal defence. The maximum penalty for buggery with a boy under 16 years is life imprisonment and with a boy over 16 years and consenting is 2 years.

It is an offence for a man to have sexual intercourse with a girl under 13 years; the consent of the victim is no defence and it carries a maximum penalty of life imprisonment. Sexual intercourse with a girl under 16 years is an offence; the only defence is that the man was under 24 years had not committed similar offences previously and reasonably believed that he was married to the girl or that she was over 16 years.

Indecent assault on a woman or man is an offence under this Act, the term 'woman' includes a girl child and the term 'man' includes a boy child. Procurement of a girl or woman in any part of the world for the purpose of prostitution is an offence.

Under Section 28 of the Act, it is an offence for a person to cause or encourage the prostitution of or the commission of unlawful sexual intercourse with, or of an indecent assault on a girl under the age of 16 for whom he/she is responsible. This person will include the girl's parent, legal guardian or any other person who has the custody, charge or care of the girl.

Under the Sexual Offences Act 1985, it is an offence to 'curb crawl' and to persistently solicit women for the purpose of prostitution.

C. THE STREET OFFENCES ACT (1959)

The Street Offences Act 1959 provides for the prosecution of a prostitute for loitering and soliciting. Prostitution itself is not illegal, however soliciting, loitering, living off immoral earnings, running a brothel and procuring are offences and punishable. This Act does not distinguish between children, young people and adults.

D. THE INDECENCY WITH CHILDREN ACT (1960)

This law prohibits an act of gross indecency towards a child under 14

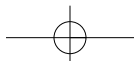
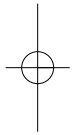
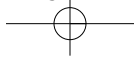
years or incitement of a child under that age to such an act. This Act also covers situations where the abuser may not have touched the child but invites the child to touch him. A passive response is not a defence.

E. THE LOCAL GOVERNMENT MISCELLANEOUS PROVISIONS ACT (1982)

Under this Act, it is an offence knowingly to permit a person under 18 to enter a sex establishment; such offence is punishable with a maximum fine of 20,000 pounds.

F. THE POLICE AND CRIMINAL EVIDENCE ACT (1984) (PACE)

This Act deals with the powers of the police to investigate criminal offences and contains provisions with regards to stop, search, arrest and detain. It also contains provisions for protection of the rights of suspects.



XV. CONVENTION ON THE RIGHTS OF THE CHILD, 1989

1. HISTORY

The first Declaration of the Rights of the Child, which later came to be known as the Declaration of Geneva was drafted in 1923 by Eglantyne Jebb of Great Britain. It was the first international instrument concentrating on children. The need for this declaration arose as a large number of children were orphaned or disabled during World War I. This declaration was adopted by the League of Nations in 1924. After World War II, the Geneva Declaration was expanded, and the 1948 Declaration of the Rights of the Child was drafted. This declaration was further expanded in 1959; this latter expansion for the first time coined the principle 'in the best interest of the child'.

Declarations are mere statements of intent and are not legally binding. Many wished for the declaration to be converted into a binding treaty in the favour of children. The Government of Poland in 1978 submitted a draft of the Convention on the Rights of the Child to the UN Commission on Human Rights. A working group was constituted by the commission to debate upon the concept and the nature of the convention. The final draft of the convention involved extensive participation of non-governmental organisations.

2. NEED FOR THE CONVENTION ON THE RIGHTS OF THE CHILD

Child rights were covered by a number of international instruments; several of them included special provisions with regards to children. There was a lobby that argued that a separate convention would be to the disadvantage of children as it could lead to discrimination.

The inadequacy of the then existing international instruments to meet the needs of children was one of the main reasons why the convention was ultimately drafted. Children have special needs; these needs were not treated under the then existing instruments. These special needs include protection from infant mortality, absence of educational facilities, deficient health

care for children, etc. Another reason for the drafting of the convention was that the concept of child rights had undergone substantial changes since the adoption of the then existing international instruments.

3. ADOPTION OF THE CONVENTION

The Convention on the Rights of the Child was adopted by the General Assembly of the United Nations on 20 November 1989. It entered into force as an international law on 2 September 1990 after ratification by 20 state parties. This convention sets universal legal standards for the protection of children against neglect, abuse and exploitation, as well as guaranteeing to them their basic human rights, including survival, development and full participation in social, cultural, educational and other endeavours necessary for their individual growth and well-being.

The convention recognises that children's issues are political and should be given priority in the political agenda; mere lip service by politicians no longer suffice. Though stressing that the family is the best environment for the child, it also addresses situations where the child's interests and those of the parents or guardians do not coincide. Removal of children from the family environment is felt to be necessary when the family becomes a threat to the safety and well-being of the child.

4. COMMITMENT BY STATE PARTIES

The Convention on the Rights of the Child is almost universally ratified; only the U.S.A. and Somalia have not yet ratified the Convention. India ratified the convention on 11 December 1992.

The World Declaration on the Survival, Protection and Development was agreed upon at the World Summit for Children held in 1990. The attending nations committed themselves to promote the earliest ratification and implementation of the Convention on the Rights of the Child. A solemn commitment was also made to give high priority to the rights of children, their survival and their protection and development, and to ameliorate the plight of millions of children who live under especially difficult circumstances as victims including, victims of abuse and exploitation.

The Plan of Action for Implementing the World Declaration on the Survival, Protection and Development of Children in the 1990s was formulated to assist in preparing programmes for the implementation of the declaration within respective countries. The plan of action deals with the common aspirations that people have throughout the world for the well-being of children and suggests a set of goals and targets for children in the 1990s, strategies for reaching these goals, and commitments for action and follow-up measures at various levels. This plan of action recognises that children in especially difficult circumstances such as those 'child workers or youth

trapped in the bondage of prostitution, sexual abuse and other forms of exploitation' deserve special attention, protection and assistance from their families and communities and as part of national and international co-operation.

5. SALIENT FEATURES OF THE CONVENTION

The Convention contains provisions with regards to child abuse. The concerned provisions are summarised below.

ARTICLE 1

A child means every human being below the age of 18 years unless, under the law applicable to the child, majority is attained earlier.

ARTICLE 2

State parties shall respect and ensure the rights set forth in the present convention to each child within their jurisdiction without discrimination of any kind.

ARTICLE 3

In all actions concerning children, the best interest of the child shall be a primary concern.

State parties undertake to ensure the child such protection and care as is necessary for his or her well being.

ARTICLE 4

State parties shall undertake all appropriate legislative, administrative and other measures for the implementation of the rights recognised in the present convention.

ARTICLE 9

State parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary in a particular case such as one involving abuse or neglect of the child by the parents.

ARTICLE 11

State parties shall take measures to combat illicit transfer and non-return of children abroad through bilateral or multilateral agreements or accession to existing agreements.

ARTICLE 12

A child who is capable of forming his or her own views shall be assured the

right to express these views freely in all matters affecting the child. The child shall be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child.

ARTICLE 16

No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation. The child has the right to the protection of the law against such interference or attacks.

ARTICLE 18

State parties shall render appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities and shall ensure the development of institutions, facilities and services for the care of children.

ARTICLE 19

'1. State parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical and mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.

2. Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement.'

ARTICLE 20

1. A child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the state.

2. State parties shall in accordance with their national laws ensure alternative care for such a child.

3. Such care could include, inter alia, foster placement, kafala of the Islamic law, adoption or if necessary placement in suitable institutions for the care of children. When considering solutions, due regard shall be paid to the desirability of continuity in child's upbringing and to the child's ethnic, religious, cultural and linguistic background.

