

**PROTECTION AND CARE OF JUVENILES:
THE RECENT TREND IN JUVENILE
JUSTICE IN INDIA**

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for the award of the Degree of Doctor of
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CONTENTS

	<u>Pages</u>
ACKNOWLEDGEMENT.....	i
LIST OF CASES.....	I-VI
CHAPTER - I	
INTRODUCTION	1-7
CHAPTER – II	
JUVENILES AND HUMAN RIGHTS :	
INTERNATIONAL PERSPECTIVE	8-52
(A) Universal Declaration of Human Rights, 1948	11
(B) International Covenant on the Economic, Social and Cultural Rights, 1966 and International Covenant on Civil and Political Rights, 1966.....	12
(C) Declaration of the Rights of the child, 1959.....	15
(D) The Convention on the Rights of the Child, 1989.....	17
(E) U. N. Standard Minimum Rules for the Administration of Juvenile Justice, 1985 (Beijing Rules).....	25.
(F) U N Rules for the Protection of Juveniles Deprived of their Liberty, 1990.....	29.
(G) United Nations Guidelines for the Prevention of Juvenile Delinquency, (The Riyadh Guidelines).....	33
(H) Guidelines for Action on Children in the Criminal Justice System.....	39
(I) The World Summit for Children, 1990.....	42
(J) U.N. Conference of Environment and Development ...	45
(K) World Conference on Human Rights, 1993.....	46
(L) United Nations Standard Minimum Rules for Non-Custodial Measures (The Tokyo Rules).....	46
(M) The fourth World Conference on Women or The Beijing Declaration, 1995.....	48
(N) Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst forms of Child Labour.....	50

	<u>Pages</u>
CHAPTER – III	
JUVENILES AND HUMAN RIGHTS : NATIONAL PERSPECTIVE	53-110
CONSTITUTIONAL PROVISIONS	54
(A) FUNDAMENTAL RIGHTS	54
(i) Right to Equality	54
(ii) Right to Life and Personal Liberty	59
(iii) Right against Exploitation	63.
DIRECTIVE PRINCIPLES	70
(i) Protection of tender age of Children.....	71
(ii) Protection of Childhood and youth against exploitation	73
(iii) Free and Compulsory education	75
(iv) Nutrition and Standard of living.....	77
NATIONAL POLICY FOR CHILDREN.....	80
(A) National Children Policy	80
(B) National Child Labour Policy	82
(C) National Education Policy	84
(D) National Policy of Handicapped Persons	87
HISTORY OF CHILD LEGISLATION IN INDIA	88
(i) Prior to 1773	88
(ii) 1773-1850.....	89
(iii) 1850-1919.....	90
(iv) 1919-1950.....	91
(v) Post 1950.....	92
LEGISLATIVE ENACTMENTS	95
(1) The Employment of Children Act, 1938.....	95
(2) Factories Act, 1948.....	96
(3) Mining legislation	99
(4) The Motor Transport Workers Act 1961.....	100
(5) The Apprentice Act,1961.....	101
(6) The Beedi and Cigar workers (Conditions of Employment) Act,1966.....	101
(7) The Merchant Shipping Act,1958.....	102
(8) Plantation Legislation	102
(9) The Children (Pledging of Labour) Act,1933.....	103

(10) The Child Labour (Prohibition and Regulation) Act, 1986.....	104
PROVISIONS UNDER SECULAR LAWS	106
(1) Civil Procedure code, 1908.....	106
(2) Criminal Procedure code, 1973.....	107
(3) Indian Penal Code, 1860.....	109
(4) Indian Evidence Act,1872.....	110
(5) Indian Contract Act, 1872.....	110.

CHAPTER - IV

JUVENILE OFFENDERS AND OFFENCES

AGAINST JUVENILES	111-204
(1) Sociological Approach	114
(2) Psychological Approach	114
(3) Legal Approach	114
TYPES OF DELINQUENCY	115
(1) Individual Delinquency	115
(2) Group Supported Delinquency	116
(3) Organized Delinquency.....	116
(4) Situational Delinquency	116
FACTORS RESPONSIBLE FOR DELINQUENCY.....	117
(a) Family Atmosphere	117
(b) Neighbourhood	118
(c) Bad Schooling	119
(A) DETERMINATION OF AGE OF JUVENILE	121
(B) JUVENILE IN CONFLICT WITH LAW	173
(i) Bail and Custody.....	174
(ii) Juvenile Prisoners	183
(iii) Trial Procedure.....	188
(iv) Punishment and Conviction	193
(C) OFFENCES AGAINST JUVENILES	197

CHAPTER – V

CARE AND PROTECTION OF JUVENILES	205-233
(A) CHILD IN NEED OF CARE AND PROTECTION	206
(B) WELFARE PROVISIONS	225
AUTHORITIES AND INSTITUTIONS	226

	<u>Pages</u>
(i) Children's Home.....	226
(ii) Shelter Homes.....	227
(iii) Special Homes.....	230
(iv) Observation Homes	231
CHAPTER - VI :	
ENFORCEMENT INSTITUTIONS AND SOCIAL	
REINTEGRATION UNDER THE JUVENILE	
JUSTICE ACT.....	234-265
(A) Rehabilitation and Social Reintegration	234
(1) Adoption.....	240
(2) Fostercare.....	256
(3) Sponsorship	258
(4) Aftercare Organisations.....	259
(5) Probation.....	262
CHAPTER - VII:	
EPILOGUE	266-279
APPENDICES	280-362
Appendix (1) Declaration of the Rights of the Child, 1959.....	280
Appendix (2) Convention on the Rights of the Child, 1989.....	284
Appendix (3) U.N Standard Minimum Rules for Non- Custodial Measures (Tokyo Rules).....	315
Appendix (4) U.N. Rules for the Protection of Juvenile Deprived of their Liberty,1990.....	326
Appendix (5) Guidelines for Action on Children in the Criminal Justice System	346
BIBLIOGRAPHY:	
A. PRIMARY SOURCES.....	363
(i) Acts, Statutes and Covenants.....	363
B. SECONDARY SOURCES.....	364
(i) Books.....	364
(ii) Articles.....	365
(iii) Journals.....	366
(iv) Websites.....	366

TABLE OF CASES

A

Arjan Das v State of Punjab,AIR 1958 Punjab 400.

Arnit Das v State of Bihar,AIR 2000 SC 2264.

Anish Ansari v State of Jharkhand,2010 Cr.L.J 1959.

Ajay v State of UP,2006 Cr.L.J 3326.

Abdul Qayum v State of Bihar,AIR 1972 SC 214.

B

Bandhua Mukti Morcha v. Union of India,AIR 1984 SC 802.

Bhoop Ram v. State of UP,(1989) 3 SCC 1.

Bachchey Lal v. State of UP,(1976) 4 SCC 305.

Bhola Bhagat v. State of Bihar,AIR 1998 SC 236.

Bikau Pandey and others v. State of Bihar,AIR 2004 SC 997.

Basavraj SangmarappaThonte v. State of Maharashtra, 2009 Cr.L.J 1360.

Babu Singh v. State of UP, AIR 1978 SC 527.

Bachpan Bachao Andolan v. Union of India, (2011)5 SCC 1.

C

Childline India Foundation v Allan John Waters,(2011) 6 SCC 261.

Chiranjit Lal v Union of India,AIR 1951 SC 41

D

Deepal Girishbhai Soni and others v. United India Insurance Co Ltd, Baroda, AIR 2004 SC 2107

E

Ex.Gnr.Ajit Singh v. Union of India and others, 2004 Cr.L.J 3994.

G

Gaurav Jain v. Union of India, AIR 1997 SC 3021.

Gopalan v. State of Madras,(1950) SCR 88.

Ghaio Mau & Sons v. State of Delhi, AIR 1956 Punjab 97.

Gopinath Ghosh v. State of W.B,AIR SC 237.

Ganesha v. State of Madhya Pradesh,2006 CRI.L.J 3604.

Ghanashyam Misra v. The State, AIR 1957 Ori.78.

H

Hussainara Khatoon v Home Sec,Bihar,AIR 1979 SC 1360.

Haresh Mohandas Rajput v State of Maharashtra,AIR 2011 SC 3681.

I

Imtiaz Hussein v. State of Maharashtra,2008(3) Mh. LJ (Cri) 478.

J

Jayendra v. State of U.P.,(1981) 4 SCC 149.

K

Kadra Pehadiya v. State of Bihar,AIR 1981 SC 939.

Kameshwar Prajapati v. The State of Jharkhand,2006 CRI.L.J 773.

Kamala Devi v. State of Punjab,AIR 1984 SC 1895.

Kamal Kishore v. State of Himachal Pradesh,AIR 2000 SC 1920.

L

Lakshmikant Pande v. Union of India,AIR 1984 SC 469.

Lakshmikant Pandey v. Union of India,AIR 1984 SC 232.

M

M.C Mehta v. State of Tamil Nadu,AIR 1997 SC 699.

Mohini Jain v. State of Karnataka,AIR 1992 SC 1858.

Mohamad Zakir Mohamad Mukhtar Shaikh v. State of Maharashtra,2008 CRI.L.J 2519.

Mohd.Hanif Khan v. State of M.P.,2011 CRI.L.J 726.

Munna v. State of U.P,AIR 1982 SC 806.

Mohd. Aziz v. State of Maharashtra,AIR 1976 SC 730.

N

Nuvrala Kiran v The State of A.P,2004 CRI.L.J 1263.

O

Om Prakash v. State of Uttaranchal ,(2003)1 SCC 648.

P

Peoples Union for Democratic Rights v. Union of India,AIR1982 SC 1473.

Pradeep Kumar v. State of U.P ,AIR 1994 SC 104.

Pratap Singh v. State of Jharkhand (2005) 3 SCC 551.

Pankaj and another v. State of U.P,2005 Cr.L.J 3683.

PremChand Sao alias Jhari Sao v. State of Jharkhand,2003 Cr.L.J 86.

Praveen Kumar Maurya v. State of U.P. 2011 Cr. L. J. 200.

Parbatabai Sakharam Taram v. State of Maharashtra 2006 Cr. L. J. 2202

R

Ramdeo Chauhan v. State of Assam (2001) 5 SCC 714

Ravinder Singh Gorkhi v. State of U.P. (2006) 5 SCC 584

Rajindra Chandra v. State of Chattisgarh and another (2002) 2 SCC 287

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Rama Murthy v. State of Karnataka AIR 1997 SC 1739

Rattan Lal v. State of Punjab AIR 1965 SC 444

Rameshbhai Chanderbhai Rathod v. State of Gujarat AIR 2011 SC 803

Robert Heij Kamp v. Bal Anand World Children Welfare Trust, India, Mumbai AIR 2008 (NOC) 1054 (Bom)

S

Sheela Barse v. Union of India AIR 1986 SC 1773

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Suo Motu By High Court on its own motion v. Chief Secretary Government of Maharashtra and others 2009 (79) AIC 367 (Bom H.C)

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Sheela Barse v. The Secretary, Children Aid Society, AIR 1987 SC 656

State of Maharashtra v. Rajendra Jawanmal Gandhi AIR 1997 SC 3986

U

Umesh Chandra v. State of Rajasthan AIR 1982 SC 1057

V

Unni Krishnan v. State of Andhra Pradesh AIR 1993 SC 2178

V

Vikram Deo Singh Tomer v. State of Bihar AIR 1988 SC 1782

Vikram Singh v. State of Haryana 2009 (13) SCC 645

CHAPTER – I

INTRODUCTION

CHAPTER – I

INTRODUCTION

A very important segment of a society are its children. They are the greatest gift that has been bestowed upon humanity. They are the pillars on which the foundation of tomorrow is laid. They are useful human resources that can lead to the progress and development of a country. As rightly pointed out by Rabindra Nath Tagore:¹

“A nation’s children are its supremely important asset and the nation future lies in their proper development. An investment in future. A healthy and educated child of today is the active and intelligent citizen of tomorrow”.

Therefore, an important duty on the part of the state is to provide proper care and protection to children because the future of a nation depends on the physical and mental well – being of the children. Hence, in this context it may be mentioned that the idea of social justice became a political doctrine of all the states and it was incorporated in their constitutions particularly of those states that became independent after the Second World War. In the last century there was a phenomenal change towards the social welfare state at the global level. Our Indian Constitution is no exception to it. The establishment of the United Nations and the subsequent enactment of human rights instrument in particular the Universal Declaration of Human Rights, International Covenant on Civil and Political Rights and The Covenant on Economic, Social and Cultural Rights. The aim of all such instruments also include to provide juvenile justice. The relevant provisions in such international instruments and its relationship with our municipal laws have

1. Quoted in, Paramjeet Singh, *Juvenile Deviations and protection in the context of the Juvenile Justice Act, 1986*, 26 Civil and military Journal (1990) 35.

been discussed in the foregoing pages. In the year 1960 our Parliament enacted The Children Act and other state enactment were also there. However, there was lack of uniformity in its provisions and in the infrastructure for their enforcement. Therefore, the net outcome of the legislation providing for juvenile justice was not very much satisfactory. Ultimately with a view to provide for uniformity and to create its own and independent institutions the Juvenile Justice Act was enacted in the year 1986. This Act was the first central legislation on Juvenile Justice for the whole country. This Act was supposedly enacted in pursuance of the Beijing Rules. However, the enactment of the first Uniform law on juvenile justice did not bring about any drastic improvement in the treatment of juveniles. At the same time the density of the world opinion was on rise and that subsequently resulted into the Convention on the Rights of the Child, 1989. India being a party to this Convention gave serious thought to accommodate the global principles and thereby enacted the Juvenile Justice (Care and Protection of Children) Act in the year 2000 which repealed the Juvenile Justice Act, 1986. The phenomenal growth as to the development of the legal provisions as well as the sincerity of efforts made to make them a reality are the subject – matter of discussion in this research.

The preamble spells out the social justice as the objective of our Constitution and promises to achieve the goal through fundamental rights and directive principles. Therefore, the main issues involved herein are how far the juvenile justice is part of the wide spectrum of social justice, what are the fundamental rights in particular that are attracted in the matter of juveniles and how far the state has been successful in assuring the equality, liberty and dignity to the weaker sections in general and to the poor children in particular these are the subject – matter of the present study. The fundamental rights to equality, life and liberty have been granted to all persons. Whether this assurance is sufficient enough to protect the rights of children or is there a special need to enact special Laws for juveniles providing for special treatment to them and making differential treatment to children with a view to better

protect their rights and interests? Moreover, if law is enacted especially for the children its enforcement independently and connecting its provisions with relevant fundamental rights are another area of study. The right against exploitation has been specifically guaranteed for the protection of weaker sections which has been specifically guaranteed for the protection of weaker sections which may be equally invoked in the matter of juvenile justice. The judiciary in such a situation has liberally construed the respective fundamental rights by enforcing it even against the private act and this trend has at times imposed some burden upon the privileged classes. The relevant judicial decisions have been discussed at the opposite places in the present work.

The social and economic rights mainly find place in the directive principles of state policy in part IV of our Constitution. A number of provisions may be invoked for providing juvenile justice. At the dawn of our constitution it was thought not possible to enforce the provisions of the socio – economic capacity and development of the state. It provided for the protection of tender age of children, childhood and youth against exploitation etc. It also imposes a duty upon the state to look after the child. It further prohibits employment and misuse of children for immoral purposes. The free and compulsory education to all children has also been provided. However, the question is what has been the fate and achievement of the state in fulfilling its obligations in respect of the aforesaid provisions? The answer of this and related issues may be found in this work.

The most important matter in respect of juveniles which have attracted attention is the administration of criminal justice. This aspect may be broadly divided into two category – first – the offences committed by juveniles and second - the offences committed against juveniles. In view of the constitutional imperative the juvenile offenders cannot be treated on the equal footings by applying the general norms and procedures of the criminal justice, therefore, the juvenile offenders requires special and separate treatment in different aspects of criminal justice. This issue involves many questions, for example –

determination of age of juvenile and the relevant date for this purpose, liberalization of bail provisions and the custody of juvenile prisoners, prevention of their sexual abuse, humane treatment inside the prison walls and overall change in the altitude of the Court and the Police. Also what measures can be taken to prevent delinquent acts among juveniles? A humble attempt has been made to discuss all the above issues and other related matters in the present study. Throughout the country the state of affairs inside prisons is very much unsatisfactory and distorting and it is most surprising that when the plight of prison inmates is brought to focus before the judiciary the state agencies come forward to cover up the wrongs done and even the flagrant violation of the fundamental laws. Such a situation came up before the Supreme Court when it issued general direction to all the district judges throughout the country to report on the status of juvenile prisoners through the Register of respective High Courts. The Supreme Court had to pass successive orders in this matter mainly due to the delay in compliance with its earlier directions by authorities including lower judiciary. The above judicial decision and the subsequent developments have been analyzed in order to evolve a future course of action.

In the matter of fair trial many principles as essential requirements of reasonable, just and fair procedure has been evolved by the judiciary in recent times. At different stages of the trial procedure the free legal aid was thus included within the requirement of speedy trial. However, in spite of the Constitutional mandate followed by the statutory provisions providing for legal assistance in particular to children the reality is somewhat different. Such issues were brought before the judiciary and it was considered that the law like juvenile justice cannot be administered effectively by the traditional minds. This aspect brings us to many issues, for example - whether the powers conferred on the Juvenile Justice Board is unreasonable and arbitrary? Whether other than the Principal Magistrate the two social workers who are members of the Board have got Magisterial powers individually to deal with provision under Criminal Procedure Code, 1973? Whether the Judges and other agencies

involved with juvenile justice require any physical training? Whether the members of the Juvenile Justice Boards require special knowledge of child psychology? Another question that may arise is as to whether the provision under the Juvenile Justice (Care and Protection of Children) Act, 2000 relating to inquiry that should be conducted as per trial in summons case is a proper one or not? The answer of these questions may be found in the present study.

The penology and sentencing laws adopted a liberal attitude towards juveniles and the reformatory theory of punishment prevailed. In this respect the punishment and conviction of juvenile after he is adjudged guilty require special treatment. This aspect brings forth various issues for consideration for example – whether the application of reformatory theory would absolve a juvenile from conviction? It also involves the issue of imposition of severe penalty upon the juveniles. It further involves a question as to whether the imposition of fine on the juvenile is in consonance with juvenile jurisprudence. The recent trend that is operative in the area of juvenile justice has been discussed.

Children are vulnerable, immature and dependent. This allows them to be subjected to various offences that are committed against them, for example – trafficking for the purpose of prostitution and child labour. The present work analyses the provisions made in this respect and their efficacy. The other area which attracted the attention of the law makers has been the care and protection of child in need of care and protection. In all developing countries including ours it has proved to be a major problem that a large number of children lack attention and care which may be due to multifarious reasons which most of the time includes the neglect and carelessness of the parents and other family members as well as of the society. The law has imposed mandatory obligations on the guardians as well as upon the society. But in reality such norms are seldom adhered to. One of the root causes of such neglect is poverty and consequently this leads to innumerable problems such as child labour, abuse of children for various purposes,

abandonment and neglect and drug abuse or trafficking. The Juvenile Justice (Care and Protection of Children) Act, 2000 has made provisions to protect children. The analysis of such provisions and their efficacy may be found in the present study.

Over and above the welfare of juveniles and rehabilitation thereof have been the prime concern of the state. With a view to give effect to this objective the Act establishes a number of institutions like Children's homes, shelter homes, special homes and observation homes. However, the fact remains that such an enormous job cannot be performed by the state agencies alone and hence it requires the cooperation of all the members of the society and in particular the active involvement of non – government organizations working in the respective areas and the co-ordination of all such efforts together. A question that may arise in this context is how safe are the children who are required to stay in such institutions? There is every possibility of such children being subjected to all forms of abuse and torture. The present work concentrates upon the legal provisions in the respect and tries to assess how far the aforesaid provisions have been visualized. Further, for the purpose of rehabilitation and social reintegration of the child provisions have been incorporated for giving the child in adoption, foster – care or providing sponsorship to the child or sending the child to an after – care organization. In this context the question that comes up for consideration is whether adoption and foster – care is really the safest option to provide care and protection to an abandoned or surrendered child? The analysis of provisions in this respect and their efficiency may be found in the present study.

Now coming to the framework of the study it has been divided into seven chapters. Chapter one is introductory and chapter two mainly discusses the steps taken at the international level for the protection of the children. Chapter three mainly brings out the constitutional provisions along with the national policy for children, the history of child legislation in India, the legislative enactments and also the provisions under secular laws.

The administration of criminal justice in respect of juveniles covering areas like offences against juveniles, offences against juveniles, offences by juveniles, bail and custody, trial procedure, punishment and conviction are the subject matters of study in chapter four. Chapter five takes in the problem of child in need of care and protection and also deals with the establishment of authorities and institutions like children's homes; shelter homes etc. chapter six discusses the rehabilitation and social reintegration of the child through the process of adoption, foster care, sponsorship and aftercare organizations. The net result of the present study and recommendations have been discussed in the last chapter.

CHAPTER – II

JUVENILES AND HUMAN RIGHTS: INTERNATIONAL PERSPECTIVE

CHAPTER – II

JUVENILES AND HUMAN RIGHTS: INTERNATIONAL PERSPECTIVE

There are certain rights which every human being possesses as for example – right to life, right to freedom, right to marry etc. These rights are inherent in all of us and it is not possible to live a dignified life without these rights. These rights known as human rights are also important because they affect our life in a daily basis.

Looking at the history of human rights it is said that these rights are not new. History shows that since hundreds of years people have been thinking about human rights. In most of the world's religions and philosophies the roots of human rights can be found. In spite of the cultural difference the human rights of the individual person have been emphasized by some cultures whereas the rights of the group like clan tribe or community have been emphasized by others though there is a general agreement among them regarding certain basic values which include respect for life and human dignity.

It is said that the concept of human rights in the form has evolved in the present century and has become very significant aspect of contemporary international relations. Human rights are currently a matter of great international interest. The present concern for formulation and protection of human rights is said to be the result of gross violation of the same during the two world wars. The world community realized that it was unrealistic to expect protection of human rights solely by national governments. It was felt that for effective protection of human rights, international community also needs to take steps. It was considered a necessary condition for international peace.¹

1. B.N. Tripathi, *Jurisprudence – Legal Theory*, 14th Edition (1999) at 411-412.

A mechanism to maintain international peace and security especially after the Second World War the United Nations lays great emphasis on the need for safeguarding basic human rights because it was realized that protection of human rights is closely linked to international peace and security. Thus the charter of United Nations reaffirmed faith in the fundamental human rights and in dignity and worth of the human person and made promotion and encouragement of respect for human rights and fundamental freedoms responsibility of the world body. The charter imposes an obligation on the member states regarding observation of human rights and makes human rights and fundamental freedom an important norm of international law.²

The various international instruments containing the universal rights are basically focused against human beings and generally available to all persons including juveniles. However, at the world level special attention has been given with respect to the rights of the child because children are special and they need special protection. There is a great need to protect the human rights of the child specially because children are the future citizens of tomorrow and also because they are vulnerable to all forms of abuse and exploitation. If proper and adequate protection is not afforded to children then there is every possibility of them being invisible to the world. But this we cannot afford as this would mean exposing children to more abuse neglect and exploitation.

Apart from this it is also said that there is a great need to protect the human rights of the child specially because children are the future custodians of sovereignty, rule of law, liberty, equality, fraternity and lastly international peace and security. They are said to be the potential embodiment of our ideals, aspirations, ambitions and future hopes. In fact, they are the only messengers of our ideologies, philosophies, knowledge and culture heritage. Undoubtedly, the child by reasons of his physical and mental immaturity needs special care and protection including adequate legal protection³. In order to do

2. *Id.* at 412.

3. Srinivas Gupta, *Human Rights of the Child and Judicial Activism in India*, III CILQ (1994) at 133.

so the protection of the child became the thrust area of the human rights organizations and independent conventions on the subject was also prepared.

Therefore, through various provisions in the UN charter 1945 the members of the United Nations reaffirmed their faith in fundamental rights and in the dignity and worth of human person.⁴ It is noteworthy here that the dignity and worth of human person would definitely include children as well. The UN Charter also contains a provision for international cooperation in solving international problems including promoting and encouraging respect for human rights and fundamental freedoms for all without distinction as to race, sex, language or religion.⁵ It is important to note that here too the guarantees envisaged includes children as well.

It is submitted that the basic concern for children and their rights initially was almost negligible in almost most of the countries. However, the beginning of the movement for the rights of the child can be traced back to the mid – nineteenth century with the publication of an article in June 1852 by Slagvolk, which was titled “*The Rights of the children*”, and later by Kate Kliggins titled “*Children’s Rights*”, in 1892. There after, with the attention gradually shifting to the working conditions of children, the legal position of children in England began to change with the introduction of factory laws which concentrated on the amelioration of the working employees specially children.⁶

The situation of children received international attention in 1923 when the council of the newly established non – governmental organization “Save the Children International Union” adopted a five point declaration on the rights of the child. In 1924, this Geneva Declaration was endorsed by the fifth Assembly of the League of Nations. In 1948, the General Assembly of the United Nations approved an expanded version of that text and

4. Preamble of the UN Charter, 1945.

5. Article 1(3) of the UN charter says. “to achieve international cooperation in solving international problems of an economic, social, culture or humanitarian character and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion”.

6. Mamta Rao, *Law relating to women and children*, 2005, Eastern Book Company, at 389.

in 1959 adopted a new declaration for child welfare and protection. However before discussing The Declaration of the Rights of the Child, 1959 and The Convention on the Rights of the Child, 1989, which marked the culmination of the efforts to bring the international community to recognize the needs of children.⁷ It is desirable to mention the various international human rights instruments where specific provisions have been incorporated for care and protection of children which are as follows :-

[A] UNIVERSAL DECLARATION OF HUMAN RIGHTS:-

The Universal Declaration of Human Rights was adopted and proclaimed by General Assembly Resolution 217A (III) of 10th December, 1948. This Declaration embodies some more measures to protect the child. Through it, a “*common standard*” of achievement for all people and all nations were adopted.⁸ Then it provides that everyone is entitled to all the rights and freedoms set forth in this Declaration without any distinction of any kind.⁹ It is notable that the word “*all*” used in Article 1 and the word ‘everyone’ used in Article 2 obviously and necessarily includes the child also. Besides, this declaration also deals with the protection of family.¹⁰ The Declaration recognized several rights of the child including the right to life and liberty¹¹ as

7. *Id.*

8. Article 1 of the UDHR says, “*All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood*”.

9. Article 2 of the UDHR says, “*Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.*

Furthermore no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which person belongs, whether it be independent trust, non – self – governing or under any other limitation of sovereignty.”

10. Article 16(3) of the UDHR says, “*The family is the natural and fundamental group unit of society and is entitled to protection by society and the state*”.

11. Article 3 of the UDHR says, “*Everyone has the right to life, liberty and security of person*”.

also right to education.¹² The Declaration while dealing with the question of social security gives special assistance to motherhood and childhood and special protection to all children born out of wedlock.¹³

[B] INTERNATIONAL COVENANT ON THE ECONOMIC, SOCIAL AND CULTURAL RIGHTS, 1966 AND THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS 1966:-

Both the above mentioned Covenants were adopted by the United Nations General Assembly on December 16, 1966. The International Covenant on Economic, Social and Cultural Rights provides protection and assistance to the family measures and special measures of protection and assistance to all children without discrimination of any kind.¹⁴ The covenant also recognizes the right of everyone to health and

12. Article 26(1) of the UDHR says, “Everyone has the right to education. Education shall be free at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.”

Article 26(2) of the UDHR says, “Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, social or religious groups, and shall further the activities of the United Nations for maintenance of peace.”

Article 26(3) of the UDHR says, “Parent have a prior right to choose the kind of education that shall be given to their children”.

13. Article 25(2) of the UDHR says, “Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock shall enjoy the same social protection”.

14. Article 10(1) of ICESCR says, “The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children”.

Article 10(3) of ICESCR says, “Special measures of protection and assistance should be taken on behalf of all children and young persons without any discrimination for reasons of parentage or other conditions. Children and young persons should be protected from economic and social exploitation. Their employment in work harmful to their morals or health or dangerous to life or likely to hamper their moral development should be punishable by law. States should also set age limits below which the paid employment of child labour should be prohibited and punishable by law”.

development of the child.¹⁵ The Covenant also recognizes the right of everyone to education. Education shall be directed to the full development of the human personality and shall enable all persons to participate effectively in a free society and promote peace among all nations. Parents and legal guardians are given the liberty to choose schools for their children.¹⁶

Similarly, the International Covenant on Civil and Political Rights also deals with various provisions for the protection and development of children. The Covenant provides that accused juvenile persons shall be separated from adults and shall be accorded treatment appropriate to their age.¹⁷ No death sentence shall be imposed for crimes committed below 18

15. Article 12(1) of ICESCR says *“The State Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.”*

Article 12(2) of ICESCR says, *“The steps to be taken by the state parties to the present covenant to achieve the full realization of this right shall include those necessary for –*

- a) the provision for the reduction of the still – birth rate and of infant mortality and for the healthy development of the child;*
- b) the improvement of all aspects of environmental and industrial hygiene;*
- c) the prevention, treatment and control of epidemic, endemic, occupational and other diseases;*
- d) the creation of conditions in the world assure to all medical service and medical attention in the event of sickness.”*

16. Article 13(1) of the ICESCR says, *“The state parties to the present covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and sense of its dignity and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial ethnic or religious groups and further the activities of the United Nations for the maintenance of peace.”*

Article 13(3) of the ICESCR says, *“The state parties to the present Covenant undertake to have respect for the liberty to parents and when applicable, legal guardians to choose for their children’s school other than those established by the public authorities which can form to such minimum educational standards as may be laid down or approved by the state and to ensure the religious and moral education of their children in conformity with their own convictions.”*

Article 13(4) of the ICESCR says, *“No part of this article shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subjects always to the observance of the principles set forth in paragraph 1 of this article and to the requirement that education given in such institutions shall conform to such minimum standards as may be laid down by the state.”*

17. Article 10(2) of the ICCPR says, *“Accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication.”*

Article 10(3) of the ICCPR says, *“The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation. Juvenile offenders shall be regretted from adults and be accorded treatment appropriate to their age and legal status”.*

years of age.¹⁸ The Covenant provides that all persons are equal before the courts and in the determination of any criminal charge against him, everyone shall be entitled to fair and public hearing.

However, the press and the public may be excluded from all or part of a trial for certain reasons or in the interest of the private lives of the parties, but any judgment rendered in a criminal case or in a suit of law shall be made public except in case of juvenile persons.¹⁹ In the determination of any criminal charge against all persons, everyone shall be entitled to certain minimum guarantees, but in the case of juvenile persons, the procedure shall be such as will take account of their age and desirability of promoting their rehabilitation.²⁰ The Covenant provides that the state parties shall have respect for the liberty of parents and legal guardians to ensure the religious and moral education of their children.²¹ Every child shall have without discrimination of any kind such measures of protection as required by him and shall be registered immediately after birth and shall have a name and acquire a nationality.²²

18. Article 6(5) of the ICCPR.

19. Article 14(1) of the ICCPR says, "*All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order or national security in a democratic society, or when the interests of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgment rendered in a criminal case or in a suit of law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children*".

20. Article 14(4) of the ICCPR.

21. Article 18(4) of the ICCPR says, "*The state parties to the present covenant undertake to have respect for the liberty of parents and when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions*".

22. Article 24(1) of the ICCPR says, "*Every child shall have, without discrimination as to race, colour, sex, language, religion, national or social origin, property or with the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the state.*"

Article 24(2) of the ICCPR says, "*Every child shall be registered immediately after birth and shall have a name.*"

Article 24(3) of the ICCPR says, "*Every Child has the right to acquire a nationality.*"

[C] DECLARATION OF THE RIGHTS OF THE CHILD, 1959: -

The General Assembly on November 20th 1959, with representative of 78 countries meeting in plenary session unanimously adopted the Declaration of the Rights of the child. The basic objectives of the Declaration of the Rights of the child, 1959 are provided in its preamble.²³ Also the ten principles that has to be taken into account while recognizing the rights of the child and striving for their observance are:-

- 1) The child shall enjoy all the rights set forth in this Declaration. Every child, without any exception whatsoever, shall be entitled to these rights, without distinction or discrimination on account of race, colour, sex, language, religion, political or other status, whether of himself or his family.²⁴
- 2) The child shall enjoy special protection, and shall be given opportunities and facilities, by law and other means, to enable him to develop physically, mentally, morally, spiritually and socially in a locality and normal manner and in conditions of freedom of dignity. In the enactment of laws for this purpose, the best interests of the child shall be

23. The Preamble of the Declaration of the rights of the child, 1959 says:

“Whereas the people of the United Nations have in the charter, reaffirmed their faith in fundamental human rights and in the dignity and worth of the human person and have determined to promote social progress and better standards of life in larger freedom;

Whereas the United Nation has in the Universal Declaration of Human Rights, proclaimed that everyone is entitled to all the rights and freedoms set forth therein without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status;

Whereas the child by reason of his physical and mental immaturity, needs special safeguards and care including appropriate legal protection, before as well as after birth;

Whereas the need for such special safeguards has been stated in the General Declaration of the Rights of the Child of 1924, and recognized in the universal Declaration of human Rights and in the statutes of specialized agencies and international organizations with the welfare of the children;

Whereas mankind owes to the child the best it has to give; Now therefore,

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 good and for the good of society the rights and freedoms herein set forth and calls upon parents upon men and women as individuals and upon voluntary organizations, local authorities and national governments to recognize these rights and strive for their observance through legislative and other measures progressively taken in accordance with ten principles.”

24. Principle 1.

the paramount consideration.²⁵

- 3) The child shall be entitled from his birth to a name and nationality.²⁶
- 4) The child shall enjoy the benefits of social security. He shall be entitled to grow and develop in health, to this and special care and protection shall be provided both to him and to his mother including adequate prenatal care, the child shall have the right to adequate nutrition, housing recreation and medical services.²⁷
5. A child who is physically, mentally or socially handicapped shall be given special treatment, education and care required by his particular condition.²⁸
6. The Child, for the full harmonious development of his personality, needs love and understanding. He shall wherever possible, grow up in the care and under the responsibility of his parents, and in any case in an atmosphere of affection and of moral and material security; a child of tender years shall not, save in exceptional circumstances, be separated from his mother. Society and the public authorities shall have the duty to extend particular care to children without a family and to those without adequate means of support. Payment of state and other assistance towards the maintenance of children of large families is desirable²⁹.
7. The child is entitled to receive education, which shall be free and compulsory, at least in the elementary stage. He shall be given an education which will promote his general culture and enable him, on a basis of equal opportunity, to develop his activities, his individual judgment, and his sense of moral and social responsibility and to become a useful member of society.

25. Principle 2.

26. Principle 3.

27. Principle 4.

28. Principle 5.

29. Principle 6.

The best interests of the child shall be the guiding principle of those responsible for his education and guidance, that responsibility lies in the first place with his parents. The child shall have full opportunity for play and recreation, which should be directed to the same purposes as education, society and public authorities shall endeavour to promote the enjoyment of this right.³⁰

8. The child shall in all circumstances be among the first to receive protection and relief.³¹
9. The child shall be protected against all forms of neglect, cruelty and exploitation. He shall not be 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 any occupation or employment which would prejudice his health or education, or interfere with his physical, mental or moral development.³²

10. The child shall be protected from practices which may foster racial, religious and any other form of discrimination. He shall be brought up in a spirit of understanding, tolerance, friendship among peoples, peace and universal brotherhood and in full consciousness that his energy and talents should be devoted to the service of his fellowmen.³³

[D] THE CONVENTION ON THE RIGHTS OF THE CHILD, 1989: -

In respect of the international movement on behalf of Child Rights The Convention on the Rights of the Child represents a turning point. However, before the convention on the rights of the child was adopted in 1989, both the League of Nations in 1924 and the United Nations in 1959 had adopted declarations on the rights of the Child. States were called upon by

30. Principle 7.

31. Principle 8.

32. Principle 9.

33. Principle 10.

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these declarations to recognize certain principles regarding children's rights and take legislative and other measures in order to enforce them. These declarations constituted only statements of general principles and were not legally binding.

Therefore, in the late 1970's, some states that was particularly led by the government of Poland started to argue that there should be a new instrument on the rights of the children which would bind states under international law apart from setting guiding principles. The UN Commission on Human Rights in its 34th session during the year 1978 stated its concern that children throughout the world were continuing to suffer not only under colonial rule and apartheid regimes, but also through racism, war, and other forms of aggression and in order to protect the rights of children agreed to strengthen international instruments. In 1978, the UN General Assembly declared the year 1979 as the International year of the child in order to commemorate the 20th anniversary of the Declaration on the Rights of the Child, 1959 and a working group to draft a convention on the rights of children was established by the UN Commission on Human Rights. For the purpose of drafting the convention the working group based its project upon the principles enshrined in past declarations and cooperated with UN member states, specialized UN agencies, non – governmental organizations and regional inter – governmental organizations. A draft convention on the Rights of the Child was adopted by the working group in December 1988 and submitted to the same to the UN General Assembly for consideration. Thereafter, the convention on the rights of the child was adopted by the General Assembly on 20th November, 1989 and ratified by India on 12th December 1992.

The United Nation convention on the Rights of the Child derives strength from its ratification by governments, implying thereby that governments agree to follow the principles and are committed to certain standards in dealing with children. It is guided by the principle that the essential needs of children should be given the highest priority in the allocation

in recognizing children's rights. Part three (Articles 46 through Article 54) contains clauses concerning ratification and accession, entry into force, reservations and amendments.³⁷ The basic objectives of the Convention on the Rights of the child, 1989 are provided in its preamble.³⁸

Under the Convention on the Rights of the child, 1989, the word child has been defined as any human being below the age of eighteen

37. <http://www.wcl.american.edu/hrbrief/V7i2/Child10years.htm> [Visited on 6th August 2009].

38. The Preamble of the Convention on the Rights of the Child says:

"The State Parties to the present Convention,

Considering that in accordance with the principles proclaimed in the charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world;

Bearing in mind that the peoples of the United Nation have, in the charter, reaffirmed their faith in fundamental human rights and in the dignity and work of the human person and have determined to promote social progress and better standards of life in larger freedom;

Recognizing that the United Nations has in the Universal Declaration of human rights and in the International covenants on human rights proclaimed and agreed that everyone is entitled to all the rights and freedoms set forth therein, without distinction of any kind such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status;

Recalling that in the Universal Declaration of human rights the United Nations has proclaimed that childhood is entitled to special care and attention;

Convinced that the family as the fundamental group of society and the natural environment for the growth and well being of all its member and particularly children should be afforded the necessary protection and assistance so that it can fully assume its responsibilities without the community;

Recognizing that the child, for the full and harmonious development of his or her personality should grow up in a environment, in an atmosphere of happiness, love and understanding;

Considering that the child should be fully prepared to live an individual life in society and brought up in the spirit of the ideals proclaimed in the charter of the United Nations and in particular in the spirit of peace, dignity, tolerance freedom, equality and solidarity;

Bearing in mind that the need for extending particular care to the child has been stated in the Geneva Declaration of the Right of the Child, 1924 and in the Declaration of the Rights of the Child adopted by the united Nations in 1959 and recognized in the Universal Declaration of Human Rights, in the international covenant on civil and political rights (in particular in articles 23 and 24), in the International Covenant on Economic, Social and Cultural rights (in particular in its article 10) and in the statutes and relevant instruments of specialized agencies and international organizations concerned with the welfare of children;

Bearing in mind that as, indicated in the Declaration of the rights of the child adopted by the General Assembly of the United Nations on 20th November 1959 "the child, by reason of his/her physical and mental needs special safeguards and care including appropriate legal protection, before as well as after birth";

Recalling the provisions of the declaration on social and legal principles relating to the protection and welfare of children, with special reference to foster placement and adoption nationally and internationally; the United Nations Standard Minimum Rules for Administration of Juvenile Justice (the Beijing Rules); and the Declaration on the Protection of Women and Children in Emergency and Armed Conflict;

Recognizing that in all countries, in the world there are children living in exceptionally difficult conditions, and that such children need special consideration;

Taking due account of the importance of the traditions and cultural values of each people for the protection and harmonious development of the child;

Recognizing the importance of international cooperation for improving the living conditions of children in every country, in particular in developing countries."

years.³⁹ The basic approach to the problem of children is required to be different from those of adults. A child may have separate needs and requirement depending upon the personal family and social environment in which he lives in and psychological parameters of his growth. Therefore, a child needs separate treatment at the human rights level as well which may be many fold including the protection, care, development and the like. The human rights consideration takes into account all such factors. Provisions have been made to ensure that the child is protected against all forms of discrimination or punishment and that the rights set forth in this convention are respected by the state parties without any discrimination.⁴⁰ The convention provides that in all actions concerning children the interests of the child shall be a primary consideration.⁴¹ The convention providing for the implementation of the rights recognized in the present convention mentions that all appropriate legislative, administrative and other measures for the implementation of the rights recognized in the present convention. With regard to economic, social and cultural rights, state parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the frame work of

39. Article 1 says, "*For the purposes of the present convention a child means any human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier*".

40. Article 2(1) says, "*States Parties to the present convention shall respect and ensure the rights set forth in this convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status*".

Article 2(2) says, "*States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expresses opinions or belief of the child parent's legal guardian's or family members.*"

41. Article 3(1) says, "*In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be primary consideration*".

Article 3(2) says, "*State Parties undertake to ensure the child such protection and care as is necessary for his or her well – being, taking into account the rights and duties of his or her parents, legal guardians or other individuals legally responsible for him or her and this end shall take all appropriate legislative and administrative measures*".