ARTICLE 21

State parties to recognise and/or permit the system of adoption and ensure that the best interest of the child is of the paramount consideration. The adoption of a child is to be authorised by competent authorities. Safeguards and standards to be laid down for inter-country adoptions, especially to ensure that placement does not result in improper financial gain for those involved.

ARTICLE 25

State parties should periodically review the treatment provided to a child who has been placed by the competent authority for the purpose of care, protection or treatment of his or her physical or mental health.

ARTICLE 26

State parties to provide every child with the right to benefit from social security, including social insurance. The benefits should be commensurate with the resources and circumstances of the child and the persons having responsibility for the child.

ARTICLE 27

The parents or person responsible for the child is primarily responsible to maintain the child.

State parties shall take all appropriate measures for the recovery maintenance of the child from die parents or other persons having financial responsibility for the child.

ARTICLE 32

State parties to protect the child from economic exploitation and performing any work that is likely to be hazardous or interfere with the child's education or be harmful to the child's health or physical, mental, spiritual, moral/social development.

ARTICLE 33

State parties to protect children from the illicit use of narcotic drugs and psychotropic substances and to prevent the use of children in the illicit production and trafficking of such substances.

ARTICLE 34

'State parties undertake to protect the child from all forms of sexual exploitation and sexual abuse. For these purposes, State Parties shall in particular take all appropriate national, bilateral and multilateral measures to prevent:

- (a) The inducement or coercion of a child to engage in any unlawful sexual activity;

- (b) The exploitative use of children in prostitution or other unlawful sexual practices;
- (c) The exploitative use of children in pornographic performances and materials.'

ARTICLE 35

'State parties shall take all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form.'

ARTICLE 36

'State parties shall protect the child against all other forms of exploitation prejudicial to any aspects of the child's welfare.'

ARTICLE 39

'State parties shall take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts. Such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child.'

Part II of the Convention on the Rights of the Child deals with Monitoring of State Parties.

1. A committee on the rights of the child has been established monitor the measures adopted by state parties in pursuant ratification of the convention.
2. A state party shall submit to the committee, through the secretary general of the United Nations, an initial report on the measures adopted and progress made within two years of ratification of the convention by that particular state party. The initial report should contain basic information about the country The initial report should include:
 1. General Measures of Implementation
 - a. the manner in which the country is attempting to implement the convention;
 - b. the manner in which the country is monitoring the implementation,
 - i. coordinating the implementation of the convention at the state level through a national coordinating body that has representatives of non-governmental organisations on it,
 - ii. monitoring through an ombudsman or commissioner who is sufficiently independent of the government,
 - iii. creating awareness about the convention within the state party,
 - iv. training of professionals with regards to the convention.

2. Paper reality, i.e., the changes brought about in existing laws, policies and schemes relating to children.
3. Ground reality, i.e., data and figures, budget allocation in respect of child-related issues.
3. A state party shall submit periodic reports thereafter every five years. The periodic report should contain the following :-
 - A. Reference to suggestions and recommendations made by the committee in the initial report or previous periodic report; the measures taken by the state party to deal with the recommendations or the reasons why the state party has not been able to deal with the recommendations.
 - B. Further progress made by the state party.
4. The state parties are to make their Reports widely available to the public in their own countries.
5. The committee may request the state parties to submit further information relevant to the implementation of the convention.
6. The committee may make suggestions and recommendations based on the country report. The state party is to take action upon the suggestions and recommendations and the next report should reflect the steps taken by the state party within their country in pursuance of the suggestions and recommendations made by the committee.

Reporting by non-governmental organisations

a. Non-governmental organisations may submit a parallel report, individually or through a coalition of non-governmental organisations, or may submit a written statement through a non-governmental organisation having 'consultative status'. Submission of a parallel report is extremely important as usually the country report does not reflect the true picture; the country report is either vague or discloses a rosy and unreal situation. The parallel report should be submitted to:

The Secretary to the Committee on the Rights of the Child
 Centre for Human Rights
 Palais des Nations
 8-14 avenue de la Paix
 1211 Geneva 10, Switzerland

b. Non-governmental organisations may attend and make oral representations on the first day of the committee meeting to direct focus on relevant issues.

c. Non-governmental organisations may attend as observers the meeting between the committee members and state parties so as to have direct knowledge of what transpired at the meeting. The proceedings of the meeting should be narrated to other non-governmental organisations on their return, to enable others to have knowledge

of what transpired at the meeting.

d. The suggestions and recommendations are the only ammunition in the hands of the committee, governmental organisations should closely monitor the state parties compliance of suggestions and recommendations made by the committee.

e. There is an 'NGO Group for CRC' operating from Geneva. This group is most helpful and provides required information to non-governmental organisations in different parts of the world working on child rights issues.

NGO Group for the Convention on the Rights of the Child
P.O. Box No. 88
1211 Geneva 20
Switzerland

The Convention on the Rights of the Child does not have the right of individual petition, therefore submissions made by individuals will not be considered by the Committee on the Rights of the Child. It is imperative that an optional protocol be drafted to enable individuals to redress their grievances before the committee. Optional protocols have been drafted on particular child-related topics; one such instrument is the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography.

6. DOMESTIC APPLICABILITY OF THE CONVENTION

Despite the near-universal ratification of the Convention on the Rights of the Child, children have not been protected from sexual abuse and exploitation. The gap between ratification and implementation must be bridged to ensure a promising future for our children. Conventions are legally binding for countries that have ratified them. Legally binding international instruments should operate directly and immediately within the domestic legal system. The translation of the provisions of a covenant into national laws and policies is an obligation of all ratifying states. Domestic laws should be interpreted by courts in a manner so as to give effect to the obligations contained in the convention. The rights under the Convention on the Rights of the Child have justiciable dimensions; for the satisfaction of these rights judicial remedies are essential. Different countries have different approaches with regards to the domestic applicability of international instruments.

1. Dualistic Approach

Under this approach, there is a clear distinction between domestic law and international law. International law and instruments will have effect in the

domestic legal system only after they have been transposed into national law.

2. Intermediate Approach

The international instrument as a whole has to be transposed into the national law.

3. Monistic Approach

The international law and domestic law are considered as one legal system and transformation of the international instrument is not necessary.

Under the intermediary and monistic approach, the provisions contained in international instruments will take precedence over those contained in domestic law in the event of conflict.

General Comment No.3 and General Comment No. 10 adopted by the Committee on Economic, Social and Cultural Rights deals with the nature of the obligation of state parties and the domestic applicability of the International Covenant on Economic, Social and Cultural Rights. The full realisation of certain rights may be achieved progressively by the state party, but definite steps towards the goal must be taken within a reasonably short time after the covenant's entry into force. The steps so taken must be deliberate and concrete, and targeted towards meeting the obligations recognised in the Covenant. Any retrogressive measures taken by a state party that will obstruct realisation of these rights are not to be tolerated. The state party will be required to justify such a measure.

The Constitution of India contains a provision under which the state is committed to respect international instruments.

'Article 51. Promotion of international peace and security-The State shall endeavour to:

- (a) promote international peace and security;
- (b) maintain just and honourable relations between nations;
- (c) foster respect for international law and treaty obligations in the dealings of organised people with one another; and
- (d) encourage settlement of international disputes by arbitration.'