Article 3(3) says, "*State Parties shall ensure that the institutions, service and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision*".

international cooperation.⁴²

While respecting the responsibilities, rights and duties of parents it is has further been provided under the convention that state parties shall respect the responsibilities of the extended family or community which is provided for by local custom, legal guardians or other persons legally responsible for the child to provide in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present convention.⁴³

One important provision under this Convention is the recognition of the inherent right to life of every child⁴⁴ and also ensuring do the maximum extent possible the survival and development of the child.⁴⁵ The right to access to health care services⁴⁶ and adequate standard of living⁴⁷ including food, clean water and a place to live and name and nationality,⁴⁸ have been recognized under the head of survival aspect whereas under the development aspect of rights of child the convention has guaranteed to every child the right of child the convention has guaranteed to every child the right to education,⁴⁹ to rest and leisure,⁵⁰ to freedom to expression and information⁵¹ and to freedom of thought, conscience and religion.⁵²

The convention incorporates another very important right of the child i.e. “*due weight*” shall be given to the views of the child in accordance to their age and maturity.⁵³ Regarding the protectional aspect the convention has extended protection to mentally and physically handicapped children. The convention provides that a mentally and physically disabled child

42. Article 4, *The Convention on the Rights of the Child, 1989*.

43. Article 5, *Id.*

44. Article 6 (1), *Id.*

45. Article 6(2), *Id.*

46. Article 24, *Id.*

47. Article 27, *Id.*

48. Article 7, *Id.*

49. Article 28, *Id.*

50. Article 31, *Id.*

51. Article 13, *Id.*

52. Article 14, *Id.*

53. Article 12, *Id.*

should enjoy full and decent life and that assistance shall be given to the disabled child free of charge including education, training, health care services, rehabilitation services etc.⁵⁴ The convention also provides protection to the child refugees⁵⁵ or parentless children⁵⁶ or children who are separated from their parents.⁵⁷ The children have also been protected from economic,⁵⁸ sexual and other forms of exploitation.⁵⁹ Appropriate measures are required to be taken to protect the children from the use and sale of drugs.⁶⁰ The convention has also set out the rights of the children during war and armed conflict.⁶¹

Under this convention the children have also been protected from being subjected to torture or other cruel inhuman or degrading treatment or punishment.⁶² Further, the convention has also recognized the right of every child alleged to have infringed the penal law to be treated in a manner consistent with the promotion of the child's dignity and worth.⁶³

Apart from these mentioned provisions of the Convention, under Article 43 of the Convention a Committee on the Rights of the Child has been set up which monitors the implementation of the provisions of the convention by the states who have ratified it. The elected member by the member states forms the committee and reviews the report submitted by the states and information that is received through various sources. Since some states cannot implement the provisions without assistance because of their economic conditions and also due to lack of sanctions, therefore, the committee exercises its influence through dialogue.

Therefore in the area of children's rights the adoption of the convention of the rights of the child has witnessed significant gains.

54. Article 23, *Id.*

55. Article 22, *Id.*

56. Article 20, *Id.*

57. Article 9, *Id.*

58. Article 32, *Id.*

59. Article 34, *Id.*

60. Article 33, *Id.*

61. Article 38, *Id.*

62. Article 37, *Id.*

63. Article 40, *Id.*

Throughout the world powerful platform has been found specially for raising awareness of children's rights and this is so because of the increase in special institutions and other organizations specializing in children's rights. Apart from this, as urged by the CRC committee the state parties are adopting National Plans of Action which outline the states plan in order to enforce children's right in health, education, nutrition and other areas. However, even after the CRC has been almost universally ratified there still exists a doubt over the actual implementation and enforcement of the Convention mainly because the condition of the youth has not significantly improved.

More than a decade has passed since the adoption of the Conventions on the Rights of the Child, however, in 1999, the UNICEF indicated that the plight of the children the world over has not significantly changed. As of 1999, an estimated twelve million children under the age of five die every year, mostly due to easily preventable causes; 130 million children in developing countries, a majority of whom are girls, are not in primary school, 160 million children are severely or moderately malnourished; approximately 1.4 billion children lack access to safe waters; and 2.7 billion children lack access to adequate sanitation. In spite of the main aim of the CRC being to protect children from economic exploitation and work that interferes with their education, in 1999 a human rights watch report estimated that annually 250 million children between the age of five and fourteen years are engaged in some form of labour, usually under hazardous working conditions. UNICEF reports that approximately 300,000 children in more than 30 countries are currently participating in armed conflicts. Although the CRC has highlighted children's rights and works with states to enforce these rights reality shows that states have not followed through on their commitments to the CRC.⁶⁴

With respect to the history of children's rights the ten year anniversary of the CRC is an important turning point because today the rights of the children are being recognized than before. However, in order to further

64. <http://www.wcl.american.edu/hrbrief/V7i2/Child10years.htm> [Visited on 6th August 2009].

protect and fulfill the promises given to the children worldwide the states should take stronger steps to implement the provisions of the CRC.

[E] UNITED NATION'S STANDARD MINIMUM RULES FOR THE ADMINISTRATION OF JUVENILE JUSTICE, 1985 [BEIJING RULES]: -

The year 1979 was proclaimed as the international year of the child by the General Assembly of the United Nations. However, prior to such proclamation, in the majority of the resolutions taken by the United Nations with regard to human problem the child figured on way or the other in such resolutions. In 1955, 1960 and again in 1965 the problem of control on crime and juvenile delinquency was discussed in a detailed manner in the United Nations Congress on the prevention of crime and Treatment of offenders. The problems of juvenile justice administration were also discussed at length in the successive Congress and the resolution on the development of minimum standards for juvenile justice was the most important outcome of the sixth congress. Thereafter, during the seventh congress of the United Nations a topic under the title "*Youth crime and justice*" which included "*Prevention of crime and Treatment of offenders*" was taken up as its agenda. In May 1984 the Inter – regional preparatory meetings was held at Beijing which identified some of the important causes of juvenile delinquency viz, poverty and deprivation, unemployment and underemployment, extremism involving violence under the guise of religion, among others. The various conclusions that came up in this meeting was placed before the seventh congress of the UN which recommended their acceptance and finally the United Nations Standard Minimum Rules for The Administration of Juvenile Justice was adopted by the General Assembly in its Ninety – Sixth plenary meeting in Nov'1985. These rules are also known as Beijing Rules. The General Principles are contained in

part one of the Beijing Rules.⁶⁵

Provisions have been incorporated under the Beijing Rules with respect to the age of criminality. It has been mentioned that the age of criminal responsibility for juveniles shall not be fixed at too low an age level especially in those legal systems that recognizes this concept.⁶⁶ Juveniles have further been guaranteed at all stages of proceedings basic procedural safeguards like presumption of innocence, the right to be notified of the charges, the right to remain silent, the right 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.⁶⁷

Right to privacy is an important right guaranteed to all and juveniles should not be an exception to it. Thus, the Beijing Rules provides that at stages the right to privacy of juveniles should be respected. This provision is to ensure that no harm is caused to a juvenile by undue publicity or by the process of labeling.⁶⁸ In order to protect the identity of a juvenile offender it has further been provided that no information shall be published that may lead

65. Rule 1.1 says, "*Member states shall seek in conformity with their respective general interests to further the well being of the juvenile and her or his family*".

Rule 1.2 says, "*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*".

Rule 1.3 says, "*Sufficient attention shall be given to positive measures that involve the full mobilization of all possible resources, including 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 conflict with the law.*"

Rule 1.4 says, "*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 maintenance of a peaceful order in society*".

Rule 1.5 says, "*These rules shall be implemented in the context of economic, social and cultural conditions prevailing in each Member State*".

Rule 1.6 says, "*Juvenile Justice services shall be systematically development and co-ordinated with a view to improving and sustaining the competence of personnel involved in the services including their methods, approaches and attitudes.*"

66. Rule 4.1, *The Beijing Rules*.

67. Rule 7.1, *Id.*

68. Rule 8.1, *Id.*

to the identification of the juvenile offender.⁶⁹

Part two of the Beijing Rules deals with investigation and prosecution and provisions have been incorporated relating to notification to parents or guardians of the juveniles apprehension⁷⁰ and resort to formal trial by the competent authority when dealing with juveniles offenders.⁷¹ The Beijing Rules further provides that Police officers dealing with juveniles shall be specially instructed and trained,⁷² and detention shall only be used as a measure of last resort.⁷³

Part three deals with adjudication and disposition. Provisions have been included that deals with matters like competent authority to adjudicate,⁷⁴ right to legal aid,⁷⁵ investigation of the background and circumstances under which the juvenile is living and condition under which offence was committed.⁷⁶ Certain principles have also been provided for which the disposition of the competent authority shall be guided. These principle are⁷⁷:-

- a) The action taken shall always be in proportion not only to the circumstances and the gravity of the offence but also to the circumstances and the needs of the juvenile as well as the needs of the society.
- b) Restrictions on the personal liberty of the juvenile shall be imposed only after careful consideration and shall be limited to the possible minimum;
- c) Deprivation of personal liberty shall not be imposed unless the juvenile is adjudicated of a serious act involving violence against another person or of persistence in committing other serious offences and unless there is no other appropriate response;
- d) The well being of the juvenile shall be guiding factor in the

69. Rule 8.2, *The Beijing Rules*.

70. Rule 10.1, *Id.*

71. Rule 11.1, *Id.*

72. Rule 12.1, *Id.*

73. Rule 13.1, *Id.*

74. Rule 14.1, *Id.*

75. Rule 15.1, *Id.*

76. Rule 16.1, *Id.*

77. Rule 17.1, *Id.*

consideration of his or her case.

One very important provision incorporated under the Rules is the non imposition of capital punishment for any crime committed by juveniles⁷⁸ and also that juveniles shall not be subject to corporal punishment.⁷⁹ Apart from this a number of disposition measures specially to avoid institutionalization have been provided for.⁸⁰ Further provisions have been made for avoidance of unnecessary delay,⁸¹ confidentiality of the records of juvenile offenders,⁸² use of professional education, in – service training and other modes of instructions to maintain professional competence of all personal dealing with juvenile cases.⁸³

Part four deals with non – institutional treatment and provisions regarding effective implementation of orders,⁸⁴ assistance to juveniles at all stages of proceedings⁸⁵ and contribution of volunteers, voluntary organizations etc for rehabilitation of juveniles⁸⁶ have been incorporated.

Part five deals with institutional treatment and the objectives of institutional treatment⁸⁷ have also been laid down. Provisions have also been made with respect to frequent and early recourse to conditional release⁸⁸ and semi – institutional arrangements.⁸⁹ Part six deals with research,⁹⁰ planning, policy formulation and evaluation.⁹¹

78. Rule 17.2, *The Beijing Rules*.

79. Rule 17.3, *Id.*

80. Rule 18.1, *Id.*

81. Rule 20.1, *Id.*

82. Rule 21.1, *Id.*

83. Rule 22.1, *Id.*

84. Rule 23.1, *Id.*

85. Rule 24.1, *Id.*

86. Rule 25.1, *Id.*

87. Rule 26.1, *Id.*

88. Rule 28.1, *Id.*

89. Rule 29.1, *Id.*

90. Rule 30.1, *Id.*

91. Rule 30.3, *Id.*

[F] UNITED NATIONS RULES FOR THE PROTECTION OF JUVENILES DEPRIVED OF THEIR LIBERTY (1990): -

The United Nations Rules for the Protection of Juveniles Deprived of their Liberty was adopted by the General Assembly resolution 45/113 of 14th December 1990. All persons under the age of 18 yrs who have been deprived of their liberty come under the applicability of the Rules. Part 1 of the Rules deals with the fundamental perspective. One of the most important fundamental perspectives is that the rights and safety of the juveniles should be upheld by the juvenile justice system and the physical and mental well being of the juveniles should be promoted and imprisonment should be used as a last resort.⁹²

Further, it has been provided that the juveniles should only be deprived of their liberty in accordance with the principles and procedures set forth in these Rules and in the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules). Deprivation of the liberty of a Juvenile should be a disposition of last resort and for the minimum necessary period. The length of the sanction should be determined by the judicial authority without precluding the possibility of his or her early release.⁹³ With the aim of counteracting the detrimental effects of all types of detention and to fostering integration in society the rules are intended to establish minimum standards accepted by the United Nations for the protection of juveniles deprived of their liberty in all forms consistent with human rights and fundamental freedom.⁹⁴ These rules are made applicable without any kind of partiality and discrimination.⁹⁵

Part two deals with the scope and application of the rules. The term '*juvenile*'⁹⁶ has been defined as 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

92. Rule 1, *UN Rules for the Protection of Juveniles Deprived of their Liberty, 1990.*

93. Rule 2, *Id.*

94. Rule 3, *Id.*

95. Rule 4, *Id.*

96. Rule 11 (a), *Id.*

liberty should be determined by law whereas the term deprivation of liberty has been defined to mean 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.⁹⁷ Other provision include benefit of activities and programmes to be guaranteed to juveniles detained in facilities,⁹⁸ non – denial of the civil economic, political, social or cultural rights⁹⁹ and protection of individual rights of juveniles.¹⁰⁰ Part three deals with juveniles under arrest or awaiting trial.¹⁰¹

Part four deals with the management of juvenile facilities. Provisions relating to the maintenance of a confidential individual file containing all reports including legal records, medical records and records of disciplinary proceedings and made accessible only to authorized persons have been incorporated in this part. Further, safeguarding the right of the juvenile to contest, every juvenile should be given a chance to contest any fact or opinion which appears to be inaccurate or unfair so that it can be rectified, and on release of juvenile the records shall be sealed and expunged.¹⁰²

It has also been mentioned that a complete and secure record containing certain information has to be kept in every place where a juvenile is detained.¹⁰³ It is further provided that all juveniles on admission in a facility shall be informed of the rules governing the facility as well as their rights and obligations in a language that they understand.¹⁰⁴ With a view to seeing that the juveniles are not subjected to any kind of hardship or indignity the juveniles while being transferred from one facility to another should be transported in conveyances with adequate ventilation and light and at the

97. Rule 11 (b), *UN Rules for the Protection of Juveniles Deprived of their Liberty, 1990.*

98. Rule 12, *Id.*

99. Rule 13, *Id.*

100. Rule 14, *Id.*

101. Rule 17, *Id.*

102. Rule 19, *Id.*

103. Rule 21, *Id.*

104. Rule 24, *Id.*

expense of the administration.¹⁰⁵

With a view to identifying the specific type of care and programme required by a particular juvenile on admission to a facility it has been provided that as soon as possible each juvenile should be interviewed and a psychological and social report should be prepared.¹⁰⁶ In order to ensure the protection of juveniles from harmful influences and risk situations the detention of juveniles should only take place under conditions that take full account of their particular needs, status and special requirements according to their age, personality, sex and type of offence as well as mental and physical health.¹⁰⁷ In order to ensure that the juveniles are not brought into contact with hardened adult criminals it has been mentioned that juveniles should be separated from adults in all detention facilities unless they are members of the same family.¹⁰⁸

In order to facilitate access and contact between the juveniles and their families provisions have been incorporated for the decentralization of facilities and also the establishment of open detention facilities wherein there should be no or minimum security measures with population small enough to allow individualized treatment.¹⁰⁹ Provisions relating to the design of detention facilities¹¹⁰ sleeping accommodation¹¹¹ and sanitation¹¹² have also been made under the Rules.

Recognizing the right to education of every juvenile provisions for providing education outside the detention facility in community schools and by qualified teachers have been made.¹¹³ This provision is to ensure that often release the juveniles may continue their education without any difficulty. With a view to preparing a juvenile for his/her future and also to ensure that the juvenile can get an opportunity to lead a dignified life after

105. Rule 26, *UN Rules for the Protection of Juveniles Deprived of their Liberty, 1990.*

106. Rule 27, *Id.*

107. Rule 28, *Id.*

108. Rule 29, *Id.*

109. Rule 30, *Id.*

110. Rule 32, *Id.*

111. Rule 33, *Id.*

112. Rule 34, *Id.*

113. Rule 38, *Id.*

release it has been provided that every juvenile should have the right to receive vocational training in occupations.¹¹⁴ Respecting the right to religion of each juvenile, every juvenile should be allowed to satisfy the needs of his or her religious and spiritual life.¹¹⁵

Further health care services,¹¹⁶ including the adoption of specialized drug abuse, prevention and rehabilitation programmes¹¹⁷ are also included under the Rules.

Recognizing the right to fair and humane treatment it has been mentioned that juveniles should have adequate communication with the outside world. They should be allowed to communicate with their families, friends and other persons or representative of reputable outside organization.¹¹⁸ This provision is to ensure, that the juveniles get opportunity to prepare for their integration into the society after release. Furthermore, in order to ensure that the juveniles that the juveniles are not subjected to humiliation or degradation it has been mentioned that instruments of restraint and force can only be used in exceptional cases where all other control methods have been exhausted and failed and only as authorized and specified by law and regulation.¹¹⁹

Upholding the inherent dignity of the juvenile it has been provided that disciplinary measures and procedures should maintain the interest of safety and an ordered community life.¹²⁰ With a view to ensure that the physical or mental health of the juvenile may not be compromised under any circumstances any disciplinary measure that constitutes cruel, inhuman or degrading treatment has been strictly prohibited which also includes corporal punishment, placement in a dark cell, closed or solitary confinement or any other punishment.¹²¹

114. Rule 42, *UN Rules for the Protection of Juveniles Deprived of their Liberty, 1990.*

115. Rule 48, *Id.*

116. Rule 49, *Id.*

117. Rule 54, *Id.*

118. Rule 59, *Id.*

119. Rule 64, *Id.*

120. Rule 66, *Id.*

121. Rule 67, *Id.*

Apart from the abovementioned provisions services should also be ensured to the juveniles in order to help them in re – establishing themselves in society. These services should ensure that the juvenile is provided with suitable residence, employment, clothing and sufficient means to maintain themselves upon release¹²² as provided under the rules.

Employments of qualified and sufficient number of Personnel are also provided for under the Rules.¹²³

[G] UNITED NATIONS GUIDELINES FOR THE PREVENTION OF JUVENILE DELINQUENCY [THE RIYADH GUIDELINES]: -

The United Nations has since 1955 and after every five years, been organizing a congress on crime prevention and Treatment of Offenders bringing together representatives of the world's national Governments, specialists in crime prevention and criminal justice, scholars of international repute and members of the NGO's concerned, with the main aim of discussing problems, sharing professional experiences and seeking viable solutions to crime. In almost all United Nations Congresses on crime Prevention and treatment of offender's juvenile delinquency and its prevention have been an agenda. Therefore, two important resolutions were passed at the Eight United Nations Congress on the Prevention of Crime and the Treatment of Offenders i.e. Rules for the Protection of Juveniles Deprived of their Liberty and Guidelines for the Prevention of Juvenile Delinquency also known as the Riyadh Guidelines. The Riyadh Guidelines was adopted by the General Assembly on 14th December, 1990. Every social area is dealt within the Guidelines viz, family, school, community, the mass media, social policy, legislation and Juvenile Justice Administration. The fundamental principles of

122. Rule 80, *UN Rules for the Protection of Juveniles Deprived of their Liberty, 1990.*

123. Rule 81, *Id.*

these guidelines have been mentioned in Part I.¹²⁴

Part III deals with general prevention and provision has been made regarding comprehensive prevention plans. It is mentioned that at every level of government comprehensive prevention plans should be instituted and it shall include among others an in depth analysis of the problems and inventories of programmes, services, facilities and resources available; well defined responsibilities for the qualified agencies, institutions and personnel

124. Article 1 says, *“The prevention of juvenile delinquency is an essential part of crime prevention in society. By engaging in lawful, socially useful activities and adopting a humanistic orientation towards society and outlook on life, young person’s can develop non – criminogenic attitudes”*.

Article 2 says, *“The successful prevention of juvenile delinquency requires effort on the part of the entire society to ensure the harmonious development of adolescences with respect for and the promotion of their personality from early childhood”*.

Article 3 says, *“For the purpose of the interpretation of the present juveniles a child – centered orientation should be pursued. Young persons should have an active role and partnership within society and should not be considered as mere objects of socialization or control”*.

Article 4 says, *“In the implementation of the present guidelines in accordance with national legal systems, the well being of young persons from their early childhood should be the focus of any preventive programme”*.

Article 5 says, *“The need for and importance of progressive delinquency prevention policies and the systematic study and the elaboration of measures should be recognized. These should avoid criminalizing and penalizing a child for behavior that does not cause serious damage to the development of the child or harm to others. Such policies and measures should involve:-*

- a) *The provision of opportunities in particular educational opportunities, to meet the varying needs of young persons and to serve us a supportive framework for safeguarding the personal development of all young personal particularly those who are demonstrably endangered or at social risk and are in need of special care and protection.*
- b) *Specialized philosophies and approaches for delinquency prevention on the basis of laws, processes, institutions, facilities and a service delivery network aimed at reducing the motivation need and opportunity for or conditions giving rise to the commission of infractions.*
- c) *Official intervention to be pursued primarily in the overall interest of the young person and guided by fairness and equity.*
- d) *Safeguarding the well being, development, rights and interests of all young persons.*
- e) *Consideration that youthful behaviors or conduct that does not conform to overall social norms and values is often part of the maturation and growth process and tends to disappear spontaneously in most individuals with the transition to adulthood.*
- f) *Awareness that, in the predominant opinion of experts labeling a young person as “deviant”, “delinquent” or “predelinquent” often contributes to the development of a consistent pattern of undesirable behavior by young persons;*

Article 6 says, *“Community based services and programmes should be developed for the prevention of juvenile delinquency particularly where no agencies have yet been established. Formal agencies of social control should be utilized as a means of last resort”*.

involved in prevention efforts; methods for effectively reducing the opportunity to commit delinquent acts; and youth participation in delinquency prevention policies and process, including to recourse to community resources, youth self help and victim compensation and assistance programmes.¹²⁵

Part IV deals with the socialization process and provisions giving emphasis on preventive policies facilitating the successful socialization and integration of all children and young persons particularly through the family, the community, peer groups, schools, vocational training and the world of work and also through voluntary organizations¹²⁶ have been provided for.

Keeping in view the importance of family it has been mentioned that governmental and social efforts to preserve the integrity of the family including the extended family should be pursued. The responsibility of the society to assist the family in providing care and protection and ensuring the physical and mental well – being of children has also been mentioned.¹²⁷ It has been further provided that policies should be established by the government that are conducive for bringing up children in stable and settled family environments.¹²⁸ In case stable and settled family environment does not exist then foster care and adoption should be considered.¹²⁹

Provisions have also been made that relates to giving special attention to children of families affected by problems brought by rapid and uneven economic, social and cultural change and particularly children of indigenous migrant and refugee family.¹³⁰ Development of programmes that would provide families with the opportunity to learn about parental roles and obligations regarding child development and child care¹³¹ is another provision that has been incorporated under the guidelines.

125. Article 9, *UN Guidelines for the Prevention of Juvenile Delinquency*.

126. Article 10, *Id.*

127. Article 12, *Id.*

128. Article 13, *Id.*

129. Article 14, *Id.*

130. Article 15, *Id.*

131. Article 16, *Id.*

Giving priority to education governments are obliged to make public education accessible to all young persons.¹³² It has been further provided that education systems should in addition to their academic and vocational training activities devote particular attention to the following:-¹³³

- i. Teaching of basic values and developing respect for the child's own cultural identity and patterns for the social values of the country in which the child is living, for civilizations different from child's own and for human rights and fundamental freedoms;
- ii. Promotion and development of the personality, talents and mental and physical abilities of young people to their fullest potential;
- iii. Involvement of young persons as active and effective participants in, rather than mere objects of the educational process;
- iv. Undertaking activities that foster a sense of identity with and of belonging to the school and the community;
- v. Encouragement of young persons to understand and respect diverse views and opinions as well as cultural and other differences;
- vi. Provision of information and guidance regarding vocational training, employment opportunities and career development;
- vii. Provisions of positive emotional support to young persons and the avoidance of psychological maltreatment;
- viii. Avoidance of harsh disciplinary measures, particularly corporal punishment.

In order to address the problem of drug and substance abuse it is mentioned that special attention should be given to comprehensive policies and strategies for the prevention of alcohol, drug and other substance abuse by young persons.¹³⁴

The chapter on community has also been introduced wherein it has been provided that community based services and programmes that respond to the special needs, problems interests and concern of young

132. Article 20, *UN Guidelines for the Prevention of Juvenile Delinquency*.

133. Article 21, *Id.*

persons should be developed or strengthened.¹³⁵

Adequate shelter for young persons,¹³⁶ special programmes for drug abusers,¹³⁷ financial support to voluntary organizations providing services for homeless or street children¹³⁸ are some of the other provisions that have been incorporated. Provisions relating to mass media has also been included wherein it is provided that encouragement should be given to mass media so that it can be ensured that young persons have access to information and material from national and international sources¹³⁹ and can also portray the positive contribution of young persons in society.¹⁴⁰ In particular, the encouragement of television and film media¹⁴¹ also finds prominence under the guidelines. At the same time the social role and responsibility of the mass media has also been emphasized.¹⁴²

Chapter V deals with social policy. Provisions relating to government agencies priority to plans and programmes for young persons have been incorporated where it is mentioned that for the effective delivery of services, facilities and staff for adequate mental and medical health care, nutrition, housing and other relevant services the government agencies should give high priority to plans and programmes for young persons and provide sufficient funds and other resources.¹⁴³

Giving paramount importance to the best interests of the young persons institutionalization of young persons as a last resort measures also finds mention under the guidelines.¹⁴⁴ Emphasizing the duty of the government agencies to provide full time education it has been mentioned that government agencies should provide young persons with the opportunity of

134. Article 25, *Id.*

135. Article 32, *UN Guidelines for the Prevention of Juvenile Delinquency.*

136. Article 34, *Id.*

137. Article 35, *Id.*

138. Article 36, *Id.*

139. Article 40, *Id.*

140. Article 41, *Id.*

141. Article 43, *Id.*

142. Article 44, *Id.*

143. Article 45, *Id.*

144. Article 46, *Id.*

continuing in full – time education funded by the state where parents or guardians are unable to support the young persons and of receiving work experience.¹⁴⁵

Planning and developing programmes to prevent delinquency is yet another important provision under the guidelines where it is mentioned that programmes to prevent delinquency should be planned and developed on the basis of reliable, scientific research findings and periodically monitored, evaluated and adjusted accordingly.¹⁴⁶ Further, dissemination of scientific information¹⁴⁷ and voluntary participation in plans and programmes¹⁴⁸ are the other provisions mentioned under the guidelines.

Chapter VI deals with legislation and juvenile administration. For this purpose it has been provided that there should be enactment and enforcement of specific laws and procedures by the government to promote and protect the rights and well – being of all young persons.¹⁴⁹ At the same it is mentioned that legislation should be enacted and enforced to prevent the victimization, abuse, exploitation and the use for criminal activities of children and young persons.¹⁵⁰ Further, with the aim of restricting and controlling accessibility by weapons of any sort to children and young persons legislation should be enacted and enforced.¹⁵¹ Enactment of legislation to prevent stigmatization, victimization and criminalization of young persons,¹⁵² establishment of an office of ombudsman,¹⁵³ training of law enforcement and other relevant personnel,¹⁵⁴ and enactment and strict enforcement of legislation¹⁵⁵ are provided for under this chapter.

Chapter VII deals with research, policy development and

145. Article 47, *UN Guidelines for the Prevention of Juvenile Delinquency*.

146. Article 48, *Id.*

147. Article 49, *Id.*

148. Article 50, *Id.*

149. Article 52, *Id.*

150. Article 53, *Id.*

151. Article 55, *Id.*

152. Article 56, *Id.*

153. Article 57, *Id.*

154. Article 58, *Id.*

155. Article 59, *Id.*

coordination. Provisions have been made where it is mentioned that to promote the justice system, youth, community and development agencies and other relevant institutions and also interaction and coordination between economic, social, education and health agencies and services efforts should be made and appropriate mechanisms established on both a multidisciplinary and an interdisciplinary basis.¹⁵⁶

Provisions relating to intensification of the exchange of information, experience and expertise relating to youth crime, delinquency prevention and juvenile justice,¹⁵⁷ developing and strengthening regional and international cooperation,¹⁵⁸ providing support to technical and scientific cooperation on practical and policy related matters,¹⁵⁹ encouragement to collaboration in undertaking scientific research,¹⁶⁰ collaboration and coordination by united Nations bodies, institutions etc,¹⁶¹ active role of the United Nations Secretariat¹⁶² are incorporated under the guidelines.

[H] GUIDELINES FOR ACTION ON CHILDREN IN THE CRIMINAL JUSTICE SYSTEM: -

The Guidelines for Action on Children in the Criminal Justice System were developed pursuant to Economic and Social Council resolution 1996/13 of 23rd July at an expert group meeting held at Vienna from 23rd to 25th February 1997 with the financial support of the Government of Austria. The guidelines for Action are addressed to the secretary General and relevant United Nations agencies and programmes, state parties to the convention on the rights of the child as regards its implementation as well as member states as regards the use and application of the United Nations standards minimum rules for the Administration of Juvenile Justice (The

156. Article 60, *UN Guidelines for the Prevention of Juvenile Delinquency*.

157. Article 61, *Id.*

158. Article 62, *Id.*

159. Article 63, *Id.*

160. Article 64, *Id.*

161. Article 65, *Id.*

162. Article 66, *Id.*

Beijing Rules) the United Nations Guidelines for the prevention of Juvenile Delinquency (The Riyadh Guidelines) and the United Nations Rules for the protection of juveniles Deprived of their Liberty, herein after together referred to as United Nations standards and norms in juvenile justice.¹⁶³

Part I deals with the aims, objectives and basic considerations. It has been provided that the aims of the Guidelines for actions are to provide a framework to achieve the following objectives:-¹⁶⁴

- a) To implement the Convention on the Rights of the Child and to pursue the goals set forth in the Convention with regard to children in the context of the administration of juvenile justice, as well as to use and apply the United Nations standards and norms in juvenile justice and other related instruments such as the Declaration of Basic Principles of justice for victims' of crime and abuse of power;
- b) To facilitate the provision of assistance to states parties for the effective implementation of the Right of the child and related instruments.

Provisions relating to cooperation between governments, relevant entities of the United Nations system, non governmental organizations etc to ensure effective use of the guidelines for actions,¹⁶⁵ considerations to be given in the use of the Guidelines for Action,¹⁶⁶ allocation and utilization of adequate resources,¹⁶⁷ are provided for under the guidelines.

Part III deals with the plans for the implementation of the Convention on the rights of the child, the pursuit of its goal and the use and application of international standards and norms in juvenile justice. Measures of general application have been incorporated where it is mentioned that the importance of a comprehensive and consistent national approach in the area of juvenile justice should be recognized with respect for the interdependence and indivisibility of all rights of the child.¹⁶⁸ Other provisions include measures to

163. <http://www2.ohchr.org/english/law/pdf/system.pdf> [Visited on 21st August 2009].

164. Article 4, *Guidelines for Action on Children in the Criminal Justice System*.

165. Article 5, *Id.*

166. Article 8, *Id.*

167. Article 9, *Id.*

168. Article 10, *Id.*

be taken relating to policy, decision making, leadership and reform,¹⁶⁹ ensuring the effectiveness of birth registration programmes¹⁷⁰ and ensuring that children benefit from all their rights.¹⁷¹ One important provision that has been incorporated is the establishment of juvenile courts and a comprehensive child centered juvenile process where it has mentioned that particular attention should be given to the following points:-¹⁷²

- a) There should be a comprehensive child centered juvenile justice process.
- b) Independent expert or other types of panels should review existing and proposed juvenile justice laws and their impact on children;
- c) No child who is under the legal age of criminal responsibility should be subject to criminal charges;
- d) States should establish juvenile courts with primary jurisdiction over juveniles who commit criminal acts and special procedures should be designed to take into account the specific needs of children. As an alternative, regular courts should incorporate such procedures as appropriate. Wherever necessary national legislative and other measures should be considered to accord all the rights of and protection for the child, where the child is brought before a court other than a juvenile court in accordance with articles 3, 37 and 40 of the Convention.

Further, recognizing the importance of protecting children requiring special protection measures it is provided that appropriate action should be taken to alleviate the problem of children in need of special protection measures such as children working or living on the streets or children permanently deprived of a family environment, children with disabilities, children with minorities, immigrants and indigenous people and other vulnerable groups of children.¹⁷³ It has been mentioned that the placement of children in closed institutions should be reduced. In such

169. Article 11, *Guidelines for Action on Children in the Criminal Justice System*.

170. Article 12, *Id.*

171. Article 13, *Id.*

172. Article 14, *Id.*

173. Article 17, *Id.*

placement of children should only take place in accordance with the provisions of Article 37(b) of the convention and as a matter of last resort and for the shortest period of time. Corporal punishment in the child justice and welfare systems should be prohibited.¹⁷⁴

Apart from the abovementioned provisions measures to be taken at the international level also finds mention in the guidelines. Such measures include establishment of mechanisms to ensure thorough and impartial investigation,¹⁷⁵ urgent need for the close cooperation between all bodies in this field,¹⁷⁶ the effective implementation of the Convention on the Rights of the Child,¹⁷⁷ maintenance of close cooperation between the Crime Prevention and Criminal Justice Division and Department of Peace Keeping Operations.¹⁷⁸

It has been further laid down that states should undertake to ensure that child victims and witness are provided with appropriate access to justice and fair treatment, restitution, compensation and social assistance. This should be in accordance with the Declaration of Basic Principles for victims of Crime and Abuse of power.¹⁷⁹ Other important provisions regarding child victims are right to be treated with compassion and respect for their dignity,¹⁸⁰ access to assistance that meets their need;¹⁸¹ access to fair and adequate compensation for all child victims of violation of human rights¹⁸² safe return of children displaced illegally or wrongfully retained across borders.¹⁸³

[I] THE WORLD SUMMIT FOR CHILDREN, 1990:-

At the United Nations a large gathering of world leaders assembled on 29th – 30th September 1990 in order to attend the world summit for children.

174. Article 18, *Guidelines for Action on Children in the Criminal Justice System*.

175. Article 25, *Id.*

176. Article 27, *Id.*

177. Article 28, *Id.*

178. Article 29, *Id.*

179. Article 43, *Id.*

180. Article 45, *Id.*

181. Article 46, *Id.*

182. Article 48, *Id.*

183. Article 52, *Id.*

This summit was led by 71 heads of state and governments and 88 other senior officials mostly at the ministerial level.¹⁸⁴ A plan of action for implementing the World Declaration on the Survival, Protection and Development of children in 1990 was adopted at this World Summit. The Challenges that were identified during the World Summit are :

- (i) 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 social 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.
- (ii) Each day, millions of children suffer from the scourges of poverty and economic crisis – from hunger and homelessness, from epidemics and illiteracy, from degradation of the environment. They suffer from the grave effects of the problems of external indebtedness and also from the lack of sustained and sustainable growth in many developing countries, particularly the least developed ones.
- (iii) Each day, 40,000 children die from malnutrition and disease, including acquired immunodeficiency syndrome (AIDS), from the lack of clean water and inadequate sanitation and from the effects of the drug problem.

Therefore, the world leaders agreed to meet these challenges and committed themselves to the following 10 point programme to protect the rights of the children and to improve their lives:

- a. To work to promote earliest possible ratification and implementation of the Convention on the Rights of the child programmes to encourage information about children's rights should be launched world - wide taking into account the distinct cultural and social values in different countries.
- b. To work for a solid effort of national and international action to

184. <http://www.unicef.org/wsc/plan.htm> [Visited on 21st August 2009]

enhance children's health to promote pre natal care and to lower infant and child mortality in all countries and among all peoples. To promote the provision of clean water in all communities for all their children, as well as universal access to sanitation.

- c. To work for optimal growth and development in childhood, through measures to eradicate hunger, malnutrition and famine, and thus to relieve millions of children of tragic sufferings in a world that has the means to feed all its citizens.
- d. To work to strengthen the role and status of women and promote responsible planning of family size, child spacing, breast feeding and safe motherhood.
- e. To work for respect for the role of the family in providing for children and will support the efforts of parents, other care – givers and communities to nurture and care for children from the earliest stages of childhood through adolescence. To also recognize the special needs of children who are separated from their families.
- f. To work for programmes that reduce illiteracy and provide educational opportunities for all children irrespective of their background and gender; that prepare children for productive employment and lifelong learning opportunities i.e. through vocational training and that enable children to grow to adulthood within a supportive and nurturing cultural and social context.
- g. To work to ameliorate the plight of millions of children's who live under specially difficult circumstances – as victims of apartheid and foreign occupation; orphans and street children and children of migrant workers; the displaced children and victims of natural and man – made disasters; the disabled and the abused, the socially disadvantaged and the exploited. To work for special protection of the working child and for the abolition of illegal child labour and to ensure that children are not drawn into

becoming victims of the scourge of illicit drugs.

- h. To work carefully to protect children from the scourge of war and to take measures to prevent further armed conflicts, in order to give children everywhere a peaceful and secure future. To promote the values of peace, understanding and dialogue in the education of children and to protect the essential needs of children and family even in times of war and in violence-ridden areas.
- i. To work for common measures for the protection of the environment, at all levels, so that children can enjoy a safer and healthier future.
- j. To work for a global attack on poverty, which would have immediate benefits for children's welfare. The vulnerability and special needs of the children of the developing countries, and in particular the least developed ones deserves priority.

The former Secretary General of the United Nations J.Perez de Cuellar while addressing the world summit in 1990 said: *“As we look at the world’s social and economic landscape, we marvel at the extraordinary advances that have been made in civilization as a whole yet with all this we also see that children continue to be the most vulnerable segment of society. Two set of anxieties cry to be addressed. One arises from the global social crisis which robs children of emotional shelter and moral sustenance that they need. The other cause of distress is the poverty that stalks the larger part of the world and that denies children enjoyment of their rights. To this are added effects of conflicts internal and external. One in two among the eight million refugees in the world is a child.”*¹⁸⁵

[J] UN CONFERENCE OF ENVIRONMENT AND DEVELOPMENT: -

In June 1992 at Rio de Janerio, Brazil, the United Nations Conference on Environment and Development was held. Agenda 21 is an important agenda

because it reinforces the commitments that were made at the World Summit for Children. Chapter 25 of Agenda 21 specifically relates to children and youth. In this chapter it has been specifically urged to the government to:

- a) Implement programmes to reach the goals set by the World Summit for children.
- b) Ratify and implement the Convention on the Rights of the Child;
- c) Promote primary environmental care activities to improve the environment by meeting basic needs and empowering local communities;
- d) Expand children's education specially for the girl child;
- e) Incorporate children's concerns into all relevant policies and strategies for environment and development.

[K] WORLD CONFERENCE ON HUMAN RIGHTS, 1993: -

The principle of "*first call for children*" was reiterated during the world conference and protection and implementation of the rights of the child was given due importance. The importance and role of the UNICEF in the protection and promotion of the rights of the child's was underlined. For the promotion of rights of the child the UNICEF coined a new perception "*Human Rights begins with children's Rights.*"¹⁸⁶

[L] UNITED NATIONS STANDARD MINIMUM RULES FOR NON – CUSTODIAL MEASURES (THE TOKYO RULES): -

The United Nations Standard Minimum Rules for non-custodial measures also known as the Tokyo Rules was adopted by the General Assembly Resolution 45/110 of 14th December 1990.

The Tokyo Rules are to be applied without any discrimination on the grounds of race, colour, sex, age, language, religion, political or other opinion, national or social origin, property birth or other

185. Mamta Rao, *Law Relating to Women and Children*, 1st Edn (2005) at p. 408.

186. *Id.*

status.¹⁸⁷ Therefore '*juveniles*' would also naturally come under the application of these rules.

The fundamental aims of the Tokyo Rules are: -

- (i) To provide a set of basic principles to promote the use of non-custodial measures, as well as minimum safeguards for persons subject to alternatives to imprisonment.
- (ii) To promote greater community involvement in the management of criminal justice, specifically in the treatment of offenders, as well as to promote among offenders a sense of responsibility towards society.
- (iii) To implement the rules taking into account the political, economic, social and cultural conditions of each country and the aims and objectives of its criminal justice system.
- (iv) In the implementation of the Rules, Member States shall endeavour to ensure a proper balance between the rights of individual offenders, the rights of victims and the concern of society for public safety and crime prevention.
- (v) Development of non-custodial measures by the member states within their legal systems to provide other options, thus reducing the use of imprisonment, and to rationalize criminal justice policies, taking into account the observance of human rights, the requirements of social justice and the rehabilitation needs of the offender.

A number of provisions pertaining to legal safeguards have been incorporated under the Tokyo Rules like selection of non-custodial measure based on an assessment of established criteria,¹⁸⁸ right of the offender to make request or complaint¹⁸⁹, protection of the dignity of the offender at all times,¹⁹⁰ maintaining confidentiality of the offenders personal records¹⁹¹.

Provisions relating to pre-trial stage have been included in Part II wherein it is mentioned that pre-trial detention should only be used as a

187. Rule 2.2, *The Tokyo Rules*.

188. Rule 3.2, *Id.*

189. Rule 3.6, *Id.*

190. Rule 3.9, *Id.*

191. Rule 3.12, *Id.*

means of last resort in criminal proceedings, with due regards for the investigation of the alleged offence and for the protection of society and victim¹⁹².

Part V deals with implementation of non – custodial measures. Provisions dealing with supervision are dealt with the purpose of supervision is to reduce reoffending and to assist the offender's integration into society in a way which minimizes the likelihood of a return to crime.¹⁹³ It has been further provided that wherever needed offenders should be provided with psychological, social and material assistance and with opportunities to strengthen links with the community and facilitate their reintegration into society.¹⁹⁴

Research, planning, policy for regulation and evolution finds mention in part VIII. It is mentioned that research and information mechanisms should be built into the criminal justice system for the collection and mainly so of data and see justice on the implementation of non – custodial treatment for offender.¹⁹⁵ It has been further provided that programmes for non – custodial measures should be systematically planned and implemented as an integral part of the criminal justice system within the national development process.¹⁹⁶

[M] THE FOURTH WORLD CONFERENCE ON WOMEN OR THE BEIJING DECLARATION, 1995:-

On 15th September 1995, The Beijing Declaration was formalized. The Beijing Declaration is particularly determined to advance the goals of equality, development and peace for all women every wherein the interest of all humanity.

The commitment of the international community to the advancement of women and to the implementation of the platform for Action.

192. Rule 6.1, *The Tokyo Rules*.

193. Rule 10.1, *Id*.

194. Rule 10.4, *Id*.

195. Rule 20.3, *Id*.

196. Rule 21.1, *Id*.

The advancement and empowerment of women in relation to women's human rights, women and poverty, women and decision – making, violence against women and other areas of concern.¹⁹⁷

It is important to mention here that though the Beijing Declaration is specifically with respect to women, however, special attention has been paid to ensure rights of the girl children and protecting them against all kinds of crime and violence.