In *Maganbhai Ishwarbhai Patel vs. Union of India & Anr.*, A.I.R. 1969 S.C. 783, the Supreme Court has held that international instruments are legally binding.

'Our Constitution makes no provision making legislation a condition of the entry into an international treaty in times either of war or peace. The executive power of the Union is vested in the President and is exercisable in accordance with the

Constitution. The executive is qua the State competent to represent the State in all matters international and may by agreement, convention or treaties incur obligations which in international law are binding upon the State. But the obligations arising under the agreement or treaties are not by their own force binding upon Indian nationals. The power to legislate in respect of treaties lies with the Parliament under Entries 10 and 14 of List I of the Seventh Schedule. But making of law under that authority is necessary when the treaty or agreement operates to restrict the rights of citizens or others or modifies the laws of the State. If the rights of the citizens or others which are justiciable are not affected, no legislative measure is needed to give effect to the agreement or treaty'

Further,

'If, in consequence of the exercise of executive power, rights of the citizens or others are restricted or infringed, or laws are modified, the exercise of power must be supported by legislation; where there is no such restriction, infringement of the right or modification of the laws, the executive is competent to exercise the power.'

In People's Union for Civil Liberties vs. Union of India & Anr., (1997) 3 SCC 433, the Supreme Court has opined on the domestic applicability of international covenants and conventions.

'The main criticism against reading such conventions and covenants into national laws is one pointed out by Mason, C.J. himself, viz., the ratification of these conventions and covenants is done, in most of the countries by the Executive acting alone and that the prerogative of making the law is that of the Parliament alone; unless Parliament legislates, no law can come into existence. It is not clear whether our Parliament has approved the action of the Government of India ratifying the said 1966 Covenant. Indeed, it appears that at the time of ratification of the said Covenant in 1979, the Government of India has made a specific reservation to the effect that the Indian legal system does not recognise a right to compensation for victims of unlawful arrest or detention. This reservation has, of course, been held to be of little relevance now in view of the decision of Nilabati Behera. [See page 313, para 43 (SCC p. 438, para 42) in D.K. Basu.] Assuming that it has, the question may yet arise whether such approval can be equated to legislation and invests the Covenant with the sanctity of a law made by Parliament. As pointed out by this Court in S.R. Bommai vs. Union of India, every action of Parliament cannot be equated to legislation. Legislation is no doubt the main function of Parliament but it also performs many other functions all of which do not amount to legislation. In our opinion, this aspect requires deeper scrutiny than has been possible in this case. For the present, it would suffice to state that the provisions of the covenant,

which elucidate and go to effectuate the fundamental rights guaranteed by our Constitution, can certainly be relied upon by courts as facets of those fundamental rights and hence, enforceable as such.'

Matters relating to 'infants and minors' are included at item no. of List III-Concurrent List of the Seventh Schedule to the Constitution. 'United Nations Organisations' is contained at item no. 12 of List I - Union List of the Seventh Schedule. 'Entering into treaties and agreements with foreign countries and implementing of treaties, agreements and conventions with foreign countries' is contained at item no. 14 of the same List. The spirit of the Convention on the Rights of the Child and many of its provisions are contained in the Constitution and other child-related laws. The remaining provisions of the convention give additional benefits to the child and in no manner restrict his/her rights.

Legal opinion in the past was that international instruments do not automatically become part of the domestic law and require to be incorporated into the legal system by the enactment of appropriate laws. Legal jurisprudence now views this issue differently – international instruments can be directly enforced by courts provided they do not conflict with domestic laws.

The Convention on the Rights of the Child has been ratified by the Government of India, thereby giving it a legal status. Moreover, the convention is also morally binding. The Government of India cannot be allowed to make promises on the international platform and do the absolute opposite within the country. The Government of India is therefore both legally and morally bound by the contents of the convention, and it is for courts to hold the state accountable and liable in case of non-implementation and breach of its provisions.

7. OPTIONAL PROTOCOL TO THE CONVENTION ON THE RIGHTS OF THE CHILD

'The State Parties to the present Protocol,

Considering that, in order further to achieve the purposes of the Convention on the Rights of the Child and the implementation of its provisions, especially articles 1, 11, 21, 32, 33, 34, 35 and 36, it would be appropriate to extend the measures that State Parties should undertake in order to guarantee the protection of the child from the sale of children, child prostitution and child pornography,

Considering also that the Convention on the Rights of the Child recognises the rights of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development,

Gravely concerned at the significant and increasing international traffic of children for the purpose of the sale of children, child prostitution and child pornography,

Deeply concerned at the widespread and continuing practice of sex tourism, to which children are especially vulnerable, as it directly promotes the sale of children, child prostitution and child pornography,

Recognising that a number of particularly vulnerable groups, including girl children, are at greater risk of sexual exploitation, and the girl children are disproportionately represented among the sexually exploited,

Concerned about the growing availability of child pornography on the Internet and other evolving technologies, and recalling the International Conference on Combating Child Pornography on the Internet (Vienna, 1999) and, in particular, its conclusion calling for the worldwide criminalisation of the production, distribution exportation, transmission, importation, intentional possession and advertising of child pornography, and stressing the importance of closer cooperation and partnership between Governments and the Internet industry,

Believing that the elimination of the sale of children, child prostitution and child pornography will be facilitated by adopting a holistic approach, addressing the contributing factors, including underdevelopment, poverty, economic disparities, inequitable socio-economic structure, dysfunctional families, lack of education, urban-rural migration, gender discrimination, irresponsible adult sexual behavior, harmful traditional practices, armed conflicts and trafficking of children,

Believing that efforts to raise public awareness are needed to reduce consumer demand for the sale of children, child prostitution and child pornography, and also believing in the importance of strengthening global partnership among all actors and of improving law enforcement at the national level,

Noting the provisions of international legal instruments relevant to the protection of children, including the Hague Convention on the Protection of Children and Cooperation with Respect to Inter-Country Adoption, the Hague Convention on the Civil Aspects of International Child Abduction, the Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children, and International Labour Organisation Convention No. 182 on the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour,

Encouraged by the overwhelming support for the Convention on the Rights of the Child, demonstrating the widespread commitment that exists for the promotion and protection of the rights of the child,

Recognising the importance of the implementation of the provisions of the Programme of Action for the Prevention of the Sale of Children, Child Prostitution and Child Pornography and the Declaration and Agenda for Action adopted at the

World Congress against Commercial Sexual Exploitation of Children, held at Stockholm from 27 to 31 August 1996, and the other relevant decisions and recommendation of pertinent international bodies,

Taking due account of the importance of the traditions and cultural values of each people or the protection and harmonious development of the child,

Have agreed as follows:

Article 1

State Parties shall prohibit the sale of children, child prostitution and child pornography as provided for by the present Protocol.

Article 2

For the purpose of the present Protocol:

- a) Sale of children means any act or transaction whereby a child is transferred by any person or group of persons to another for remuneration or any other consideration;
- b) Child prostitution means the use of a child in sexual activities for remuneration or any other form of consideration;
- c) Child pornography means any representation, by whatever means, of a child engaged in real or simulated explicit sexual activities or any representation of the sexual parts of a child for primarily sexual purposes.