The Beijing Declaration is determined to ensure the full enjoyment by women and girl child of all human rights and fundamental freedoms and take effective action against violation of these rights and freedoms.¹⁹⁸ Also to take all necessary measures to eliminate all forms of discrimination against women and the girl child and remove all obstacles to gender equality and the advancement and empowerment of women;¹⁹⁹ prevent and eliminate all forms of violence against women and girls²⁰⁰; promote and protect all human rights of women and girls;²⁰¹ intensify efforts to ensure equal enjoyment of all human rights and fundamental freedoms for all women and girls who face multiple barriers to their empowerment and advancement because of such factors as their race, age, language, ethnicity, culture, religion or disability or because they are indigenous people,²⁰² develop the fullest potential of girls and women of all ages, ensure their full and equal participation in building a better world for all and enhance their role in the development process²⁰³ as well as to ensure women's equal access to economic resources, including land, credit, science and technology, vocational training, information, communication and market, as a means to further the advancement and empowerment of women and girls, including through the enhancement of their capacities to enjoy the benefits of equal access to these

197. <http://www.thegreatinitiative.com/resolution/beijing-declaration-and-platform-for-action-1995/> [Visited on 11th November 2011].

198. Article 23, *The Beijing Declaration 1995*.

199. Article 24, *Id.*

200. Article 29, *Id.*

201. Article 31, *Id.*

202. Article 32, *Id.*

203. Article 34, *Id.*

resources, inter alia, by means of international cooperation.²⁰⁴

It is desirable to mention here that from 5th June to 9th June 2000 at the United Nations Headquarters in New York the 23rd Special Session of the General Assembly on “*Women 2000: gender equality, development and peace for the twenty first century*” took place. During this session a political declaration and outcome document entitled..... “*Further actions and initiatives to implement the Beijing Declaration and platform for Action*” was adopted.

The governments and the international community once more reaffirmed their commitment to the platform for action and a common development agenda with gender equality as an underlying principle. And with respect to girl child it further recognized that policies, programmes and budgetary process should adopt a gender perspective, be based on a clear research based knowledge on the situation of women and girls and sex disaggregated data and be defined in terms of short and long term time bound targets and measurable goals and follow up mechanisms to assess progress. The special session further reaffirmed the importance of gender mainstreaming in all areas and at all levels and the complementarity between mainstreaming and special activities targeting women. Certain areas were identified as requiring focused attention, which among others include violence against women and girls.

[N] CONVENTION CONCERNING THE PROHIBITION AND IMMEDIATE ACTION FOR THE ELIMINATION OF THE WORST FORMS OF CHILDS LABOUR: -

In 1999 the International labour Organization adopted the Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour also known in short as the Worst Forms of Child Labour Convention. This convention came into force on 19th November 2000.

204. Article 35, *The Beijing Declaration 1995*.

Each member which ratifies this Convention shall take immediate and effective measures to secure the prohibition and elimination of the worst forms of child labour as a matter of urgency.²⁰⁵ Emphasizing the importance of education in eliminating child labour it is provided that each member shall, taking into account the importance of education in eliminating child labour, take effective and time bound measures to:-²⁰⁶

- a) Prevent the engagement of children in the worst forms of child labour;
- b) Provide the necessary and appropriate direct assistance for the removal of children from the worst of child labour and for their rehabilitation and social integration;
- c) Ensure access to free basic education, and wherever possible and appropriate, vocational training, for all children removed from the worst forms of child labour;
- d) Identify and reach out to children at special risk, and
- e) Take account of the special situation of girls.

The aforesaid deliberations of the international endeavour to protect and develop the human rights of the child are sufficient to bring home the conclusion that the World Community appears to be sincere in protecting the rights of the child. However, the fact remains that on the one hand the development of the children could not be achieved upto the expectation and the goals projected and propagated at the international level. On the other hand, there have been increase in the cases of exploitation, misuse and violations of the human rights of the child. Although the weakness of the international law developments relating to the human rights that lacks the enforcement machinery is there, the international law contribution is memorable as it has an impact upon the national law in many ways. It is due to the propagation and propaganda of the human rights by the international organizations which affect the making of the national constitutions in the contemporary period and as a result India has also adopted the rights of the

205. Article 1, *Worst Forms of Child Labour Convention, 1999*.

206. Article 7, *Id.*

child in its constitution. Further some of the important human rights either have been incorporated in one laws through judicial interpretation or have been incorporated by legislative enactments²⁰⁷

207. Section 2(d) of the Protection of Human Rights Act, 1993 defines Human right as : *“The rights relating to life, liberty, equality and dignity of the individual guaranteed by constitution or embodied in the International Covenants and enforceable by Courts in India”*.

CHAPTER – III

JUVENILES AND HUMAN RIGHTS: NATIONAL PERSPECTIVE

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A child is considered to be a national asset. In a civilized society the growth, development and welfare of the entire community depends on the health and well – being of the children. The future of a country depends on the proper upbringing of children and giving them proper training so that they can be good citizens in future. As a result the importance of child welfare cannot be underestimated.

At the international and national levels great concern has been shown for the welfare of children. Kofi A. Annan, the then Secretary General of the United Nations observed that¹:

“There is no trust more sacred than the one the world holds with children. There is no duty more important than ensuring that their rights are respected, and their welfare is protected, that their lives are free from fear and home and that they grow up in peace”.

Therefore, in order to ensure that the rights of the child are respected and their welfare is protected the Universal Rights as contained in the various international instruments are basically focused against human beings and generally available to all persons including juveniles. As the national level too various legislative measures have been taken in view of various conventions and recommendations of the UN and ILO. However, before discussing the various legislative enactments it becomes important to note the various constitutional provisions that are relevant in the matter of juvenile justice.

1. Mamta Rao, *Law relating to woman and children*, 1st edition (2005) at p. 388.

CONSTITUTIONAL PROVISIONS:-

The signature tune of our constitution is social justice. The basic objectives of the constitution are provided in the Preamble² which provides for the justice, liberty and equality that aims against exploitation. In the matter of juvenile justice these constitutional ideals are applicable. These above mentioned objectives of the constitution have been spelled out through various provisions and the most important among them being the fundamental rights³ and directive principles⁴.

[A] FUNDAMENTAL RIGHTS: -

The Fundamental rights as enshrined in Part III of the Indian Constitution are essential to protect the rights and liberties of the people against the encroachment of power delegated by them to their government. The history of the struggle for political freedom in India made a declaration of fundamental rights inevitable⁵. The Fundamental Rights as enacted in our constitution, therefore, not only recognize the dignity of the individuals to which the Preamble refers, but also recognize their necessity for the full development of the individual and for preserving the unity of India⁶. Our Constitution contains a separate chapter on fundamental rights⁷. Now we deal with the fundamental rights which are relevant in the matter of juvenile justice.

(i) Right to Equality: - The preamble of our constitution seeks to secure to all its citizens social, economic and political justice as also equality of status and opportunity⁸. However, it is an undeniable truth that despite the efforts of our

2. Preamble of the constitution of India says, "*We the People of India, having solemnly resolved to constitute India into a Sovereign Socialist, Secular, Democratic, Republic and to secure to all its citizens – Justice, Social, Economic and Political; Liberty of thought, expression, belief, faith and worship; Equality of status and opportunity and to promote among them all Fraternity assuring the dignity of the individual and the unity and integrity of the nation*".

3. Part III, *The Constitution of India*

4. Part IV, *The Constitution of India*.

5. H.M. Seervai, *Constitutional Law of India*, 14th Ed (1991) at 155.

6. *Id.*

7. See, Articles 12-35, Part III, *The Constitution of India*.

8. The Preamble, *Constitution of India*.

constitution makers to provide social and economic justice as well as equality of opportunity to all, these still exist inequalities in our society. Especially even after years of independence of our country many social evils are still prevalent in our society. Children belonging to the poor and weaker sections are subjected to inequalities in their day to day lives. Therefore⁹, equality in this sense means conferring special benefits on weaker sections though it may mean imposing burden on the privileged classes, which is also called distributive justice. An application of that is juvenile justice. Hence special laws are required for the protection of the poor and neglected children. The constitution guarantees fundamental rights to such children of special treatment under the law. Laws made for the welfare of children are thus in tune with the right to equality.

Article 14 to 18 of the constitution guarantee the right to equality to every citizen of India. Article 14 embodies the general principles of equality before law and prohibits unreasonable discrimination between persons¹⁰. Article 14 embodies the idea of equality expressed in the Preamble. Article 14¹¹ however, does not mean that all laws must be general in character. It does not mean that the same laws should apply to all persons. It does not mean that every law must have universal application for all persons are not by nature, attainment or circumstances in the same position¹². The varying need of different classes of persons often require separate treatment¹³.

While Article 14 forbids class legislation, it does not forbid reasonable classification of persons, objects and transactions by the legislature for the purpose of achieving specific ends. But classification must not be "arbitrary, artificial or evasive". It must always rest upon some real and substantial distinction bearing a just and reasonable relation to the object

9. B.P Dwivedi, *Neglected Juveniles: The Law and Laxity*, 16 *I.B.R* (1989), 478.

10. J.N Pandey, *Constitutional law of India*, 32nd Edi (1997) at 70.

11. Article 14 says, "*The state shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.*"

12. J.N Pandey, *Constitutional law of India*, 32nd Edi (1997) at 72.

13. *Chiranjit Lal vs. Union of India*, AIR 1951 SC 41.

sought to be achieved by the legislature¹⁴. Therefore, it is significant to note that Article 15(3)¹⁵ of the constitution makes special provision for children. It is stated that the welfare of children is of prime importance in a welfare state, hence any special provision for their protection or upliftment would not offend against the guarantee of non – discrimination in Article 15(1)¹⁶.

In *Gaurav Jain v. Union of India*¹⁷, a writ petition was filed by a public spirited lawyer under Article 32 of the constitution on behalf of a class of women who were trapped as victims of circumstances in the flesh trade and welfare of their children. The petitioner sought the improvement of the plight of the unfortunate women and their progeny. A significant question that arose before the court was : what are the rights of the children of the fallen women, the modules to segregate them from their mothers and others so as to give them protection, care and rehabilitation in the mainstream of national life.

The court observed that the Preamble of the Indian constitution pledges to secure ‘socio – economic justice’ to all its citizen with stated liberties ‘equality of status and opportunity ‘assuring ‘fraternity’ and dignity of the individual. The fallen women too are part of citizenry. The victims of the trap are poor, illiterate and ignorant sections of the society and are the target group in the flesh trade. Despite that trap, she is confronted with the problems to bear and rear the children. The limitations of trade comfort them in bringing up their children, be it male or female. Their children are equally subjected to inhuman treatment by managers of brothels and are subjected to discrimination, social isolation, they are deprived of their right to live a normal life for no fault of their own. Nevertheless, there is the realization for the need to keep such children away from the red light area, particularly girl children and have them inducted into respectable and meaningful avocations or

14. J.N Pandey, *Constitutional law of India*, 32nd Edi (1997) at 73.

15. Article 15(3) says, “Nothing in this article shall prevent the state from making and special provision for women and children”.

16. Article 15(1) says, “The state shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.”

17. *AIR* 1997 SC 3021 at 3026.

self employment schemes. They need to be treated with humanity and compassion so as to integrate them into the social mainstream¹⁸.

The court further pointed out that equally, the right of the child is the concern of the society so that fallen women surpass trafficking of her person from exploitation; continue to bring up her children, live a life with dignity and to continue in the foul social environment. Equally, the children have the right to equality of opportunity, dignity and care, protection and rehabilitation by the society with both hands open to bring them into the mainstream of social life without pre – stigma affixed on them for no fault of theirs. The convention on the Rights of the Child, The Fundamental Rights in part III of the Constitution, Universal Declaration of Human Rights, the Directive Principles of the state Policy are equally made available and made meaningful instruments and means to ameliorate their conditions social, educational, economical and cultural and to bring them into the social stream by giving the same opportunities as had by other children¹⁹.

*Lakshmikant Pande V. Union Of India*²⁰, is another case in point where a letter by an Advocate was treated as a writ petition, complaining of malpractices indulged in by social organizations and voluntary agencies engaged in the work of offering Indian Children in adoption to foreign parents. The letter alleged that not only Indian Children of tender age are under the guise of adoption “exposed to long horrendous journey to distant foreign countries at great risk to their lives but in cases where they survive and where these children are not placed in the shelter and Relief Homes, they in course of time become beggars or prostitutes for want of proper care from their alleged foster parents”. Therefore, the petitioner accordingly sought relief restraining Indian based private agencies “from carrying out further activity of routing children for adoption abroad” and directing the Government of India, the Indian council of child welfare to carry out their obligations in the matter of

18. *Id.* At 3027, See also, *Gaurav Jain V. Union of India*, AIR 1990 SC 292.

19. *Id.* at 3027.

20. AIR 1984 SC 469 at 471.

adoption of Indian Children by foreign parents²¹.

The court observed that in a civilized society the importance of child welfare cannot be over emphasized, because the welfare of the entire community, its growth and development, depend on the health and well being of its children. Children are a “supremely important national asset” and the future well – being of the nation depends on how its children grow and develop. The great poet Milton put it admirably when he said:

“*Child shows the man as morning shows the day*” and the study Team on social welfare said much to the same effect when it observed that “*the physical and mental health of the nation is determined largely by the manner in which it is shaped in the early stages.*”²² The Court further observed that the child is a soul with a being, with a nature and capacities of its own, who must be helped to grow into their maturity, into fullness of physical and vital energy and the utmost breadth, depth and height of its emotional intellectual and spiritual being, otherwise there cannot be a healthy growth of the nation. Therefore, naturally children need special protection because of their tender age and physique, mental immaturity and incapacity to look after themselves. The court was of the opinion that there is a growing realization in every part of the globe that children must be brought up in an atmosphere of love and affection and under the tender care and attention of parents so that they may be able to attain full emotional, intellectual and spiritual stability and maturity and acquire self confidence and self – respect and a balanced view of life with full appreciation and realization of the role which they have to play in the nation building process without which the nation cannot develop and attain real prosperity because a large segment of society would then be left out of the development process. Article 15(3) which enables the state to make special provisions inter alia for children reflects this consciousness.²³

21. *Id.* at 471

22. Quoted in *Laxmikant AIR 1984 SC 469*.

23. *Id.* at 474-75.

(ii) **Right to life and personal liberty:** -Article 21²⁴ of our constitution is said to be the most important fundamental right. The expansive interpretation of Article 21 includes the right to live with human dignity. Where legislation has been made for the welfare of weaker sections in furtherance of directive principles, its implementation may be directed by the courts under Article 21.²⁵ The right to live with human dignity includes protection of children of tender age against abuse, opportunities and facilities for children to develop in a healthy manner and in conditions of freedom and dignity, educational facilities, just and human conditions.²⁶ Further the object of Article 21 is to prevent encroachment upon personal liberty by the executive save in accordance with law and in conformity with the provisions thereof.²⁷

It is pertinent to note here that particularly in the 4th and 5th decades of the constitution there has been tremendous development in the area of right to life and personal liberty due to different reasons at the national and international level. When India adopted the International Human Rights instruments in 1979 the judiciary became more conscious about the rights of weaker sections particularly children and in the subsequent judicial decisions' we find the copious references to the international documents to improve the lot of juveniles. This phenomenal growth led to the development of group rights for juveniles which was enforced even against individuals through public interest integration. We find on the analysis of some of the judicial decisions in this respect that the evolution of the right to live with human dignity brought Article 21 to the international standard.

In *Vikram Deo Singh Tomer V. State of Bihar*,²⁸ the court pointed out that India being a welfare state is governed by a constitution which holds a pride of place in the heart of its citizens. It lays special emphasis on the

24. Article 21 says, "No person shall be deprived of his life or personal liberty except according to procedure established by law".

25. B.P Dwivedi, *Neglected Juveniles; the Law and Laxity*, 16 *IBR*(1989) 488.

26. *Bandhua Mukti Morcha V. Union of India*, AIR 1984 SC 802 at 811 – 12.

27. *Gopalan V. State of Madras* (1950) SCR 88.

28. AIR 1988 SC 1782.

protection and well being of the weaker sections of society and seeks to improve their economic and social status on the basis of constitutional guarantees spelled out in its provisions. It shows particular regard for children and notwithstanding the pervasive ethos of the doctrine of equality it contemplates special provision being made for them by law. The court stated that we live in an age when this court has demonstrated while interpreting Article 21 of the Constitution, that every person is entitled to a quality of life consistent with his human personality. The right to live with human dignity is the fundamental right of every citizen. And, so the court stressed the fact that in the discharge of its responsibilities to the people, the state recognizes the need for maintaining establishments for the care of unfortunate children, who are the castaways of an imperfect social order and for whom, therefore, of necessity provisions must be made for their protection and welfare. Therefore, to abide by the constitutional standards recognized by well accepted principle it is incumbent upon the state when assigning children to such establishments described as "Care Homes" to provide at least the minimum conditions ensuring human dignity.

Yet another significant case is that of *Kadra Pehadiya V. State of Bihar*²⁹. In this case four young boys were kept in Pakud Sub jail in Santhal Praganas for a period of about eight years without any progress in their trial. It was stated that these four young boys could not have been more than 9 to 11 years old when they were arrested. Though the petitioners were brought to the jail as far back as November and December 1972 their case was not committed to the Court of Session until 2nd July 1974. The Supreme Court ordered the High Court of Patna to make an inquiry as to why it should have taken a period of 20 months for the case of the petitioners to be committed to the session's court. Further, it had taken a period of three years for the trial to begin after the committal to the Court of Session. This disclosed a shocking state of affairs. Moreover, though the trial of the petitioners commenced on

29. AIR 1981 SC 939 at 940.

30th August 1977 it was merely a symbolic commencement for it never proceeded further and had not made any progress. Even after three years they were still rotting in jail, not knowing what was happening to their case.

The court further stated that the petitioners were reconciled to their fate, living in a small world of their own, cribbed, cabined and confined within the four walls of their prison. The outside world just did not exist for them. The constitution had no meaning and significance and human rights no relevance for them. The court then referred to how it had criticized this shocking state of affairs in *Hussainara Khatoons's case*³⁰ and had hoped that after the anguish expressed and the severe strictures passed by the court the justice system in the state of Bihar would improve and no one would be allowed to be confined in jail for more than a reasonable period of time. Nevertheless, the situation had remained unchanged and the four petitioners who had entered the jail as young lads of 12 or 13 had been languishing in jail for over eight years for a crime which perhaps ultimately they might be found not to have committed. The court failed to understand why the justice system had become so dehumanized that lawyers and judges did not feel a sense of revolt at caging people in jail for years without a trial. Since the trial had not made any progress for the last over eight years, the Supreme Court directed the Sessions Judge, Dumka to take up the case against these four petitioners immediately and to proceed with it from day to day without any interruption.

Besides, it was also found on enquiry that the four petitioners were made to work outside jail walls for fetching water and doing other duties and to guard against the possibility of their running away, they were put in leg irons which were not taken off and they remained in leg irons even at lock up time. Therefore, the four under trial prisoners made to work outside the jail walls was held to be in flagrant violation of prison regulations and contrary to the ILO conventions against forced labour. Hence, the

30. *Hussainara Khatoon v. Home Secretary, Bihar*, AIR 1979 SC 1360.

superintendent of the Pakud sub – jail was directed by the court to immediately remove leg irons from the feet of the four petitioners and to resist from taking work from them so long as they are under trial prisoners³¹.

*Sheela Barse V. Union of India*³² is another case in point where an application under Article 32 of the Constitution had asked for the release of children below the age of 16 years detained in jails within different states of the country, production of complete information of children in jails, information as to the existence of juvenile courts, homes and schools and for a direction that the District Judges should visit jails or sub jails within their jurisdiction to ensure that children are properly looked after when in custody as also for direction to the State Legal Aid Boards to appoint duty counsel to ensure availability of legal protection for children as and when they are involved in criminal cases and are proceeded against.

The court for the first time held that where a complaint is filed or first information report is lodged against a child below the age of 16 years for an offence punishable with imprisonment of not more than 7 years, the investigation should be completed within a period of three months from the date of filing of the complaint or lodging of the First Information Report and if the investigation is not completed within this time, the case against the child must be treated as closed. Further, after the filing of the charge sheet against the child within three months, the case must be tried and disposed of within a further period of 6 months and this period should be inclusive of the time taken up in committal proceedings³³. The court reiterated what it had stated in *Hussainara Khatoons's case*³⁴ that the right to speedy trial is a fundamental right implicit in Article 21 of the constitution. The consequence of violation of the fundamental right to speedy trial would be that the prosecution itself would be liable to be quashed on the ground that it is in breach of the fundamental

31. AIR 1981 SC at 940-41.

32. AIR 1986 SC 1773 at 1774.

33. AIR 1986 SC 1773 at 1778.

34. *Hussainara Khatoons V State of Bihar*, AIR 1979 SC 1360.

right.

The court also suggested that instead of each state having its own Children's Act different in content and procedure from the Children's Act in other states, it would be desirable if the Central Government initiated Parliamentary Legislation on the subject, so that there is complete uniformity in regard to the various provisions relating to children in the entire territory of the country. Besides, the Children's Act which may be enacted by parliament should contain not only provisions for investigation and trial offences against children below the age of 16 years but should also contain mandatory provisions for ensuring social, economic and psychological rehabilitation of the children who are either accused of offences or are abandoned or destitute or lost.³⁵

(iii) **Right Against Exploitation:** - In our Indian society many social evils have been in existence since ancient times. Some of these social evils are still prevalent even to this day. One of such social evil is the exploitation of poor children in the hands of privileged classes especially in the name of slavery which is one of the worst forms of traffic in human beings. Since slavery is no longer a social menace anywhere in India therefore the constitution does not specifically mention it. Nevertheless, another manifestation of the same evil is still prevalent all over the world that is traffic in children for immortal purposes. It was necessary to prohibit such practices all together. Therefore, the constitution makers have made an effort to eliminate such practices and as a result of which the right against exploitation was included in the fundamental rights. The right against exploitation has been embodied in Articles 23³⁶ and 24³⁷ of the constitution and these articles are specific manifestations of the ideal and aspiration enshrined therein.

35. AIR 1986 SC 1773 at 1779.

36. Article 23(1) says "*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*".

37. Article 24 says, "*No child below the age of fourteen years shall be employed to work in any factory or mine or engaged in any other hazardous employment.*".

The fundamental rights are generally enforceable against the state as defined under Article 12 of the Constitution which does not include a private individual. Nevertheless, there are some of the socio – economic rights which are frequently violated by private persons. This fact, therefore, was taken into account by the framers of our constitution and the provisions were incorporated to protect such rights even against private persons. The relevant articles 23 and 24 are thus available against the state as well as private individuals. The implication of this provision is that even if the exploitation of juveniles is at the hands of the individual the state may be directed through writs to prevent such exploitation in order to enforce the right, although the state did not violate the right because to enforce fundamental right the writ cannot be issued against a private individual. Moreover, the violator in such case being the private individual is liable for punishment for violation of the above requirement in accordance with law.

Article 23 of the constitution thus embodies two declarations. First, that traffic in human beings, begar and other similar forms of forced labour are prohibited. Second, any contravention of this provision shall be an offence punishable in accordance with law. Traffic in human beings means to deal in men and women like goods such as to sell or let otherwise dispose them off. It would include traffic in women and children for immoral or other purposes. In pursuance of Article 23 the bonded labour system has also been abolished and declared illegal by the Bonded Labour System (Abolition) Act, 1976. On the other hand, begar means involuntary work without payment. It is fundamental right of a person, citizen or non – citizen not to be compelled to work without the wages, the only exception being commonly imposed public services. The guarantee is not restricted to begar alone but includes other similar forms of forced labour. Begar commonly connotes forced labour for which no wages are paid, or if some payment is made, it is grossly inadequate. It means making a person work against his will

and without any remuneration³⁸.

People's union for Democratic Rights V. Union of India,³⁹ is a very significant case where the Supreme Court had an occasion to consider the scope and ambit of article 23. The court held that Article 23 was clearly designed to protect the individual not only against the state but also against other private citizens. Article 23 is not limited in its application against the state but it prohibits "*traffic in human beings and begar and other similar forms of forced labour*" practiced by anyone else. The scope of Article 23 is wide and unlimited. The court said that the evil of forced labour was the relic of a feudal exploitative society and it was totally incompatible with the new egalitarian socio-economic order which "we the people of India" were determined to build and constituted a gross and most revolting denial of basic human dignity. It was therefore necessary to eradicate this pernicious practice and wipe it out altogether from the national scene and this has to be done immediately because with the advent of freedom, such practice could not be allowed to continue to blight the national life any longer. The Constitution makers therefore decided to give teeth to their resolve to obliterate and wipe out this evil practice by enacting constitutional prohibition against it in the chapter on fundamental rights, so that the abolition of such practice may become enforceable and effective as soon as the constitution came into force. Therefore, because of this reason the provision enacted in Article 23 was included in the chapter on fundamental rights. The prohibition against "traffic in human beings and beggar and other similar forms of forced labour" was clearly intended to be a general prohibition, total in its effect and all pervasive in its range and it is enforceable not only against the state but also against any other person indulging in any such practice.⁴⁰

The court further stated that every form of forced labour, 'begar' or otherwise is within the inhibition of Article 23 and it makes no

38. V. N. Shukla, *The Constitution of India*, 9th Edi (1994) at 201.

39. AIR 1982 SC 1473.

40. *Id.* at 1486.

difference whether the person who is forced to give his labour or service to another is remunerated or not. Even if remuneration is paid, labour supplied by a person would be hit by this Article if it is forced labour, that is labour supplied not willingly but as a result of force or compulsion⁴¹. Therefore, in the instant case it was held that the deduction of Re 1 per worker per day by the Jamadars from the wages payable to workers employed by contractor for Asiad Projects in Delhi as a result of which the workers did not get the minimum wage of Rs. 9.25 per day was violative of Article 23 of the constitution. The court directed government to take necessary steps for punishing the violation of fundamental rights of citizens guaranteed by Article 23.

In yet another instance the Supreme Court has held that the payment of wages lower than the minimum wages to the person employed on Famine Relief Work is violative of Article 23. Whenever any labour or service is taken by the state from any person who is affected by drought and scarcity condition the state cannot pay him less wage than the minimum wage on the ground it is given to them to meet famine situation. The state cannot take advantage of their helplessness⁴².

The law laid down in Asiad Worker's case and followed in Sanjit Roy has been fully endorsed in the significant case of *Bandhua Mukti Morcha V. Union of India*.⁴³ The court stated that where a public interest litigation alleging that certain workmen are living in bondage and under inhuman conditions is initiated it is not expected of the government that it should raise preliminary objection that no fundamental rights of the petitioners or the workmen on whose behalf the petition has been filed, have been infringed. On the contrary the government should welcome it as it may give the government an opportunity to examine whether bonded labour system exists and as well as to take appropriate steps to eradicate that system. This is the constitutional obligation of the government under Article 23 which prohibits

41. *Id.* at 1488.

42. *Sanjit Ray v. State of Rajasthan*, AIR 1983 SC 328.

43. AIR 1984 SC 802.

‘forced labour’ in any form.

*Vishal Jeet V. Union of India*⁴⁴ is another case in point where the court held that Article 23 which relates to Fundamental Rights in part III of the Constitution and which has been put under the caption ‘Right against Exploitation’ prohibits ‘traffic in human beings and begar and other similar forms of labour’ and provides that any contravention of Article 23(1) shall be an offence punishable in accordance with law. The expression ‘*traffic in human beings*’ is evidently a very wide expression including the prohibition of traffic in women for criminal or other purposes. It was further stated that in implementation of the principles underlying Article 23(1) the suppression of Immoral Traffic in women and Girls Act, 1956 has been enacted under Article 35 with the object of inhibiting or abolishing the immoral traffic in women and girls.

Now coming to Article 24⁴⁵ of the Constitution which is yet another important fundamental right enshrined in the constitution. This article prohibits employment of children below 14 years of age in factories and hazardous employment. This provision is in the interest of health and strength of young person and is in keeping with the provisions of the directives in Article 39(e) and (f).

It is submitted that initially the general understanding was that the right secured by Article 24 will hardly be effective in the absence of legislation prohibiting and penalizing its violation⁴⁶. But in the case of *People’s Union for Democratic Rights V. Union of India*⁴⁷ the Supreme Court of India clearly stated that though the Employment of Children Act, 1938 was not applicable in case of employment in the construction work of these projects, since construction industry is not a process specified in the schedule and is therefore not within the provisions of sub-section (3) of section 3 of that Act.

44. AIR 1990 SC 1413 at 1415.

45. Article 24 says, “No child below the age of fourteen years shall be employed to work in any factory or mine or engaged in any other hazardous employment”.

46. V. N. Shukla, *The Constitution of India*, 9th Edi (1994) at 205.

47. AIR 1982 SC 1473 at 1480.

The court stated that this was unfortunately a sad and deplorable omission and hence, must be immediately set right by every state government by amending the schedule so as to include construction industry in it in exercise of the power conferred under section 3A of the Employment of Children Act, 1938. The court hoped that every state government would take the necessary steps in this behalf without any undue delay because construction work was clearly a hazardous occupation and it was absolutely essential that the employment of children under the age of 14 years must be prohibited in every type of construction work.

The court further referred to Article 24 of the Constitution which was a constitutional prohibition and even if not followed up by appropriate legislation must operate '*proprio vigore*' and construction work being plainly and indubitably a hazardous employment it was clear that by reason of this constitutional prohibition no child below the age of 14 years can be allowed to be engaged in construction work. Therefore, the court observed that there could be no doubt that notwithstanding the absence of specification to the Employment of Children Act, 1938 no child below the age of 14 years could be employed in construction work and the Union of India as also every state government was to ensure that this constitutional mandate was not violated in any part of the country.

The principle that the construction work is a hazardous employment and children below 14 cannot be employed in this work was reiterated by the Supreme Court in labourers working on *Salal Hydro Project V. Jammu & Kashmir*⁴⁸. In this case the Supreme Court referred to what it had pointed out in its judgment in the *Asiad Workers case*⁴⁹ that construction work is a hazardous employment and therefore under Article 24 of the constitution no child below the age of 14 years can be employed in construction work. The problem of child labour was a different problem and it was purely on account of economic reasons that parents often wanted their children to be employed in

48. AIR 1954 SC 177 at 183

49. *Peoples Union for Democratic Rights v. Union of India*, AIR 1982 SC 1473.

order to make two ends meet. The possibility of augmenting their meagre earnings through employment of children was very often the reason why parents did not send their children to schools and there were large dropouts from schools. Therefore, this was an economic problem and it could not be solved merely by legislation. So long as there was poverty and destitution in this country, it would be difficult to eradicate child labour. Nevertheless, the court said that an attempt had to be made to reduce, if not eliminate the incidence of child labour, because it was absolutely essential that a child should be able to receive proper education with a view to equipping itself to become a useful member of the society and play a constructive role in the socio – economic development of the country.

Further, having regard to the prevailing socio – economic conditions, the court submitted that it was not possible to prohibit child labour altogether and infact any such move may not be socially or economically acceptable to large masses of people. That was the reason why Article 24 limited the prohibition against employment of child labour only to factories, mines or other hazardous employments. Hence, construction work was a hazardous employment and no child below the age of fourteen years could be allowed to be employed in construction work by reason of prohibition enacted in Article 24 and this constitutional provision was to be enforced by the Central government.

In another landmark judgement of the Supreme Court namely *M.C Mehta V. State of Tamil Nadu*⁵⁰, the court once again had an occasion to state that children below the age of 14 years cannot be employed in any hazardous industry, mines or other works. The court has also laid down exhaustive guidelines how the state authorities should protect economic, social and humanitarian rights of millions of children, working illegally in public and private sections. In our country Sivakasi was taken as the worst offender in matter of violating prohibition of employing child labour. Since the situation

50. AIR 1997 SC 699.

had become intolerable there, the public spirited lawyer Shri M.C. Mehta thought it necessary to invoke this courts power under Article 32 as after all the fundamental right of the children guaranteed by Article 24 was being grossly violated. He, therefore, brought this matter before the court. He brought to the notice of the Court the plight of the children engaged in Sivakasi Cracker factories. The Court said that if employment of child below that age of 14 is a constitutional indication in so far as work in any factory or mine or engagement in other hazardous work and if it has to be seen that all children are given education till the age of 14 years in view of this being a fundamental right.

Taking guidance there from, the court ordered that the offending employer must be asked to pay compensation for every child employed in contravention of the provisions of the Act a sum of Rs. 20,000/- which sum could be deposited in a fund to be known as child labour Rehabilitation – cum – welfare fund. The liability of the employer would not cease even if he would desire to disengage the child presently employed⁵¹.

The court did not issue directions to the state to ensure alternative employment in every case covered by Article 24 as Article 41 speaks about right to work ‘within the limits of the economic capacity and development of the state’. – as it will drain the resources of the state. Instead the court left the matter to be sorted out by the appropriate government. The court made it clear that incase of getting employment for an adult, the parent or guardian shall have to withdraw the child from the job. Even if no employment would be provided the parent shall have to see that his child is spared from the requirement of the job as an alternative source of income would become avoidable to the child’s family till he continues his studies up to the age of 14 years⁵².

B. DIRECTIVE PRINCIPLES:-

Part IV of the Constitution of India deals with the Directive Principles of State Policy. There are sixteen Articles from 36 to 51

51. *AIR* 1997 SC 699 at 709.

52. *Id.* at 710.

that deal with the Directive Principles which cover a wide range of state activity embracing economic, social, legal and educational problems.

The principles that are embodied in Part IV are directives to the various governments and government agencies including village panchyats to be followed as fundamental in the governance of the country. It shall be the duty of the state to apply these principles in making laws. The word state has been used in various articles in this part and the same has been defined under article 36 which for the meaning of that word makes reference to article 12. Thus, the meaning of the word state throughout part IV wherever that word has been used shall be same as defined under article 12. In addition to the government and legislatures of the Union and the states the state shall include the local as well as other authorities. The term other authorities has been subjected to interpretation by the judiciary that has given a wide meaning and extended to include the agency or instrumentality of the state. Therefore, all such institutions and organizations coming within the ambit of other authorities shall also be bound by the directives proclaimed in Part IV. Thus, they place an ideal before the legislators of India while they frame new legislation for the country's administration. They lay down a code of conduct for the administrators of India while they discharge their responsibilities as agents of the sovereign power of the nation. In short, it is said that the directive principles enshrine the fundamentals for the realization of which the state in India stands. They guide the path which lead the people of India to achieve the noble ideals which the preamble of the Constitution proclaims – Justice, Social, Economic and political; liberty, equality and Fraternity⁵³.

Our constitution contains a separate chapter on directive principles. Now we deal with the directive principles which are relevant in the matter of Juvenile Justice.

(i) Protection of tender age of Children: - The provision relating to the

53. M.V. Pylee, *An Introduction to the constitution of India*, 2nd Edi (1998) at 144.

protection of tender age of children are dealt with in Article 39(e).⁵⁴ Therefore, the objective under clause (e) of Article 39 is that the state should , in particular, direct its policy towards securing that the tender age of the children are not abused. This reflects the great anxiety of the constitution makers to protect and safeguard the interests and welfare of the children of our country. The government of India in pursuance of the constitutional provisions of clause (e) and (f) of Article 39 evolved a national policy for the welfare of the children⁵⁵.

Further, with the growing danger in society to healthy and decent living with morality, the world public opinion congregated at New York in a Convention for suppression of traffic in persons for exploitation for immoral purposes. Pursuant to the signing of that Convention on May 9, 1950 our Parliament passed an Act called "Suppression of Immoral Traffic in Women and Girls Act, 1950" which is now changed as "The Immoral Traffic (Prevention) Act 1956" to which certain drastic amendments are introduced by the Amendments Act of 46 of 1978 and 44 of 1986. This Act aims at suppressing the evils of prostitution in women and girls and achieving a public purpose viz to end evils of prostitution and also to provide an opportunity to these fallen victims so that they could become decent members of the society⁵⁶.

In *M.C Mehta V. State of Tamil Nadu*⁵⁷, the court observed that if the wish embodied in Article 39(e) that the tender age of children is not abused and citizens are not forced by economic necessity to enter avocation unsuited to their age and if children are to be given opportunities and facilities to develop in a healthy manner and childhood is to be protected against exploitation as visualized by Article 39 (f) the least that ought to be done was to see the fulfillment of legislative intendment behind

54. Article 39(e) says, "*The state shall in particular direct its policy towards securing 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 or strength.*"

55. *Vishal Jeet v. Union of India*, AIR 1990 SC 1413.

56. *Id.* at 1416.

57. AIR 1997 SC 699.

enactment of the Child Labour (Prohibition and Regulation) Act, 1986.

Bahagwati, J., (as he was then) in *Lakshmikant Pandey V. Union of India*⁵⁸, while emphasizing the importance of Children has expressed his view thus -

“It is obvious that in a civilized society the importance of child welfare cannot be over – emphasized because the welfare of the entire community, its growth and development depend on the health and well – being of its children, children are a ‘supremely important national asset’ and the future well – being of the nation depends on how its children grow and develop”.

(ii) Protection of childhood and youth against exploitation:-The provision relating to the protection of childhood and youth against exploitation has been dealt with in Article 39(f)⁵⁹ of the constitution. Clause (f) was modified by the constitution (42nd Amendment) Act, 1976 with a view to emphasize the constructive role of the state with regard to children⁶⁰.

In *Sheela Barse V. Union of India*⁶¹, the Supreme Court stated that Article 39(f) of the constitution provides that the 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 moral and material abandonment. Therefore, every state except Nagaland has a children’s Act but in some states that Act has not yet been brought into force. This piece of legislation is for the fulfillment of a constitutional obligation and is a beneficial statute. The state legislatures have enacted the law on being satisfied that the same is necessary in the interest of the society particularly of children. The court suggested that it was a matter for the state government to decide as to when a particular statute should be brought into force and without

58. AIR 1984 SC 469 at 474.

59. Article 39 (f) says, “The state shall in particular direct its policy towards securing 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”.

60. J.N. Pandey, *Constitutional Law of India*, 32nd Edi (1997) at 319.

61. AIR 1986 SC 1773 at 1776.

delay every state should ensure that the Act is brought into force and administered in accordance with the provisions contained therein.

Further, the court stated that if a child is a national asset, it is the duty of the state to look after the child with a view to ensuring full development of its personality. That is why all statutes dealing with children provide that a child shall not be kept in jail. Even apart from this statutory prescription, it is elementary that a jail is hardly a place where a child should be kept. There can be no doubt that incarceration in jail would have the effect of dwarfing the development of the child, coarsening his conscience and alienating him from the society. Hence, the court made it clear that even where children are accused of offences, they must not be kept in jails. The state governments were directed by the court to set up necessary remand homes and observation homes where children accused of an offence can be lodged pending investigation and trial. The court stressed the fact that on no account should the children be kept in jail and if the State Government has not got sufficient accommodation in its remand homes or observation homes, the children should be released on bail instead of being subjected to incarceration in jail⁶².

Next, referring to the plight of prostitutes and their children the Supreme Court in the case of *Gaurav Jain V. Union of India*⁶³, suggested that the rescue and rehabilitation of the child prostitutes and children should be kept under the nodal department namely Department of Women and Child Development under the ministry of Welfare and Human Resource, Government of India. It would devise suitable schemes for proper and effective implementation. Adequate steps should be taken to rescue the prostitutes, child prostitutes and neglected juveniles, measures should be taken to provide them adequate safety, protection and rehabilitation in the juvenile homes manned by qualified, trained social workers or homes run by NGO's with aid and financial assistance given by the government of India or state government concerned.

62. *Id.* at 1777-78.

63. AIR 1997 SC 3021 at 3048, *See also, Gaurav Jain v. Union of India*, AIR 1990 SC 292.

The question concerning the employment of children in any hazardous industry came up before the Supreme Court in the significant case of *M.C Mehta V. State of T.N*⁶⁴, also known as the “child labour abolition case”. In this case the matter was brought in the notice of the court by a public spirited lawyer Sri M.C Mehta through a public interest litigation under Article 32. He brought to the notice of the court the plight of the children engaged in sivakasi cracker factories and how the constitutional right of these children guaranteed by Article 24 was being grossly violated. A three judge Bench of the Supreme Court held that children below the age of 14 years cannot be employed in any hazardous industry or mines or other work.

(iii) Free and Compulsory Education:-Since ancient times there has been a constant realization for the need and importance of education besides the other basic needs of man like food, clothing and shelter. Proper education of a child in the formative years helps in the overall development of the child thereby making him a decent member of the society.

Therefore, it is only education which equips a citizen to participate in achieving the objectives enshrined in the preamble. The constitution seeks to achieve this objective by guaranteeing fundamental rights to each individual which he can enforce through court of law if necessary. The directive principles in part IV of the Constitution are also with the same objective. The dignity of man is inviolable. It is primarily the education which brings forth the dignity of a man. The framers of the constitution were aware that more than seventy percent of the people to whom they were giving the constitution of India were illiterate. They were also hopeful that within a period of ten years illiteracy would be wiped out from the country. It was with this hope that Articles 41⁶⁵ and 45⁶⁶ were brought in chapter IV of the Constitution.

64. AIR 1997 SC 699.

65. Article 41 says, “The state shall within the limits of its economic capacity and development, make effective provision for securing the right to work, to education and to public assistance in cases of unemployment, old age, sickness and disablement and in other cases of undeserved want”.

66. Article 45 says, “The state shall endeavors to provide within a period of ten years from the commencement of this constitution for free and compulsory education for all children until they complete the age of fourteen years”.

An individual cannot be assured of human dignity unless his personality is developed and the only way to do is the educate him⁶⁷.

The question of the fundamental right to education, its scope and limitation came up before the apex court in *Mohini Jain V. State of Karnataka*⁶⁸. The court stated that the directive principles which are fundamental in the governance of the country cannot be isolated from the fundamental rights guaranteed under Part III. These principles have to be read into the fundamental rights. Without making “right to education” under Article 41 of the constitution a reality the fundamental rights under Part III shall remain beyond the reach of large majority which is illiterate. The fundamental rights guaranteed under Part III of the constitution of India including the right to freedom of speech and expression and other rights under Article 19 cannot be appreciated and fully enjoyed unless a citizen is educated and is conscious of his individualistic dignity. The “right to education” therefore, is concomitant to the fundamental rights enshrined under Part III of the constitution. The state is under a constitutional mandate to provide educational institutions at all levels for the benefit of the citizens. The educational institutions must function to the best advantage of the citizens. Opportunity to acquire education cannot be confined to the richer section of the society⁶⁹.

The court further made it clear that every citizen has a ‘right to education’ under the constitution. The state is under an obligation to establish educational institutions to enable the citizens to enjoy the said right. The state may discharge its obligation through state owned or state – recognized educational institutions⁷⁰.

However, the broad proposition given by the Supreme Court in *Mohini Jain’s case*⁷¹ was rejected and the whole doubt as to

67. *Mohini Jain v. State of Karnataka*, AIR 1992 SC 1858 at 1863.

68. *Id.*

69. *Id.* at 1864-1865.

70. *Id.* at 1866.

71. *Id.* at 1858.

emergence of fundamental right to education was removed by the Supreme Court in its landmark judgement in *Uni Krishnan V. State of Andhra Pradesh*⁷², where the court stated that it could not agree with such a broad proposition as given in *Mohini Jain's case* because it would mean that every citizen of this country could call upon the state to provide him education of his choice. The right to education which is implicit in the right to life and personal liberty guaranteed by Article 21 must be construed in the light of the directive principles in Part IV of the constitution. The three articles 45, 46 and 41 are designed to achieve the goal enshrined in the Preamble relating to education. It is in the light of these articles that the contents and parameters of the right to education have to be determined. Right to education understood in the context of Article 45 and 41 means a) every child/ citizen of this country has a right to free education until he completes the age of fourteen years, and b) after a child/ citizen completes 14 years his right to education is circumscribed by the limits of the economic capacity of the state and its development. Nevertheless, it is pertinent to note here that right to education has been made a fundamental right by virtue of Article 21-A. This Article was inserted by the 86th Amendment, 2002.

(iv) Nutrition and standard of living: -Article 47⁷³ of the constitution deals with the provisions relating to the duty of the state to raise the level of nutrition and the standard of living and to improve the public health. Therefore, this article directs on the state to regard the raising of the level of nutrition and the standards of living of the people and the improvement of public health as among its primary duties. Further, the state is required to take steps to bring about prohibition of the consumption except for medical purposes of intoxicating drinks and drugs.

72. AIR 1993 SC 2178 at 2231-32.

73. Article 47 says, "*The state shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties and, in particular, the state shall endeavor to bring about prohibition of the consumption except for medicinal purposes of intoxicating drinks and of drugs which are injurious to health*".

In *State of Bombay V. F. N Balsara*⁷⁴, the directive that the state shall endeavour to bring about prohibition of the consumption of intoxicating drinks and drugs was taken into support of the courts decision that the restrictions imposed by the Bombay Prohibition Act in respect of possession, sale use or consumption of liquor were not unreasonable restrictions on the exercise of the right guaranteed under article 19(1). The court observed that this article only deals with the matter of provision and says that while prohibition is being enforced, it will not cover the matter of consumption of intoxicating drinks or drugs for medical purposes. But this does not mean that if intoxicating drinks or drugs are found to be misused on a large scale for the purposes of intoxication and not for medicinal purposes, a prohibition of such use will not amount to disobedience of the directive.

In *Ghaio Mau & Sons V. State of Delhi*⁷⁵, the petitioning firm urged that it had a legal right to sell liquor. The court stated that this is incorrect. From the earliest times it has been found expedient to control the use and traffic in liquor and this control embraces both regulatory and prohibiting measures. The court pointed out that this doctrine has been recognized by the Directive principles of the state policy in Article 47 of the constitution and it is an accepted directive that manufacture or sale or its possession or even its use is not a matter of inherent or natural right vested in a person and it is a mere privilege which the government may grant to one person and deny to another person. This power of the government to regulate or prohibit use and traffic in liquor includes the power to prescribe reasonable rules on which such business may be conducted. One of the recognized forms of this regulation is to prohibit this trade except on grant of a license which is a permission to the license to engage in the trade on the terms laid down in the license. Such a license is a merely personal and a temporary permit or privilege to be enjoyed as long its terms are complied with. The Court further observed that, therefore, the issue

74. AIR 1951 SC 318.

75. AIR 1956 Punjab 97 at 98-99

of a license is a matter of grace granted by the government and is not a matter of right. The legislature by statute generally makes the granting of a license dependent on the approval of the applicant by some officer. It is however, clear that no person can demand such a license as of right and cannot carry on the trade under the law of the land without first obtaining the required approval of the licensing authority.

Subsequently in *Arjan Das V. State of Punjab*⁷⁶, a petition was filed under Article 226 of the constitution challenging the validity of the Punjab Opium (Restriction on Oral Consumption) Rules promulgated by the Punjab government under section 5 of the Opium Act (Central Act 1 of 1878) on the grounds that they are inconsistent with the parent opium Act and contravene articles 14 and 19(1) (g) of the constitution.

It was argued on behalf of the petitioner by the learned counsel that the provisions of these rules are inconsistent with the Opium Act in as much as they impose restrictions and ultimately prohibition in the consumption of opium, while section 5 merely permits the state government to regulate the possession and sale of opium and this provision necessarily excludes restrictions and prohibition. The learned Counsel also argued that some of these rules contravene the constitution in as much as they give arbitrary and uncontrolled power to the Excise and Taxation Officer and impose unreasonable restrictions on the petitioner's right to carry on trade in opium. It was also argued that these restrictions and prohibition cannot be enforced by the rules framed under section 5 of the Act but that this can only be done by legislation. The court observed that in the present case the legislature in section 4 of the Opium Act has declared its decision of prohibiting sale and possession of opium. The court then referred to Article 47 of the constitution which lays down that the Government shall endeavor to bring about prohibition or consumption of intoxicating things and drugs which are injurious to health. Obviously opium is a drug which is injurious to health. Therefore, the court

76. AIR 1958 Punjab 400.

held that in the context of the present case “regulations” and “conditions” include prohibition of opium trade⁷⁷.

Thus, the constitution mandates that every child shall have the right to health, well – being, education and social protection without any discrimination on the ground of caste, birth, colour, sex, language, religion, social origin, property or birth alone⁷⁸.

NATIONAL POLICY FOR CHILDREN

Apart from the constitutional provisions as discussed it is also desirable to mention the national policies. The national policies influence lawmaking, clarify laws and ultimately have the effect of supporting rights⁷⁹. Therefore, the following national policies are particularly related to children:

(A) National Children Policy:- The government of India after having considered the question of evolving a national policy for the welfare of children decided to adopt the National Policy for children on 22nd August, 1974. The National Policy for the welfare of children starts with a preamble which is goal oriented:

“The Nation’s children are a supremely important asset. Their nurture and solitude are our responsibility. Children’s programme should find prominent part in our national plans for the development of human resources, so that our children grow up to become robust citizen, physically fit, mentally alert and morally healthy, endowed with the skills and motivations provided by society. Equal opportunities for development to all children during the period of growth should be our aim, for this would serve our larger purpose of reducing inequality and bring social justice”.

Certain measures have also been set out by the National Policy which the government of India proposes to adopt towards attaining the objectives that have been set out in the preamble which are as follows:

77. *Id* at 401-402.

78. Mamta Rao, *Law relating to women and children*, 1st Edn, 2005, at p. 411

79. *Id*.

- (i) All children shall be covered by a comprehensive health programme.
- (ii) Programmes shall be implemented to provide nutrition services with the object of removing deficiencies in the diet of children.
- (iii) Programmes will be undertaken for the general improvement of the health and for the care, nutrition and nutrition education of expectant and nursing mothers.
- (iv) The state shall take steps to provide free and compulsory education for all children upto the age of 14 for which a time bound programme will be drawn up consistent with the availability of the resources. Special efforts will be made to reduce the prevailing wastage and stagnation in schools, particularly in the case of girls and children of the weaker sections of the society. The programme of informal education for pre – school children from such sections will also be taken up.
- (v) Children who are not able to take full advantage of formal school education should be provided other forms of education suited to their requirements.
- (vi) Physical education, game, sports and other types of recreational as well as cultural and scientific activities shall be promoted in schools, community centres and such other institutions.
- (vii) To ensure equality of opportunity, special assistance shall be provided to all children belonging to the weaker sections of the society, such as children belonging to the Scheduled Castes and Scheduled Tribes and those belonging to the economically weaker sections, both in urban and rural areas.
- (viii) Children who are socially handicapped, who have become delinquent or have been forced to take to begging or are otherwise in distress, shall be provided facilities of education, training and rehabilitation and will be helped to become useful citizens.
- (ix) Children shall be promoted against neglect, cruelty and exploitation.
- (x) No child under 14 years shall be permitted to be engaged in any hazardous occupation or to be made to undertake heavy work.
- (xi) Facilities shall be provided for special treatment, education, rehabilitation

and care of children who are physically handicapped, emotionally distributed or mentally retarded.

- (xii) Children shall be given priority for protection and relief in times of distress or natural calamity.
- (xiii) Special programmes shall be formulated to spot, encourage and assist gifted children, particularly those belonging to the weaker sections of the society.
- (xiv) Existing laws should be amended so that in all legal disputes whether between parents or institutions the interests of children are given paramount consideration.
- (xv) In organizing services for children, efforts would be directed to strengthen family ties so that full potentialities of growth of children are realized within the normal family, neighborhood and community environment.

The National Policy for children further sets out for the constitution of a National Children Board to provide focus and to ensure at different levels continuous planning, review and coordination of all the essential services and similar Boards may also be constituted at the state level. The National Policy for children also lays down that the government shall endeavour that adequate racecourses are provided for child welfare programmes and appropriate schemes are undertaken. At the same time, voluntary organizations engaged in the field of child welfare will continue to have the opportunity to develop, either on their own or with state assistance in the field of education, health, recreation and social welfare services. In order to achieve the above aims, the state will provide necessary legislative and administrative support⁸⁰.

(B) National Child Labour Policy 1987:-

The need to protect child labour from exploitation and from being subjected to work in hazardous conditions that endanger such

80. http://www.indg.in/primary-education/policies_and_schemes/national_policy_for_children_1974.pdf (visited on 10th Nov 2011).

children's physical and mental development, and the need to ensure the health and safety of children at the workplace was recognized by the government. It further recognized that they should be protected from excessively long working hours and from night work, that work even in non – hazardous occupations should be regulated and all working children should be provided with sufficient weekly rest periods and holidays. The National Child Labour Policy 1987 envisages the strict enforcement of the provisions of the child labour (Prohibition and Regulation) Act 1986 and other related legislation. The policy further sets out that in order to successfully rehabilitate child labour withdrawn from employment and to reduce the incidence of child labour progressively, the environment of the child needs to be focused. The ongoing development programmes in the areas of education, health, nutrition, integrated child development and the anti poverty programmes are utilized for the benefit of the child and his family, and this will diminish the compulsion to send the children to work⁸¹.

The National Child labour policy lays down that project based approach has been adopted for identification, withdrawal and rehabilitation of working children in areas where there is high concentration of child labour. Therefore, in areas having high concentration of child labour The National Child labour Projects (NCLP) were launched for the first time in 1988. The elimination of the prevalence of child labour in this country is the main objective of the National Child Labour Project (NCLP). The components of the running of the NCLP are:

- (i) Enforcement of the Child Labour (Prohibition and Regulation) Act 1986, the Factories Act 1948, the Mines Act 1952 and such other Acts within the project area.
- (ii) Coverage of families of child labour under the income/employment generating programmes under the over aegis of anti poverty programmes.

81. <http://www.tnchildlabour.tn.gov.in/nclp87.htm> (visited on 10th Nov' 2011).

- (iii) Formal and non – formal education for child labour in hazardous employment. Also, a stepped – up programme of Adult education.
- (iv) Setting up of special schools for child workers together with provision of vocational education/training in such special schools, supplementary nutrition, and stipend to the children taken out from the prohibited employments and health care for all the children attending at such special schools.
- (v) Creating awareness among the different target groups in the society through governmental and non – governmental organizations to raise their consciousness on the issue of child labour.
- (vi) Survey of child labour in the project areas and also evaluate the progress of the project periodically.

(C) National Education Policy:-

Education plays a very important part in the overall development of a child. One of the essential elements of human capability is the ability to read and write. Without education human being cannot progress further in life. Education is the first step towards acquiring other tools of learning. Apart from this it equips people to make informed choices, empowers them to resist oppression and enables them to claim their rights⁸².

Therefore, after independence the first commission that was appointed was the University Education Commission in 1948. Dr. S. Radhakrishnan was the chairman and under his chairmanship the commission was to report on Indian University Education and also suggest improvements and extensions that would be desirable to suit the present and future requirements of the country.

A comprehensive and voluminous report was prepared by

82. <http://bhrc.bih.nic.in/Docs/childrenRights.pdf> (visited on 10th November 2011).

the commission and got for itself the task of reorienting the education system to face the “great problem, national and social, the acquisition of economic independence, the increase of general prosperity, the attainment of effective democracy, overriding the distinctions of caste and creed, rich and poor and a rise in the level of culture. For a quick and effective realization of these aims, education is a powerful weapon if it is organized effectively and in public interest as we claim to be civilized people, we must regard the higher education of the rising generations as one of our principle concerns”. The essential tasks of this commission were in correspondence to the class needs i.e. to orient the educational system towards achieving economic independence and attainment of values to ensure an effective democracy⁸³.

Thereafter, in September 1952 the secondary education commission was appointed under the chairmanship of Dr. L.S Mudaliar. This commission reinforced the recommendations of Dr. Radhakrishnan and submitted its report to the first Parliament in 1953. A major contribution of this commission was the establishment of multi purpose schools.

The Education Commission was another commission that was appointed after the Mudaliar commission. Under the chairmanship of D.S Kothari this commission was to deal with all aspects and sectors of education and to advise government on the evolution of a National System of Education for the country. However, the commission was criticized on the ground that it did not give a clear picture of development of the future society we should strive to create in the country and the steps to be taken to create it. Further, it has been argued that the commission’s report failed to highlight the close links between education and society though it prepared a blueprint of the national system of education.

In 1968 the Policy Resolution was adopted following the submission of the report. The National Policy of 1968 marked a significant step

83. http://shodhganga.inflibnet.ac.in/bitstream/10603/1918/8/08_chapter3.pdf (visited on 14th Nov 2011)

in the history of education is post Independence India. To promote national progress, a sense of common citizenship and culture and to strengthen national integration was the main aim of this National Policy. Emphasis was laid on the need for a radical reconstruction of the education system, to improve its quality at all stages, and gave much greater attention to science and technology, the cultivation of moral values and a closer relation between education and the life of the people. However, in 1969 the Kothari Commission was found lacking in many respects in relation to governance. Thus, the Banaras Hindu University Inquiry Committee was appointed in 1969. The commission recommended regarding the appointment of Vice Chancellors, structure and composition of university grants etc which gave the state a greater control over the administration higher education correspondent to the ruling classes interest and hence was implemented⁸⁴. Thereafter, with the defeat of the Congress in the 1977 elections and with the formation of the Janata Government the Draft Education Policy of 1979 was prepared. The main emphasis of the policy was on non – formal education. But this education policy could not be adopted by the government successfully because of the early downfall of the Janata Party.

In the year 1986 the National Policy of Education and its Programme of Action (POA) gave unqualified priority to Universalization of Elementary Education (UEE) and many innovations were introduced. Firstly, the emphasis from enrolment perse was shifted to enrolment as well as retention. In this respect the Programme of Action, 1986 states rightly that “enrolment by itself is of little importance if children do not continue beyond one year, many of them not seeing the school for more than a few days”. Secondly, the NPE, 1986 sought to adopt an array of meticulously formulated strategies based on micro – planning, and applied at the grass roots level all over the country, to ensure children retention at school. POA, 1986 sought to replace enrolment drives by participative planning in which the teachers and villagers would formulate family wise and child wise design of action to ensure

84. <http://www.ugc.ac.in/policy/policy.html> (visited on 14th November 2011).

that every child regularly attended school or non – formal education centre and completed atleast five years of schooling or its non formal equivalent. Thirdly, the NPE, 1986 recognized that unattractive school environment, unsatisfactory condition of buildings and insufficiency of instructional material function as demotivating factors for children and their parents. Therefore, a drive for a substantial improvement of primary schools and provision of support services was called for by the policy. Fourthly, the adoption at the primary stage of a child centered and activity – based process of learning was commended by the NPE, 1986. Fifthly, the NPE 1986 and its POA postulated a large programme of restructuring of teacher education, pre – service as well as in service. Lastly, the NPE 1986 sought to address the most difficult aspect of access viz access to education of millions of girls and working children who, because of socio – economic compulsions cannot participate in school system. Most of the directives of NPE – POA have been operationalised by the Union and States/ Union Territories⁸⁵.

(d) National Policy of Handicapped Persons:-

The National Policy recognizes that persons with disabilities are valuable human resources for the country and seeks to create an environment that provides them equal opportunities, protection of their rights and full participation in society. The policy mainly focuses on prevention of disabilities, rehabilitation measures and physical rehabilitation strategies.

The most vulnerable group are children with disabilities and therefore need special attention. Thus, the government in this respect would strive to⁸⁶

- (i) Ensure right to care, protection and security for children with disabilities;

85. <http://roton.educationforallinindia.com/page64.html> (visited on 15th Nov 2011).

86. <http://www.disabilityindia.org/nationalpolicyfordisable.cfm#top>. (visited on 15th Nov 2011).

- (ii) Ensure the right to development with dignity and equality creating an enabling environment where children can exercise their rights, enjoy equal opportunities and full participation in accordance with various statutes;
- (iii) Ensure inclusion and effective access to education, health, vocational training along with specialized rehabilitation services to children with disabilities;
- (iv) Ensure the right to development as well as recognition of special needs and of care and protection of children with severe disabilities.

Apart from the above mentioned policies it would also be desirable to mention the National Policy and Charter for Children, 2011, the main intent of which is to remove the structural causes related to all issues affecting children's rights in the wider societal context and to awaken the conscience of the community to protect children from violation of their rights, while strengthening the family, society and nation.

Under the National Policy and Chapter for Children, 2001 a number of important rights have been focused on. Some of which are the right to survival; right to health; right to nutrition; right to early childhood care; right to education; right to protection of the girl child; right of child victims.

HISTORY OF CHILD LEGISLATION IN INDIA.

The history of legislation on children in India has been divided into the following periods by reference to legislative or other landmark developments, namely⁸⁷ -

(i) Prior to 1773: -

During this period there were provisions for the maintenance of children in the Hindu as well as Muslim laws and the main responsibility of the parents and family was to bring up children. Under both the Hindu and Muslim laws charity for the care of poor and destitute had been

87. Ved Kumari, *The Juvenile Justice system in India-From Welfare to Rights*, 2004 at p-57.

a noble cause and this in turn provided for the care of children if the family failed to provide so. If a person found an abandoned child then Muslim law made it compulsory for him to take charge of the child if he believed that it would else perish. However, with respect to delinquent juveniles there was no reference in neither set of laws. But it is submitted that a cursory study of the Manusmriti and The Hedaya shows that different punishment were given to children for certain offences⁸⁸. For e.g. under Hindu law, if a child was found throwing filth on a public road then it would not be liable for punishment but only to admonition and the child would be made to clean it whereas an adult if found guilty of a similar offence would be liable to fine as well as to clean the filth. Under the Muslim law a young boy was not punishable if he was found having sex with a consenting adult women. Therefore, these provisions shows that for their criminal activities the principle of lesser culpability of children was adopted. Also, in the two sets of laws the general principles of penology, capable of individualization of punishment were also found. Discretionary power was given to the Kazeer under the Muslim law for the purpose of determining the degree of Tazeer or chastisement. Under the Hindu law the king while giving punishment was to ascertain the motive, the time and place of offence, consider the ability of the criminal to suffer and the nature of the crime and give punishment to those who deserved it. Like in the equity courts in England the King was ordained under the Hindu law to take care of the property of the child till he came of age and became capable of taking care. Therefore, it is submitted that these provisions show that children were recognized as separate entities from adults who required special care and not fully responsible for their acts⁸⁹.

(ii) 1773 – 1850: -

This period saw the transformation of the East India

88. *Id.*

89. *Id.* at 58.

Company from a trading company to a governing body. At the same time during this period the first legislations on children were also introduced. The welfare of children was given importance as is evident from the fact that in 1787 Krishna Chandra Ghosal and Jai Narain Ghosal requested Lord Cornwallis the then Governor – General in India to establish a ‘home’ for destitute children near Calcutta. Thereafter in 1843 due to the efforts of Dr. Buist, an Englishman, the first ‘ragged school’ was established in Bombay for orphans and vagrant children. This school is now known as the David Sassoon Industrial school⁹⁰. This was followed by the introduction of the Apprentices Act, 1850. This Act was the earliest piece of legislation covering children in the age group of 10 – 18. Provisions were made in this Act for the children convicted by courts who were intended to be provided with some vocational training which might help their rehabilitation. Children found destitute by the trying Magistrates were also covered by this Act⁹¹.

(iii) 1850 - 1919.

During this period a wide variety of legislations were enacted that dealt particularly with matters relating to children. Some of them being the Female Infanticide Act 1870 and the Vaccination Act 1880 and also the Guardianship and Wards Act 1890. The first two Acts made provisions to secure life and health of infants whereas the latter Act made provisions for their continued care and protection. Factories Act 1881 was another legislation enacted to deal with the problem of child labour. Apart from this, children below the age of 7 years was declared as *doli incapax* and also the presumption of *mens rea* could be rebutted in case of children in the 7 – 12 age group under the Indian Penal Code.

In 1864 the Whipping Act was enacted as a result of the revelation of high rate of recommitments and major increase in the number of

90. *Id* at 59.

91. Asutosh Mukherjee, *Juvenile Justice*, 1st Edition (1989) at p 54.

juvenile offenders. It was expected that this Act would help in bringing down the number of juveniles lodged in jails. For a long time juvenile delinquents and reformatories were some of the issues relating to jail management and on which immediate legislative action was required. As a result the Reformatory Schools Act, 1879 was enacted. Under this Act a child below 15 years if found guilty of an offence might at the discretion of the court be detained in a Reformatory school for a period of 3 to 7 years instead of being sent to prison. This act also provided that a boy over 14 years of age would be released on license, if suitable employment was found for him, and the head of the Institution was able to indicate certain conditions in regard to licensing if they were fulfilled⁹². In order to empower the local government to effect the reformation in a more cohesive manner the Reformatory Schools Act, 1876 was amended in 1897⁹³. After a year the code of Criminal Procedure 1898 under section 29 B, 399 and 562 authorized Magistrates to send juvenile offenders to reformatories instead of prisons in the specified circumstances along with provisions relating to grant of provision and trial of children by the juvenile court. The Criminal Tribes (Amendments) Act was enacted in the year 1897 under which the children of members of criminal tribes received special attention. This Act further provided for the establishment of industrial, agriculture and reformatory schools for children of members of the criminal tribes who were in the age group of 14 – 18 years. The power to remove such children from criminal tribe settlements and place them in reformatory was given to the local governments⁹⁴.

(iv) 1919 – 1950:-

This period saw the passing of a number of state children Acts such as the Madras Children Act which was passed in June 1920. Under this Act a “child” was defined as a person under 14, a ‘young person’ belonged

92. *Id.* at P -55.

93. Ved Kumari, *The Juvenile Justice System in India From Welfare to Rights*, 2004 at p. 63.

94. *Id.* at 64

to the age group of 14 and 16 and a 'youthful offender' meant a person convicted of an offence punishable with transportation or imprisonment and who at the time of such conviction was under the age of 16 years. The establishment of certified schools, Junior Certified Schools for training of 'children' and senior certified schools for the purpose of training 'youthful offenders' was also provided for under this Act.

In 1922 the Bengal Children Act was passed. With certain insignificant changes definitions of the Madras Act were also incorporated in the Bengal Children Act. In this Act the Certified School came to be known as Industrial School. This was followed by the Bombay Children Act which was passed in 1924. This act was based on the English Children's Act of 1908. Thereafter, in the years to come other states enacted similar Acts for eg – the Assam Students and Juvenile Smoking Act, 1923, the Delhi Children Act, 1941, the Mysore Children Act 1943, the Travencore children Act 1945, the Cochin Children Act 1946 and the East Punjab Act 1949.

In 1943 the Vagrancy Act was enacted. This Act provided for the care and training of children below 14 who lived on begging or were under unfit guardianship or were under the care of parents of drinking or criminal habits or frequently visited prostitutes or were destitute or were subjected to bad treatment.

The child Marriage Restraint Act enacted in 1929 also known as the Sarda Act came into operation during this period.

(v) Post 1950:-

After independence The West Bengal Children Act of 1922 was replaced by the West Bengal Children Act, 1956. In the same year the Women's and Children's Institution (Licensing) Act was passed wherein provisions were made for obtaining licenses by such institutions after fulfilling the norms and conditions and for penalty for breaches thereof.

In 1958 The Probation of Offenders Act was enacted. The power to release certain offenders only on admonition or on probation of good conduct though they are found guilty was given to the courts. Restrictions were

imposed by this Act on imprisonment of offenders under twenty one years of age. In order to rehabilitate the offenders as useful members of society the Probation Officers are entrusted with the duty to act as their friends, philosophers and guides under this Act.

Thereafter in the year 1960 The Children Act was passed which was a central enactment. This was passed in order to look into the needs of the Union Territories and had two main objects i.e. (a) to provide for the care, protection, maintenance, welfare, training, education and rehabilitation of neglected or delinquent children, and (b) to provide for the trial of delinquent children in the Union Territories and in the centrally administered areas. To widen the definition of neglected child to include the children whose parents were not only 'unfit' but also 'unable' to exercise proper care and control The Children Act, 1960 was amended in 1978.

However the need for a uniform children Act was being continually emphasized but it is submitted that the central government showed its inability to enact one on the ground that the subject matter of children Act fell in the state list of the seventh schedule of the constitution. But in 1985 when the UN General Assembly adopted the Beijing Rules, recommendations for a uniform law that was made in the 69th report of the Committee on Subordinate Legislation was tabled in Parliament on 12th May 1986 and the suggestion of the Supreme Court in 1986 for initiating parliamentary legislation on the subject paved the way for bringing uniformity in the law relating to juvenile justice all over the country⁹⁵.

Consequently, with a view to provide a uniform pattern of administration of justice and to ensure that no child under any circumstances is lodged in jail or police lock up all state children Acts including the children Act of 1960 have been replaced by the juvenile justice Act, 1986 as enacted by the Parliament. The Act provided for the care, protection treatment, development and rehabilitation of neglected or delinquent

95. Ved Kumari, *The Juvenile Justice System in India From Welfare to Rights*, 2004 at p. 63.

juveniles and for the adjudication of certain matters relating to delinquent juveniles. The Act also made provision for the establishment of observation homes, juvenile homes for neglected juveniles and special homes for delinquent juveniles.

The legal framework envisaged under the Juvenile Justice Act not only emphasized on elaborate system for dealing with the various aspects of juvenile justice process but also recognized certain types of safeguards for the interest of the juveniles. Thus, performance of certain functions by the police that are based on the recognition of the rights is required for carrying out the process of arrest or taking into charge of a 'neglected juvenile'. This Act gave a role to the police also who after apprehending a child had to report to the nearest juvenile court and send the child to the remand home for safe custody if he is not bailed out.⁹⁶

Therefore, The Juvenile Justice Act, 1986 is said to represent a blueprint for a qualitative improvement in child care services in conformity with the principles of a few equitable and just treatment of neglected or delinquent juveniles⁹⁷.

The enactment of the Juvenile Justice Act, 1986, was followed by numerous national consultations concerning juvenile justice administration during 1999-2000 with a view to improve the existing unsatisfactory state of affairs. As a result under the chairmanship of Justice Krishna Iyer a Committee was appointed to prepare a children Code. The committee submitted its recommendation to the Central Government in the form of "The Children Code Bill 2000".

The Bill is a secular code and seeks to apply its provisions to every child within the territories of India, irrespective of nationality, race, colour, sex, religion, language, birth, political or other opinion, ethnic, economic, or social status or property, disability or any of them

96. Saurabh Malhotra, *Juvenile Justice System : An Overview*, XIV *CILQ* (2001) 236.

97. T. H. Khan, *Juvenile Justice System in India : An Appraisal*, III *CILQ* (1994) 74

of the child or his parents or legal guardian. While drafting this code the primary considerations that lay before the committee were the best interests of the child. Certain children's Rights have been guaranteed by the Bill viz. right to nationality, parentage life, freedom of expression, privacy and shelters, protection and care, education, cultural and religious rights, health care, adoption, refugee children, protection against economic exploitation and abuse and rights in criminal proceedings⁹⁸

The Children's Code Bill 2000, however, did not receive any mention in the same year when the Juvenile Justice (Care and Protection of Children) Bill 2000 was introduced in the Lok Sabha and Rajya Sabha. Consequently, the Parliament in view of the international obligations passed the Juvenile Justice (Care and Protection of Children) Act, 2000 (Act 56 of 2000) in December, 2000. This Act envisages to protect and safeguard the interests and welfare of such children and to give effect to the minimum standards prescribed by the UN convention on the Rights of Child, 1989 which was ratified by India in 1992 and the Beijing Rules. By the passing of the Juvenile Justice (Care and Protection of Children) Act, 2000 the Juvenile Justice Act, 1986 stands repealed.

LEGISLATIVE ENACTMENTS:-

Various legislative measures taken by the Government specially in view of the various Conventions and recommendations of the UN and ILO deserves special mention which are as follows –

(1) THE EMPLOYMENT OF CHILDREN ACT, 1938:-

To combat the evils of child labour in workshops The Employment of children Act, 1938 was passed. This Act prohibits the employment of children below 15 years of age in any occupations connected with the transport of passengers, goods or mail by railway or port authority

98. Mayank Vaid, *Right to Adoption – A "Fundamental" Right of the Child*, 15 *Legal News and Views* (2001) 26-27

within the limits of a port.

This Act further lays down that with the exception of children employed as apprentices or trainees, no child between the ages of 15 and 17 years would be employed or permitted to work in these occupations unless he was allowed a rest interval of atleast 12 consecutive hours in a day which was to include the period between 10.00 p.m and 7.00am. The Act also prohibits the employment of children below the age of 14 years in workshops connected with beedi making, carpet weaving, cement manufacture including bagging of cement, cloth printing, dying and weaving, manufacture of matches, explosions and fireworks, mica cutting and splitting, shellac manufacture, soap manufacture, soap manufacture, training and wool cleaning⁹⁹. However, these provisions do not apply to workshops where the work is done by occupier with the aid of his family only or to any school established, aided or recognized by any state government.

This Act also makes provisions for the Railways and Port to maintain registers showing the names and dates of births of children below the age of 17 who were employed by them¹⁰⁰.

This Act was amended in 1939, 1948, 1949 and 1951 and ultimately in the year 1986 The Child Labour (Prohibition and Regulation) Act was passed which repealed the Employment of Children Act, 1938.

(2) FACTORIES ACT, 1948: -

An Act to consolidate and amend the law regulating labour in factories was passed in 1948 which came into force on 1st April, 1949. This Act is an important one because it makes provision for prohibition of employment of young children and prescribes working hours for minors.

99. Section 3(3), *The Employment of Children Act, 1938*.

100. Section 3 – E, *Id.*

Under chapter VII of the Factories Act, 1948 provisions have been relating to the prohibition of employment of child below 14 years of age¹⁰¹. The Act also requires Non – adult workers to carry tokens¹⁰² and also certificate of fitness to be provided on application to a young person by the surgeon¹⁰³. The Act has also made provision for working hours for

101. Section 67 provides that “No child who has not completed his fourteen years shall be required to work or allowed to work in any factory”.

102. Section 68 provides that “A child who has completed his fourteenth year or an adolescent shall not be required or allowed to work in any factory unless –

a) A certificate of fitness granted with reference to him under section 69 is in the custody of the manager of the factory, and

b) Such child or adolescent carries while he is at work a token giving a reference to such certificate”.

103. Section 69(1) provides that “A certifying surgeon shall on the application of any young person or his parent or guardian accompanied by a document signed by the manager of a factory that such person will be employed therein if certified to be fit for work in a factory, or on the application of the manager of the factory in which any young person wishes to work, examine such person and ascertain his fitness for the work in the factory”.

Section 69(2) provides that “the certifying surgeon, after examination, may grant to such young person, in the prescribed form, or may renew –

a) A certificate of fitness to work in a factory as a child, if he is satisfied that the young person has completed his fourteen years, that he has attained the prescribed physical standards and that he is fit for such work.

b) A certificate of fitness to work in a factory as an adult if he satisfied that the young person has completed his fifteenth year, and is fit for a full days work in a factory.

Provided that unless the certifying surgeon has personal knowledge of the place where the young proposes to work and of the manufacturing process in which he will be employed he shall not grant or renew a certificate under this sub section until he has examined such place”.

Section 69 (3) provides that “A certificate of fitness granted or renewed under sub – section (2) – (a) shall be valid only for a period of twelve months from the date there of: b) may be made subject to conditions in regard to the nature of the work in which the young person may be employed or requiring re – examination of the young person before the expiry of the period of twelve months”.

Section 69(4) provides that “A certifying surgeon shall revoke any certificate granted or renewed under sub-sec(2) if in his opinion the holder of it is no longer fit to work in the capacity stated therein in a factory”.

Section 69(5) provides that “where a certifying surgeon refuses to grant or renew a certificate or a certificate of the kind requested or revokes a certificate, he shall, if so requested by any person who could have applied for the certificate or renewal thereof, state his reasons in writing for so doing”.

Section 69(6) provides that “where a certificate under this section with reference to any young person is granted or renewed subject to such conditions as referred to in clauses (b) of sub-section(3), the young person shall not be required or allowed to work in any factory except in accordance with those conditions”.

Section 69(7) provides that “Any fee payable under this section shall be paid by the occupier and shall not be recoverable from the young person, his parents or guardian”.

children,¹⁰⁴ notice of periods of work for children¹⁰⁵ and register of child workers¹⁰⁶ and other important provisions have also been incorporated under this chapter. Provisions have also been made that deal with the hours of work¹⁰⁷ and power to require medical examination of any person or young person¹⁰⁸. It has been further provided that the provisions of chapter VII shall be in addition to, and not in derogation of the provisions of the Employment of

104. Section 71 (1) says, "No child shall be employed or permitted to work, in any factory – (a) for more than four and a half hours in any day; (b) during the night. Explanation – For the purpose of this sub-section "night" shall mean a period of at least twelve consecutive hours which shall include the interval between 10 pm and 6 am."

Section 71(2) says, "The period of work of all children employed in a factory shall be limited to two shifts which shall not overlap or spread over more than five hours each and each child shall be employed in only one of the relays which shall not, except with the previous permission in writing of the Chief Inspector be changed more frequently than once in a period of fifty days."

Section 71(3) says, "The provisions of section 52 shall apply also to child workers and no exemption from the provisions of that section may be granted in respect of any child".

Section 71(4) says, "No child shall be required or allowed to work in any factory on any day on which he has already been working in another factory".

Section 71(5) says, "No female child shall be required or allowed to work in any factory except between 8 am and 7 pm".

105. Section 72(1) says, "There shall be displayed and correctly maintained in every factory in which children are employed in accordance with the provisions of sub-section(2) of section 108 a notice of periods of work for children, showing clearly for everyday the periods during which children may be required or allowed to work".

Section 72(2) says, "The periods shown in the notice required by Sub-section (1) shall be fixed before hand in accordance with the method laid down for adult workers in section 61, and shall be such that children working for those periods would not be working in contravention of any of the provisions of section 71".

Section 72(3) says, "The provisions of sub-section(8), (9) and (10) of S. 61 shall apply also to the notice required by sub-section (1) of this section".

106. Section 73(1) says, "The manager of every factory in which children are employed shall maintain a register of child workers, to be available to the Inspector at all times during working hours or when any work is being carried on in a factory, showing –

- a) the name of each child worker in the factory,
- b) the nature of his work,
- c) the group, if any, in which he is included,
- d) where his group works on shifts, the relay to which he is allotted and
- e) the number of his certificate of fitness granted under section 69"

Section 73(1A) says, "No child worker shall be required or allowed to work in any factory unless his name and other particulars have been entered in the register of child workers".

Section 73(2) says, "The state Government may prescribe the form of the register of child workers, the manner in which it shall be maintained and the period for which it shall be preserved".

107. Section 74, *The Factories Act, 1948*.

108. Section 75 says, "where an Inspector is of opinion –

- a) that any person working in a factory without a certificate of fitness is a young person, or
- b) that a young person working in a factory with a certificate of fitness is no longer fit to work in the capacity stated therein – he may serve on the manager of the factory a notice requiring that such person or young person as the case may be, shall be examined by a certifying surgeon, and such person or young person shall not, if the Inspector, so directs, be employed, or permitted to work, in any factory until he has been so examined and has been granted a certificate of fitness or a fresh certificate of fitness as the case may be, under section 69, or has been certified by the certifying surgeon examining him not to be a young person".

Children Act, 1938¹⁰⁹.

Penalty provisions for permitting double employment of children have also been incorporated. It has been provided that if a child is made to work in a factory on a day which he has already been working in another factory then the parent or the guardian or the person having custody over the child or if any direct benefit is obtained from his wages then punishment with fine which may extend to one thousand rupees may be awarded unless it appears to the court that the child worked without the consent of the parent, guardian or person¹¹⁰. Provisions have also been made regarding onus as to age¹¹¹.

(3) MINING LEGISLATION:-

The first Act that was passed with respect to mines was the Indian Mines Act, 1901. Under this Act the Chief Inspector was granted power to prohibit employment of children in mines where conditions were dangerous to their health and safety. This Act was replaced by the Indian Mines Act, 1923 under which provisions were made prohibiting the employment of a child in a mine or the presence in any part of a mine that was below the ground or in any open excavation in which any mining operation was being carried out.

The Indian Mines Act was amended in 1935 and the minimum age for employment of children in mines was raised from 13 to 15 years. It was further provided that an adolescent could be employed underground only if he was duly certified by a qualified medical practitioner. In 1952 the Mines Act, was re-enacted with a view to bring the mine legislation

109. Section 77, *The Factories Act, 1948*.

110. Section 99, *Id.*

111. Section 104(1) says, "*When any act or omission would, if a person were under a certain age, be an offence punishable under that Act, and such person is in the opinion of the court prima-facie under such age, the burden shall be on the accused to prove that such person is not under such age*".

Section 104(2) says, "*A declaration in writing of a certifying surgeon relating to a worker that he has personally examined him and believes him to be under the age stated in such declaration shall, for the purposes of this Act and the rules made there under, be admissible as evidence of the age of that worker*".

at par with the Factories Act, 1948¹¹².

The Mines Act, 1952 is a legislation to regulate the employment of children in mines. Provisions have been made relating to the prohibition of employment of person below 18 years in a mine¹¹³. Further, provisions have been incorporated regarding the power of medical examination¹¹⁴. The penal provisions have also been laid down which provides that if a person is employed in a mine in contravention of section 40, the owner, agent or manager of such mines shall be liable to punishment with fine.

4) THE MOTOR TRANSPORT WORKERS ACT, 1961:-

This Act as amended in 1986 was passed to regulate the conditions of service of motor transport workers. This Act also prohibits employment of children¹¹⁵. Provisions regarding adolescents employed as motor transport workers to carry tokens¹¹⁶, grant of certificate of

112. Asutosh Mookherjee, *Juvenile Justice*, 1st Edition (1989) at P – 65.

113. Section 40(1) says, "After the commencement of Mines (Amendment) Act 1983, no person below 18 years of age shall be allowed to work in any mine or part thereof".

Section 40(2) says, "Notwithstanding anything in sub section (1) apprentices and other trainees not below 16 years of age may be allowed to work in any mine or part thereof by the manager : Provided that incase of trainees, other than apprentices, prior approval of the Chief Inspector or an Inspector shall be obtained before they are allowed to work.

Explanation –In this section and in section 43, apprentice means an apprentice in clause (a) of Section 2 of the Apprentice Act, 1961."

114. Section 43(1) says, "where an inspector is of opinion that any person employed in a mine or otherwise than as an apprentice or other trainee is not an adult or that any person employed in a mine as an apprentice or other trainee is either below sixteen years of age is no longer fit to work, the Inspector may serve on the manager of the mine a notice requiring that such person shall be examined by a certifying surgeon and such person shall not, if the Inspector so directs, be employed or permitted to work in any mine until he has been so examined and certified that he is an adult or, if such person is an apprentice or trainee that he is not below sixteen years of age and is fit to work".

Section 43 (2) says, "Every certificate granted by a certifying surgeon on a reference under sub – section (1) shall for the purpose of this Act, be conclusive evidence of the matters referred therein".

115. Section 21 says, "No child shall be required or allowed to work in any capacity in any motor transport undertaking".

116. Section 22 says, "No adolescent shall be required or allowed to work as a motor transport worker in any motor transport undertaking unless –
(a) A certificate of fitness granted with reference to him under section 23 is in custody of the employers and
(b) Such adolescent carries with him while he is at work a token giving a reference to such certificate."

fitness¹¹⁷ and power of Inspector to require medical examination¹¹⁸ have been made under this Act.

(1) THE APPRENTICE ACT, 1961:-

This Act was passed with a view to enabling a person to undergo apprenticeship training in any designated trade in pursuance of a contract. This Act repealed the Apprentice Act, 1850. Some of the important provisions relating to children incorporated in this Act are the qualifications for being engaged as an apprentice¹¹⁹ and contract of apprenticeship¹²⁰.

(2) THE BEEDI AND CIGAR WORKERS (CONDITIONS OF EMPLOYMENT) ACT, 1966:-

This Act is a special enactment to regulate the conditions of work of beedi and cigar workers. Since a large number of children are exploited in the beedi and cigar industry therefore this Act makes special provision regarding the employment of children in this industry. Under this

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117. Section 23(1) says, "A certifying surgeon shall, on the application of any adolescent or his parent or guardian accompanied by a document signed by the employer or any other person on his behalf that such person will be employed as a motor transport worker in a motor transport or any other person on his behalf with reference to any adolescent intending to work examine such person and as certain his fitness for work as a motor transport worker".
Section 23(2) say, "A certificate of fitness granted under this section shall be valid for a period of 12 months from the date thereof but may be renewed".
118. Section 24 says, "Where an Inspector is of the opinion that a motor transport worker working in any motor transport undertaking without a certificate of fitness is an adolescent the Inspector may serve on the employee a notice requiring that such adolescent motor transport worker be examined by a certifying surgeon and such adolescent motor transport worker shall not, if the Inspector so directs, be employed or permitted to work in any motor transport undertaking until he has been so examined and has been granted certificate of fitness under section 23".
119. Section 3 says that, "A person shall not be qualified for being engaged as an apprentice to undergo apprentice ship training in any designated trade unless he –
(a) is not less than fourteen years of age, and
(b) has satisfied such standards of education and physical fitness as may be prescribed: Provided that different standards may be prescribed in relation to apprenticeship training in different designated trades and for different categories of apprentices".
120. Section 4(1) says, "No person shall be engaged as an apprentice to undergo apprenticeship training in a designated trade unless such person or, if he is a minor, his guardian has entered into a contact of apprenticeship with the employees"
Section 4(2) says, "The apprenticeship training shall be deemed to have commenced on the date on which the contract of apprenticeship has been entered into under sub – section(1)".
Section 4(3) says, "Every contract of apprenticeship may contain such terms and conditions as may be agreed to by the parties to the contract.
Provided that no such term or condition shall be inconsistency with any provision of this Act or any rule made there under."