Article 3

1. Each State Party shall ensure that, as a minimum, the following acts and activities are fully covered under its criminal or penal law, whether these offences are committed domestically or trans-nationally or on individual or organised basis

(a) In the context of sale of children as defined in article 2:

- (i) The offering, delivering or accepting, by whatever means, a child for the purpose of:
 - a. Sexual exploitation of the child;
 - b. Transfer of organs of the child for profit;
 - c. Engagement of the child in forced labour;
- (ii) Improperly inducing consent, as an intermediary, for the adoption of a child in violation of applicable international instruments on adoption;
 - (a) Offering, obtaining, procuring or providing a child for child prostitution, as defined in article 2.
 - (b) Producing, distributing, disseminating, importing, exporting, offering, selling or possessing for the above purposes child pornography as defined in article 2.

2. Subject to the provisions of a State Party's national law, the same shall apply to

an attempt to commit any of these acts and to complicity or participation in any of these acts.

3. Each State Party shall make these offences punishable by appropriate penalties that take into account their grave nature.

4. Subject to the provisions of its national law, each State Party shall take measure, where appropriate, to establish the liability of legal persons for offences established in paragraph 1 of the present article. Subject to the legal principles of the State Party, this liability of legal persons may be criminal, civil or administrative.

5. State Parties shall take all appropriate legal and administrative measures to ensure that all persons involved in the adoption of a child act in conformity with applicable international legal instruments.

Article 4

1. Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences referred to in article 3, paragraph 1, when the offences are committed in its territory or on board a ship or aircraft registered in that State.

2. Each State Party may take such measures as may be necessary to establish its jurisdiction over the offences referred to in article 3, paragraph 1, in the following cases:

- (a) When the alleged offender is a national of that State or a person who has his habitual residence in its territory;
- (b) When the victim is a national of that State.

3. Each State Party shall also take such measures as may be necessary to establish its jurisdiction over the above-mentioned offences when the alleged offender is present in its territory and it does not extradite him or her to another State Party on the ground that the offence has been committed by one of its nationals.

4. This Protocol does not exclude any criminal jurisdiction exercised in accordance with internal law.

Article 5

1. The offences referred to in article 3, paragraph 1, shall be deemed to included as extraditable offences in any extradition treaty existing between Parties and shall be included as extraditable offences in every extradition subsequently concluded between them, in accordance with the conditions set forth in those treaties.

2. If a State Party that makes extradition conditional on the existence of a treaty receives a request for extradition from another State Party with which it has no extradition treaty, it may consider this Protocol as a legal basis for extradition in respect of such offences. Extradition shall be subject to the conditions provided by

the law of the requested State.

3. State Parties that do not make extradition conditional on the existence of a treaty shall recognise such offences as extraditable offences between themselves subject to the conditions provided by the law of the requested State.

4. Such offences shall be treated, for the purpose of extradition between State Parties, as if they had been committed not only in the place in which they occurred but also in the territories of the States required to establish their jurisdiction in accordance with article 4.

5. If an extradition request is made with respect to an offence described in article 3, paragraph 1, and if the requested State Party does not or will not extradite on the basis of the nationality of the offender, that State shall take suitable measures to submit the case to its competent authorities for the purpose of prosecution.

Article 6

1. State Parties shall afford one another the greatest measure of assistance in connection with investigations or criminal or extradition proceedings brought in respect of the offences set forth in article 3, paragraph 1, including assistance in obtaining evidence at their disposal necessary for the proceedings.

2. State Parties shall carry out their obligations under paragraph 1 of the present article in conformity with any treaties or other arrangements on mutual legal assistance that may exist between them. In the absence of such treaties or arrangements, State Parties shall afford one another assistance in accordance with their domestic law.

Article 7

State Parties shall, subject to the provisions of their national law:

- (a) Take measures to provide for the seizure and confiscation, as appropriate, of:
 - (i) Goods such as materials, assets and other instruments used to commit or facilitate offences under the present Protocol;
 - (ii) Proceeds derived from such offences;
- (b) Execute requests from another State Party for seizure or confiscation of goods or proceeds referred to in subparagraph (a) (i);
- (c) Take measures aimed at closing, on a temporary or definitive basis premises used to commit such offences.

Article 8

1. State Parties shall adopt appropriate measures to protect the rights and inter-

est of child victims of the practices prohibited under the present Protocol at all stages of the criminal justice process, in particular by:

- (a) Recognising the vulnerability of child victims and adapting procedures to recognise their special needs, including their special needs as witnesses;
 - (b) Informing child victims of their rights, their role and the scope, timing and progress of the proceedings and disposition of their cases;
 - (c) Allowing the views, needs and concerns of child victims to be presented and considered in proceedings where their personal interests are affected, in a manner consistent with the procedural rules of national law;
 - (d) Providing appropriate support services to child victims throughout the legal process;
 - (e) Protecting, as appropriate, the privacy and identity of child victims and taking measures in accordance with national law to avoid the inappropriate dissemination of information that could lead to the identification of child victims;
 - (f) Providing, in appropriate cases, for the safety of child victims, as well as that of their families and witnesses on their behalf, from intimidation and retaliation;
 - (g) Avoiding unnecessary delay in the disposition of cases and the execution of orders or decrees granting compensation to child victims.
2. State Parties shall ensure that uncertainty as to the actual age of the victim shall not prevent the initiation of criminal investigations, including investigations aimed at establishing the age of the victim.
 3. State Parties shall ensure that, in the treatment by the criminal justice system of children who are victims of the offences described in the present Protocol, the best interest of the child shall be a primary consideration.
 4. State Parties shall take measures to ensure appropriate training, in Particular legal and psychological training, for the persons who work with victims of the offences prohibited under the present Protocol.
 5. State Parties shall, in appropriate cases, adopt measures in order to protect the safety and integrity of those persons and/or organisations involved in the prevention and/or protection and rehabilitation of victims of such offences.
 6. Nothing in the present article shall be construed as prejudicial to or inconsistent with the rights of the accused to a fair and impartial trial.

Article 9

1. State Parties shall adopt or strengthen, implement and disseminate laws, administrative measures, social policies and programmes to prevent the offences referred to in the present Protocol. Particular attention shall be given to protect children who are especially vulnerable to these practices.
2. State Parties shall promote awareness in the public at large, including children,

through information by all appropriate means, education and training, about the preventive measures and harmful effects of the offences referred to in the present Protocol. In fulfilling their obligations under this article, State Parties shall encourage the participation of the community and, in particular, children and child victims, in such information and education and training programmes, including at the international level.

3. State Parties shall take all feasible measures with the aim of ensuring all appropriate assistance to victims of such offences, including their full social reintegration and their full physical and psychological recovery.
4. State Parties shall ensure that all child victims of the offences described in the present Protocol have access to adequate procedures to seek, without discrimination, compensation for damages from those legally responsible.
5. State Parties shall take appropriate measures aimed at effectively prohibiting the production and dissemination of material advertising the offences described in the present Protocol.

Article 10

1. State Parties shall take all necessary steps to strengthen international cooperation by multilateral, regional and bilateral arrangements for the prevention, detection, investigation, prosecution and punishment of those responsible for acts involving the sale of children, child prostitution, child pornography and child sex tourism. State Parties shall also promote international cooperation and coordination between their authorities, national and international non-governmental organisations and international organisations.
2. State Parties shall promote international cooperation to assist child victims in their physical and psychological recovery, social reintegration and repatriation.
3. State Parties shall promote the strengthening of international cooperation in order to address the root causes, such as poverty and under development, contributing to the vulnerability of children to the sale of children, child prostitution, child pornography and child sex tourism.
4. State Parties in a position to do so shall provide financial, technical or other assistance through existing multilateral, regional, bilateral and other programmes.

Article 11

Nothing in the present Protocol shall affect any provisions that are more conducive to the realisation of the rights of the child and that may be contained in:

- (a) The law of a State Party;
- (b) International law in force for that State.

Article 12

1. Each State Party shall submit, within two years following the entry into force of the Protocol for that State Party, a report to the Committee on the Rights of the Child providing comprehensive information on the measures it has taken to implement the provisions of the Protocol.
2. Following the submission of the comprehensive report, each State Party shall include in the reports they submit to the Committee on the Rights of the Child, in accordance with article 44 of the Convention, any further information with respect to the implementation of the Protocol. Other State Parties to the Protocol shall submit a report every five years.
3. The Committee on the Rights of the Child may request from State Parties further information relevant to the implementation of this Protocol.

Article 13

1. The present Protocol is open for signature by any State that is a party to the Convention or has signed it.
2. The present Protocol is subject to ratification and is open to accession by any State that is a party to the Convention or has signed it. Instruments of ratification or accession shall be deposited with the Secretary-General of the United Nations.

Article 14

1. The present Protocol shall enter into force three months after the deposit of the tenth instrument of ratification or accession.
2. For each State ratifying the present Protocol or acceding to it after its entry into force, the present protocol shall enter into force one month after the date of the deposit of its own instrument of ratification or accession.

Article 15

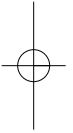
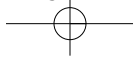
1. Any State Party may denounce the present Protocol at any time by written notification to the Secretary-General of the United Nations, who shall thereafter inform the other State Parties to the Convention and all States that have signed the Convention. The denunciation shall take effect one year after the date of receipt of the notification by the Secretary-General of the United Nations.
2. Such a denunciation shall not have effect of releasing the State Party from its obligations under this Protocol in regard to any offence that occurs prior to the date on which the denunciation becomes effective. Nor shall such a denunciation prejudice in any way the continued consideration of any matter that is already under consideration by the Committee prior to the date on which the denunciation becomes effective.

Article 16

1. Any State Party may propose an amendment and file it with the Secretary-General of the United Nations. The Secretary-General shall thereupon communicate the proposed amendment to State Parties, with a request that they indicate whether they favour a conference of State Parties for the purpose of considering and voting upon the proposals. In the event that, within four months from the date of such communication, at least one-third of the State Parties favour such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations. Any amendment adopted by a majority of State Parties present and voting at the conference shall be submitted to the General Assembly for approval.
2. An amendment adopted in accordance with paragraph 1 of the present article shall enter into force when it has been approved by the General Assembly of the United Nations and accepted by a two-thirds majority of the State Parties.
3. When an amendment enters into force, it shall be binding on those State Parties that have accepted it, other State Parties still being bound by the provisions of the present Protocol and any earlier amendments that they have accepted.

Article 17

1. The present Protocol, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited in the archives of the United Nations.
2. The Secretary-General of the United Nations shall transmit certified copies of the present protocol to all State Parties to the Convention and all States that have signed the Convention.



XVI. OTHER INTERNATIONAL INSTRUMENTS

1. CONVENTION FOR THE SUPPRESSION OF THE TRAFFIC IN PERSONS AND THE EXPLOITATION OF THE PROSTITUTION OF OTHERS

This convention was signed by India on 9 May 1950 and came into force on 25 July 1951.

The preamble starts with a recital, which embodies the essence of the convention,

'Whereas prostitution and the accompanying evil of the traffic in persons for the purpose of prostitution are incompatible with the dignity and worth of the human person and endanger the welfare of the individual, the family and the community'

The salient features of the convention are as follows:

1. Any person who in order to gratify the passions of another, procures, entices or leads away for the purpose of prostitution another person, even if with such person's consent or exploits, the prostitution of another person, even if with such person's consent, is liable for punishment.
2. Any person who keeps or manages or knowingly finances a brothel or knowingly lets or rents a building or other place or any part thereof for the prostitution of another is liable for punishment.
3. The above offences shall be regarded as extraditable offences in any extradition treaty entered into between any state parties to this convention.
4. Each state party to this convention shall establish or maintain a service to coordinate and centralise results of investigation of offences under the convention, and such service should compile all information for the facilitation of prevention and punishment of offences, and such service should be in close touch with corresponding services of other states parties.

5. The service so established shall furnish particulars of an offence or an attempt to commit such offence to services established by other state parties. The information so furnished should include the description of the offender, fingerprints, photographs, method of operation, police record and record of conviction.
6. State parties should take measures for the prevention of prostitution and for the rehabilitation and social adjustment of victims of prostitution.
7. State parties shall undertake with immigration and emigration authorities such measures as are required to check the traffic in persons of either sex for the purpose of prostitution.
8. State parties shall pending the completion of the procedure for repatriation make suitable arrangements for the temporary care and maintenance of destitute victims of international traffic. Repatriation should take place only with the consent of the victim or the person claiming such victim and after agreement is reached with the state of destination.
9. State parties are to communicate to the Secretary General of the United Nations such laws and regulations that have been promulgated in their respective states, and each year thereafter such laws and regulations that have been promulgated and measures taken by state parties concerning the applicability of the convention.

The need to modify this convention in order to effectively deal with the problem of child prostitution and trafficking has been voiced by child rights activists. Under this convention, prostitution can also be a voluntary exercise of self-determination. Child prostitutes are victims and cannot be said to be exercising the right of self-determination or any other right. It is necessary to modify the convention so that it deals with child prostitution as a separate and distinct problem. Further, this convention should also have a monitoring mechanism as is established under the Convention on the Rights of the Child; such monitoring mechanism will make a state party accountable on the international platform for compliance with the Convention within its territory.

2. DECLARATION OF THE RIGHTS OF THE CHILD (1959)

The Declaration of the Rights of the Child was adopted by the General Assembly subsequent to the Geneva Declaration of the Rights of the Child 1924. The portions of the Declaration of the Rights of the Child that have some bearing on child sexual abuse are reproduced below.

'The General Assembly Proclaims this Declaration of the Rights of the Child to the end that he may have a happy childhood and enjoy for his own good and for the good of society the rights and freedom herein set forth, and calls upon parents,

upon men and women as individuals, and upon voluntary organisations, local authorities and national governments to recognise these rights and strive for their observance by legislative and other measures progressively taken in accordance with the following principles:

Principle 2

The child shall enjoy special protection, and shall be given opportunities and facilities, by law and by other means, to enable him to develop physically, mentally, morally, spiritually and socially in a healthy and normal manner and in conditions of freedom and dignity. In the enactment of laws for this purpose, the best interests of the child shall be of paramount consideration.

Principle 8

The child shall in all circumstances be among the first to receive protection and relief.

Principle 9

The child shall be protected against all forms of neglect, cruelty and exploitation. He shall not be the subject of traffic, in any form. The child shall not be admitted to employment before an appropriate minimum age; he shall in no case be caused or permitted to engage in an occupation or employment which would prejudice his health and education, or interfere with his physical, mental or moral development.'

3. UNITED NATIONS CONVENTION AGAINST TORTURE AND OTHER FORMS OF CRUEL, INHUMAN, OR DEGRADING TREATMENT OR PUNISHMENT (1987)

This international convention adheres 'to promote universal respect for, and observance of human rights and fundamental freedoms' and 'to article 5 of the Universal Declaration of Human Rights and article 7 of the International Covenant on Civil and Political Rights, both of which provide that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment'.