Act, no child below the age of 14 years shall be employed in any industrial premises. However, subject to the provisions of the Act children who have completed the age of 14 years but not 18 years of age may be allowed to work. It is also further provided in the Act that no young person shall be required to work in any industrial premises except between 6am and 7pm¹²¹. Thus, employment during the night is prohibited.

(3) THE MERCHANT SHIPPING ACT, 1958:-

This Act is an important legislation that specifically relates to the shipping industry and contains provisions prohibiting and regulating child employment. The Act prohibits employment of children below 14 years of age in any capacity in the industry except as provided under section 100,

- a) In a school ship or training ship in accordance with the prescribed conditions;
- b) In a ship in which all persons employed are members of one family;
- c) In a home trade ship of less than two hundred tons gross; or
- d) Where such person is to be employed on nominal wages and will be in charge of his father or other adult near made relative.

Sections 110 – 113 lay down certain conditions for the employment of young person who are above 14 years but have not completed 18 years of age.

(1) PLANTATION LEGISLATION: -Some of the early legislation relating to plantation were-

- (i) The worker's Breach of Contract Act, 1859.
- (ii) The Employment and Workmen's (Disputes) Act, 1860.
- (iii) The Assam labour and Emigration Act, 1901.
- (iv) The Madras Planters' Act, 1903
- (v) The Jalpaiguri Labour Act, 1912.
- (vi) The Coorg Labour Act, 1926.

121. Section 25, *The Beedi and Cigar workers (Conditions of Employment) Act, 1966*.

However, with the passage of time the above legislations were put to an end. Thereafter, in 1932 the Tea Districts Emigrant labour Act was passed on the basis of the recommendation of the Royal Commission on labour. This Act contained provisions prohibiting the migration of children less than 16 years of age to tea plantation areas unless accompanied by parents or guardians.

Finally, in 1951 the Plantation Labour Act was passed. This Act prohibits the employment of children below 12 years of age¹²². Further, adolescent between 15 to 18 years cannot be employed for work unless he is certified fit for work by a surgeon which is valid for a year only¹²³. Provisions have also been made for punishment by imprisonment which may extend to one month or with fine or both for making use of a false certificate of fitness¹²⁴.

(2) THE CHILDREN (PLEDGING OF LABOUR) ACT, 1933

This Act was enacted with the purpose of eradicating the problems arising from the pledging of labour of young children by their parents to employers in view of loans of advances. Under this Act an arrangement, oral or written, to pledge the labour of children whereby parents or the guardian of a child in return of any payment or benefit to be received, undertakes to cause or allow the services of a child to be utilized in any employment, is declared to be void¹²⁵. However, an agreement made without detriment to a child and not made in consideration of any benefit other than reasonable wages to be paid for the child's services and terminable at more than a week's notice is not to be deemed as an illegal agreement¹²⁶. Further, if a person knowingly enters into an agreement with a parent or guardian of a child whereby such parent or guardian pledges the labour of the child, or an employee who knowingly employs such

122. Section 24, *The Plantation Labour Act, 1951*.

123. Section 26, *Id.*

124. Section 34, *Id.*

125. Section 3, *The Children (Pledging of Labour) Act, 1933*.

126. Section 2, *Id.*

child is liable to a fine upto Rs. 200¹²⁷.

(10) THE CHILD LABOUR (PROHIBITION AND REGULATION) ACT, 1986:-

The existence of child labour is as old as the existence of human civilization itself because in one form or the other children have been used as labourers such as in the form of slaves, domestic servants etc.

India is supposedly the largest example of a nation plagued by the problem of child labour¹²⁸. Thus, with a view to regulate the conditions of child labour The Child Labour(Prohibition and Regulation) Act was enacted in the year 1986. This Act aims at identifying more hazardous processes and industries with a view to banning child labour in these industries and regulating conditions for children in non – hazardous occupations. This Act comes into force in respect of all classes of establishments throughout the territory of India. The main objectives of this Act are:

- a) To bring uniformity in the definition of child in the related laws.
- b) To ban the employment of children in specific occupations and process.
- c) To modify the scope of banned industries and process by laying down a procedure.
- d) To regulate the conditions of work of children when they are not prohibited from working.
- e) To lay deterrent punishment for violators.

Under this Act a ‘child’ has been defined to mean a person who has not completed his fourteenth year of age¹²⁹. Provisions regarding prohibition of employment of a child have been made under this

127. Section 4, *Id.*

128. <http://skev.com/child%20labour.htm> (visited on 10th November 2011).

129. Section 2(ii), *The Child Labour (Prohibition and Regulation) Act, 1986.*

Act¹³⁰. Other important provisions relate to the hours and periods of work¹³¹, notice to inspector regarding employment of children¹³² and maintenance of registers¹³³. Further, the appropriate government may by notification in the Official Gazettee make rules for the health and safety of children employed or permitted to work¹³⁴. The Act also provides the following procedure relating to offences¹³⁵.

- 1) Any person, Police Officer or Inspector may file a complaint about the commission of an offence under this Act in any court of competent jurisdiction.
- 2) Every certificate as to the age of a child which has been granted by a prescribed medical authority shall, for the purposes of this Act, be conclusive evidence as to the age of the child to whom it relates.

130. Section 3 says, "No child shall be employed or permitted to work in any of the occupations set forth in Part A of the schedule or in any workshop wherein any of the processes set forth in Part B of the Schedule are carried on".

131. Section 7(1) says, "No child shall be required or permitted to work in any establishment in excess of such number of hours or may be prescribed for such establishment or class of establishments".

Section 7(2) says, "The period of work on each day shall be so fixed that no period shall exceed three hours and that no child shall work for more than three hours before he has had an interval for rest for at least one hour".

Section 7(3) says, "The period of work of a child shall be so engaged that inclusive of his interval for rest, under sub-section (2) it shall not be spread over more than six hours including the time spent in waiting for work on any day."

Section 7(4) says, "No child shall be permitted or required to work between 7pm and 8 am".

Section 7(5) says, "No child shall be required or permitted to work overtime".

Section 7(6) says, "No child shall be required or permitted to work in any establishment on any day on which he has already been working in another establishment".

132. Section 9(1), (2) and (3), *The Child Labour (Prohibition and Regulation) Act, 1986*.

133. Section 11 says, "There shall be maintained by every occupier in respect of children employed or permitted to work in any establishment, a register to be available for inspection by an Inspector at all times during working hours or when work is being carried on in any establishment, showing – a) the name and date of birth of every child so employed or permitted to work (b) hours and periods of work of any child and the intervals of rest to which he is entitled; (c) the nature of work of any such child; (d) such other particulars as may be prescribed."

134. Section 13, *The Child Labour (Prohibition and Regulation) Act, 1986*.

135. Section 16, *Id.*

3) No court inferior to that of a Metropolitan Magistrate or Magistrate of the first class shall try any offence under this Act.

Further, it is pertinent to note here that after the Child Labour (Prohibition and Regulation) Act, 1986 was amended in the year 2006 employment of children as domestic workers and as workers in restaurants, dhabas, hotels and spas have been banned.

PROVISION UNDER SECULAR LAWS:-

The need to protect and nurture the rights of the child has also been recognized by the various secular laws of the land. They are as follows:

(1) CIVIL PROCEDURE CODE, 1908:-

Under the Civil Procedure Code certain safeguards have been provided for the children.

It has been provided under the Civil Procedure Code that a suit by a minor is to be instituted by his next friend¹³⁶. It is also provided that where a suit is instituted by or on behalf of a minor without a next friend, the defendant may apply for the plaint to be taken off the file¹³⁷. Where as in a case where a suit is instituted on behalf of a minor by his next friend, security for the payment of all costs is to be furnished by the next friend, when so ordered under Rule 2 – A.

Where the defendant is a minor, the Court, on being satisfied of the fact of his minority shall appoint a proper person to be guardian for the suit of such minor¹³⁸. Further, it is provided that a decree against a minor is not to be set aside unless prejudice has been caused to his interests¹³⁹. The Code also gives the qualification to who may act as a next friend or can be

136. Order XXXII, Rule 1, *Civil Procedure Code, 1908*.

137. Rule 2, *Id.*

138. Rule 3, *Id.*

139. Rule 3-A, *Id.*

appointed as a guardian for a suit¹⁴⁰. It has also been pointed out that every application to the court on behalf of a minor shall be made by his next friend or guardian¹⁴¹. But applications under Rule 10, Sub - rule (2) do not fall under this provision.

It has further been provided that a next friend or guardian for the suit shall not, without the leave of the court, receive any money or other movable property either by way of compromise before the decree or order or under a decree or order in favour of the minor¹⁴². But managers of Hindu undivided families and parents of minor fall under the exception to this provision. Similarly, next friends or guardians have been restrained to make agreements or compromises on behalf of minors without the leave of the court¹⁴³.

(2) CRIMINAL PROCEDURE CODE, 1973:-

The Criminal Procedure Code, 1973 contains certain provisions for the welfare and protection of children. The CrPc has made provisions regarding jurisdiction in cases of juveniles¹⁴⁴.

Thereafter, section 125 -128 of the CrPc deals with provisions relating to maintenance of wives, children and parents. In *Bhagwan Dutt V. Kamala Devi*¹⁴⁵, it was held that by providing a simple, speedy but limited relief, the provisions seek to ensure that the neglected wife, children and parents are not left beggared and destitute on the scrap – heap of society and thereby driven to a life of vagrancy, immortality and crime for their

140. Rule 4, *Civil Procedure Code, 1908*.

141. Rule 5, *Id.*

142. Rule 6, *Id.*

143. Rule 7, *Id.*

144. Section 27 says, “Any offence not punishable with death or imprisonment for life, committed by any person who at the date when he appeals or is brought before the court is under the age of sixteen years, may be tried by a court of Chief Judicial Magistrate, or by any court specially empowered under the Children Act, 1960, or any other law for the time being in force providing for the treatment, training and rehabilitation of youthful offenders”.

145. 1975 SCC (Cri) 563.

subsistence.

It has been provided that if any person having sufficient means neglects or refuses to maintain his legitimate or illegitimate minor child, whether married or not, unable to maintain itself¹⁴⁶ or his legitimate or illegitimate child (not being a married daughter) who has attained majority, where such child is by reason of any physical or mental abnormality or injury unable to maintain itself¹⁴⁷ then a Magistrate of the first class may, after getting proof of such neglect or refusal order such person to make a monthly allowance for the maintenance of such child at the monthly rate not exceeding five hundred rupees in the whole as the Magistrate thinks fit. It has been further provided that the Magistrate may order the father of a minor female child referred to in clause (b) to make such allowance until she attains her majority, on the Magistrate being satisfied that the husband of such minor female child, if married, does not have sufficient means.

Under section 125 a 'minor' has been defined to mean a person who, under the provisions of the Indian Majority Act, 1875 is deemed not to have attained his majority. The CrPc also provides that when the person required by any court, or officer to execute a bond is a minor such court or officer may accept, in lieu thereof, a bond executed by a surety or sureties only¹⁴⁸. One of the important provisions contained in the CrPc is relating to release of young offender on probation of good conduct or admonition. It has been provided that a person who is not under twenty – one years of age and is convicted of any offence with fine only or with imprisonment for a term of seven years or less or if any person under twenty – one years of age is convicted of an offence not punishable with death or imprisonment for life then having regard to the age, character or antecedents of the offender and to the circumstances under which the offence was committed, the court may if it

146. Section 125(1) (b) *Criminal Procedure Code, 1973.*

147. Section 125(1) (c), *Id.*

148. Section 448, *Id.*

thinks fit that the offender may be released on probation of good conduct direct that he be released on entering a bond with or without sureties, to appear and receive sentence when called upon during such period (not exceeding three years) as may be directed by the court and in the meantime to keep the peace and be of good behaviour¹⁴⁹.

(3) INDIAN PENAL CODE, 1860:-

The Indian Penal Code, 1860 also contains provisions relating to the protection of children. It has been provided that nothing is an offence which is done by a child under seven years of age¹⁵⁰. It is further provided that nothing is an offence which is done by a child above seven years of age and twelve years, who has not attained sufficient maturity of understanding to judge the nature and consequences of the conduct on that occasion¹⁵¹. Provisions referring to acts done in good faith for the benefit of a child¹⁵² and consent given under fear or misconceptions¹⁵³ are incorporated under the code. The code also makes the abetment of suicide of a child or

149. Section 360 (1) *Criminal Procedure Code, 1973*.

150. Section 82, *Indian Penal Code, 1860*.

151. Section 83, *Id.*

152. Section 89 says that, "*Nothing which is done in good faith for the benefit of a person under twelve years of age, or of unsound mind, by or with consent, either express or implied, of the guardian or other person having lawful charge of that person, is an offence by reason of any harm which it may cause or be intended by the doer to cause or be known by the doer to be likely to cause to that person: provided –*
Provisos—first that this exception shall not extend to the intentional causing of death or to the attempting to cause death;
Secondly—that this exception shall not extend to the doing of anything which the person doing it knows to be likely to cause death, for any purpose other than the preventing of death or grievous hurt, or the curing of any grievous disease or infirmity.
Thirdly that this exception shall not extend to the voluntary causing of grievous hurt, or to the attempting to cause grievous hurt, unless it be for the purpose of preventing death or grievous hurt, or the curing of any grievous disease or infirmity.
Fourthly that this exception shall not extend to the abetment of any offence, to the committing of which offence it would not extend".

153. Section 90 says that, "*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*
Unless the country appears from the context, if the consent is given by a person who is under twelve years of age."

insane person a punishable offence¹⁵⁴.

(4) INDIAN EVIDENCE ACT, 1872.

The Indian Evidence Act, 1872 contains provision relating to the legitimacy of a child¹⁵⁵ and evidence of a child witness¹⁵⁶.

(5) INDIAN CONTRACT ACT, 1872.

Under this Act provisions have been incorporated with respect to the contractual capacity of a person¹⁵⁷ and claim for necessities supplied to a person incapable of contracting or supplied on his account¹⁵⁸.

154. Section 305 says, "*If any person under eighteen years of age, any insane person, any delirious person, any idiot or any person in a state of intoxication commits suicide, whoever abets the commission of such suicide shall be punished with death or imprisonment for life or imprisonment for a term not exceeding ten years, and shall also be liable to fine*".

155. Section 112 says, "*The fact that any person born during the continuance of a valid marriage, between his mother and any man, or within two hundred and eighty days after its dissolution, the mother remaining unmarried shall be conclusive proof that he is the legitimate son of that man unless it can be shown that the parties to the marriage had no access to each other at any time when he could have been begotten*".

156. Section 118 says that "*All persons shall be competent to testify unless the court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions by tender years, extreme old age, whether of body or mind, or any other cause of the same kind*".

157. Section 11 says, "*Every person is competent to contract who is of the age of majority according to the law to which he is subject and who is of sound mind and who is not disqualified from contracting by any law to which he is subject*".

158. Section 68 says, "*If a person, incapable of entering into a contract or anyone whom he is legally bound to support, is supplied by another person with necessities suited to his condition in life, the person who has furnished such supplies is entitled to be reimbursed from the property of such incapable person*".

CHAPTER – IV

JUVENILE OFFENDERS AND OFFENCES AGAINST JUVENILES

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JUVENILE OFFENDERS AND OFFENCES AGAINST JUVENILES

The concept of criminal justice has been vastly affected by the concept of juvenile justice. The concept of juvenile justice largely rejects the stark legality in its preference to emphasizing the well – being of the juvenile inspite of them being in conflict with the law unlike the concept of criminal justice which, inter-alia, entails the principle of strict legality with regard to its approach and philosophy towards the law violational conduct¹. In any country the juvenile justice system depends upon the judicial system of the nation. Being a part of the larger system of justice the juvenile justice system is a special kind of legal justice which has been specifically designed to protect and promote the well – being of the children. It is submitted that juvenile justice is of recent origin because earlier laws were enacted and enforced without the special needs and requirements of children being taken into consideration².

Therefore, naturally juvenile offenders have always received a different type of treatment from the criminal law system of most societies as compared to adult or grown up offenders, the reason being that young offenders are generally not able to understand the nature and consequences of their acts and it would be unjust to deal with them in the same manner as those of adult offenders³.

Children, as such, are not born as criminals. Being the most vulnerable group in any society they are always in need of special care and protection. Because of their vulnerable and dependent nature they are often subjected to exploitation and ill – treatment in the very society that they live.

1. A. Padmavathi, *Concept of Juvenile Justice*, 10 *legal News and Views* (1996) 24.

2. Balraj Chauhan, *Dispensing juvenile justice through juvenile court*, 1 *Lucknow University Law Journal* (1994) 102.

3 Usha Razdan, *Apex Court towards humanizing the administration of Juvenile Justice*, 33 *JILI* (1991) 366.

As Rabindra Nath Tagore observed:

“A nation’s children are its supremely important asset and the nation’s future lies in their proper development. An investment in children is needed an investment in future. A healthy and educated child of today is the active and intelligent citizen of tomorrow”⁴.

Therefore, it becomes the duty of the state to provide constant care and protection to children because the future of any nation depends on their overall physical and emotional well being.

However, it is generally seen that because of the fact of children being innocent they are most of the time subjected to exploitation in many forms apart from being ill – treated. As a result many of these unfortunate children are forced by a number of circumstances to commit crimes and sadly the consequences of which these children cannot even understand. These children if not reformed in their early years will turn out to be hardened criminals of tomorrow.

Juvenile delinquency, therefore, is said to be a complex social problem on which much thought and attention have been given in all countries including India during the last few decades. The problem of juvenile delinquency is slowly increasing all over the world mainly because of the advancement of industrialization and urbanization⁵.

Deviant behavior among children or what is called delinquency in legal terms is not a problem faced by one nation, it is, rather a world wide phenomenon. It has remained prominent in western countries as well as in India since long. It is submitted that the situation seems to be more alarming in United States of America because the problem has touched its peak specially after reported cases of shoot out in the Schools in America. This is enough fact to establish that the American Society has been the worst sufferer with respect to the problem of juvenile’s delinquency⁶.

4. Param Jeet Singh, *Juvenile Deviations and protection in the context of the Juvenile Justice Act, 1986*, 26 *Civil and Military law Journal* (1990) 35.

5. Prof. Mohd Najmi, *Juvenile Delinquency – Its Causes and Remedies*, *CBI Bulletin* 25 (1991) 3.

6. Abdul Latif Wani, *Juvenile Delinquency in India*, *V Kashmir University Law Review* (1998) 67.

The term 'delinquency' has been derived from the terms *de* (away from) and *liquere* (to leave), the Latin initiative 'delinquere' that translates to "emit in its original, earliest sense". It was used to refer to the failure of an individual to perform a task or duty. The term 'delinquent' describes a person guilty of an offence against the customs⁷. It is also said that the expression 'Juvenile Delinquency' is a combination of two words juvenile and delinquency. The combined meaning of two words is anti – social or criminal conduct by the young person⁸. In legal terminology juvenile delinquency means any act prohibited by law for children upto a prescribed age limit, and a child found to have committed an act of juvenile delinquency. Apart from this the following acts would also come within the purview of juvenile delinquency like violation of law or ordinance, immoral and indecent conduct, immoral conduct around school, engaging in illegal occupation, knowingly associated with immoral person, growing up in idleness, knowingly entering or visiting houses of ill repute, habitually remaining truant from school, incorrigible, begging or receiving alms etc⁹.

In the Indian context there was confusion regarding the definition of Juvenile Delinquency because it was differently defined under the various state enactments. But with the enactment of the Juvenile Justice Act, 1986, proper definition of the term juvenile delinquency was given. This Act, however, has been repealed by the Juvenile Justice (Care and Protection of Children) Act, 2000. Under the provisions of this Act "juvenile" or "child" means a person who has not completed eighteenth year of age¹⁰. The term 'delinquent juvenile' as was under the 1986 Act has been replaced by the term 'juvenile in conflict with law' and who has been defined to mean a juvenile who is alleged to have committed an offence and has not completed eighteenth year of age as on the

7. Dr. S. Guruswamy, *Juvenile Delinquency: Occurrence Care and Cure*, 32 *Social Defence* (1993) 6.

8. Dr. Baldev Singh, *Juvenile Justice System in India: An Appraisal*, 31 *Civil and Military Law Journal* (1995) 66.

9. *Ibid.*

10. Sec 2(k), *The Juvenile Justice (Care and Protection of Children) Act, 2000*.

date of commission of such offence¹¹.

Juvenile delinquency has been said to be the subject of extensive study. Therefore, three main approaches to juvenile delinquency has been intended to be highlighted as follows¹²:

1) Sociological Approach –

Sociologists contend that delinquency is rejection of certain social norms if the problem of juvenile delinquency is approached on the basis of the society and its impact on it. A large number of individual families were not in a position to tackle the anti - social behavior of young people. This was the point when it came to be recognized as a community problem. Sociologists are of the view that delinquency is the behavior which a given community at a given time considers to be in conflict with its best interests, whether or not the offender has been brought before the court. Though a child is not born a delinquent but it acquires delinquency through the learning process and is a form of social behavior. Generally, the environment that a youth lives in is reflected in his delinquent acts.

2) Psychological Approach –

It is a true but sad fact of every society that not all children are lucky enough to have a normal childhood. There are a large number of children who live with adoptive parents, in foster – care or in institutions. As a result many a times their desires and urges remain unsatisfied. Therefore, juvenile delinquency is said to be the expression of desires and urges that remain unsatisfied in the normal way from the psychological point of view. Since every misbehaviour that an adult does will not make him/her a criminal similarly every child who misbehaves cannot be judged as a delinquent child.

3) Legal Approach:

The legal definition of the term juvenile delinquency is the more important one. For the crime preventing agencies this definition is of great

11. Section 2(1), *The Juvenile Justice (Care and Protection of Children) Act, 2000*.

12. Prof. Mohd Najmi, *Juvenile Delinquency – Its Causes and Remedies*, 25 *CBI Bulletin* (1991) 3.

importance. Those laying stress on the legal aspect of definition lay stress on the official delinquency, where there is no law there is no crime. Those who believe this notion only recognize that type of delinquency, which is officially labeled and apprehended. The legal delinquency is an act, course of conduct or situation which might be brought before a court for adjudication¹³.

TYPES OF DELINQUENCY

At this point it would be desirable to discuss the various types of delinquency because delinquency exhibits a variety of styles of conduct or forms of behaviour¹⁴. Howard Becker has mentioned four kinds of delinquencies¹⁵.

1) Individual Delinquency –

When a delinquent act is committed by one individual who is solely responsible for the act refers to individual delinquency. Psychiatrists have given explanations for this kind of delinquent behavior by stating that delinquency is caused by the physiological problems that result from defective/ faulty/pathological interaction patterns. Researchers like Healy and Bronner who made a comparison between delinquent youths and their non – delinquent siblings found that over 90 percent of the delinquent's as compared to 13 percent of their non delinquent siblings belonged to unhappy family circumstances and were not satisfied with the circumstances in their lives. As a result they committed delinquent acts to deal with the various problems that they faced in such unhappy circumstances. Comparisons were also made by researchers like Bandura and Walters between the aggressive action of white delinquents and that of non delinquent boys who did not have any kind of economic problem. It was found that in respect of their relationship with mother the delinquents differed a little from non – delinquents. But in respect of their relationship with their fathers they differed a lot. This showed that delinquent boys could not instil in themselves moral values because their fathers failed to be good role models and also because fathers were strict,

13. *Ibid.*

14. Ram Ahuja, *Social Problems in India*, 2nd Edition (2004) 346.

15. *Id*

harsh and stern in their dealings with the delinquent boys. Therefore in delinquency the father – son relations is said to be more important than the mother – son relation.

2) Group – Supported Delinquency –

Where a delinquent act is committed by an individual along with others but the cause is not in the personality of the individual or in the delinquents family but in the culture of the individual's home and neighbourhood refers to group supported delinquency. Researchers like Thrasher and Shaw and Mckay have found that a young child becomes delinquent as a result of its association and companionship with other delinquents.

3) Organized Delinquency –

In organized delinquency a delinquent act is committed by developing formally organized groups. In the United States in the 1950's these types of delinquencies were arranged after which the concept of 'delinquent sub – culture' is said to have been developed. This concept is said to refer to the set of values and norms by which the behavior of group members are guided, the commission of delinquencies are encouraged and status is awarded on the basis of such acts and typical relationships are specified to persons who fall outside the groupings that are governed by group norms¹⁶.

4) Situational Delinquency –

In this type of delinquency the delinquent act is committed without any kind of commitment to delinquency. It is said that this type of delinquency is committed because of less developed impulse control and/or because of lesser reinforcement of family restraints and also because the delinquent has little to lose even if he/she gets caught. However, it is submitted that this type of delinquency is not yet developed and is a supplement rather than a replacement to other types of

16. *Id.* at 347 - 348.

delinquencies¹⁷.

FACTORS RESPONSIBLE FOR JUVENILE DELINQUENCY

After the above discussion regarding the types of delinquencies it also becomes important to discuss the various factors that play an important role in a juvenile committing delinquent acts. Not one factor contributes to a youngster's delinquencies. A number of factors have been attributed towards a juvenile committing delinquent acts which are as follows.

a) Family Atmosphere:

The family is one unit in every society that binds together its members. Apart from the basic necessities that are required to live a normal life the family also provides protection, love, care and guidance to youngsters. Therefore, the family of a child is most important in moulding the child's basic character and personality. What parents do and say have a strong influence on the children. Children take their parents as role models and most of the times they too want to be like their parents.

Delinquent behavior as a result of family environment may be analyzed with reference to a broken home, family tension, parental rejection, parental control and family economics.

The broken family may be termed as one where the parents are separated either by death or divorce or it could also mean a home where both parents are together but both the father and mother are alcoholics or there is constant quarrel or an unhealthy atmosphere at home which is not conducive for the child's emotional well – being. Such broken families not only fail to provide love and affection to the child but and also loses control over the child. As a result children belonging to broken homes feel uncared and unwanted. This leads to them committing delinquent acts.

Another important factor that contributes to juvenile delinquency is family tension. If there is family tension for long time then that makes youngsters feel insecure and discontent in such tension - filled environment of the family. As a result the parents are not in a position to provide peaceful

17. *Id* at 348

atmosphere for raising the child and solving family problems.

Parental rejection or emotional deprivation also contributes towards a child turning into a delinquent. A child needs to be given enough love and attention in its early years for the overall emotional development. Thus, a child who fails to get love and affection apart from support and supervision at home feels rejected or neglected and as a consequence will resort to deviant groups and commit delinquent acts.

Another factor that plays a major part towards the delinquent behaviour of a child is methods of parental control or types of discipline. Generally the types of methods used by parents in order to discipline their children differs. If the parents use an authoritarian approach in order to discipline their child then the child will not be able to interact freely with his peer groups thereby affecting the relationship of the child with his peers. On the other hand, if the parents adopt a lenient attitude in disciplining their child there is every possibility that the child may not be guided in a proper way and thus take advantage of the situation. Therefore, the methods of discipline should be a balanced one so that children donot resort to committing delinquent acts.

A child's delinquent behavior can also be attributed towards emotional instability and behavioral disturbances in one or both the parents.

Though economic instability of a family does not always necessarily amount to a child resorting to delinquent acts because children belonging to middle class or upper – middle class may also give in to deviant behavior. Nevertheless, family economics can also be a major contributing factor towards juvenile delinquency. Normally when a child is not provided with material requirements then that can create a sense of insecurity within the child and also affect the control that the family exercises over the child. In such cases the child can look for material support outside the family thereby raising the probability of the child committing delinquent acts.

b) Neighborhood –

Generally, apart from the family a child spends a major part of his day with his friends in the neighborhood. Specially in congested neighborhoods that

does not have sufficient recreational facilities increase the chances of children forming gangs and thereby committing delinquent acts. Also in neighborhoods where there are picture houses, cheap hotels and video halls the chances of juveniles committing crime increases.

It is further submitted that in modern times cinema has become one primary means of recreation available specially to youth which has furthered juvenile delinquency and antisocial activity to a certain extent. Some films are said to have such bad influence upon children and specially adolescents that after watching them in some in some towns certain kinds of crimes increased manifold¹⁸.

c) **Bad Schooling –**

One of the most important place where a child comes into contact with others of his/her age and acquires knowledge and moral values is the school. Therefore, the behavior, personality and attitude of a child is shaped in school. In this respect, school plays an important part in the development of a child's growth. However, there has been instances of bad schooling wherein cruel treatment has been meted out by the teachers towards the children. The existence of unhealthy environment in the school affects the child mentally and creates a sense of hatred and frustration among the school going children. Many a times they are forced to leave school thereby increasing the chances of them committing delinquent acts.

Therefore, after a discussion of the various factors responsible for juvenile delinquency it may be said that juvenile delinquency is by and large, a product of social and economic maladjustment¹⁹. Not one factor is the sole cause of juvenile delinquency. Nevertheless where a juvenile does commit an offence he should be treated separately from the adult offenders. The juvenile delinquents require special treatment in the criminal justice system distinct and separate from other accused. They need to be treated separately because if they are prosecuted in ordinary courts and are sentenced to same penalties as adults

18. Dr. S Guruswamy, *Juvenile Delinquency : Occurrence, Care and Cure*, 32 *Social Defence* (1993) 7

19. *Munna V State of UP*, AIR 1982 SC 806.

and serve their sentence in same prisons in which hardened and habitual criminals are kept or lodged then the result would be that young offenders would come in the company of hardened criminals and learn criminal behavior from the adult ones. Besides, the children are brought to jail on the charge of having committed minor offences and kept in jails as undertrial prisoners for a long time with dreaded criminals and most of the times they are subjected to sexual exploitation as well. This has a negative effect on the growth and development of the child. Hence, keeping in mind the need for a differential approach towards the problem of juvenile delinquency has given rise to a different law for juvenile delinquents. Therefore, the Juvenile Justice Act, 1986 was enacted by the parliament to deal with the problems of neglected and delinquent juveniles and for the adjudication of certain matters relating to and disposition of delinquent juveniles.

However, the juvenile Justice Act, 1986 has now been repealed by The Juvenile Justice (Care and Protection of Children) Act, 2000²⁰. The Act is based on the provision of the Indian Constitution and the Convention on the Rights of the Child and on principles of the United Nations Standard Minimum Rules for the Administration of Juvenile Justice 1985 (The Beijing Rules), the United Nations Rules for the Protection of Juveniles Deprived of their liberty (1990) and all other relevant international instruments. The Preamble of the Act states that it is an act to consolidate and amend the law relating to juveniles in conflict with law and children in need of care and protection, by providing for proper care, protection and treatment by catering to their development needs, and by adopting a child – friendly approach in the adjudication and disposition of matters in the best interests of children and for their ultimate rehabilitation and for matters connected therewith or incidental thereto.

Objectives of the Act –

- 1) To lay down the basic principles for administering justice to a juvenile or the child;

20. Hereinafter referred to as the *Act*.

- 2) To make the juvenile system meant for a juvenile or the child more appreciative of the development needs in comparison to criminal justice system as applicable to adults;
- 3) To bring the juvenile law in conformity with the United Convention on the Rights of the Child;
- 4) To prescribe a uniform age of eighteen years for both boys and girls;
- 5) To ensure speedy disposal of cases by the authorities regarding juvenile or the child within a time limit of four months;
- 6) To spell out the role of the state as a facilitator rather than doer by involving voluntary organizations and local bodies in the implementation of the legislation;
- 7) To create special juvenile police units with a humane approach through sensitization and training of police personnel;
- 8) To enable increased accessibility to a juvenile or the child by establishing Juvenile Justice Boards and Child Welfare Committees and Homes in each district or groups of districts;
- 9) To minimize the stigma and in keeping with the developmental needs of the juvenile or the child to make separate provision for juveniles in conflict with law and child in need of care and protection;
- 10) To provide for effective provisions and various alternatives for rehabilitation and social reintegration such as adoption, foster care, sponsorship and after care of abandoned, destitute, neglected and delinquent juvenile and child.

[A] DETERMINATION OF AGE OF JUVENILE

In the context of adjudication of certain matters relating to delinquent juveniles a question may arise as to who is a juvenile and a delinquent juvenile? It is pertinent to note here that the term delinquent juvenile has been replaced by the term “juvenile in conflict with law” by the Juvenile Justice (Care and Protection of Children) Act, 2000. Section 2(K)²¹ and 2(L)²² of the Act defines a

21. Section 2(K) says, “*juvenile*” or “*child*” means a person who has not completed eighteenth year of age.

juvenile and a juvenile in conflict with law separately. Next, another question may arise as to what are the factors for the determination of the age of the juvenile? Before proceeding further with the question of the determination of the age of the juvenile it is desirable to refer to the provisions laid down in the Juvenile Justice (Care and Protection of Children) Act, 2000 for the purpose of determination of the age of the juvenile. Section 7A²³ of the Act lays down the provisions for the presumption and determination of the age of the juvenile. It may be mentioned here that section 7A has been inserted by virtue of the Juvenile Justice (Care and Protection of Children) Amendment Act, 2006. Mention may also be made of the Juvenile Justice (Care and Protection of Children) Rules, 2007, wherein rules have been made with respect to the procedure to be followed in the determination of the 'age'²⁴. The issue of

22. Section 2(L) says, "juvenile in conflict with law" means a juvenile who is alleged to have committed an offence and has not completed eighteenth year of age as on the date of commission of such offence.

23. Section 7A(1) says, "whenever a claim of juvenility is raised before any Court or a Court is of the opinion that an accused person was a juvenile on the date of commission of the offence, the court shall make an inquiry, take such evidence as may be necessary (but not an affidavit) so as to determine the age of such person, and shall record a finding whether the person is a juvenile or not, stating his age as nearly as may be :

Provided that a claim of juvenility may be raised before any court and it shall be recognized at any stage, even after final disposal of the case and such claim shall be determined in terms of the provisions contained in this Act and the rules made there under, even if the juvenile has ceased to be so on or before the date of commencement of this Act."

Section 7A(2) says, "If the Court finds a person to be a juvenile on the date of commission of the offence under sub-section(1), it shall forward the juvenile to the Board for passing appropriate orders and the sentence, if any, passed by a court shall be deemed to have no effect."

24. Rule 12(1) says, "In every case concerning a child or a juvenile in conflict with law, the court or the Board or as the case may be the committee referred to in rule 19 of these rule shall determine the age of such juvenile or child or a juvenile in conflict with law within a period of thirty days from the date of making of the application for that purpose".

Rule 12(2) says, "The Court or the Board or as the case may be Committee shall decide the juvenility or other wise of the juvenile or the child or as the case may be the juvenile in conflict with law, prima facie on the basis of physical appearance or documents, if available and send him to the observation home or in jail".

Rule 12(3) says, "In every case concerning a child or juvenile in conflict with law, the age determination inquiry shall be conducted by the court or the Board or as the case may be the committee by seeking evidence by obtaining –

- (a) (i) the matriculation or equivalent certificates if available, and in the absence whereof;
- (ii) the date of birth certificate from the school (other than a play school) first attended; and in the absence whereof;
- (iii) the birth certificate given by a corporation or a municipal authority or a panchayat;
- (b) and only in the absence of either (i), (ii) or (iii) of clause (a) above the medical opinion will be sought from a duly constituted Medical Board, which will declare the age of the juvenile or child. In case exact assessment of the age cannot be done, the court or the Board or as the case may be, the committee, for the reasons to be recorded by them, may, if considered necessary, give benefit to the child or juvenile by considering his/her age on lower side within the margin of one year. And while passing orders in such case, shall, after taking into consideration such evidence as may be available, or the medical opinion, as the case may be record a finding in respect of his age and either of the evidence specified in any of the clauses (a)(i), (ii), (iii) or in the absence whereof, clause (b) shall be the conclusive proof of the age as regards such child or the juvenile in conflict with law".

Rule 12(4) says, "If the age of the juvenile or child or the juvenile in conflict with law is found to be below 18 years on the date of offence, on the basis of any of the conclusive proof specified in sub-rule(3), the court or the Board or as the case may be the committee shall in writing pass an order stating the age and declaring the status of juvenility or otherwise, for the purpose of the Act and these rules and a copy of the order shall be given to such juvenile or the person concerned."

Rule 12(5) says, "Save and except where, further enquiry or otherwise is required interalia, in terms of section 7A, section 64 of the Act and these rules, no further inquiry shall be conducted by the Court or the Board after examining and obtaining the certificate or any other documentary proof referred to in sub-rule (3) of this Rule."

Rule 12(6) says, "The provisions contained in this rule shall also apply to those disposed of cases, where the status of juvenility has not been determined in accordance with the provisions contained in sub-rule (3) and the Act, requiring dispensation of the sentence under the Act for passing appropriate order in the interest of the juvenile in conflict with law".

determination of the age of the juvenile came up before the Supreme Court in a number of cases.

In *Umesh Chandra V. State of Rajasthan*²⁵, the appellant was charged under sections 364 and 302, Indian Penal Code. The trial court had overruled a preliminary objection that the session Judge was not competent to try the case of the appellant as he was a child under the provisions of the Rajasthan Children Act, 1970. Thereafter, the appellant filed a revision to the Rajasthan High Court against the order. The revision was dismissed by the High court which held that the Children Act was not applicable to the appellant as the Act had not been enforced in Tonk district on the date of the occurrence. It was further held by the High Court that the appellant had failed to prove that he was below 16 years of age. The appellant, therefore, filed appeal by special leave which was directed against the judgment of the High Court of Rajasthan.

The learned Counsel for the appellant had assailed the finding of the High Court and contended that the High Court had based its decision on wholly irrelevant material and had also committed error of law in appreciating important documentary evidence. Another point of argument was the application of the Act to Tonk where the offence was committed. In the opinion of the Court as the Rajasthan Children Act, 1970 had thereby been enforced in the entire state, thus, the question no longer survived because where a situation contemplated by section 26 of the Rajasthan Children Act, 1970 (in short "the Act") arises, an accused, who is found to be a child, has to be forwarded by the sessions court to the children's Court which can pass appropriate sentence. Where, however, proceedings against a child are pending before Sessions Judge section 26 of the Act enjoins a duty on the Court in which the proceeding in respect of the child is pending on the date on which the Act is extended to the area to act in the manner therein prescribed. In such a situation, the court was under an obligation to proceed with the trial and record a finding as if the Act does not apply. But after the trial was concluded and a finding was recorded that the child had committed an offence, the court could not pass any sentence but the court was under a

25. AIR 1984 SC 1057

statutory obligation to forward a child to the children's Court which shall pass orders in respect of that child in accordance with the provisions of the Act as if it had been satisfied on inquiry under the Act that the child had committed the offence. Therefore, in the opinion of the Court, in view of this provision section 21 would be attracted and the children's court will have to deal with the child under section 21. Thus, in the view of the court the main point for consideration in this case was what is the exact date of birth of the appellant. The court agreed with the approach made by the High Court that in cases like these ordinarily the oral evidence can hardly be used to determine the correct age of a person, and the question, therefore, would largely depend on the documents and the nature of their authenticity. Oral evidence could be of use if documentary evidence was not available and even the horoscope could not be relied on because it could be prepared at any time to suit the needs of a particular situation.

The Court further referred to the testimony of the appellant's father according to which the appellant was born on 22.6.57 and was aged 15 years 9 months on 12.3.1973 ie the date of occurrence. However, the Court did not dispute the fact that there was nothing to show the birth of the appellant nor any evidence has been produced on this aspect of the matter. The first document wherein the age of the appellant was clearly entered was the admission form of the school where the date of birth of the appellant had been shown as 22.6.1957. In the opinion of the Court the High Court seemed to have rejected this document by adopting a very peculiar process of reasoning which apart from being unintelligible was also legally erroneous and the High Court seemed to have thought that the admission forms as also the schools register both of which were, according to the evidence, maintained in the due course of business, were not admissible in evidence because they were not kept or made by any public officer.

The Court observed that the High Court seemed to have confused the provisions of S-35, 73 and 74 of the Evidence Act in interpreting the documents which were admissible not as public documents or documents maintained by public servants under sections 34, 73 or 74 but which were admissible under

section 35 of the Evidence Act. A perusal of the provisions of section 35 would clearly reveal that there is no legal requirement that the public or other official book should be kept only by a public officer but all that is required is that it should be kept in discharge of an official duty. Therefore, the Court held that in these circumstances the view of the High Court with regard to section 35 is plainly untenable and sections 73 and 74 are utterly irrelevant.

Another question that was argued at the Bar was as to what is the material date which is to be seen for the purpose of application of the Act? In this respect the Court observed that in view of its finding that at the time of occurrence the appellant was undoubtedly a child within the provisions of the Act, the further question that if he could be tried as a child if he had become more than 16 years by the time the case went upto the court, does not survive because the Act itself takes care of such contingency. In this connection the Court referred to sections 3 and 26 of the Act and submitted that a combined reading of these two sections would clearly show that the statute takes care of contingencies where proceedings in respect of a child were pending in any court in any area on the date on which the Act came into force. As regards the general applicability of the Act, the Court was clearly of the view that the relevant date for the applicability of the Act is the date on which the offence takes place. In the view of the Court the children Act was enacted to protect young children from the consequences of their criminal acts on the footing that their mind at that age could not be said to be mature for imputing measures as in the case of an adult. Therefore, this being the intendment of the Act, a clear finding had to be recorded that the relevant date for applicability of the Act is the date on which the offence takes place. In the view of the Court sections 3 and 26 became necessary because it was quite possible that by the time the case comes up for trial, the child may have ceased to be a child. Since both the sections clearly pointed in the direction of the relevant date for the applicability of the Act as date of occurrence therefore, the Court was of the view that the relevant date for applicability of the Act so far as age of the accused, who claims to be a child, is concerned, is the date of the occurrence and not the date of the trial.