The term 'torture' means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind when such pain or suffering is inflicted by or at the instigation of or with the consent of or acquiescence of a public official or other person in an official capacity.'

The state party is to take effective legislative, administrative, judicial, or other measures to prevent acts of torture in any territory under its jurisdiction. Such acts of torture are to be incorporated as offences under the criminal law, with provisions for appropriate punishment. The punishment should take into account the gravity of the offence.

Under this convention, a committee against torture is to be established. With the consent of the state party, the committee is authorised to receive and consider communications from or on behalf of individuals claiming to be victims of violation of the provisions of this convention by a state party.

Sexual abuse within child care institutions managed by the state would fall under the purview of this convention as the child is made to undergo severe pain or suffering to intimidate him/her into submission. The Government of India has not ratified this convention.

4. WORLD DECLARATION ON THE SURVIVAL, PROTECTION AND DEVELOPMENT OF CHILDREN

The World Summit for Children was held at the United Nations, New York, on 30 September 1990 and attended by 71 presidents and prime ministers.

'THE DECLARATION

1. We have gathered at the World Summit for Children to undertake a joint commitment and to make an urgent universal appeal - to give every child a better future.
2. The children of the world are innocent, vulnerable and dependent. They are also curious, active and full of hope. Their time should be one of joy and peace, of playing, learning and growing. Their future should be shaped in harmony and co-operation. Their lives should mature, as they broaden their perspectives and gain new experiences.
3. But for many children, the reality of childhood is altogether different.

THE CHALLENGE

4. Each day, countless children around the world are exposed to dangers that hamper their growth and development. They suffer immensely as casualties of war and violence; as victims of racial discrimination, apartheid, aggression, foreign occupation and annexation; as refugees and displaced children, forced to abandon their homes and their roots; as disabled; or as victims of neglect, cruelty and exploitation.'

This instrument recognises that nations have the means and knowledge to protect lives and diminish the suffering of children, to promote the full development of their human potential and to make them aware of their

needs, rights and opportunities. The participating nations have agreed to endeavour to give all children the chance to realise their worth in a safe and supportive environment, through families and other caregivers committed to their welfare. The nations have committed themselves to take political action at the highest level for the wellbeing of children and to give high priority to the wellbeing of children at the time of allocating resources.

5. REPORT OF THE UN SPECIAL RAPPORTEUR (1993)

This report was particularly important as it outlined the role of official forces in trafficking and in drawing the link between industrial recruiting, bonded labour and forced prostitution in Nepal. It called for improved law enforcement, investigation and punishment of corrupt officials, better international cooperation on trafficking, including national cooperation with the Interpol and the establishment of national policy bodies to deal with child exploitation.

The main findings of the report are that general legal remedies are not easily accessible to the victims of abuse and that law enforcement lacks (i) training and (ii) the will to confront child exploitation.

'(e) Several laws, such as Constitution, depend for their implementation upon various ministries and the bureaucracy. This means that, in effect, the rights inherent in such laws are not justiciable; it would be difficult to resort to courts to enforce them. In any case, in view of the physical and mental distance between the majority of the population, who are rural based and often illiterate on the one hand, and the formal judicial structure, on the other hand, there is a wide gap between availability of legal remedies and genuine accessibility of those remedies.

(f) Law enforcement authorities are often weak, understaffed, under-trained, and corrupt. Interestingly during the Special Rapporteur's dialogue with the police, the latter complained that the labour laws did not clearly confer upon the police the power to raid illegal factories and that this was within the mandate of the labour inspectors. This type of obfuscation and "burden shifting" does not bode well for law enforcement and child protection.'

Human Rights Watch/Asia has in its Report, 'Trafficking of Nepali Girl and Women to India's Brothel : Rape for Profit', identified the active support of the Indian police as the main reason for proliferation of trafficking from Nepal into India, and has recommended the following;

'Officials found guilty of involvement in trafficking and/or brothel operations, or of failing to enforce the law with respect to those operations, should be prosecuted

to the fullest extent of the law. Suspensions, transfers or public apologies for complicit law enforcement officials is not sufficient.'

6. DECLARATION AND AGENDA FOR ACTION

The Declaration and Agenda for Action was unanimously accepted by the World Congress Against Commercial Sexual Exploitation of Children on 28 August 1996. The World Congress was held at Stockholm, Sweden, and 119 countries were represented through their governments and non-governmental organisations. The main task of this Congress was to find strategies to end child prostitution, child pornography and trafficking of children for sexual purpose.

'This meeting breaks new ground. For the first time on a global level, we come together to confront the commercial sexual exploitation of children. We are here to affirm, without compromise, that children are not property – to be bought and sold, that their human rights are to be taken with utmost seriousness, and that their voices must be heard in the fulfillment of those rights. This Congress must send a wear and unequivocal message: the commercial sexual exploitation of children must end - in every urban centre, every rural community, every corner of the world.'

–Ms. Carol Bellamy, Executive Director,
United Nations Children's Fund (UNICEF)
in her keynote address at the Congress

The declaration calls for all states in cooperation with national and international organisations and civil society, *inter alia*, to

- ☞ accord high priority to action against the commercial exploitation of children and allocate adequate resources for this purpose;
- ☞ criminalise the commercial sexual exploitation of children as well as other forms of sexual exploitation of children, and condemn and penalise all those offenders involved, whether local or foreign, while ensuring that the child victims of this practice are not penalised;
- ☞ enforce laws, policies and programmes to protect children from commercial sexual exploitation and strengthen communication and cooperation between law enforcement authorities;
- ☞ develop a climate through education, social mobilisation, and development activities to ensure that parents and others legally responsible for children are to fulfil their rights, duties and responsibilities to protect children from commercial sexual exploitation;
- ☞ enhance the role of popular participation, including that of children, in pre-

venting and eliminating the commercial sexual exploitation of children.

The Panel on Law Reform and Law Enforcement at the Congress formulated the following suggestions and recommendations;

- ☞ Implementation of the Convention on the Rights of the Child by all states, with an adequate monitoring system to check and evaluate progress.
- ☞ Training for law enforcement personnel, including judges and police.
- ☞ A common age of consent for sexual encounters must be arrived at. The age of 18 as provided under the Convention on the Rights of the Child is not acceptable by many countries.
- ☞ National legislation should provide that the rights of the child victim shall take precedence over the rights of an offender, if there is any conflict. Child friendly legal procedures should be adopted. Children should be made eligible to receive compensation from the perpetrators of the offence.
- ☞ Centralised Data Base relating to the movements of paedophiles to be constituted.
- ☞ International Central Register of Missing Children to be maintained.
- ☞ Protecting children from becoming victims is a global responsibility. The public must be educated through awareness campaigns.
- ☞ There must be a public recognition that, child sexual abuse of children is big business, motivated by profit and that it needs to be addressed as a serious crime.
- ☞ Monitoring of child abusers, both suspected and convicted, should be developed through national and international registers. For this purpose the electronic communication potential must be utilised.
- ☞ Educating of legislators and politicians about the principles of international law.
- ☞ Extraterritorial legislation is a valuable tool for the pursuit of child abusers, countries should be encouraged to frame such legislation.
- ☞ The need for a Protocol to the Convention on the Rights of the Child to enable the harmonising of enforcement procedures.
- ☞ Child sexual exploitation should be categorised as a crime against humanity. Expansion of the proposed jurisdiction of the International Criminal Tribunal so as to include child sexual exploitation.
- ☞ The Commission of Crime Prevention and Criminal Justice should elaborate on international instruments against trafficking in children.