*Gopinath Ghosh V. State of W.B*²⁶ is a relevant case in point where the Supreme Court observed that the appellant had been convicted by the trial court along with two other accused under section 302 read with section 34 IPC and all of them were awarded imprisonment for life. All the three accused preferred the appeal in the Calcutta High Court. The Division Bench dismissed the appeal of the appellant holding him guilty under section 302 IPC, while the appeal of the other two accused had been accepted and their conviction set aside. Hence, the appellant filed the appeal by special leave to the Supreme Court.

It was urged by the learned Counsel for the appellant that on the date of the offence the appellant was aged below 18 years and was therefore a 'child' within the meaning of the expression in the West Bengal Children Act, 1959 and, therefore the court had no jurisdiction to sentence him to suffer imprisonment after holding a trial. In view of this contention, the Supreme Court framed the issue with regard to age of the appellant on the date of the offence and remitted the issue to learned Sessions Judge to certify the finding after giving opportunity to both sides to lead both oral and documentary evidence. The learned Additional Sessions Judge after hearing both the sides certified his finding that appellant Gopinath Ghosh was aged between 16 and 17 years on the date of the offence²⁷.

The Supreme Court observed that unfortunately, the appellant had never questioned the jurisdiction of the Sessions Court and had given his age as 20 years when questioned by the learned Additional Sessions Judge. It was not contended before the learned Additional Session Judge as well as at the hearing of his appeal in the High Court that he was a juvenile delinquent within the meaning of the West Bengal Children Act and, therefore, the Court had no jurisdiction to try him, as well as the court had no jurisdiction to sentence him to suffer imprisonment for life. It was for the first time that this contention was raised before the Supreme Court. The Court observed that in view of the

26. AIR 1984 SC 237.

27. *Id.* at 239.

underlying intendment and beneficial provisions of the Act read with clause(f) of Article 39 of the Constitution, the Court considered it proper not to allow a technical contention that this contention is being raised in this court for the first time to thwart the benefit of the provisions being extended to the appellant, if he was otherwise entitled to it. The Supreme Court stated that on the basis of the age report submitted by the Sessions Court to the effect that the appellant was a juvenile delinquent on the date of offence; the court of the Magistrate could not have committed the case to the Court of Session. Only an enquiry could be held against the appellant as provided in the West Bengal Children Act, and he could not be sentenced do suffer imprisonment.

The court held that the entire trial of the appellant was thus without jurisdiction and was vitiated. It was consequently held that the conviction of the appellant by the trial court and confirmed by the High Court were unsustainable and they must be set aside. Further, the Supreme Court observed that the apex court ordinarily would be reluctant to entertain a contention based on factual averments raised for the first time before it. However, the court observed that it would be equally reluctant to ignore, overlook or nullify the beneficial provisions of a very socially progressive statute by taking shield behind the technicality of the contention being raised for the first time in the Supreme Court²⁸.

It is significant to note here that generally the Supreme Court does not admit a fresh plea relating to facts in a criminal appeal which was not raised before the trial court. But in view of the juvenile delinquent the court took a liberal view and made an exception to the above rule. In the above case, therefore, the court admitted the plea of age of the appellant and decided it. The court on the sole basis of age of the accused vitiated the whole trial. The court went a step further by lying down that the trial judge must make an enquiry into the age of the accused in such cases before proceeding further.

The court was of the opinion that whenever a case is brought before the Magistrate and the accused appears to be aged 21 years or below, before

28. *Id.* at 240 – 41.

proceeding with the trial or undertaking an inquiry, an enquiry must be made about the age of the accused on the date of the occurrence. This ought to be more so where Special Acts dealing with juvenile delinquents are in force. It was stated that this procedure, if properly followed would avoid a journey up to the Apex court and the return journey to the grass root court²⁹.

Subsequently in *Bhoop Ram V State of U.P*³⁰, the Supreme Court had to deal with the only question whether the appellant who had been convicted along with five others for the offence of murder and had been sentenced to imprisonment for life, should have been treated as a 'child' within the meaning of section 2(4) of the U.P Children Act, 1951 and sent to an approved school for detention therein till he attained the age of 18 years instead of being sentenced to undergo imprisonment in jail. The appellant is support of his contention that he was less than 16 years of age on the date of the commission of the offence relied upon a school certificate wherein his date of birth was shown. The trial court without going into the question whether the appellant was below 16 years of age on the date of the commission of the offence, adverted only to the fact that appellant was below 18 years of age at the relevant time and proceeded to follow the ratio in *Bachchey Lal V. State of U.P*³¹ and awarded the lesser sentence of imprisonment for life instead of the extreme penalty of death sentence. The Supreme Court at the stage of admission of special leave petition, directed the Sessions Judge to conduct an inquiry into the age of the appellant and submit the report.

The appellant did not place any other material before the Session Judge except the school certificate to prove that he had not completed 16 years on the date of the commission of the offence. The Sessions Judge, after considering the medical certificate and the school certificate stated in the report that the appellant appeared to be about 28 – 29 years of age which meant that the appellant would have completed 16 years on the date of the occurrence. The Sessions Judge had rejected the school certificate produced by the appellant on the ground that 'it is

29. *Id*

30. (1989) 3 SCC 1.

31. (1976) 4 SCC 305.

not unusual that in schools ages are understated by one or two years for future benefits". Whereas the learned Counsel for the appellant argued that the Chief Medical Officer's certificate and the session Judge's report regarding the age of the appellant are based only on their respective opinions whereas the school certificate produced by the appellant contains definite information regarding the date of birth of the appellant and hence the school certificate should prevail over the certificate of the Doctor and the report of the Session Judge specially in the absence of any material to raise doubts about the truth of the entries in the certificate.

Therefore, disagreeing with the report of the Sessions Judge to the effect that the appellant was not a 'child', the Supreme Court, on the basis of the evidence addressed before the Sessions Judge, was of the opinion that the appellant could not have completed 16 years of age when the occurrence took place. The Supreme Court observed that the appellant should thus have been dealt with under the U.P Children Act, 1951 instead of being sentenced to imprisonment on his conviction by the Session Judge. The crucial question before the Supreme Court was how to deal with the appellant who was more than 28 years of age at the time of decision of the appeal by the Supreme Court. It was observed that there was no question for the appellant being sent at that age to an approved school under the U.P. Children Act, 1951 for being detained there, as he had crossed the maximum age of detention in an approved school ie 18 years. Referring to and following the precedent of the Supreme Court in *Jayendra V. State of U.P*³², the Supreme Court in this case sustained the conviction of the appellant under all charges framed against him but quashed the sentence awarded to him and directed his release forthwith.

Similarly, in *Pradeep Kumar V. State of U.P*³³, the Supreme Court had the occasion to consider the sole question whether each of the appellants in the three appeals before the Supreme Court was a 'child' within the meaning of the U.P Children Act, 1951, and as such, on conviction under section 302 read with

32. (1981) 4 SCC 149.

33. AIR 1994 SC 104.

section 34 IPC, should have been sent to an approved school for detention till the age of 18 years. The Supreme Court was satisfied that on the date of occurrence the appellants had not completed 16 years of age and as such they should have been dealt with under the U.P Children Act instead of being sentenced to imprisonment on conviction under sections 302/34 IPC. Since the appellants at the time of the judgement by the Supreme Court were aged more than 30 years, the Supreme Court observed that there was no question of sending them to an approved school for detention. Accordingly, while sustaining the conviction of the appellants under the charges framed against them, the sentences as awarded to them were quashed and appellants were directed to be released.

Thereafter, in *Bhola Bhagat V. State of Bihar*³⁴, where out of ten accused persons all of whom had been sentenced by the trial court to undergo imprisonment for life for the offence under section 302 read with section 149 IPC, three of them were below 16 years of age on the date of the occurrence of the offence. However, the trial court did not give the benefit of Bihar Children Act to the said accused person.

In appeal before the High Court of Patna, the argument was that the said there convicted appellants were children as defined in the Bihar Children Act, 1982 on the date of the occurrence, and their trial along with the adult accused by the criminal court was not in accordance with law. However, this contention was rejected by the High Court. The High Court relied upon a judgement of the Supreme Court in the case of *State of Haryana V. Balwant Singh*³⁵, wherein it has been observed that if the plea that the accused was a child had not been raised before the committal court as well as before the trial court, the High Court could not merely on the basis of the age recorded in the statement under section 313 CrPc conclude that the respondent was a 'child' within the meaning of the definition of the expression under the Act on the date of the occurrence in the absence of any other material to support that conclusion³⁶.

34. AIR 1998 SC 236.

35. 1993 Supp.(1) SCC 409.

36. *Id.* note 34 at 238 - 39.

Therefore, the Supreme Court held that such approach of the High Court in dealing with the question of age of the appellants and the denial of benefit to them of the provisions of both the Acts was not proper. If the High Court had doubts about the correctness of their age as given by the appellants and also as estimated by the trial court, it ought to have ordered an enquiry to determine their ages, and it should not have brushed aside their plea without such enquiry³⁷.

The Supreme Court accordingly, following the course earlier adopted by the Supreme Court in the cases of *Gopinath Ghosh*³⁸, *Bhoop Ram*³⁹ and *Pradeep Kumar*⁴⁰ while sustaining the conviction of the appellants, quashed the sentences awarded to them, as all of them had crossed the maximum age detention in an approved school.

The Supreme Court further reiterated that when a plea is raised on behalf of an accused that he was a 'child' within the meaning of the definition of the expression under the Act, it becomes obligatory for the court, in case it entertains any doubt about the age as claimed by the accused, to hold an inquiry itself for determination of the question of age of the accused or cause an enquiry to be held and seek a report regarding the same, if necessary, by making the parties to lead evidence in that regard. Keeping in view the beneficial nature of the socially oriented legislation, it is an obligation of the court where such a plea is raised to examine that plea and it cannot fold its hands and without returning a positive finding regarding that plea, deny the benefit of the provisions to an accused. The Court observed that it expected the High Courts and the Subordinate Courts to deal with such cases with more sensitivity as otherwise the objects of the Acts would be frustrated and the effort of the legislature to reform the delinquent child and reclaim him as a useful member of the society would be frustrated⁴¹.

In another instance the question of the credibility of the Register of Births and Deaths came up before the Supreme Court in *Santenu Mitra V. State of West*

37. *Id.*

38. *Gopinath Ghosh V. State of W.B.*, AIR 1984 SC 237.

39. *Bhoop Ram V. State of U.P.* (1989) 3 SCC 1

40. *Pradeep Kumar V. State of U.P.*, AIR 1994 SC 104.

41. AIR 1998 SC 236 at 242.

*Bengal*⁴². In this case the appellant was facing a trial under section 302 IPC before the Court of Session and his plea was that he was a child on the date of the commission of the offence. The appellant strongly relied upon an entry made in the Register of Birth and Deaths. The court observed that even though the date of birth of the appellant as recorded in the register was 19.11.72, since the entry was made sometime between 14.8.78 and 18.11.78 it was not contemporaneous and thus not reliable. The High Court on being approached again in revision rejected the plea of the appellant. The Supreme Court was of the view that the High Court fell in error in not holding the appellant to be below 16 years of age on the date of commission of the offence.

The court stated that it is nobody's case that the entry in the Register of Births and Deaths is not a genuine entry. Once that entry was recorded by an official in performance of his duties, it cannot be doubted on the mere argument that it was not contemporaneous with the suggested date of birth of the appellant. It was further stated that the occurrence had taken place much later and it could not have been expected on the date when the entry was made that the appellant would claim benefit thereof on the commission of some offence. Therefore, the Supreme Court without hesitation set aside the impugned order of the High Court and declared the appellant to be a juvenile.

However, there came about a change in the judicial attitude in respect of the determination of the age of the juvenile which is evident from the case of *Armit Das V. State of Bihar*⁴³, where two questions arose for consideration before the Supreme Court. First, by reference to which date the age of the petitioner is required to be determined for finding out whether he is a juvenile or not. Secondly, whether the finding as to age, as arrived at by the courts below and maintained by the High Court, can be sustained.

The learned Counsel for the appellant submitted that it is the date of the offence which is crucial for determining the age of the person claiming to be a juvenile while according to the learned Additional Solicitor General it is the date

42. AIR 1999 SC 1587.

43. AIR 2000 SC 2264.

on which the person is brought before the competent authority by reference to which the age of the person is required to be determined so as to find out whether he is a juvenile or not⁴⁴. It was pointed out by the court that neither the definition of the juvenile nor any other provision contained in the Juvenile Justice Act, 1986 specifically provides the date by reference to which the age of a boy or a girl has to be determined so as to find out whether he or she is a juvenile or not. The court observed that the scheme of the Juvenile Justice Act contemplates its applicability coming into play only when the person may appear or be brought before the competent authority. Referring to the relevant provisions of the Juvenile Justice Act, the Court observed that a reading of the relevant provisions makes it very clear that an enquiry as to the age of the juvenile has to be made only when he is brought or appears before the competent authority. A police officer or a Magistrate who is not empowered to act or cannot act as a competent authority has to merely form an opinion guided by the apparent age of the person and in the event of forming an opinion that he is a juvenile, he has to forward him to the competent authority at the earliest subject to arrangements for keeping in custody and safety of the person having been made for the duration of time elapsing in between. The competent authority shall proceed to hold an enquiry as to the age of that person for determining the same by reference to the date of the appearance of the person before it or by reference to the date when such person was brought before it. It is irrelevant what was the age of the person on the date of commission of the offence⁴⁵.

During the course of hearing an important question that was posed by the court to the learned senior counsel for appellant as to what happens if a boy or a girl of just less than 16 or 18 years of age commits an offence and then leaves the country or for any reasons neither appears nor is brought before the competent authority until he or she attains the age of 50 years? Disagreeing with the interpretation suggested by the learned Senior Counsel for the appellant, the court was of the opinion that the procedure prescribed by the provisions of the

44. *Id.* at 2266.

45. *Id.* at 2267-68.

Act has to be adopted only when the competent authority finds the person brought before it or appearing before it to be under 16 years of age if a boy and under 18 years of age if a girl on the date of being brought or such appearance first before the competent authority. The date of the commission of the offence is irrelevant for finding out whether the person is a juvenile within the meaning of clause (h) of section 2 of the Juvenile Justice Act, 1986⁴⁶.

The learned Senior Counsel for the appellant invited the attention of the Supreme Court to the following cases *Santenu Mitra V. State of WB*⁴⁷, *Bhola Bhagat V. State of Bihar*⁴⁸ and *Gopinath Ghosh V. State of W.B.*⁴⁹. The learned senior Counsel emphasized that in all these cases the question whether the person arrayed as accused/appellant before the court was a juvenile or not was decided by taking into consideration the age of the accused on the date of occurrence or the date of the commission of the offence. The Supreme Court observed that these cases are authorities for the propositions that (i) the technicality of the accused having not claimed the benefit of the provisions of the Juvenile Justice Act at the earliest opportunity or before any of the courts below should not keeping in view the intendment of the legislation, come in the way of the benefit being extended to the accused appellant even if the plea was raised for the first time before the court, (ii) a hypertechnical approach should not be adopted in support of the plea that he was a juvenile and if two views may be possible on the same evidence, the court should lean in favour of holding the accused to be a juvenile in borderline cases and (iii) the provisions of the Act are mandatory and while implementing the provisions of the Act, those charged with responsibilities should show sensitivity and concern for a juvenile. However, in none of the cases the specific issue – by reference to which date (the date of the offence or the date of production of the person before the competent authority); the court shall determine whether the person was a juvenile or not, was neither

46. *Id.* at 2269.

47. *AIR* 1999 SC 1587.

48. *AIR* 1998 SC 236.

49. *AIR* 1984 SC 237

raised or decided⁵⁰. The court, therefore, made it clear that the crucial date for determining the question whether a person is juvenile is the date when he is brought before the competent authority. The Court observed that so far as the finding regarding the age of the appellant is concerned it is based on appreciation of evidence and arrived at after taking into consideration of the material available on record and valid reasons having been assigned for it⁵¹.

Thereafter, in subsequent cases also the Supreme Court had opportunity to deal with the issue of determination of age of juvenile and refused to accept the claim of juvenility. In *Ramdeo Chauhan V. State of Assam*⁵², where the petitioner who had been awarded death sentence by the trial court and the High Court and had been confirmed by the Supreme Court filed review petition on the ground that the petitioner was a juvenile on the date of commission of the offence. According to the petitioner he was 15 years 1 month and 7 days old on the date of the occurrence. It was contended that the trial court wrongly held the petitioner to be more than 20 years of age and the High Court erred in not deciding the question of age despite concession made by the Counsel appearing for the petitioner. It was submitted that the Counsel of the accused could not have sacrificed the interest of the accused and should have insisted on a finding from the court regarding his being a child or a juvenile. The court observed that the grounds urged in the petition and at the Bar do not make out a case for review. In the guise of this petition, the petitioner had sought the reappraisal of the whole evidence, firstly, to hold him not guilty and even if he was found guilty to give him the benefit of the Act. In the opinion of the court the contentions raised and the prayers made were admittedly beyond the scope of review. It was further observed that this petition could be dismissed only on this ground. However, being the case of death sentence, the court decided to consider the whole matter in depth to ascertain as to whether the petitioner is entitled to the benefit of the Act or not. The Court observed that it further opted to consider that even if he is not proved to be a juvenile, can he be given the benefit of his age on the ground

50. AIR 2000 SC 2264 at 2270 - 71.

51. *Id.* at 2272.

52. (2001) 5 SCC 714.

of his allegedly being on the borders of the age contemplated under the Act for the purposes of awarding him the alternative sentence of imprisonment for life⁵³.

It was further observed that in the case of the petitioner, it appears that the investigating officer, the Magistrate before whom the accused was produced, the Magistrate who recorded his confessional statement and the Sessions Court to whom the accused was committed did not find that the accused was a juvenile or a child. Such Magistrate and court were in a better position to form an opinion regarding the age of the accused that had admittedly appeared before them as they had the opportunity to see and observe him. The court held that there was no doubt in their mind that the plea of the petitioner being a juvenile is not only an afterthought but a concoction of his imagination at the belated stage to thwart the cause of justice by having resort to wrangles of procedures and technicalities of law.⁵⁴

The court held that it was satisfied that the petitioner was not a juvenile within the meaning of the Act nor did he seriously claim to be a juvenile for the purpose of getting the benefit of section 22 of the Act. The judgement of the trial court and the High Court cannot be assailed on the ground of having been passed in violation of the mandate of law. It was further observed that despite holding that neither was the petitioner juvenile nor were the provisions of the Act applicable to the case, the court examined this matter from another angle ie to find out as to whether the petitioner was near or about the age of a juvenile for the purposes of ascertaining as to whether the death sentence can be substituted by imprisonment for life. The court was of the considered opinion that the technicalities of law cannot come in the way of dispensing justice in a case where the accused is likely to be given the extreme penalty imposable under law. In deference to the judgement of this court in *Gopinath Ghosh V. State of W.B*⁵⁵, and *Bhola Bhagat V. State of Bihar*⁵⁶, the court took upon to examine as to whether the accused was a child or was near or about the age of juvenile for the

53. *Id.* at 731.

54. *Id.* at 732 - 33.

55: 1984 Supp SCC 228.

56. (1997) 8 SCC 720.

purposes of ascertaining as to whether the death sentence can be sustained by imprisonment for life⁵⁷.

After examining the evidence led before the trial court in this regard the court found no reason to disagree with the reasoned conclusions arrived at by the trial court⁵⁸.

Therefore, in view of the majority judgement the review petition was dismissed.

In *Omprakash V. State of Uttaranchal*⁵⁹, the appellant accused had been convicted under section 302 and 307 IPC by the learned Additional Sessions Judge, Dehradun. For committing the offence of murder, death sentence was imposed. The appellant also preferred an appeal from jail. The High Court dismissed the appeal preferred by the accused – appellant and confirmed the death sentence and other sentences passed against him for the offences under sections 302 and 307 IPC. It was against this judgement of the High Court that the present appeal before the Supreme Court was preferred by the accused through jail authorities.

The court observed that regarding the age of the appellant, a contention had been raised that he was a juvenile at the time of commission of crime on 15 – 11 – 1994 because he had given his age as 20 years in his statement recorded under section 313 CrPc on 7 – 3 – 2001. Apart from the fact that on behalf of the appellant no proof was adduced regarding his age, the High Court noted that he admittedly had opened the bank account in Punjab National Bank at Dehradun on 9 – 3 – 1994. The High Court observed that the appellant would not have been in a position to open the account unless he was a major and declared himself to be so. That view was also taken by the trial court. The court observed that the approach of the trial court as well as the High Court on this aspect cannot be faulted. Therefore, in view of the foregoing discussion the court affirmed the

57. (2001) 5 SCC 714 at 734 - 35

58. *Id.* at 737.

59. (2003) 1 SCC 648.

conviction of the appellant accused under section 302 IPC and the appeal was dismissed⁶⁰.

In *Surinder Singh and Another V. State of U.P.*⁶¹, the appellants were found guilty of offence punishable under section 302 read with section 34 of the Indian Penal Code, 1860 by the Allahabad High Court, upsetting the judgement of acquittal passed by the Session Judge, Rampur. The court observed that in the present appeal, the learned Counsel for the appellants at the threshold took exception to the trial on the ground that the accused persons were juveniles as defined under the Juvenile Justice Act, 1986 (in short the 'Juvenile Act') at the time of occurrence. There was no determination of their respective ages and if the trial court doubted the correctness of their age a proper enquiry to determine their age should have been undertaken. It was pointed out that one of the accused ie Surinder Singh claimed his age to be 16/17 years, while other accused Pinder Singh claimed his age to 17/18 years. The trial court noted that the age of Surinder Singh appeared to be 18/19 years. It was submitted that while the accused persons were in jail, they were kept in a cell of the jail meant for juvenile. According to the appellants, this itself is indicative of the fact that they were juveniles⁶².

The court further held that the jurisdictional issue based on purported ages of the accused needs consideration first. The question relating to the age of the accused was never raised before the courts below, necessitating a decision in this regard. It was pointed out by the court that infact the juvenile Act on which the appellants had placed reliance was not in existence at the time of occurrence and Uttar Pradesh Children Act, 1951 (in short the 'Children Act') which was repealed by Juvenile Act was operative. Clause (4) of section 2 of the children Act defines 'child' who is under the age of 16 years. Statement of the accused on which great reliance was placed by Learned Counsel for the appellants itself shows that the accused Surinder Singh and Pinder Singh stated their ages to be 16/17 and 18/19 years. Though the statement was recorded few months after the

60. *Id.* at 659

61. *AIR* 2003 SC 3811.

62. *Id.* at 3814.

occurrence that does not really show that the accused were less than the prescribed age on the date of occurrence. Further, at no point of time during trial or before the High Court this question was raised.

It was further observed by the Court that the necessity of determining the age of the accused arises when the accused raises a plea and the Court entertains a doubt. Here, no claim was made by the accused that he was a child and therefore, the question of the court entertaining a doubt did not arise. Further, the mere fact that the accused were put in a cell meant for juveniles as contended by learned Counsel for the appellants is a plea which is just to be noted and rejected. The Court pointed out that there was no material to even substantiate this stand; nor any such treatment could be specifically said to have been meted out by any orders of Court/Authority. On the contrary, the order of bail passed by the Allahabad High Court by which bail was granted did not even direct that they were to be kept in a cell meant for juveniles. The order dated 9 – 2 – 1987 was passed when after admitting the appeal, the present appellants were directed to be released on bail in the concerned Government appeal and at that time there was not even any adjudication of the question whether the accused were child/juvenile. Therefore, the court observed that in the aforesaid background, plea based on purported age raised by the appellants had no merit and was rejected⁶³. Similarly, in *Bikau Pandey and others V. State of Bihar*⁶⁴, the Court held that the jurisdictional issue based on purported age of the accused needs consideration first. The question relating to the age of the accused was never raised before the Courts below during trial, and in appeal, necessitating a decision in this regard. In fact, the Juvenile Act on which the appellants had placed reliance was not in existence at the time of occurrence. Further, at no point of time during trial or before the High Court this question was raised⁶⁵. The necessity of determining the age of accused arises when the accused raises a plea and the Court entertains a doubt. The court further pointed out that here, when the claim was made by the accused that he was a child the plea was considered

63. *Id.* at 3814 - 3815.

64. *AIR* 2004 SC 997.

65. *Id.* at 1001.

and a decision was rendered that he was not a child. That order had attained finality without any challenge thereto. The clearly untenable plea that the school register was wrong, could not be accepted by accepting the self – serving affidavit of the father. Further, in the opinion of the Court there was no argument advanced either before the trial court or the High Court on this issue and the disputed factual question which had also attained finality in view of an earlier order could not be permitted to be raised⁶⁶.

Thereafter, in *Ganesh v. State of Madhya Pradesh*⁶⁷, the appellant preferred this appeal under section 374(2) of Cr. P.C. after being aggrieved by the judgement passed by the Second Additional Sessions Judge, Tikamgarh convicting and sentencing the appellant under section 376 IPC for four years rigorous imprisonment.

The court observed that coming to the question of jurisdiction over the trial as raised by the Counsel for the appellant that the case was triable by the Juvenile Court as the appellant was Juvenile and below 16 years of age on the date of incident as per Juvenile Justice Act 1987. According to him the case was wrongly tried by the sessions Court contrary to provisions of such Act. In this regard minor question was raised by the Counsel that no inquiry was held by the trial court regarding age of the appellant. But the court observed such independent inquiry was not necessary in the case. The age of the appellant was mentioned in his MLC report and also in other papers filed along with charge sheet. In the memo of his arrest, Ex – P/5 his age was mentioned as 19 years. Even on his medical examination Dr. B.B. Khare had mentioned his age as 17 years and the same was supported by his depositions also. The court pointed out that it was not challenged in his cross – examination and what so ever evidence was laid on behalf of the appellant in his defence in this regard that was not reliable. DW – 3 Pamma had stated that the appellant being his brother – in – law was only 15 years of age on the date of deposition of this witness but the same had not been supported by any material document or circumstance. Even the

66. *Id.* at 1002.

67. 2006 Cr. L. J. 3604.

mother of the appellant or other elder person of his family had not been examined in this regard. Therefore, the court pointed out that in the absence of any cogent circumstance such defense evidence cannot be relied on. In such circumstance on account of non – examination of the mother or father of the appellant on the question of his age, the version of Dr. B.B Khare was binding against the appellant. So the trial Court had not committed any error to proceed with the trial⁶⁸.

It was further pointed out by the court that even at the stage of appreciation of evidence in view of deposition of the said doctor, the trial court had not found the age of the appellant below 17 years, and hence the trial court had not committed any error either in holding trial or concluding the same. Besides above, in the circumstances it appeared that the trial court had examined and decided the aforesaid question regarding age of the appellant even on appreciation of the evidence. Thus, the arguments in this regard advanced by the appellant that no enquiry was held, was not sustainable and the same failed. Therefore, in view of the aforesaid discussions the court pointed out that the case laws cited by the appellant's Counsel did not give any support to his case as concerning cases as mentioned in the synopsis were based on different circumstances in which the age was disputed on behalf of the concerned accused on the basis of some positive circumstances or some conflicting evidence was available on record and the same was not considered by the trial court but in the case at hand in view of availability of reliable and admissible evidence the appellant was found 17 years of age. Therefore, the court observed that it had no dispute regarding principles laid down in such cited cases but in the facts and circumstances those are distinguishable and not applicable to this case⁶⁹.

In *Ravinder Singh Gorkhi V. State of U.P*⁷⁰, for the first time before this court a contention was raised that as the appellant was a minor on the date of commission of the offence, he was entitled to the benefit thereof in terms of the

68. *Id.* at 3607 - 3608.

69. *Id.* at 3608.

70. (2006) 5 SCC 584.

provision of section 2(4) of the Uttar Pradesh Children Act, 1951 (for short “the Act”).

The court observed that determination of the date of birth of a person before a court of law, whether in a civil proceeding or a criminal proceeding would depend upon the facts and circumstances of each case. Such a date of birth has to be determined on the basis of the materials on record. It will be a matter of appreciation of evidence adduced by the parties. Different standards having regard to the provision of section 35 of the Evidence Act cannot be applied in a civil case or a criminal case⁷¹.

It was further pointed out by the court that a question was raised as to whether the determination of the age of a child should be made on the basis of the date on which the occurrence took place or when he was produced before the court. The court stated that before a Constitution Bench in *Pratap Singh V State of Jharkhand*⁷², the above said question came up for consideration in the context of the provisions of the Juvenile Justice Act, 2000 where it was held that the date of commissions of the offence would be the relevant date. Therefore, in terms of the aforementioned decision of the Constitution Bench such determination is required to be made even if at the relevant time, the juvenile crossed the age of the eighteen years. In absence of any other statute operating in the field, Section 35 of the Evidence Act will have application and the Court while determining such age would depend upon the materials brought on record by the parties which would be admissible in evidence in terms of section 35 of the Act⁷³.

The Court was, therefore, of the opinion that until the age of a person is required to be determined in a manner laid down under a statute, different standard of proof should not be adopted. It was further pointed out that it is no doubt true that the court must strike a balance. In case of a dispute the court may appreciate the evidence having regard to the facts and circumstances of the case. It would be a duty of the court of law to accord the benefit to a juvenile, provided he is one. To give the same benefit to a person who is infact not a juvenile may

71. *Id.* at 591.

72. (2005) 3-SCC 551.

73. *Supra* note 70 at 592.

cause injustice to the victim⁷⁴. An important case that came up for consideration before the Supreme Court relating to determination of age of the Juvenile was that of *Pratap Singh V. State of Jharkhand*⁷⁵. In this case the appellant was alleged as one of the conspirators to have caused the death of the deceased by poisoning. The appellant was arrested and produced before C.J.M who assessed the age of the appellant to be around 18 years old. A petition was filed on behalf of the minor claiming that he was a minor on the date of occurrence ie 31 – 12 – 1998, whereupon the learned CJM transmitted the case to the Juvenile Court. The appellant was produced before the Juvenile Court on 3 – 3 – 2000. The Juvenile Court assessed the age of the appellant by appearance to be between 15 and 16 years and directed the Civil Surgeon to constitute a Medical Board for the purpose of assessing the age of the appellant by scientific examination and submit a report. No such Medical Board was constituted. Thus, the learned ACJM asked the parties to adduce evidence and on examining the school leaving certificate and marksheet of Central Board of Secondary Education came to the finding that the appellant was below 16 years of age as on 31 – 12 – 1998 taking the date of birth of the appellants as 18 – 12 – 1983 recorded in the aforesaid certificate. The appellant was then released on bail. Aggrieved thereby, the informant filed an appeal before the 1st Additional Sessions Judge, who after referring to the judgement of this court in *Arnit Das V. State of Bihar*⁷⁶, disposed of the appeal on 19 – 02 – 2001 holding that the juvenile Court had erred in not taking note of the fact that the date of production before the juvenile court was the date relevant for deciding whether the appellant was juvenile or not for the purpose of trial and directed a fresh inquiry to assess the age of the appellant. Aggrieved thereby the appellant moved the High Court by filing Criminal Revision Petition. The High Court while disposing of the revision followed the decision of the Supreme Court in Arnit Das case and held that reconing date is the date pf production before the court and not the date of the occurrence of the

74. *Id.* at 595 - 596.

75. *AIR* 2005 SC 2731.

76. (2000) 5 *SCC* 488.

offence. Further, in the Supreme Court the conflicting views in *Arnit Das V. State of Bihar*⁷⁷ and *Umesh Chandra V. State of Rajasthan*⁷⁸ was taken note of. Accordingly the matter was referred to the Constitution Bench. The Court observed that the dual questions which require authoritative decision are:

- a) Whether the date of occurrence will be the reckoning date for determining the age of the alleged offender as Juvenile offender or the date when he is produced in the Court/competent authority.
- b) Whether the Act of 2000 will be applicable in the case a proceeding initiated under 1986 Act and pending when the Act of 2000 was enforced with effect from 1 – 4 – 2001⁷⁹.

The learned Counsel for the appellant submitted that the decision in *Umesh Chandra* rendered by a three – Judge Bench of this Court has laid down the correct law and a two – Judge Bench decision in *Arnit Das* cannot be said to have laid down a correct law. He further referred to the aims and objects of the Juvenile Justice Act, 1986 (herein after referred to as the 1986 Act) and submitted that the whole object is to reform and rehabilitate the juvenile for the offence he is alleged to have committed and if the date of offence is not taken as reckoning the age of the juvenile, the purpose of the Act itself would be defeated⁸⁰.

Sema J delivering the majority opinion of the court quoted from the statement of Objects and Reasons of the 1986 Act and submitted that the whole object of the Act is to provide for the care, protection, treatment, development and rehabilitation of neglected delinquent juveniles. It is a beneficial piece of legislation aimed as to make available the benefit of the Act to the neglected or delinquent juvenile. The Court further pointed out that the notable distinction between the definitions of 1986 Act and 2000 act is that in 1986 Act “juvenile in conflict with law” is absent. The definition of delinquent juvenile in 1986 Act as noticed above is preferable to an offence said to have been committed by him. It

77. *Id.*

78. (1982) 2 SCC 202.

79. AIR 2005 SC 2731 at 2736

80. *Id.*

is the date of offence that he was in conflict with the law. When a juvenile is produced before the competent authority and or court he has not committed an offence on that date but he was brought before the authority for the alleged offence which he has been found to have committed. Therefore, in view of the court what was implicit in 1986 Act had been made explicit in 2000 Act⁸¹.

The Court further referred to section 32, 18, 3 and 26 of the Act of 1986 and stated that the legislative intendment underlying sections 3 and 26 read with the preamble, aims and objects of the Act is clearly discernible. A conjoint reading of the sections, preamble, aims and objects of the Act leaves no matter of doubt that the legislature intended to provide protection, treatment, development and rehabilitation of the neglected or delinquent juveniles and for the adjudication thereof. In the view of the court therefore, sections 3 and 26 became necessary and both the sections clearly pointed in the direction of the relevant date for the applicability of the Act as the date of occurrence. The court was clearly of the view that the relevant date of applicability of the Act so far as age of the accused, who claims to be a child, is concurred, is the date of the occurrence and not the date of the trial. The Court further stated that the law laid down in Umesh Chandra is the correct law and that the decision rendered by a two – Judge bench of this court in Arnit Das cannot be said to have laid down a good law⁸². Dealing with the question whether the Act of 2000 will be applicable in the case a proceeding is initiated under 1986 Act and pending when the Act of 2000 was enforced with effect from 1 – 4 – 2001 the court pointed out that to answer the aforesaid question it would be necessary to make a quick survey of the definitions and sections of 2000 Act relevant for the purpose of disposing of the case at hand⁸³. The Court referred to section 69 of the 2000 Act and stated that sub – section (2) postulates that anything done or action taken under the 1986 Act shall be deemed to have been done or taken under the corresponding provisions of the 2000 Act. Thus, although the 1986 Act was repealed by the 2000 Act, anything done or any action taken under the 1986 is saved by sub –

81. *Id.* at 2737.

82. *Id.* at 2738-39.

83. *Id.* at 2739.

section (2), as if the action has been taken under the provisions of the 2000 Act. The Court then referred to section 20 which makes special provision in respect of pending cases⁸⁴.

The Court further referred to the definition of juvenile under the 1986 Act and 2000 Act and stated that the striking distinction between the 1986 Act and the 2000 Act was with regard to the definition of juvenile. The Court also made a reference of section 3 and stated that even where an inquiry has been initiated and a juvenile ceases to be a juvenile ie crosses the age of 18 years, the inquiry must be continued and orders made in respect of such person as if such person had continued to be a juvenile. Similarly, under section 64 where a juvenile is undergoing a sentence of imprisonment at the commencement of the 2000 Act he would in lieu of undergoing such sentence, be sent to a special home or be kept in a fit institution. In the opinion of the Court these provisions showed that even in cases where a mere inquiry had commenced or even where a juvenile had been sentenced the provisions of the 2000 Act would apply⁸⁵.

It was observed by the Court that section 20 of the Act as quoted above deals with special provision in respect of pending cases and begins with non – obstante clause. The sentence “notwithstanding anything contained in this Act, all proceedings in respect of a juvenile pending in any court in any area on date of which this Act came into force’ has great significance. It was further pointed by the Court that the proceedings in respect of a Juvenile pending in any court referred to in section 20 of the Act is relatable to proceedings initiated before the 2000 Act came into force. The term “any court” would include even ordinary criminal courts. The Court pointed out that if the person was a “Juvenile” under the 1986 Act the proceedings would be pending in criminal courts only if the boy had crossed 16 years or girl had crossed 18 years. This showed that section 20 referred to cases where person had ceased to be a juvenile under the 1986 Act but had not yet crossed the age of 18 years then the pending case would continue in the Court as if the 2000 Act had not yet been passed and if the Court found that

84. *Id.* at 2739 - 40.

85. *Id.* at 2740.

the juvenile had committed an offence, it shall record such finding and instead of passing any sentence in respect of the Juvenile, shall forward the juvenile to the Board which shall pass orders in respect of that juvenile⁸⁶.

In this connection the court thought it pertinent to note that section 16 of the 2000 Act is identical to section 22 of the 1986 Act. Similarly section 15 of the 2000 Act is in pari materia with section 21 of the 1986 Act. Thus, the court observed that such an interpretation does not offend Article 20 (1) of the constitution of India and the Juvenile is not subjected to any penalty greater than what might have been inflicted on him under the 1986 Act⁸⁷.

Making further reference to Rule 62 as framed by the Central Government the Court stated that this Rule also indicated that the intention of the legislature was that the provisions of the 2000 act were to apply to pending cases provided on 1 – 4 – 2001 ie the date on which the 2000 Act came into force, the person was a “Juvenile” within the meaning of the term as defined in the 2000 Act ie he/she had not crossed 18 years of age. Therefore, the court held that the provisions of 2000 Act would be applicable to those cases initiated and pending trial/inquiry for the offences committed under the 1986 Act provided that the person had not completed 18 years of age as on 1 – 4 – 2001⁸⁸.

On the other hand Sinha J., in his concurring opinion made extensive reference to United Nations Standard Minimum Rules for the Administration of Juvenile Justice. While dealing with the question as to what would be the reckoning date in determining the age of the offender viz date when produced in a court or the date on which the offence was committed, Sinha J. referred to the conflict as created by the decision in *Umesh Chandra V State of Rajasthan*⁸⁹ and *Arnit Das V. State of Bihar*⁹⁰ and stated that the argument given in Arnit Das case could not be accepted for more than one reason. The Court observed that the said Act is not only a beneficial legislation but also a remedial one. The meaning of the expression ‘Juvenile’ used in a statute by reason of its very nature has to be

86. *Id.* at 2740 - 41.

87. *Id.* at 2741.

88. *Id.*

89. (1982) 2 SCC 202.

90. (2000) 5 SCC 488.

assigned with reference to a definite date. In the view of the Court the term 'Juvenile' must be given a definite connotation. A person cannot be a juvenile for one purpose and an adult for another purpose. It was, having regard to the constitutional and statutory scheme, not necessary for Parliament to specifically state that the age of juvenile must be determined as on the date of commission of the offence. The same is inbuilt in the statutory scheme. The statute must be construed having regard to the scheme and the ordinary state affairs and consequences flowing therefrom. In the opinion of the court the modern approach was to consider whether a child could live upto the moral and psychological components of criminal responsibility, that is; whether a child by virtue of his or her individual discernment and understanding could be held responsible for essentially antisocial behaviour⁹¹ The court further observed that in consulting a penal statute, the object of the law must be clearly borne in mind. An inquiry for the purpose of determination of age of the juvenile need not be resorted to if the person produced is admitted to be a juvenile. An enquiry would be necessary only if a dispute is raised in that behalf. A decision thence is required to be taken by the competent court and/or Board having regard to the status of the accused as to whether he is to be released on bail or sent to a protective custody or remanded to police or judicial custody. For the said purpose what is necessary would be to find out as to whether on the date of commission of the offence he was a juvenile or not as otherwise the purpose for which the Act was enacted would be defeated. The Court also stated that even at the final stage, viz, after he is found to be guilty of commission of an offence, he must be dealt with differently vis – a – vis adult prisoners. Only because his age is to be determined in a case of dispute by the Competent Court or the Board in terms of section 26 of the Act, the same would not mean that the relevant date thereof would be the one on which he is produced before the Board. The Court was of the opinion that if such an argument is accepted, the same would result in absurdity as, in a given case, it would be open to the police authorities not to produce him before the Board before he ceases to be a juvenile. If he is produced

91. *AIR* 2005 SC 2731 at 2748 - 49.

after he ceases to be juvenile, it may not be necessary for the Board to send him in the protective custody or release him on bail as a result whereof he would be sent to the judicial or police custody which would defeat the very purpose for which the Act had been enacted. The court observed that law could not be applied in an uncertain position. Furthermore, the right to have a fair trial strictly in terms of the Act which would include procedural safeguard was a fundamental right of the Juvenile. A proceeding against a juvenile must conform to the provision of the Act⁹².

Lastly, the court stated that the definition of 'juvenile' under the 1986 Act, of course referred to a person who had been found to have committed offence but the same had been clarified in the 2000 Act. The provisions of 1986 Act, sought to protect not only those juveniles who had been found to have committed an offence but also those juveniles who had been charged there for. In terms of section 3 of the 1986 Act as well as 2000 Act when an enquiry had been initiated even if the juvenile had ceased to be so as he crossed the age of 16 and 18 as the case may be, the same must be continued in respect of such person as if he had continued to be a juvenile. In the opinion of the court Section 3 of the 1986 Act, therefore, cannot be given effect to if it is held that the same only applied to post delinquency of the juvenile. The field covered by the act includes a situation leading to juvenile delinquency vis – a – vis commission of an offence. In such an event he is to be provided the post – delinquency care and for the said purpose the date when delinquency took place would be the relevant date. Therefore, the court held that the relevant date for determining the age of the juvenile would be one on which the offence has been committed and not when he is produced in Court⁹³.

Thereafter, dealing with the question as to whether the 2000 Act will be applicable in cases which were pending before the enforcement thereof Sinha J

92. *Id.* at 2749.

93. *Id.* at 2750 - 51.

put forward a question as to whether a person above 16 years becomes 'Juvenile' within the purview of the Act of 2000⁹⁴.

The Court stated that in terms of the 1986 Act, a person who was not juvenile could be tried in any Court. Section 20 of the Act of 2000 takes a care of such a situation stating that despite the same the trial shall continue in that Court as if that Act had not been passed and in the event he is found to be guilty of commission of an offence, a finding to that effect shall be recorded in the judgement of conviction, if any, but instead of passing any sentence in relation to the juvenile, he would be forwarded to the Board which shall pass orders in accordance with the provisions of the Act as if he had been satisfied on enquiry that a juvenile has committed the offence. Thus, the Court was of the opinion that a legal fiction had been created in the said provision. The court said that a legal fiction as is well known must be given its full effect although it has its limitations. Thus, by reason of legal fiction, a person, although not a juvenile has to be treated to be one by the Board for the purpose of sentencing which takes care of a situation that the person although not a juvenile in terms of the 1986 Act but still would be treated as such under the 2000 Act for the said limited purpose. The court pointed out that the Act provided for beneficent consequences and thus, it was required to be construed liberally⁹⁵.

The Court while referring to *Deepal Girishbhai Soni and others V. United India Insurance CO. Ltd, Baroda*⁹⁶ stated that it was not oblivious of the proposition that a beneficent legislation should not be construed so liberally so as to bring within its fore a person who does not answer the statutory scheme. However, as would appear from the provisions of the Act of 2000, the court said that the scheme of the 2000 Act is such that such a construction is possible. Reference was also made to section 64 of the Act of 2000. The Court further observed that section 20 of the act of 2000 would, therefore, be applicable when a person is below the age of 18 years as on 1 – 4 – 2001. Thus, by reason of the provisions of the said Act of 2000, the protection

94. *Id.* at 2751.

95. *Id.*

96. *AIR* 2004 SC 2107.

granted to a juvenile had only been extended but such extension was not absolute but only a limited one. It would apply strictly when the conditions precedent as contained in section 20 or section 64 are fulfilled. It was further pointed out by the court that the purpose of the Act would stand defeated if a child continues to be in the company of an adult. Thus, the Act of 2000 intends to give protection only to a juvenile within the meaning of the said Act and not an adult. In other words, although it would apply only to a person who is still a juvenile having not attained the age of 18 years but shall not apply to a person who has already attained the age of 18 years on the date of coming into force thereof or who had not attained the age of 18 years on the date of commission of the offence but has since ceased to be a juvenile. The Court was of the opinion that the embargo of giving a retrospective effect to a statute arose only when it took away vested right of a person. By reason of section 20 of the Act no vested right in a person had been taken away, but thereby only an additional protection had been provided to a juvenile⁹⁷.

Therefore, the upshot of the aforementioned discussions is –

- i) In terms of 1986 act, the age of the offender must be reckoned from the date when the alleged offence was committed;
- ii) The 2000 Act will have a limited application in the cases pending under the 1986 Act;
- iii) The model rules framed by the Central Government having no legal force cannot be given effect;
- iv) The court, thus, would be entitled to apply the ordinary rules of evidence for the purpose of determining the age of the juvenile taking into consideration the provisions of section 35 of the Indian Evidence Act.

Thereafter, there have been other instances where the Supreme Court as well as the High Court had to deal with the question of the applicability of the Juvenile Justice (Care and Protection of children) Act, 2000 to cases pending under the Juvenile Justice Act, 1986. Hence, in the case of *Nuvrala Kiran, V.*

97. AIR 2005 SC 2731 at 2751 - 52.

*State of A.P.*⁹⁸, the court observed that the provisions of the Juvenile Justice (Care and Protection of Children) Act, 2000, have no application, whatsoever, to the case on hand and the accused because the Act came into legal force on 28 – 2 – 2001, while the alleged offence by the accused is proved to have been committed on 18 – 1 – 2001 ie long prior to the operation of the said Act. Hence, the accused cannot claim any benefits of any of the provisions, if any, of that Act. It was further observed that as on the date of the proved offence on 18 – 1 – 2001, the Juvenile Justice act, 1986 was in force, and hence, the accused will be governed by the provisions thereof, if at all, it so does. The Court then referred to sub – sec (2) of 69 of the Juvenile Justice Act of 2000 which postulates that any action taken under the said act of 1986 shall be deemed to have been taken under the new Act of 2000. Sub section (h) of section 2 of the said Juvenile Justice act, 1986 that defines a juvenile was also referred to. The Court referred to the contention of the Prosecution according to whom the accused was aged about 18 years, as on the date of the offence and also the evidence of the Government doctor according to whom the recorded age of the accused was 17 years as on the date of his examination i.e. 25–1–2001 after making required medical examination of the accused in respect thereof. Therefore, the Court stated that when the accused is aged 17 years, he could not be described as ‘Juvenile’ within the meaning and contemplation of the said sub – section (h) of section 2 of the said Juvenile Justice Act, 1986. Hence the provisions of that Act have no application to the case on hand, and hence, the accused cannot claim the benefits if any, under any of the provisions of that Act also⁹⁹.

In *Satbir Singh and other V. State of Haryana*¹⁰⁰, the court referred to the contention of the appellant accused A 2, who had stated that he was 17 years of age as on 13 – 6 – 1986 and therefore he should be entitled to the benefit of the Juvenile Justice Act, 1986. The Court further referred to the definition of Juvenile under section 2(h) of the Juvenile Justice Act, 1986 and stated that

98. 2004 Cr. L. J. 1263.

99. *Id.* at 1267

100. 2005 Cr. L. J 4137.

since the accused had himself stated his age as 17 years as on 13-6-1989 and so he is not entitled to the benefit of Juvenile Justice Act, 1986¹⁰¹.

The Court observed that the Counsel for the appellant also made an attempt to press the services of section 20 of the Juvenile Justice (Care and protection of children) Act 2000. The Act was enforced with effect from 1-4-2001. The Court made a further reference to the case of *Pratap Singh V. State of Jharkhand and Another*¹⁰², wherein the constitution Bench of this Court considered the question and held that the provisions of the 2000 Act would be applicable even to those cases initiated and pending for offences committed under the Act of 1986, provided the offender had not completed the age of 18 years as on 1-4-2001. Therefore, the Court held that for the reasons aforesaid the appeal is devoid of any merit and was accordingly dismissed¹⁰³. Therefore, after a detailed discussion of the numerous cases relating to the determination of the age of the Juvenile it is seen that before the Juvenile Justice (Care and protection of children) Act 2000 was enacted the Juvenile Justice Act, 1986 was in operation and the position was not very clear as to what should be the date for determination of the age of the alleged offender ie the date of occurrence or the date when he is produced before the Court?

The Supreme Court in the cases of *Gopinath Ghosh V. State of W.B*¹⁰⁴, *Bhola Bhagat V. State of Bihar*¹⁰⁵, *Santanu Mitra V. State of West Bengal*¹⁰⁶, *Umesh Chandra V State of Rajasthan*¹⁰⁷, *Pratap Singh V. State of Jharkhand*¹⁰⁸, has taken the view that the proper date for determining the age of the Juvenile should be the date of commission of offence. This view appears to be more correct. If this view is accepted then every juvenile who commits an offence

101. *Id.* at 4140

102. *AIR* 2005 SC 2731

103. *Supra note* 100 at 4140.

104. *AIR* 1984 SC 237.

105. *AIR* 1998 SC 236.

106. *AIR* 1999 SC 1587.

107. (1982) 2 *SCC* 202.

108. *AIR* 2005 SC 2731.

would have been entitled to the benefit of the provisions of the Juvenile Justice Act, 1986.

However, in the case of *Arnit Das V. State of Bihar*¹⁰⁹, the Supreme Court held that the crucial date for determining the age of the juvenile is the date when he is brought before the competent authority and not of commission of offence. If this view of the Supreme Court is accepted then a question arises as to what would be the fate of a juvenile who commits an offence and is brought before the competent authority after he crosses the age limit due to procedural delays? He would definitely not be treated as a juvenile and would not be entitled to the benefits of the Juvenile Justice Act therefore, why should a juvenile be denied the benefits of the Act because of the delay on the part of the prosecution in bringing the juvenile before the competent authority? Also the very purpose of the Juvenile Justice Act was to provide care, protection, treatment and rehabilitation and also to see that no juvenile is lodged in jail in any circumstances. Therefore, the very purpose of the Act would have been defeated if the view of the Court in *Arnit Das's*¹¹⁰ case is taken into account.

The view treating that the relevant age at the time of commission of offence for determination of delinquent juvenile does not compel that the accused be would not sent to the juvenile homes after attaining higher age as the Juvenile Justice Act itself provided a provision thereof under section 21. The question posed by the Court in *Arnit Das's* case¹¹¹ as to the sending of accused above 15 years of age to the juvenile homes finds its answer in the Act itself¹¹². Had the court travelled a bit more through the provisions of the Act, it is submitted, it would have found the answer of the question under section 21 of the Act. However, the view taken in *Arnit Das* case should be taken as correct and applicable to the extent of instituting an enquiry for determining the juvenile status of the accused. Moreover, section 2 of the Juvenile Justice Act, 1986 had not defined the crucial date for determination of age of juvenile. Hence, there

109. AIR 2000 SC 2264.

110. *Id.*

111. *Id.*

112. Section 21, *The Juvenile Justice Act, 1986.*

was a need for the Parliament to come forward with a legislative amendment of the definition clause and to remove uncertainty in this regard.

Therefore, in 2000 the Parliament enacted the Juvenile Justice (Care & Protection of children) Act. This new Act has repealed the Juvenile Justice Act, 1986. The Juvenile Justice (Care and Protection of Children) Act, 2000 was further amended in 2006. The definition of 'Juvenile in conflict with law' was amended to mean a juvenile who is alleged to have committed an offence and has not completed eighteenth year as on the date of commission of such offence¹¹³. This, amended definition of 'Juvenile in conflict with law', therefore, seems to have put at rest the controversy of age of the juvenile as is evident from the definition itself.

Hereinafter subsequent case laws have been discussed where the Supreme Court as well as the High Courts have dealt with the question of determination of the age of the Juvenile and have allowed the claim of juvenility.

In *Rajindra Chandra V. State of Chattisgarh and another*¹¹⁴, Pranjali Tiwari, the accused – Respondent – 2, had been apprehended on 27 – 2 – 1997 for an offence under sections 302/34 IPC committed on the same day. The accused claimed himself to be a juvenile as having not attained the age of 16 years, and, therefore, entitled to the benefit of the Juvenile Justice Act, 1986. After an enquiry the learned Judicial Magistrate of the first class and the session Court held the accused not to be a juvenile. The accused preferred a revision in the High Court which was allowed. Therefore, the orders impugned before the High Court was quashed and the accused was held to be a juvenile. Hence, the complainant, father of the victim in the incident preferred appeal by special leave before the Supreme Court. The Court observed that it was true that the age of the accused was just on the border of sixteen years and on the date of the offence and his arrest he was less than 16 years by a few months only. The Court further referred to the case of *Arnit Das V. State of Bihar*¹¹⁵, wherein this court had on a review of judicial opinion held that while dealing with the question of age of the

113. Section 2(L), *The Juvenile Justice (Care and Protection of Children) Act, 2000*

114. (2002) 2 SCC 287.

115. (2000) 5 SCC 488.

accused for the purpose of finding out whether he is a juvenile or not a hypertechnical approach should not be adopted while appreciating the evidence adduced on behalf of the accused in support of a plea that he was a juvenile and if two views may be possible on the said evidence, the Court should lean in favour of holding the accused to be juvenile in borderline cases. Therefore, the court was of the view that the law so laid down by this court squarely applied to the facts of the present case. Accordingly, the order of the High Court was maintained and the appeal was held to be devoid of any merit and dismissed¹¹⁶.

In *Ex. Gnr. Ajit Singh, V. Union of India and others*¹¹⁷, the petitioner was enrolled in the army on 15th December, 2000. He was posted in Rajasthan and thereafter for some offence of theft, a court of enquiry was ordered against the petitioner and after recording of summary of evidence, General Court Martial commenced and the petitioner was sentenced to suffer rigorous imprisonment for seven years and was dismissed from service. The learned Counsel for the petitioner challenged the proceedings under General Court Martial under the Army Act and prayed that the conviction and sentence be quashed and the petitioner be released from jail. Another prayer in the writ petition was that the petitioner be reinstated in service with consequential benefits. The first submission of the learned Counsel for the petitioner was that the petitioner was a juvenile and he could not have been tried by the provisions of General Court Martial under Army Act. It was further contended that after coming into force of the Juvenile Justice (care and Protection of children) Act, 2000 the applicability of the said Act is to the whole of India except the state of Jammu and Kashmir. The Counsel for the petitioner also placed reliance on sections 2(k), 2(L) and 2(P) of the said Act that defines 'juvenile' or 'child', 'juvenile in conflict with law' and 'offence' respectively. He further contended that a careful reading of section 6 which has a non - obstante clause and nothing has been saved from the applicability of the aforesaid Act, it provides that any proceedings to punish the juvenile for imprisonment is contrary to the mandate of the Parliament. On the

116. (2002) 2 SCC 287 at 289 - 90.

117. 2004 Cr. L.J.3994.

other hand, the Learned Counsel for the respondent contended that in all there were six charges against the petitioner, although it was admitted that petitioner was juvenile in relation to charges Nos 1 and 3.

However, it was contended that the petitioner was not juvenile in relation to charges Nos 2, 4, 5 and 6. Therefore, the petitioner was punished keeping in view the totality of the circumstances and the offences committed by him. It was also contended that Army Act was a special Act and was a complete code in itself and was not subject to or limited by any other general or special Act. Another argument was that the non – obstante clause of section 6 had to be read in conjunction with the Juvenile Justice (Care and Protection of Children) Act, 2000 and the same dealt primarily with cases falling under the Criminal Procedure Code. It was also contended that under Army Act certain fundamental rights could be abridged under Article 33 of the Constitution of India so as to maintain discipline in the armed forces¹¹⁸.

The court observed that it had given careful consideration to the arguments advanced by Learned Counsel for both the parties. The court stated that the Juvenile Justice (Care and Protection of Children) Act, 2000 was passed by the Parliament pursuant to the resolution adopted by the United Nations on 20th November, 1989 on the right of the child wherein a set of standards to be adhered by all state Parties in securing the best interest of the child has been prescribed. The court after referring to section 2(L) that defines ‘juvenile in conflict with law’ and section 2(P) that defines ‘offence’ stated that there is little room for doubt that the Act is applicable inspite of any other law in force including the Army Act. In the view of the court when the Parliament in its wisdom had included offences which are punishable under any law, there was no exclusion of the Army Act from the operation of the aforesaid Act.

The Court further stated that even otherwise the interpretation sought to be given by the respondent that non – absolute clause is only in relation to the Criminal Procedure Code is neither here nor there¹¹⁹.

118. *Id.* at 3994 - 95.

119. *Id.* at 3995 - 96.

The court observed that there was no force in the arguments of the respondent that as the petitioner was recruited in the Army, even though he was a juvenile, the Army Act will have the applicability and override the provisions of the Juvenile Justice (Care and Protection of Children) Act, 2000. It was observed that the mere fact that the age has been enhanced to 18 years, irrespective of a boy or a girl and the Army Act is of the year 1950, it cannot be said that the legislature wanted to keep persons who are under the Army Act amenable to Army Act although they were Juvenile under the present Act. Therefore, the Court stated that it did not find any force in the arguments of the respondents that Juvenile Act will have no applicability to the person governed by the Army Act. The reliance placed by the respondent on Article 33 of the constitution was also said to be misplaced. The court said that Article 33 cannot be read to oust the application of the Juvenile Justice (Care and Protection of Children) Act, 2000 which is also an Act of Parliament and in the absence of any exception provided in the said Act with regard to its jurisdiction or applicability. Therefore, the Court observed that it cannot ignore, overlook or nullify the beneficial provision of a socially progressive statute and quashed the proceedings of the General Court Martial and ordered the Petitioner to be set free forth with¹²⁰.

In *Pankaj and another V. State of U.P. and another*¹²¹, an application was filed challenging an order passed by the learned Sessions Judge, Baghpat declining to entertain an application moved on behalf of the applicants claiming to be a juvenile and is entitled for protection under the Juvenile Justice (Care and Protection of Children) Act, 2000 (herein referred to as the Act). The applicants claimed to be minor and in the circumstances, a separate trial was liable to be conducted. It was stated in the application that they were students at the time of occurrence. The application was moved on 6 – 5 – 2005 that common trial should not proceed but the application was not entertained on the ground that since the Juvenile Justice Board had been constituted at Meerut, it is the

120. *Id.* at 3996 -97.

121. 2005 Cr.. L. J 3683.

jurisdiction of the Board to decide and declare an accused as juvenile. The application was moved challenging the said order¹²².

The court referred to the argument that was made by referring to section 7 of the Act that prescribes procedure to be followed by a Magistrate not empowered under the Act. The court then stated that in the circumstances, it was the duty of the court to have ascertained and formed an opinion whether the person, such as the applicants in the instant case, was a juvenile in his opinion or not. In the opinion of the court the learned Sessions Judge could not have thrown away the applicants and refused to entertain it only because a Juvenile Justice Board had been constituted in Meerut. The court also observed that it was relevant to point out section 6 sub clause (2) of the Act which provides for the powers of the High Court and the Court of Session to exercise the powers conferred on the Board when the proceeding comes before them in appeal, revision or otherwise. Therefore, in the present case, the application was moved before the learned Sessions Judge, Baghat, and hence in the opinion of the Court he was bound to make preliminary inquiry and come to a conclusion, instead of relegating the applicants to approach the Board¹²³.

The court further referred to the fact that the juvenile Justice Board Constituted under the Act do not meet every day as a regular sitting of the Court and in these circumstances, the learned Sessions Judge, Baghat should have atleast examined the matter and if he was of an opinion that the applicants were juvenile then an appropriate order should have been passed, which the court had failed to do so¹²⁴.

Referring to the case of *Bhola Bhagat V. State of Bihar*¹²⁵, the court observed that it was obligatory on the part of the court to hold an enquiry itself in case it entertains any doubt about the age as claimed by the accused. Therefore, in the view of the court, the learned Session Judge, Baghat had done nothing. It was further observed by the court that this was not a case where the learned

122. *Id.* at 3683.

123. *Id.*

124. *Id.* at 3684.

125. *AIR* 1998 SC 236.

Sessions Judge completely lacked jurisdiction to even conduct a preliminary enquiry regarding authenticity of the claim made by the applicants that they were juveniles within the meaning of the Act. In the opinion of the court the Learned Session Judge was itself competent in view of section 6(2) of the Act to have conducted an inquiry but it appeared that the application was not even entertained only because Juvenile Justice Board was not constituted in Baghpat.

Therefore, the court did not uphold the order of the Learned Session Judge, Baghpat and quashed it. Accordingly the applicants were permitted to move another application and the learned Session Judge, Baghpat was asked to make a preliminary inquiry as provided under the Act and only if he comes to a definite conclusion that the applicants are not juveniles on the basis of the evidence produced before him, can proceed with the joint trial. The Court further observed that if the learned session judge had any doubt regarding the age of the applicants and felt that the applicants are minor children within the meaning of the Act, then he should proceed to make an enquiry in accordance with law and refer the matter to the Board or act in accordance with section 6(2) of the Act.

The court, thus, in these circumstances allowed the application and the impugned order of the learned Session Judge, Baghpat was set aside.

Thereafter, in the case of *Kameshwar Prajapati V. State of Jharkhand*¹²⁶, the petitioner who was an accused in connection with case registered under sections 302, 494/34/120B of the Indian Penal Code had filed the revision application challenging the order passed by the Additional Chief judicial Magistrate, Khunti, rejecting the claim of the petitioner for declaring him to be a juvenile under the Juvenile Justice (care and Protection of children) Act, 2000. After the case was committed to the Court of Sessions, the petitioner filed a petition before the trial Court stating that he was a juvenile as defined under the Juvenile Justice (Care and Protection of Children) Act, 2000 since his date of birth according to the school leaving certificate was 1 – 2 – 1987 and therefore, he was only 16 years of age on the alleged date of commission of offence. An enquiry, therefore, was made by the learned Additional Chief Judicial Magistrate

126. 2006 Cr. L.J 773.

as provided under section 49 of the Juvenile Justice Care and Protection of children Act, 2000 by taking evidence and by impugned order held that the petitioner was about 21 years of age according to the age of the Medical Board and thus, was not a juvenile. The petitioner being aggrieved by the said order filed the revision application.

The Court observed that the petitioner had filed school leaving certificate from which it appears that he had passed matriculation examination in the year 2002. His date of birth as entered in the said certificate was 1 – 2- 1987 and the same date was shown even in the Mark Sheet issued by the Jharkhand Secondary Examination Board. The Court further referred to the case of *Prem Chand Sao alias Jhari Sao V. State of Jharkhand*¹²⁷, where it was held that the school leaving certificate is the best evidence of date of birth and the medical opinion regarding age which is based on estimate will not prevail over evidence of age as per entry in school certificate. Therefore, in the opinion of the Court it appeared that the present case was fully covered by the aforesaid decision of this court and the Learned Chief Judicial Magistrate, Khunti had committed error in refusing to rely on the School Leaving Certificate of the petitioner and thereby rejected the prayer for declaring the petitioner to be juvenile.

Accordingly, the court allowed the application and the impugned order of the Additional Chief Judicial Magistrate was set aside and the petitioner was declared to be a juvenile and the court below was directed to proceed with the case in accordance with law.

In *Saheb Sopan Kale V. State of Maharashtra*¹²⁸, the applicant through an application sought to recall the sentence imposed on him on the ground that he was juvenile in conflict with law on the date of offence and therefore, considering the provisions of law, comprised under the Juvenile Justice (care and Protection of Children) Act, 2000 read with Juvenile Justice Act, 1986, he could not have been sentenced for life or for death but should have been ordered to be produced before the Board, in terms of provisions of law for necessary order in

127. 2003 Cr. L.J 86.

128. 2008 Cr. L.J 2115.

terms of section 15 of the Juvenile Justice (Care and Protection of children) Act, 2000 (hereinafter called as the “Juvenile Act”).

The Court observed that it had been sought to be contended that since the applicant was born on 5th March, 1981 and this fact was abundantly proved by the enquiry conducted with the help of the police authorities as also found from the school records of the applicant and further corroborated by the medical evidence. Thus, in the opinion of the Court it could not be disputed that the applicant was below 17 years of age on the date of the offence ie on 15 – 5 – 1997. The court then referred to the submission of the learned Advocate representing the applicant according to whom the applicant was entitled for necessary benefits under the Juvenile Act. Also he had been in detention for more than 10 years since he was arrested and had been in jail since 24th May 1997.

The learned Advocate had further submitted that the sentence imposed should be recalled and since no purpose would be served by directing at this stage to produce the applicant before the Board constituted under the Juvenile Act, the applicant should be ordered to be released forthwith. The counsel for the applicant had further submitted that considering the provisions of law contained in section 20 of the Juvenile Justice Act, and taking into consideration the nature of the offence committed by the applicant, it should be left to the Board constituted under the Act to decide about the punishment in that regard though the applicant can be said to be entitled for the benefits under the Juvenile Act and also entitled for recall of the sentence imposed in Criminal Appeal No 588 of 2004 along with the Sessions case out of which the appeal arose, he should be directed to be produced before the Board to be dealt with in accordance with the provisions of Juvenile Act¹²⁹.

The Court referred to section 2(L) of the Juvenile Act that defines ‘juvenile in conflict with law’ and section 2(K) which defines ‘juvenile’. It further referred section 7 – A of the juvenile Act that deals with the procedures to

129. *Id.* at 2115 - 2116.

be followed when claim of juvenility is raised before any court. The Court then observed that a plain reading of section 7 – A of Juvenile Act would therefore reveal that the claim of juvenility can be raised at any stage of the proceedings and even after disposal of the case. So undoubtedly, when such claim is raised, court has to conduct the necessary inquiry to determine the age of the claimant to ascertain whether the claimant was juvenile on the date of commission of the offence¹³⁰.

It was further observed that since the records clearly established that the applicant was below the age of 17 years on the date of the commission of the offence ie 15th may 1997 so obviously he would be entitled for the benefits of the provisions of law comprised under section 7 – A of the Juvenile Act. So in the opinion of the Court in terms of sub – section (2) thereof the order and the sentence imposed had to be declared null and void¹³¹.

The court also referred to section 64 of the Juvenile Act that makes provisions with respect to Juvenile in conflict with law undergoing sentence at commencement of this Act and held that undoubtedly section 64 casts an obligation upon the Government to take appropriate steps in relation to a person who falls in the category of “juvenile in conflict with law”. However, the Court stated that in this case there was no occasion for the Government to take any such steps in relation to the applicant, as the applicant had never raised the issue of being juvenile prior to filing of the application under consideration nor was it raised at the time of disposal of Criminal Appeal¹³².

Therefore, in the facts and circumstances of the case, the court was of the opinion that no purpose would be served in issuing the direction for production of the applicant before the Board as it was apparent from the record that the applicant had already undergone imprisonment for more than three years. Hence, the criminal application was allowed and order of sentence imposed against the

130. *Id.* at 2116.

131. *Id.* at 2117.

132. *Id.* at 2118

applicant was recalled and quashed and the application was directed to be released forth with unless required in any other matter¹³³.

Similarly in *Mohamad Zakir Mohamad Muktar Shaikh V. State of Maharashtra*¹³⁴, the appellant had filed an appeal against the judgement and order passed by the 5th Adhoc Additional Sessions Judge, Mumbai whereby the appellant had been convicted for life holding him guilty of the offences punishable under section 363, 364 (A) and 365 read with section 34 of Indian Penal Code.

The main contention that was raised on behalf of the appellant was that the appellant was juvenile in conflict with law on the date of commission of the offence and therefore he was entitled for the acquittal of the offences under Juvenile Justice (Care and Protection of children) Act, 2000. The fact that the appellant was arrested on 22nd April, 2004 and since then he had been in jail was also submitted.

The Court also referred to the fact that after the issue of being juvenile was raised by the appellant, the necessary inquiry was ordered by the Sessions Judge and after the enquiry the Session Judge had submitted a report wherein the age of the appellant was stated as 19 years as on 15th October, 2005 ie the date on which his statement under section 313, CrPc was recorded and consequently he was held to be below 18 years of age on 13th April 2004¹³⁵.

Thereafter, the court after hearing the Learned Advocate for the parties and perusal of the report along with medical report observed that it was apparent that the appellant on the date when his statement under section 313 CrPC was recorded was found to be 19 years of age ie on 15th October, 2005. The Doctor who had examined the accused pursuant to the direction of the court had also found him to be of 23 years. Thus, considering the said reports the court found that the findings arrived at by the Sessions Judge about the age of the appellant had clearly borne out from the record and consequently the accused was juvenile

133. *Id.*

134. 2008 Cr. L J 2519.

135. *Id.* at 2520

in conflict within the meaning of said expression under the said Act on the date of commission of the offence ie 13th April 2004. Consequently, in the opinion of the court the provisions of the said Act was squarely attracted. The Court further observed that the appellant was not produced before the Juvenile Board nor the trial in the matter was in accordance with the provisions of the said Act. Referring to section 7A of the said Act the Court stated that in these circumstances section 7A of the said Act is clearly attracted¹³⁶.

Therefore, the Court held that the impugned judgement so far as it relates to the appellant cannot be sustained and is liable to be held to be bad in law in view of sub – section 2 of section 7A of the said Act.

Consequently the appellant would be entitled for release from the custody¹³⁷. The Court further referred to the fact that the appellant had been in custody since 22nd April 2004. Referring to the provisions of section 15 of the said Act, the court observed that the longest period for which a juvenile can be sent to a special home is for three years. The appellant had been detained in custody contrary to the provisions of law for a period more than he could have been detained. Therefore, considering the provisions of law as applicable to the facts of the case, the court quashed and set aside the impugned judgement and order to the extent that it related to the appellant. The appellant was directed to be released forth with unless required in any other matter¹³⁸.

In *Suo Motu by High Court on its own motion V. Chief Secretary, Government of Maharashtra and others*¹³⁹, the court went a step further and submitted that the provisions of section 7A of the Juvenile Justice (Care and Protection of children) Act, 2000 would also apply to the prisoners who were earlier convicted under the Juvenile Justice Act, 1986 when the law considered a juvenile to be a person less than 16 years of age.

F.I Rebello, J., delivering the judgment stated that one issue that had arisen in this petition was the continued detention of a “Juvenile in conflict with

136. *Id.*

137. *Id.*

138. *Id.* at 2520-21

139. 2009 (79) AIC 367 (BOM., H.C.).

law¹³⁹. Many of these juveniles had been convicted when the Juvenile Justice Act, 1986 was in operation and the age of the Juvenile was 16 years and less. He then referred to the definition of juvenile under the Juvenile Justice (Care and Protection of children) Act, 2000 as amended by the Juvenile Justice (Care and Protection of Children) Amendment Act, 2006.

A further reference of the case of *Imtiaz Hussein V. State of Maharashtra*¹⁴⁰, was made wherein this Court had the occasion to consider the effect of section 7A of the Juvenile Justice (Care and Protection of Children) Act, 2000. The Court then held that the provisions of section 7A will also apply to the prisoners who were earlier convicted under the Juvenile Justice Act, 1986 when the law considered a juvenile to be a person less than 16 years of age¹⁴¹.

The Court further observed that after the directions were issued reports were received and it was found that Yerawad Central Prison, Pune based on this direction had forwarded the cases of juveniles who were in detention to various Sessions Court who had convicted such person. However, as the Learned Amicus Curiae pointed out that many of the matters were not being considered by the Learned Judges on the ground that the judgement passed by them thereafter had been confirmed in appeal before this Court or had been disposed of by the Learned Supreme Court¹⁴².

Thereafter, the Court referred to the provisions of section 7A of the Juvenile Justice (Care and Protection of children) Act, 2000 and observed that even if earlier a case of juvenile had been considered and even rejected on the basis that the convict was not 16 years or less, as per the new Act as interpreted, their cases will have not been considered afresh. Similarly, if the cases have not been considered, considering the beneficial provisions of the New Act, these cases will have to be reconsidered¹⁴³.

140. 2008 (3) Mh LJ (Cri) 478.

141. *Supra* note 139 at 368

142. *Id.*

143. *Id.*

In *Basavraj Sangmarappa Thonte V. State of Maharashtra*¹⁴⁴, a criminal revision application was filed challenging the judgement and order that was passed by the Learned Additional Session Judge dismissing the appeal filed by the applicant.

The applicant was chargesheeted by the Judicial Magistrate, first class under sections 420, 465, 471 along with another accused. Therefore, the applicant was convicted for the offence stated therein. The applicant filed an appeal before the session court challenging the conviction which was however dismissed by the Additional Session Judge.

The court stated that this application was heard by this Court on 13 – 3 – 2000 and was pleased to issue rule and interim relief as prayed. The Court further referred to the submission of the Learned Counsel appearing for the applicant praying to recall the sentence imposed upon him on the ground that he was juvenile in conflict with law on the date of offence and, therefore, considering the provisions of law comprised under the Juvenile Justice (Care and Protection of Children) Act, 2000 read with Juvenile Justice Act, 1986, he could not have been sentenced and should have been produced before the Board in terms of provisions of law for necessary order in respect of section 15 of the Juvenile Justice (Care and Protection of Children) Act, 2000. The Learned Counsel appearing for the applicant had submitted that the date of birth of the applicant was 5 – 6- 1964. The age of the applicant on the date of commission of offence was 15 and half years. He had further submitted that the ground was raised before the lower appellate Court in respect of juvenility of the applicant at the time of commission of offence. However, the appellate Court had not accepted the claim of juvenility of the applicant because according to the learned Judge, if the age was calculated then the applicant was definitely 16 years and some months and thereby not a juvenile, in any case he was below 17 years of age. The learned Counsel for the applicant further submitted that on the basis of the admitted date even if it is accepted that the age of the applicant on the date of commission of offence was 16 years and some months, it was below 17 years

144. 2009 Cr. L.J 1360.

and therefore, the applicant was entitled to the benefit of provisions of Juvenile Justice (Care and Protection of Children) Act, 2000 and Amended Act, 2006.

It was further submitted by the Counsel that taking into consideration the various provisions of the Juvenile Justice (Care and Protection of Children) Act, 2000, which were not sufficient to extend the benefit to juvenile. The Counsel also submitted that the applicant had ceased to be juvenile on or before the commencement of the Act, as per section 7A, the benefit of the Act of 2006 has to be made applicable to the applicant's case. Explanation to section 20 and the amendment definition of 'juvenile' was referred to and submitted that if the Act is made retrospective and the age of the applicant is considered below 17 years and therefore, no punishment could be imposed on the applicant. Relying on the judgement of the Court in the case of *Saheb Sopan Kale V. State of Maharashtra*¹⁴⁵, the Learned Counsel further submitted that in view of the law laid down by the Court in the above referred judgement the present case should be covered and the benefits should be given to the applicant¹⁴⁶.

The Court, therefore, after hearing the learned Counsel appearing for the applicant and Learned A.P.P for the state was of the view that the case in hand was covered by the judgement of this court in Saheb Sopan Kale's case. It was further submitted by the court that it was admitted position that the applicant on the date of commission of offence was below 17 years so he would be entitled for the benefit of the provisions of the law comprised under section 7(A) of the Act in terms of sub – section (2) the order and the sentence imposed upon the applicant, therefore had to be declared null and void. On the date of commission of offence the applicant was below the age of 17 years, hence he was "Juvenile in conflict with law".

So considering the provisions of section 7A, sub – section 2 of the Juvenile Act, the Court quashed and set aside the sentence imposed upon the applicant by the Judicial Magistrate, first class and confirmed by the Additional

145. 2008 Cr.L.J 2115.

146. 2009 Cr.L.J 1360 at 1361.

Session Judge. The order of sentence imposed upon the applicant was declared null and void¹⁴⁷.

More recently in the case of *Dharambir V. State (NCT of Delhi)*¹⁴⁸, the appeal was directed against the final judgement and order delivered by the High Court of Delhi at New Delhi. By the judgement one of the co – convicts had been acquitted but the High Court had upheld the conviction of the appellant for the offences punishable under sections 302 and 307 read with section 34 of the Indian Penal Code, 1860.

The senior Counsel appearing for the appellant had submitted that since at the time of commission of the said offences the appellant had not completed eighteen years of age, he was a juvenile within the meaning of section 2(k) of the Juvenile Justice (Care and Protection of Children) Act, 2000 (for short “the Act of 2000”), an enquiry in terms of section 7 – A of the Act of 2000 had to be made so as to determine the age of the appellant. The appellants school leaving certificate dated 2 -12 – 2009 was relied upon by the Learned Counsel in support of the submission. Therefore, in view of the said claim, while issuing notice to the state, a Registrar of this court was directed to make an enquiry and determine the age of the appellant on the date of commission of the offences. Accordingly, after making a detailed inquiry the Registrar reported that on the date when the offences were committed ie 25 – 8 -1991, the appellant was of the age of 16 years, 9 months and 8 days¹⁴⁹.

The court, therefore, observed that the question for determination is whether or not the appellant, who was admittedly not a juvenile within the meaning of the Juvenile Justice Act, 1986 (for short “the 1986 Act”) when the offences were committed but had not completed 18 years of the age on that date, will be governed by the Act of 2000 and be declared a juvenile in relation to the offences alleged to have been committed by him? The court before adverting to the question noted that the issue with regard to the date, relevant for determining

147. *Id.* at 1361 - 62.

148. (2010) 5 SCC 344.

149. *Id.* at 345.

the applicability of either of the two Acts, in so far as the age of the accused, who claims to be a juvenile/child is concerned, is no longer res integra.

The court then referred to the difficult views that emerged on this point in *Umesh Chandra V. State of Bihar*¹⁵⁰ and *Arnit Das v. State of Bihar*¹⁵¹ and as a result the matter was referred to the Constitution Bench in *Pratap Singh V. State of Jharkhand*¹⁵², wherein affirming the view taken by a Bench of three Judges in Umesh Chandra Case, the Constitution Bench held that the relevant date for determining the age of the accused, who claims to be a juvenile/child, would be the date on which the offence has been committed and not the date when he is produced before the authority or in the Court¹⁵³.

The Court further observed that the decision in Pratap Singh Case had led to the substitution of section 2(L); the insertion of 7 – A and proviso and the Explanation to section 20 of the Act of 2000 by Act 33 of 2006 and also introduction of the Juvenile Justice (Care and Protection of Children) Rules, 2007 containing Rule 12 which lays down the procedure to be followed in determination of age of a child or juvenile Referring to section 20 of the Act of 2000 as well as Clause (L) of section 2 and section 7 – A the Court observed that it was manifest from a conjoint reading of sections 2(K), 2(L), 7 – A, 20 and 49 of the Act of 2000, read with Rules 12 and 98 of the Juvenile Justice (Care and Protection of Children) Rules, 2007 that all persons who were below the age of 18 years on the date of commission of the offence even prior to 1 – 4 – 2001 would be treated as juveniles even if the claim of juvenility is raised after they have attained the age of eighteen years on or before the date of the commencement of the Act of 2000 and were undergoing sentences upon being convicted. While taking this view the Court was fortified by the dictum of this Court in a recent decision in *Hari Ram V. State of Rajasthan*¹⁵⁴.

In the view of the Court in the present case as per the report of the Register submitted in terms of section 7 – A of the Act of 2000, the age of the

150. (1982) 2 SCC 202.

151. (2000) 5 SCC 408.

152. (2005) 3 SCC 551.

153. (2010) 5 SCC 344 at 346.

154. (2009) 13 SCC 211.

appellant as on the date of the commission of offences ie 25 – 8 – 1991 was 16 years 9 months and 8 days. Therefore, in the light of the aforesaid legal position the considered opinion of the Court was that the appellant had to be held to be a juvenile as on the date of commission of the offences for which he had been convicted and is to be governed by the provisions of the Act of 2000¹⁵⁵.

The court further observed that as per the information furnished to it, the appellant had undergone an actual period of sentence of 2 years 4 months and 4 days and was thirty – five years of age. Hence, the Court felt that keeping in view of the age of the appellant, it may not be conducive to the environment in the special home and to the interest of other juveniles housed in the Special Home, to refer him to the Board for passing orders for sending the appellant to a special home or for keeping him at some other place of safety for the remaining period of less than eight months, the maximum period for which he could now be kept in either of the two places. Accordingly, the Court sustained the conviction of the appellant for the aforesaid offences but quashed the sentences awarded to him and directed his release¹⁵⁶.

Similarly, in the case of *Mohd. Hanif Khan V. State of MP*¹⁵⁷, the appellant had preferred appeal challenging the impugned judgement passed by learned VI Additional Session Judge who had convicted the appellant under section 302 of the Indian Penal Code.

The learned Counsel for the appellant had submitted that on the date of the incident ie 4 – 11 – 1996 appellant was below 16 years of age hence his trial was without jurisdiction and the Counsel placed reliance on the school leaving certificate filed during the course of trial before the trial court wherein his date of birth was mentioned as 14 – 12 – 1980¹⁵⁸.

On the other hand, the learned Counsel for the state had supported the impugned judgement and finding arrived at by the learned trial court. According to the learned Prosecutor the appellant was produced before the trial court on 20

155. (2010) 5 SCC 344 at 349.

156. *Id.*

157. 2011 Cr. L.J 726.

158. *Id.* at 728

– 2 – 1997 and on this date the Counsel for the appellant did not press the application for inquiry about the age of the appellant because of which the trial Court had dismissed the same as not pressed. Therefore, in the view of the learned prosecutor this showed that appellant was not juvenile that is why he was not ready for enquiry as contemplated under the provisions of the Juvenile Justice Act and just wanted to take benefit of the certificate simpliciter which was not admissible in evidence without recording statement of issuing authority to prove the same in the court in accordance with the provisions of Evidence Act¹⁵⁹.

The court while dealing with the argument of Learned Counsel for the appellant was of the view that Counsel for the appellant had withdrawn the application regarding enquiry of the age, therefore, after a lapse of such a long period it would not be proper and conducive to send the matter back for determination of age of the appellant on the date of incident.

The court further observed that on the date of the incident the Juvenile Justice Act, 1986 (for short “hereinafter referred to as “old Act”) was in force and the same was replaced by section 69 of Juvenile Justice (Care and Protection) Act, 2000 (for short “New Act”). The Court then referred to Rule 97(2) of the Juvenile Justice (Care and Protection) Act, 2007 that deals with all the cases pending which have not attained finality will be dealt with and disposed of in accordance with the provisions of the “New act” as amended on 22 – 8 -2006 and 2007 Rules. In view of these provisions, the present appeal in the opinion of the Court, would also be governed by the “New Act” and Rules.

Referring to the definition of “Juvenile in Conflict with law” the Court raised a question as to whether the appellant had completed 18 years of age on the date of the incident or not?¹⁶⁰

The Court referred to the case of *Vikram Singh V. State of Haryana*¹⁶¹, where the Supreme Court had considered this issue and held that the provision of “New Act” and “the Rules” would be applicable for all pending cases. Therefore,

159. *Id.* at 728 - 29.

160. *Id.* at 730

161. 2009 (13) SCC 645

in this view of the matter, the Court observed that the core question for decision would be whether appellant had completed 18 years of age on the date of incident or not? Though no positive evidence had been adduced by the appellant on this aspect but in arrest memo of the appellant dated 7 – 11 – 1996 proved by PW – 10 the age of the appellant was mentioned as 18 years, so looking to the beneficial nature of the enactment the Court held that appellant would get benefit of the provisions of “New Act” and the “Rules” for the purpose of trial and sentence.

The Court observed that in the present case the appellant had remained in Jail during the course of trial from 8 – 11 – 1996 to 28 – 1 – 1997 and is continuously in jail from the date of judgement which meant that he had completed 32 years of age therefore, it would not be conducive to direct him to produce before the Board for passing order in terms of section 20 of the “New Act”. Accordingly, the Court maintained the conviction of appellant as passed by the trial Court and quashed the sentence awarded and directed his release¹⁶².

[B] JUVENILE IN CONFLICT WITH LAW

Under the Juvenile Justice (Care and Protection of Children) Act, 2000, the term ‘Juvenile in conflict with law’ has been defined to mean a juvenile who is alleged to have committed an offence and has not completed eighteenth year of age as on the date of commission of such offence¹⁶³. It is pertinent to note here that by the Juvenile Justice (Care and Protection of Children) Amendment Act, 2006 the definition of ‘juvenile in conflict with law’ was amended which replaced the earlier definition of ‘juvenile in conflict with law’ which was defined to mean a juvenile who is alleged to have committed an offence.