7. INTERNATIONAL LABOUR ORGANISATION (ILO)

ILO perceives the commercial exploitation of child labour as a form of forced labour and identifies poverty as one of the root causes. ILO is of the opinion that the fight against commercial sexual exploitation must go hand in hand with a campaign against unemployment and underemployment. ILO has instituted an international programme on the elimination of child labour through which it endeavours, among other evils, to eliminate commercial sexual exploitation of children.

Mr. Kari Tapiola, Deputy Director General, ILO, attended the World congress Against Commercial Sexual Exploitation of Children held in 1996 where he likened commercial sexual exploitation of children to forced labour.

'The commercial sexual exploitation of children is an intolerable form of child labour, where children are put to work forcibly, linked to involuntary or false recruitment, deception and trafficking. The forced exploitation of children must be fought energetically and punished severely, be it child prostitution or pornography or be it enforced work in brothels, private houses, factories, sweatshops or elsewhere. The problem of commercial sexual exploitation of children requires action on three fronts :

- a commitment to full employment as a means of combating poverty;
- a stronger set of international and national laws on forced child labour and their vigorous application; and
- a comprehensive programme of action involving governments and the whole civil society to translate goals and laws into reality'

8. CONVENTION CONCERNING FORCED LABOUR (1930)

The General Conference of ILO adopted this Convention on 28 June 1930.

For the purpose of this Convention, the term 'forced or compulsory labour' means all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily.

The Competent Authority is not to impose or permit the imposition of forced or compulsory labour for the benefit of private individuals, companies or associations. The term 'Competent Authority' means either an authority of the metropolitan country or the highest central authority in the territory concerned.

The illegal exaction of forced or compulsory labour is punishable as a penal offence.

Forced or compulsory labour may be allowed in certain instances where the work to be done or service to be rendered is of important direct interest for the community called upon to do the work or service; the work or service is of present or imminent necessity; the work or service will not lay too heavy a burden upon the present population, having regard to the labour available and its capacity to undertake the work; the work or service will not entail the removal of workers from their place of habitual residence; the exaction of the work or rendering of service will be directed in accordance with the exigencies of religion, social life, etc. Such forced or compulsory labour is to be regulated and closely monitored.

9 SUPPLEMENTARY CONVENTION ON THE ABOLITION OF SLAVERY, THE SLAVE TRADE AND INSTITUTIONS AND PRACTICES SIMILAR TO SLAVERY (1956)

Institutions and practices similar to slavery include,

'(c) Any institution or practice whereby:

- (i) A woman, without the right to refuse is promised in marriage on payment of a consideration in money or in kind to her parents, guardian, family or any other person or group; or
- (ii) The husband of a woman, his family, or his clan, has the right to transfer her to another person for value received or otherwise; or
- (iii) A woman on the death of her husband is liable to be inherited by another person;

(d) Any institution or practice whereby a child or young person under the age of 18 years, is delivered by either or both of his natural parents or by his guardian to another person, whether for reward or not, with a view to the exploitation of the child or young person or of his labour.'

10. CONVENTION CONCERNING THE ABOLITION OF FORCED LABOUR (1957)

The General Conference of ILO adapted this Convention on 25 June 1957.

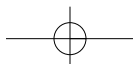
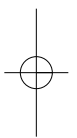
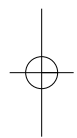
By this Convention, each Member of ILO who ratifies this Convention, undertakes to suppress and not make use of any form of forced or compulsory labour;

- ☞ as a means of political coercion or education or as a punishment for holding or expressing political views or views ideologically opposed to the established political, social or economic system;
- ☞ as a method of mobilising and using labour for purposes of economic devel-



opment;

- ☞ as a means of labour discipline;
- ☞ as a punishment for having participated in strikes;
- ☞ as a means of racial, social, national or religious discrimination.



XVII. REGIONAL INSTRUMENTS

1. THE AFRICAN CHARTER ON THE RIGHTS AND WELFARE OF THE CHILD

This charter was adopted by the African member states of the Organisation of African Unity on 2 May 1948. This charter recognises that 'the child occupies a unique and privileged position in the African society and that for the full and harmonious development of his personality, the child should grow up in a family environment in an atmosphere of happiness, love and understanding.' This charter further recognises that 'the child, due to the needs of his physical and mental development requires particular care with regard to health, physical, mental, moral and social development, and requires legal protection in conditions of freedom, dignity and security.'

The charter specifically deals with child sexual abuse and exploitation.

ARTICLE 16: Protection Against Child Abuse and Torture

State Parties are mandatorily required to take specific legislative, administrative, social and educational measures to protect the child from all sorts of degrading treatment, especially physical or mental injury or abuse, neglect or maltreatment, including sexual abuse while. In the care of a parent, legal guardian or school authority, or any other person who has the care of the child. Protective measures should include the establishment of effective monitoring procedures to provide support to the child, and other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child abuse and neglect.

ARTICLE 27: Sexual Exploitation

State Parties are to take steps to protect the child from all forms of sexual exploitation and sexual abuse and are to take measures to prevent

- (a) the inducement, coercion or encouragement of a child to engage in any sexual activity,
- (b) the use of children in prostitution or other sexual practices,
- (c) the use of children in pornographic activities, performances and materials.

ARTICLE 29: Sale, Trafficking and Abduction

State Parties are required to take appropriate measures to prevent the abduction, sale of, or traffic in children for any purpose or in any form, by any person including parents or legal guardians of the child.

**2. THE COUNCIL OF EUROPE AND ITS
RECOMMENDATION NO. R (91)**

The Council of Europe has defined child sexual exploitation as 'the sexual use for economic purposes of a child or a young person, which violates, directly or indirectly, human dignity and sexual freedom and endangers his or her psycho-sexual development.'

In 1991, the council issued Recommendation No. R (91) in respect of sexual exploitation, pornography and prostitution of, and trafficking in, children and young adults.

- ⊕ Emphasis should be on treating children and young people as victims of sexual exploitation and not as perpetrators of or accomplices to a criminal offence.
- ⊕ Need to increase resources allocated to welfare and police services, and to improve working methods for investigation.
- ⊕ High priority to be given to the identification and punishment of clients and those encouraging child prostitution.
- ⊕ Encourage the establishment of special police units to combat the procuring of children, etc.
- ⊕ Training and vocational programmes for children and young people involved in prostitution to enable them to leave the trade.
- ⊕ Conduct an extensive public education programme aimed at children and young people, parents and professionals to create awareness of the dangers and effects of child sexual exploitation and the manner in which consequential risks can be controlled.
- ⊕ Discourage the use of children and their voices in an erotic context in advertisements.
- ⊕ Utilise a tough approach for control of production, sale and possession of child pornography.
- ⊕ Adoption of laws on extraterritorial jurisdiction for the prosecution of nationals who have committed child sexual exploitation in a foreign country.

3. EUROPEAN FORUM FOR CHILD WELFARE

The European Forum for Child Welfare is a coalition of European non-governmental organisations working on the issue of child welfare.

In 1995, the forum held an international conference on the sexual exploitation of children, which was attended by police and law enforcement agencies, government departments, academics and politicians and non-governmental organisations and individuals. The conference concluded that the needs of survivors and victims of sexual exploitation should be addressed by:

- ☞ Establishing appropriate therapy, counseling and practical support services for children and young people.
- ☞ Encouraging the formation of projects and schemes that provide training, support and accommodation to young people attempting to leave prostitution.
- ☞ Encouraging the development of services that actively seek out vulnerable children and young people involved in prostitution or sexual exploitation and provide immediate rehabilitative support.

4. REPORT OF THE COMMITTEE ON PROSTITUTION CHILD PROSTITUTION, CHILD PROSTITUTES, AND CHILDREN OF PROSTITUTES, AND A PLAN OF ACTION TO COMBAT TRAFFICKING AND COMMERCIAL SEXUAL EXPLOITATION OF WOMEN AND CHILDREN BY THE DEPARTMENT OF WOMEN AND CHILD DEVELOPMENT AND THE MINISTRY OF HUMAN RESOURCE DEVELOPMENT AND THE GOVERNMENT OF INDI (1998)

This report has made recommendations with regards to handling the menace of trafficking, stressing on the need for legal reforms and strict law enforcement. The recommendations of the committee are briefly summarised below.

Trafficking

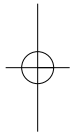
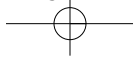
1. A nodal agency to be constituted to stop trafficking in women and children.
2. Appointment of special police officers for trafficking.
3. Formulation of a separate convention for SAARC countries to combat the trafficking of women and children for prostitution.
4. Immigration officers, border police and local police to maintain a strict vigil on entry of children under suspicious or unexplained circum-

- stances from neighbouring countries.
5. Non-governmental organisations to set up helplines, monitor transit points, such as bus stands and railway stations. Police, railway police and transport authorities to conduct surprise checks and inspection of persons taking children under suspicious circumstances.
 6. Assistance to be provided to non-governmental organisations to set up short-stay homes near the border to provide temporary shelter, care and counselling to children and women rescued from traffickers.
 7. Indian missions to network with the Ministry of Home Affairs and the Central Prevention and Rehabilitation Committee in source countries, (a) to monitor the movement of children across the border, (b) for the return and rehabilitation of rescued children and adoption of preventive measures with the consent and cooperation of the concerned country, (c) to be vigilant at the time of issuing visas to convicted or suspected child abusers.
 8. India to actively cooperate with the international community to combat trafficking and sexual exploitation of children.

Legal Reforms and Law Enforcement

1. The present legal framework to combat child sexual exploitation results in revictimisation of the victims of exploitation while exploiters mostly go scot-free. There is a need to review the prevailing law to ensure that all exploiters, including clients, traffickers, parents/guardians are made liable for punishment.
2. Modification of criminal procedures to ensure a child-sensitive approach. A system of quick and efficient prosecution of traffickers, including summary disposal of cases of commercial sexual exploitation and trafficking, should be adopted.
3. Participation of non-governmental organisations on the behalf of child victims of commercial sexual exploitation should be encouraged. Their expertise should be utilised for filing complaints, legal aid and counselling, etc.
4. The law should be amended so as to contain a provision for the confiscation of assets of exploiters and payment of compensation by exploiters to victims.
5. Victims held in debt bondage by exploiters should be released by proper enforcement of the Bonded Labour Act or the Act should be amended to ensure release of victims from debt bondage.
6. Strict enforcement by central and state governments of existing legal provisions in respect of commercial sexual exploitation of children.
7. Cases of commercial sexual exploitation of children or minors below 18 years of age, with or without consent, should be identified and proceeded with under Section 375 of the Indian Penal Code and Section

- 6 of the Immoral Traffic (Prevention) Act. Prosecutions and convictions should be given wide publicity, so as to act as a deterrent.
8. Exclusive anti-trafficking and prevention cells should be established and its officers be notified as special police officers under Section 13(1) of the Immoral Traffic (Prevention) Act.
 9. Reconstitution of advisory boards constituted under Section 13(3) of the Immoral Traffic (Prevention) Act. Advisory boards should contain social workers and non-governmental organisations who are experienced, active, committed and sincere.
 10. Regular small raids to be conducted to prevent child sexual exploitation and to instill fear in the mind of exploiters. Larger raids cause more harm than good because of the absence of facilities to care for rescued children.
 11. Raids should target clients, pimps, brothel keepers and other exploiters. Revictimisation of women and children should be curtailed.
 12. Non-governmental representatives, government officials, etc., working for the welfare of child victims should be given effective and appropriate protection.
 13. Non-governmental organisations working for the welfare and development of child victims should be issued identity cards by the police department to facilitate their work.
 14. Counselling and free legal assistance should be provided to victims who are in custodial placements.
 15. Task forces to be set up in major cities to effectively coordinate activities related to commercial sexual exploitation, such as prevention, suppression, rescue, rehabilitation, reintegration. Task forces should consist of law enforcement officers, prosecutors, legal aid officials, social welfare officers, probation officers, officers in charge of juvenile homes/protective homes, child development officers, medical personnel, etc. Task forces should be headed by the secretary, Woman and Child Development/Social Welfare Department of the State government.
 16. Protection and assistance to be provided to victims and other witnesses, to prevent their coercion by offenders.
 17. Raids, bans and restrictions on operations of massage parlours, cabaret shows, etc., which are nothing but commercial sexual exploitation in a new form.
 18. Strict enforcement of the existing law against production, publication, sale and exhibition of child pornography. Laws should be reviewed to eliminate child pornography, including prohibiting its possession.



XVIII. CONCLUSION

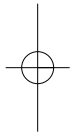
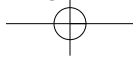
There has been a marked increase in the reporting of child sexual abuse cases in India. Unfortunately, the present legal system and procedures are such that a child victim of three years is compelled to face brutal cross-examination by the abuser's advocate. Abusers sometimes get away with the most heinous crimes due to a technicality and the child victim is left believing that he/she is at fault.

The Supreme Court recognised the inadequacy in the law and procedure and requested the law commission of India to amend the laws so as to comprehensively cover child sexual abuse. The Law Commission has not recommended any comprehensive change in the Criminal Procedure Code or the Indian Evidence Act with regards to the procedure. No concessions have been given to the child witness, he/she continues to be treated in a manner similar to an adult.

Many countries have adopted child-friendly procedures in their law to meet the ends of justice. Children are protected in different ways from the trauma of repeated questioning by the concerned professionals and agencies, delay in investigation and conducting of trial and difficulties in testifying before the court in the presence of the accused. It is imperative that these concepts be incorporated in the Indian law to achieve the primary object of punishing the abuser whilst protecting the interest of the child. Adoption of such concepts will prevent secondary damage to the child.

The concern for child sexual abuse should not result in obscuring the abuse of children, which is not sexual in nature. The amendment to the procedural law is essential for dealing with all the types of abuse – it will enable a child to portray the facts without any confusion or fear. Modifications have been recommended by the law commission to the Indian Penal Code to more comprehensively deal with the offence of child sexual abuse, but the purpose of the proposed modifications will not be fulfilled due to the absence of consequential changes in the procedure.

It is also necessary for the law to encourage transparency and accountability; this will not only bring to light child abuse within the family and institutions, but will also act as a deterrent. People should be encouraged by the state to conduct regular social audits of child care facilities this will keep child carers vigilant and expose any deficiency before it is too late and irreparable damage has been caused.



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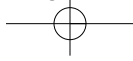
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