The main aim of the Juvenile Justice (Care and Protection of Children) Act, 2000 is to provide for proper care, protection and treatment and also to adopt a child – friendly approach in the adjudication and disposition of matters and for their ultimate rehabilitation. Also the children alleged to have committed

162. 2011 Cr.L.J 726 at 731

163. Section 2(L), *The Juvenile Justice(Care and Protection of Children) Act, 2000*.

offences cannot under any circumstances be lodged in regular jails along with adult criminals as it would have a negative effect on the growth and development of the child. Hence, keeping this in mind the Juvenile Justice (Care and Protection of Children) Act, 2000 has made separate provisions for the purpose of bail and custody, trial procedure and punishment and conviction which has been discussed as under –

i) BAIL AND CUSTODY

Before discussing the provisions relating to bail and custody as provided under the Juvenile Justice (Care and Protection of Children) Act, 2000 it is desirable to also mention the provisions relating to bail in the Criminal Procedure Code. There is no such definition of bail in the Code, but what is contemplated by the bail is to procure the release of a person from legal custody by undertaking that he shall appear at the time and place designated and submit himself to the jurisdiction and judgement of the Court¹⁶⁴.

The general provisions regarding bail has been provided for in the Code of Criminal Procedure¹⁶⁵.

The significant question whether the refusal of bail would amount to deprivation of personal liberty came up before the Supreme Court for the first time in *Babu Singh's case*¹⁶⁶. In this case the Court held that the refusal of bail was a deprivation of liberty and it must satisfy the requirement of Article 21. Thus in this case the learned Judge recognized the right to bail implicit under

164. Black's Law dictionary, 4th Edn., P - 177.

165. Section 436 (1) of the CrPc says, "when any person other than a person accused 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, and is prepared at any time while in the custody of such officer or at any stage of the proceeding before such court to give bail, such person shall be released on bail: provided that such officer or court, if he or it thinks fit, may, instead of taking bail from such person, discharge him on his executing a bond without sureties for his appearances as hereinafter provided: provided further that nothing in this section shall be deemed to affect the provisions of sub-section(3) of section 116 or section, 446-A".

Section 436 (2) of the CrPc says, "Notwithstanding anything contained in subsections (1), where a person has failed to comply with the conditions of the bail bond as regards the time and place of attendance, the Court may refuse to release him on bail, when on a subsequent occasion in the same case he appears before the Court or is brought in custody and any such refusal shall be without prejudice to the powers of the court to call upon any person bound by such bond to pay the penalty thereof under section 446."

166. *Babu Singh V. State of U.P.*, AIR 1978 SC 527.

Article 21¹⁶⁷.

The issue of bail and custody of juveniles further came up before the Supreme Court in *Kadra Pehadiya V. State of Bihar*¹⁶⁸, wherein referring to the plight of four young boys aged not more than 9 to 11 years old who had been languishing in jail for a period of 8 years without their trial having made any progress, the court pointed out that this case represents one more instance of utter callousness and indifference of our legal and judicial system to the under trial prisoners languishing in jails. Despite the observation of the Supreme Court in *Hussainara Khatoon's case*¹⁶⁹, these four young boys were not released on bail. The Court directed the Sessions Judge to proceed with the case of these four young boys from day to day without any interruption.

Subsequently, in *Sheela Barse v. Union of India*¹⁷⁰, the Supreme Court pointed out :

*“..... It is elementary requirement of any civilized society and it has been so provided that children should not be confined to jail because incarceration in jail has a dehumanizing effect and it is harmful to the growth and development of children.....”*¹⁷¹

The court observed that where children are accused of offences, they must be not kept in jails. In the opinion of the Court it was not an answer on the part of the state to say that it did not have enough number of remand homes or observation homes or other places where children could be kept and that is why they are lodged in jails. It was also not an answer on the part of the state to urge that the ward in the jail where the children are kept is separate ward in which the other prisoners are detained. It is the atmosphere of the jail which has a highly injurious effect on the mind of the child, estranging him from the society and breeding in him aversion bordering on hatred against a system which keeps him in jail. Therefore, the court ordered that even if a state government has not got

167. B.P Dwivedi, *The Changing Dimensions of Personal Liberty in India*, (1998) at 124 - 25.

168. AIR 1981 SC 939 at 940.

169. *Hussainara Khatoon V. Home Secretary, Bihar*, AIR 1979 SC 1360.

170. AIR 1986 SC 1773.

171. *Id.* at 1774 - 75.

sufficient accommodation in its remand homes or observation homes, the children should be released on bail¹⁷².

In *Munna V. State of U.P.*¹⁷³, the Supreme Court made it clear that when a child is arrested for an offence and is not released on bail he cannot be sent to jail but he must be detained in a place of safety. The Court was of the opinion that the inhibition against sending a child to jail does not depend upon any proof that he is child under the age of 16 years but as soon as it appears that a person arrested is apparently under the age of 16 years this inhibition is attracted. The reason for this inhibition lies in the Court solicitude which the law entertains for juveniles below the age of 16 years. It was further observed that the law was very much concerned to see that juveniles do not come into contact with hardened criminals and their chances of reformation are not blighted by contact with criminal offenders.

New, coming to the Juvenile Justice (Care and Protection of Children) Act, 2000¹⁷⁴ which has made provisions for bail and custody of delinquent juveniles. The Act provides for the bail of a juvenile accused of a bailable or non – bailable offence with or without surety¹⁷⁵.

In a number of occasions the Courts have had the opportunity to deal with the question of granting bail to a juvenile.

172. *Id.* at 1778.

173. *AIR* 1982 SC 806 at 809

174. Hereinafter referred to as the *Act*.

175. Section 12 (1) of the Act says, “when any person accused of a bailable or non - bailable offence, and apparently a juvenile, is arrested or detained or appears or is brought before a Board, such person shall not withstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974) or in any other law for the time being in force be released on bail with or without surety or placed under the supervision of a Probation Officer or under the case of any fit institution or fit person but he shall not be so released if there appear reasonable grounds for believing that the release is likely to bring him into association with any known criminal or expose him to moral, physical or psychological danger or that his release would defeat the ends of the justice.”

Section 12(2) of the Act says, “when such person having been arrested is not released on bail under sub - section (1) by the officer in charge of the police station, such officer shall cause him to be kept only in an observation home in the prescribed manner until he can be brought before a board.”

Section 12(3) of the Act says, “when such person is not released on bail under sub - section (1) by the Board it shall instead of committing him to prison, make an order sending him to an observation home or a place of safety for such period during the pendency of the inquiry regarding him as may be specified in the order.”

In *Sanjay Kumar V. State of UP*¹⁷⁶, the accused was challaned by the Ramiya Police station for the offence under sections 392 and 411 of the Indian Penal Code. Thereafter, he moved an application before the Additional C.J.M (Juvenile Judge) for declaring him to be a juvenile which was rejected. The revisionist then filed an appeal before the Learned Sessions Judge against the order of the Additional C.J.M. The appeal was partly allowed declaring the revisionist to be a juvenile but refused to grant bail to him. Against the said order the revision had been filed before the High Court.

The Court after perusal of the impugned judgement referred to the provision contained in section 12 of the Juvenile Justice (Care and Protection of Children) Act, 2000 and submitted that every juvenile for whatever offence he is charged with, shall be released on bail except under the circumstances mentioned in section 12 of the Act.

According to the Court the ground given by the Learned Session Judge that accused may repeat the offence was not a ground for refusing bail. The Learned Session Judge had further observed that on release there could be danger to his life. But in the view of the Court no such evidence was before him to infer that the release of accused would put his life in danger¹⁷⁷.

Lastly, the Court observed that though the bail application of the juvenile could be referred if the grounds or any one of the grounds mentioned in section 12 of the Act existed, however, the existence of such ground should not mean the guess – work of the Court but it should be substantiated by some evidence on the record. Thus, considering this, the Court held that the revisionist being a juvenile was entitled to bail¹⁷⁸.

Similarly in the case of *Ranjit Singh V. State of H.P*¹⁷⁹, the petitioner who was a juvenile within the meaning of the Juvenile Justice (Care and Protection of Children) Act, 2000 was arrested for an offence punishable under section 376

176. 2003 Cr. L.J 2284.

177. *Id.* at 2285

178. *Id.*

179. 2005 Cr. L.J 972.

read with section 511 of the Indian Penal Code and section 3 of the scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989.

The petitioner had applied for bail before the Juvenile Justice Board at Shimla. But the Principal Magistrate had declined the bail on the ground that the release of the accused juvenile on bail would defeat the ends of justice and also put him in physical and psychological danger and that there would be a lot of resentment amongst the people in the area which would have adverse physiological impact¹⁸⁰.

The court observed that the Learned Principal Magistrate had erred in saying that release of juvenile would put him to moral, physical and psychological danger without there being any material on record.

Considering the facts in its entirety the Court allowed the petition and directed that the Petitioner be released forthwith. However, the Court held that the bail would be subject to the condition that neither the petitioner nor his parents would influence the witness or otherwise interest with them¹⁸¹.

Likewise in *Sanjay Chaurasia V. State of U.P.*¹⁸², the revision was preferred by the revisionist against the judgement and order passed by the learned Session Judge whereby the party for bail of the revisionist being a juvenile under the Juvenile Justice (Care and Protection of Children) Act, 2000 was refused.

The revisionist had claimed himself to be juvenile under the provisions of the Juvenile Justice (Care and Protection of Children) Act, 2000, hereinafter referred to as the Act. The Learned Addl. Session Judge had declared him a juvenile and referred the matter to the Juvenile Justice Board where the revisionist had moved an application for releasing him on bail under section 12 of the Act which was rejected by the Board. Being aggrieved the revisionist filed criminal appeal in the Court of Learned Sessions which was dismissed and the order passed by the Juvenile Justice Board was affirmed. Therefore, being

180. *Id.*

181. *Id.*

182. 2006 Cr.L.J 2957.

aggrieved by the order passed by the Learned Session Judge and order passed by the Juvenile Justice Board the revision was filed¹⁸³.

The Contention of the Learned Counsel for the revisionist was that in the present case since the applicant had been declared juvenile by the learned Additional Session Judge, therefore, the applicant was entitled for bail under the provisions of section 12 of the Act but the Learned Juvenile Justice Board and the Learned Session Judge had refused bail without considering the proper provision of section 12 of the Act and without giving any proper reason for refusing bail of the revisionist¹⁸⁴.

On the other hand the Learned A.G.A submitted that the offence committed by the applicant was grave in nature and his release was likely to bring him into association with known criminals and expose him to moral, physical or psychological danger and his release would also defeat the ends of justice. Hence, in such circumstances, it was submitted that the revisionist may not be released on bail¹⁸⁵.

After considering the facts and circumstances of the case and the submission made by the Learned Counsel for the revisionist and the Learned A.G.A and from perusal of the records, the Court observed that it appeared that the revisionist had been declared juvenile and for the purposes of bail the Court further referred to section 12 of the Act. Thereafter, the Court observed that in case the bail was refused, some reasonable grounds for believing the exceptions as mentioned in section 12 must be brought before the court concerned by the prosecution but in the present case, no such ground for believing any of the exceptions had been brought by the prosecution before the Juvenile Justice Board and appellate Court. The court was of the view that the appellate court had dismissed the appeal only on the presumption that due to commission of the offence, the father and other relatives of other kidnapped boy had developed enmity with the revisionist and so if he was released his physical and mental life would be in danger and his release would defeat the ends of justice. The Court

183. *Id.* at 2958.

184. *Id.*

185. *Id.* at 2958-59

further observed that substantial to this presumption no material had been brought before the appellate Court and the same had not been discussed and only on the basis of the presumption Juvenile Justice Board had refused the bail of the revisionist which in the opinion of the Court was unjustified and against the spirit of the Act. Therefore, the Court was of the view that the impugned order passed by the Learned Sessions was illegal and was set aside. Keeping in view the welfare of the revisionist with a hope that he may recover himself the Court held him entitled for bail¹⁸⁶.

More recently in the case of *Praveen Kumar Maurya V. State of U.P*¹⁸⁷, the revisionist when intercepted by the Police near the Indo – Nepal border was found in possession of 4.900 grams of charas. The revisionist had claimed himself to be a juvenile and the Juvenile Justice Board had declared the revisionist as juvenile. After the declaration of the revisionist as juvenile he had moved an application for bail but was rejected by the Juvenile Justice Board. Thereafter, the revisionist filed the criminal appeal before the sessions Judge which was also dismissed. The learned Sessions Judge had submitted that if the revisionist is released on bail he would come into association with known or unknown criminals and there by would be exposed to moral, physical and psychological danger¹⁸⁸.

The learned Senior Counsel had submitted that the report of the District Probation officer was not in any way against the revisionist. According to the District Probation Officer, the family of the revisionist had a parchoon shop near SSB border and a dispute in regard to certain transaction had taken place in the shop and due to which the revisionist had been implicated in this case¹⁸⁹.

The court observed that in view of the fact that the revisionist was a juvenile, his bail prayer was liable to be considered in accordance with section 12 of the Juvenile Justice (Care and Protection of Children) Act, 2000 (in short the Juvenile Act'). The Court made a detailed reference of section 12 of the

186. *Id.* at 2959.

187. 2011 Cr.L.J 200.

188. *Id.* at 201 - 202.

189. *Id.* at-202.

Juvenile Act and submitted that a perusal of section 12 of the Juvenile Act revealed that a juvenile is entitled to bail notwithstanding the gravity of the crime. In the opinion of the court his bail could be refused only when there were reasonable grounds for believing that his release was likely to bring him into association with any known criminal or expose him to moral, physical or psychological danger or that his release would defeat the ends of justice.

It was further observed that it was manifest that the said section 12 of the Juvenile Act overrides the Code of Criminal Procedure, 1973 and other laws for the time being in force and, therefore, in the event of any inconsistency, section 12 of the Juvenile Act would prevail¹⁹⁰. However, on the other hand the submission of the learned AGA was that the quantity of Charas that was recovered was commercial quality and therefore, bail prayer of the revisionist was liable to be considered in accordance with the provisions of section 37 of the Narcotic Drugs and Psychotropic Act (in short NDPS Act). The Learned AGA further submitted that in a case where section 37(l) (b) of the NDPS Act was applicable, the Court must adopt a negative attitude towards bail and in that event bail could be granted only when the Court was satisfied that there were reasonable grounds for believing that the accused was not guilty of the offence and was not likely to commit any offence while on bail. In reply the learned Senior Counsel for the revisionist submitted that the provisions of section 12 of the Juvenile Act had an overriding effect not only on the Criminal Procedure Code, 1973 but also on the provisions of section 37 of the NDPS Act. Therefore, the provisions of section 37 (l) (b) of the NDPS Act did not have any application in the present matter¹⁹¹. In the opinion of the court it was relevant to mention that when there was a conflict between two enactments, the later enactment prevailed. The court referred to the case of *Solidaire India Ltd V. Fairgrowth Financial Services Ltd and others*¹⁹², where the above mentioned proposition had been laid down by the Apex Court.

190. *Id.*

191. *Id.* at 203.

192. *AIR* 2001 SC 958.

Lastly, the Court observed that since the revisionist was admittedly a juvenile on the date of occurrence, therefore, his bail matter was liable to be governed by section 12 of the Juvenile Act and the provisions of section 37 of the NDPS Act was not applicable, specially when section 12 of the Juvenile Act overrides the provisions of section 37 of the NDPS Act in the case of a person who is a juvenile¹⁹³.

However, in the case of *Anish Ansari V. State of Jharkhand*¹⁹⁴, the Court refused to grant bail to the juvenile. In this case the criminal revision had been preferred under section 53 of the Juvenile Justice (Care and Protection of Children) Act, 2000 which was directed against the order impugned passed by the sessions Judge by which the prayer for bail of petitioner had been dismissed for the alleged offence under section 376, Indian Penal Code.

The Court observed that from the impugned order it was revealed that the learned Sessions Judge had refused to grant bail to the petitioner juvenile on the ground and accepting the plea of Juvenile Justice Board that the release of the petitioner would expose him to moral, physical and physiological danger and that he was in association of adult co – accused¹⁹⁵.

The learned Counsel submitted that admittedly, the petitioner was a juvenile and he referred to section 12 of the Juvenile Justice Act and further submitted that in the instant case the Learned Sessions Judge had not indicated in the order that the case of the petitioner had been found in the category of exception clause of section 12 so as to deny his bail. The Learned Counsel submitted that the petitioner was in custody since 4 – 3 – 2009 and the learned counsel referred to the case of *Subodh Kumar Pandit@ Dhaneswar Pandit v. State of Jharkhand*¹⁹⁶ wherein this court in a similar situation had granted bail to the juvenile by considering the provision of law.

On the other hand, the learned A.P.P opposed the bail which had been preferred by way of revision on the ground that the petitioner with another had

193. 2011 Cr.L.J 200 at 204.

194. 2010 Cr.L.J 1959.

195. *Id.* at 1960.

196. 2006 (4) East Cr Case 257 (Jhr.)

demonstrated extreme form of brutality by committing gangrape on a minor girl of 15 years which disclosed the mental status of the petitioner and therefore, his release would certainly expose him to moral, physical or psychological danger adversely affecting his future and therefore, his case came in the exception category of section 12 of the Juvenile Justice (Care and Protection of Children) Act, 2000¹⁹⁷.

The Court, therefore, found substance in the argument of the learned A.P.P and thus keeping in view the gravity of the allegation and extent of brutality demonstrated by the petitioner by committing gangrape on a minor and also that it could expose him to moral and psychological danger the Court rejected the prayer for bail¹⁹⁸.

ii) Juvenile Prisoners –

In India many children still continue to be detained in regular jails along with adults in gross violation of the law. Hundred of them still continue to languish in jails inspite of all the provisions in law prohibiting confinement of children in jails. These juvenile prisoners are forced to do various kinds of inhuman work and are also subjected to sexual exploitations. The issue of juvenile prisoners came up before the Supreme Court in *Kadra Pehadiya V. State of Bihar*¹⁹⁹, wherein a letter was written to the Supreme Court by Dr. Vasudha Dhagamwar, a researcher and social scientist, who revealed the plight of four young boys. These four young boys were not more than 9 to 11 years old when they were arrested. Further, it had only taken more than a year for their case to be committed to the court of sessions, but it had taken a period of three years for their trial to begin and never made any progress. These four boys were also kept in leg irons in gross violation of the decision of the Supreme Court in *Sunil Batra V. Delhi Administration*²⁰⁰.

The Supreme Court observed that once a case was submitted to the Court of Session, the prisoners who continued in jails were not regarded by the state

197. 2010 Cr.L.J 1959 at 1960.

198. *Id.*

199. AIR 1981 SC 939, See also, *Kamla Devi V. State of Punjab*, AIR 1984 SC 1895.

200. AIR 1978 SC 1675.

authorities as under trial prisoners. And that is why perhaps the names of the four petitioners did not figure in the list of undertrial prisoners. The Supreme Court directed the state government to inform it by filing a list as to how many prisoners there were who had been in jails in the state of Bihar for more than 12 months after the committal of their cases to the court of session. The state government was also directed to file a list of undertrial prisoners who had been in jail for a period of more than 8 months without their trials having commenced before the court of sessions²⁰¹.

Subsequently, in *Sheela Barse V. Union of India*²⁰², a general petition was filed by a freelance journalist and a social worker who moved the Supreme Court seeking the release of all the children below 16 years detained in jails in different states of the country.

The court directed the District Judges in the country to nominate the Chief Judicial Magistrate or any other Judicial Magistrate to visit the District jail and sub – jail in their districts for the purpose of ascertaining how many children below the age of 16 years were confined in jail, what were the offences in respect of which they were charged, how many of them had been in detention, whether in the same jail or previously in any other jail before being brought to the jail in question, whether they had been produced before the children's court and, if so, when and how many times, and whether any legal assistance was provided to them. To expedite the implementation of the directions, the Court directed the District Judges to report on all the above matter within 10 weeks²⁰³. The Court pointed out that under the Jail Manuals prevalent in different states every jail had nominated committee of visitors and invariably the District and Session Judge happened to be one of the visitors. The purpose of having visitors was to ensure that the provisions in the manual were strictly complied with so far as the convicts and the undertrial prisoners were concerned.

The Court, therefore, observed that it was necessary that the safeguards which were provided in the manual should be strictly complied with and the

201. *AIR* 1981 SC 939 at 941.

202. *AIR* 1986 SC 1773.

203. *Id.* at 1775.

prisoners should have the full benefit of the provisions contained in the manual. The Court directed that every District and Sessions Judge should visit the District jail atleast once in two months and during the course of his visit he should take particular care about child prisoners, both convicts and under trials and as and when he sees any infraction in regard to the children in the prison he should draw the attention of the administration as also of his High Court. The Court hoped that as and when such reports are received in the high Court the same would be looked into and effective action would be taken thereupon²⁰⁴.

However, in *Sheela Barse V. Union of India*²⁰⁵, the applicant wanted to withdraw the petition filed by her. The Court pointed out that the applicant is not denied the right or the opportunity of instituting any public interest litigation nor is the right of a public minded citizen to bring an action for the enforcement of fundamental rights of a disabled segment of the citizens disputed. The Court refused the withdrawal of original petition and replaced the petitioner by Supreme Court Legal Aid Committee and continued the proceeding.

Therefore, in *S.C legal Aid Committee V. Union of India*²⁰⁶, the Supreme Court observed that in the backdrop of the Juvenile Justice Act, which came into force in the intervening period with effect from 2 – 10 – 1987, it was necessary to get fresh detailed reports from the District Judges and update the figures as to the exact number of delinquent juveniles.

The Court pointed out that since the scheme of the Juvenile Justice, 1986, was such that it could not be properly enforced unless appropriate rules were framed and brought into force. The Court, therefore, directed that the District Judges while making reports should also indicate whether rules had been framed and whether such rules are already in force. If such rules had not been framed in any state, such state or states were directed to frame the same and bring them into force without any further delay.

204. *Id.* at 1776.

205. *AIR* 1988 SC 2211 at 2213.

206. *AIR* 1989 SC 1278, the case was heard at different dates and successive orders were issued by the court.

The Court observed that with a view to working out the modality and to make overseeing convenient a scheme should be evolved. A committee to be entrusted with the work of making a draft scheme and place it before the Court for its consideration was proposed to be set up. In pursuance of the above order issued by the Court the draft scheme prepared by the committee was placed before the Court²⁰⁷.

Similarly, in *Munna V. State of U.P*²⁰⁸, a writ petition came up before the Court seeking relief in respect of certain juvenile under trial prisoners in the Kanpur Central Jail. The allegations in respect of these juvenile undertrial prisoners was that although there was a children's Home in Kanpur, these juvenile undertrial prisoners who were, according to the allegations in the writ petitions, more than 100 in number were lodged in the Kanpur Central Jail instead of being sent to the children's Home and they were also being sexually exploited by the adult prisoners.

The Court observed that the allegations were indeed so serious and if correct, disclosed to what utter depths of depravity man can sink, that the court cannot abdicate its constitutional duty of ensuring human dignity to the juvenile undertrial prisoners. The Court thought it proper to investigate into this matter not only in the interest of fair administration of justice but also for enforcing the basic human rights of these unfortunate juvenile undertrial prisoners who were alleged to have been victims of sexual exploitation. The court pointed out that even if it was found that these juveniles had committed any offence, they could not be allowed to be maltreated. In the opinion of the Court they do not shed their fundamental rights when they enter the jail.

Moreover, the object of punishment being reformation, the Court questioned as to what social objective could be gained by sending juveniles to jails where they would come into contact with hardened criminals and lose whatever sensitivity they may have. In the view of the court that was the reason why children Act are enacted by states all over the country and the U.P

207. *S.C Legal Aid Committee V. Union of India*, (1989) 4 SCC 738, See also, *S.C Legal Aid Committee V. Union of India*, (1989) 4 SCC 740.

208. *AIR 1982 SC 806*.

legislature had also enacted the Uttar Pradesh Children Act, 1951. Further, according to the report of the Session Judge, there were seven undertrial prisoners below the age of 16 years and out of those seven prisoners six were released. Therefore, the Court directed the secretary of U.P State Board of legal Aid and Advice to immediately contact these six children and take their statements with a view to ascertaining what was the treatment meted out to them in the Kanpur Central Jail and whether any of them were maltreated or sexually exploited²⁰⁹.

In *Rama Murthy V. State of Karnataka*²¹⁰, the Supreme Court pointing out the effects of overcrowding in prisons observed that one of the shameful effect of overcrowding was that it does not permit segregation among convicts those punished for serious offences and minor. The result may be that hardened criminals spread their influence over others. Then, juvenile offenders kept in jails got mixed up with others and they were likely to get spoiled further. So, the Court observed that the problem of overcrowding was required to be tackled in the right earnest for a better future.

In *Parbatabai Sakharam Taram V. State of Maharashtra*²¹¹, the victim a tribal girl had been arrested and illegally detained right from the year 1990 when she was of a tender age of 13 years and she had suffered inhuman torture to the extent that at the police station, the petitioner was severely beaten after which she was dumped in a police van and taken to the dense forest of Keshori at 1 a.m and hanged to a tree by lying her both hands upwards and then was beaten by belt till she lost her consciousness. Though the petitioner had repeatedly informed that she was not at all concerned with any Naxalites and that she was innocent, she was not released and continued to be tortured in cruel and inhuman manner in police custody²¹².

The court observed that it had no hesitation in arriving at a conclusion that this was a case where the state had acted in violation of Article 21 and 22 of the

209. *Id.* at 808.

210. *AIR* 1997 SC 1739 at 1746.

211. 2006 Cr.L.J 2202

212. *Id.* at 2203.

constitution of India and Juvenile Justice Act, 1986 and Juvenile Justice (Care and Protection of Children) Act, 2000 and the officials had committed offences punishable under section 3 sub section 2 (i), (ii) and (vii) of the Schedule Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 and for that the state was bound to compensate the victim as provided under Rule 12(4) of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Rules, 1995²¹³. Therefore, the Court ordered the Respondent state to pay a sum of Rs.5,00,000/- (Rs. Five Lakhs) to the petitioner within a period of four weeks from the date of pronouncement of this judgement and further directed the state to conduct a thorough and impartial inquiry in relation to the arrest and detention of the petitioner and her prosecution in three cases²¹⁴.

iii) Trial Procedure.

The essential requirements of fair trial procedure is that first every accused should be provided with free legal aid. Free legal and specially to the poor sections of a society is an essential element of fair trial procedure for securing justice to all on the basis of equal opportunities for defence²¹⁵. Legal aid has been put on a high pedestal in India by virtue of article 22 (1)²¹⁶ and article 39A²¹⁷ of the constitution of India and sections 303²¹⁸ and 304²¹⁹ of Criminal Procedure Code, 1973. While article 22(1) and section 303 CrPc grant the right to consult

213. *Id.* at 2211.

214. *Id.* at 2213

215. B.P Dwivedi, *The Changing Dimensions of Personal Liberty in India*, (1998) at 125.

216. Article 22(1) says, "No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult, and to be defended by, a legal practitioner of his choice."

217. Article 39 A says, "The state shall secure that the operation of the legal system promotes justice, on a basis of equal opportunity and shall, in particular; provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities."

218. Section 303 of the CrPc says, "Any person accused of an offence before a criminal court, or against whom proceedings are initiated under this code, may of right be defended by a pleader of his choice."

219. Section 304 (1) of the CrPc says, "where, in a trial before the Court of Session, the accused is not represented by a pleader, and where it appears to the court that the accused has not sufficient means to engage a pleader, the Court shall assign a pleader for his defence at the expense of the state."

Section 304 (2) of the CrPc says, "The High Court may, with the previous approval of the state government, make rules providing for

a) the mode of selecting pleaders for defence under sub - section (1);

b) the facilities to be allowed to such pleaders by the court;

c) the fees payable to such pleaders by the government and generally, for carrying out the purposes of sub - section (1)".

Section 304 (3) of the CrPc says, "The state government may, by notification direct that, as from such date as may be specified in the notification, the provisions of sub - section (1) and (2) shall apply in relation to any class of trials before other Courts in the State as they apply in relation to trials before courts of sessions."

and be defended by a Legal Practitioner of one's choice upon one's arrest or being charged with an offence, article 39 A and section 304 CrPc make it a solemn duty of the state to provide free legal aid to indigent litigants²²⁰.

It is important to mention here that the Juvenile Justice (Care and Protection of Children) Rules, 2007 has made provisions relating to legal aid. It has been provided that free legal services shall be extended to all the juvenile in conflict with law by the legal officer in the District Child Protection Unit and the State Legal Aid services Authority. The Board has further been empowered to deploy the services of the student legal services volunteers and non – governmental organization volunteers in para legal tasks. Such tasks may include contacting the parents of juveniles in conflict with law and also gathering relevant social and rehabilitative information about the juveniles²²¹.

The second essential requirements is speedy trial. It is said that the concept of speedy trial helps the prosecution as well as the accused, the rich as well as the poor. Though right to speedy trial is not specifically enumerated as fundamental right in the constitution of India²²² but in *Hussainara Khatoon*²²³ the Supreme Court extended the provision of Article 21 to embrace the right to speedy trial. Therefore, the essential requirements of fair trial procedure should also be made available to delinquent juveniles.

In *Kadra Pehadiya V. State of Bihar*²²⁴, the Supreme Court referred to what it had pointed out in *Hussainara Khatoon's Case*²²⁵, that speedy trial is a fundamental right of an accused implicit in article 21 of the constitution but in this case, the fundamental right had merely remained a paper promise and had been grossly violated. Therefore, the Court directed the sessions Judge to proceed with the case without any delay and interruption. The Supreme Court also directed that the four young petitioners in this case will be provided legal

220. Usha Razdan, *Apex Court Towards humanizing the administration of Juvenile Justice*, 33 *JILI* (1991) 377.

221. Rule 14 of the *Juvenile Justice (Care and Protection of Children) Rules, 2007*

222. B.P Dwivedi, *The Changing Dimensions of Personal Liberty in India* (1998) at 140.

223. *Hussainara Khatoon V. State of Bihar*, AIR 1979 SC 1360.

224. AIR 1981 SC 939 at 940- 41.

225. *Hussainara Khatoon V. State of Bihar*, AIR 1979 SC 1360.

representation by a fairly competent lawyer at the cost of the state, since legal aid in a criminal case has been declared by the Court in *Hussainara Khatoon's Case*²²⁶ to be a fundamental right implicit in Article 21 of the constitution.

In *Sheela Barse V. Union of India*²²⁷, The Supreme Court observed that if an accused is not tried speedily and his case remains pending before the Magistrate or the Sessions Court for an unreasonable length of time, it is clear that his fundamental right to speedy trial would be violated unless, of course, the trial is held up on account of some interim order passed by a Superior Court or the accused is responsible for the delay in the trial of the case. The consequences of violation of the fundamental right to speedy trial would be that the prosecution itself would be liable to be quashed on the ground that it is in breach of the fundamental right.

Therefore, the Supreme Court directed the State legal Aid and Advice Board in each state or any other legal Aid Organization existing in the state concerned to send two lawyers to each jail within the state once in a week for the purpose of providing legal assistance to children below the age of 16 years who were confined in jails²²⁸.

Now coming to the trial procedure regarding juvenile in conflict with law under the Juvenile Justice (Care and Protection of Children) Act, 2000²²⁹. It is evident that the Juvenile Justice system seeks to deal with children apart from the adult in the matters of investigation, trial and correctional process because children need to be treated separately from the adults. In order to ensure that they may not learn the technicalities of the crime commission from the hardened criminals the juvenile justice system has been established with a philosophy to accord differential treatment to the juveniles in conflict with law than adult offenders.

Therefore, the Act makes provision for the establishment of Juvenile Justice Board by the state government for the purpose of exercising the powers

226. *Id.*

227. *AIR* 1986 SC 1773 at 1778.

228. *Id.* at 1775.

229. Hereinafter referred to as the *Act*.

and discharging the duties in relation to juvenile in conflict with law²³⁰. The Juvenile Justice Board is a judicial tribunal characterized by special procedures and distinctive methods of treatment of juveniles. It differs from the traditional criminal court in many respects and reflects the philosophy that an erring child needs protection and should be rehabilitated rather than be forced to defend himself under the contentious criminal juvenile justice system. The Juvenile Justice Board as constituted shall have the power to deal exclusively with all proceedings under this Act relating to juvenile in conflict with law²³¹.

230. Section 4 (1) of the Act says, “Notwithstanding anything contained in the code of criminal Procedure, 1973 (2 of 1974), of the state Government may within a period of one year from the date of commencement of the Juvenile Justice (Care and Protection of Children) Amendment Act, 2006, by notification in the official Gazette, constitute for every district one or more Juvenile Justice Board for exercising the powers and discharging the duties conferred or imposed on such boards in relation to juveniles in conflict with law under this Act.”

Section 4 (2) of the Act says, “A Board shall consist of a Metropolitan Magistrate or a Judicial Magistrate of the first Class, as the case may be, and two social workers of whom at least one shall be a woman, forming a Bench and every such Bench shall have the powers conferred by the Code of Criminal Procedure, 1973 (of 1974) on a Metropolitan Magistrate or, as the case may be a Judicial Magistrate of the first class and the Magistrate on the board shall be designed as principal magistrate.”

Section 4 (3) of the Act says, “No Magistrate shall be appointed as a member of the Board unless he has special knowledge or training in child psychology or child welfare and no social worker shall be appointed as member of the Board unless he has been actively involved in health, education, or welfare activities pertaining to children for at least seven years.”

Section 4(4) of the Act says, “The term of office of the members of the Board and the manner in which such member may resign shall be such as may be prescribed.”

Section 4 (5) of the Act says, “The appointed of army member of the Board may be terminated after holding inquiry by the state government if -

- i) he has been found guilty of misuse of power vested under this Act,
- ii) he has been convicted of an offence involving moral turpitude, and such conviction has not been reversed or he has not been granted full pardon in respect of such offence,
- iii) he fails to attend the proceedings of the Board for consecutive three months without any valid reason or he fails to attend less than three fourth of the sittings in a year.”

231. Section 6(1) of the Act says, “where a Board has been constituted for any district, such Board shall notwithstanding contained anything any other law for the time being in force but save as otherwise expressly provided in this Act, have power to deal exclusively with all proceedings under this Act relating to juvenile in conflict with law.”

Section 6(2) of the Act says, “The powers conferred on the Board by or under this Act may also be exercised by the High Court and the Court of the Session, when the proceedings comes before them in appeal, revision or otherwise.”

Apart from this the Juvenile Justice (Care and Protection of Children) Rules, 2007²³² has provided for the functions of the Juvenile Justice Board²³³.

In *Sheela Barse V. Union of India*²³⁴, Justice Bhagwati and Justice Misra made the following recommendations regarding the aptitude and experience of a juvenile Judge:

“there must be special cadre of Magistrate who must be suitably trained for dealing with cases against children..... they must have proper and adequate training for dealing with case against juveniles, because those cases require a different type of procedure and qualitatively a different kind of approach”.

A similar view was reiterated by Bhagwati, J and Pathak, J in *Sheela Barse V. The Secretary, Children Aid Society*²³⁵

“The juvenile court has to be manned by a Judicial officer with some special training. Creation of a court with usual judicial officer and labelling it as juvenile court does not serve the requirements of the statute. The statutory scheme contemplates a judicial officer of a different type with a more sensitive

232. Hereinafter referred to as the *Rules*.

233. Rule 10 of the Rules says, “*The Board shall perform the following functions to achieve the objectives of the Act, namely: -*

- a) *adjudicate and dispose cases of juveniles in conflict with law;*
- b) *take cognizance of crimes committed under sections 23 to 28 of the Act,*
- c) *monitoring institutions for juveniles in conflict with law and seeking compliance from them in cases of any noticable lapses and improvement based on suggestions of the Board;*
- d) *deal with non - compliance on the part of concerned government functionaries or functionaries of voluntary organizations as the case may be in accordance with due process of law;*
- e) *pass necessary direction to the district authority and police to create or provide necessary infrastructure or facilities so that minimum standards of justice and treatment are maintained in the spirit of the Act;*
- f) *maintain liaison with the committee in respect of cases needing care and protection ;*
- g) *liaison with Boards in other districts to facilitate speedy inquiry and disposal of cases through the process of law;*
- h) *take suitable action for dealing with unforeseen situation that may arise in the implementation of the Act and remove such difficulties in the best interest of the juvenile;*
- i) *send quarterly information about juveniles in conflict with law produced before them to the District State Child Protection Unit, the State Government and also to the Chief Magistrate or Chief Metropolitan Magistrate for review under sub - section (2) of section 14 of the Act;*
- j) *any other function assigned by the state Government from time to time relating with juveniles in conflict wit law.”*

234. *AIR 1987 SC 1773 at 1778.*

235. *AIR 1987 SC 656 at 659.*

approach and oriented outlook. Without these any judicial officer, would, indeed not be competent to handle the special problem of children”.

Thus, the Court insisted upon the juvenile oriented judges to deal with such cases as it cannot be effectively handled by with traditional judges.

In *Ajay V. State of U.P.*²³⁶, referring to the duty of the Board the court observed that while deciding petition for declaring an accused as juvenile, the Board must keep in mind that on one hand a person really below 18 years of age should not be refused of his right given under the Juvenile Justice (Care and Protection of Children) Act, 2000. On the other hand, the Board should be equally careful to see that an accused who has attained the age of 18 years must not get benefit of a juvenile on the basis of fake or forged document. Thus, in nut-shell the duty of the Board is to ensure that the bonafide person should not be deprived of his right given under the Juvenile Justice (Care and Protection of Children) Act, 2000 and a malafide person should not get advantage of the said Act²³⁷.

iv) Punishment and Conviction

The Juvenile Justice (Care and Protection of Children) Act, 2000 has laid down a special procedure to try juveniles in conflict with law, specially to prevent the juveniles from being labeled with the stigma of crime and also because juvenile offenders are not to be punished but treated as helpless children in need of care and attention as well as socialization. Therefore, through a specialized judicial process it is necessary to bring them back in society as decent law – abiding citizens²³⁸.

The Act provides for a differential approach in the processing of the child in need of care and protection and the juvenile in conflict with law. Therefore for the purpose of punishment and conviction special provisions have been made. First, the confinement of the juvenile in a police lock up or jail has been

236. 2006 Cr.L.J 3326.

237. *Id.* at 3327 - 28.

238. T.H Khan, *Juvenile Justice System in India: An Appraisal*, VIII *CILQ* (1994) at 62.

prohibited²³⁹. Provision has also been made for giving of information to parent, guardian or probation officer after the arrest of the juvenile²⁴⁰. The Juvenile Justice Board shall hold an enquiry after a juvenile having been charged with an offence is brought before the Board²⁴¹. The Juvenile Justice Board has been further empowered to pass certain orders in respect of juveniles. The Board has been empowered, after being satisfied on enquiry that a juvenile has committed an offence, to allow the juvenile to go home after advice or admonition, to direct the juvenile to participate in group counselling. It can also direct the juvenile to perform community service.

The parent of the juvenile or the juvenile himself may be ordered to pay fine if he is above 14 years of age and earns money. The Board can also direct the juvenile to be released on probation of good conduct or make an order directing

239. Section 10 (1) of the Act says, "*As soon as a juvenile in conflict with law is apprehended by police he shall be placed under the charge of the special juvenile police unit or the designated Police Officer, who shall produce the juvenile before the Board without any loss of time but within a period of twenty - four hours of his apprehension excluding the time necessary for the journey, from the place where the juveniles was apprehension, to the Board:*

Provided that in no case, a juvenile in conflict with law shall be placed in a police lockup or lodged in jail".

Section 10 (2) of the Act says, "*The state Government may make rules consistent with this Act,-*

i) to provide persons through whom (including registered voluntary organisations) any juvenile in conflict with law may be produced before the Board;

ii) to provide the manner in which such juvenile may be sent to an observation home."

240. Section 13 of the Act says, "*Where a juvenile is arrested, the Officer in Charge of the Police Station or the special juvenile police unit to which the juvenile is brought shall, as soon as may be after the arrest, inform -*

a) the parent or guardian of the juvenile, if he can be found of such arrest and direct him to be present at the Board before which the juvenile will appear; and

b) the probation officer of such arrest to enable him to obtain information regarding the antecedents and family background of the juvenile and other material circumstances likely to be of assistance to the Board for making the inquiry."

241. Section 14 (1) of the Act says, "*Where a juvenile having been charged with the offence is produced before a Board, the Board shall hold the inquiry in accordance with the provisions of this Act and may make such order in relation to the juvenile as it seems fit: Provided that an enquiry under this section shall be completed within a period of four months from the date of its commencement, unless the period is extended by the Board having regard to the circumstances of the case and in special cases after recording the reasons in writing for such extension."*

Section 14 (2) of the Act says, "*The Chief Judicial Magistrate or the Chief Metropolitan Magistrate shall review the pendency of cases of the Board at every six months, and shall direct the Board to increase the frequency of its sittings or may cause the constitution of additional Boards."*

the juvenile to be sent to a special home for a period of three years²⁴².

The main object of the probation method as provided under section 15 sub-section (1) clause (e) and (f) is said to be to rehabilitate the offender and secure his cooperation in making himself supporting through advice and guidance in normal social setting rather than through the coercive methods practiced behind the prison walls. Therefore, the Apex Court seems to be aware of its role in preventing juveniles in conflict with law from contracting or associating with hardened criminals in jails and rehabilitating them as responsible and useful members of the society²⁴³.

The Supreme Court in *Rattan Lal V. State of Punjab*²⁴⁴, allowed the benefit of Probation of Offender Act, 1958 retrospectively in favour of a boy of 16 years, who was found guilty of having committed house trespass and having tried to outrage the modesty of a girl of 7 years. The Court pointed out that the Probation of Offenders Act, 1958 is a milestone in the progress of modern liberal trend of reform in the field of penology. It is the result of the recognition of the doctrine that the object of criminal law is to reform the individual offender than to punish him.

In *Abdul Qayum V. State of Bihar*²⁴⁵, the appellant was only 16 years of age at the time of his conviction for the offence of theft of Rs 56 which he had committed by pick pocketing. He was given six months rigorous imprisonment and a probation order was refused inspite of the fact that the probation officer had recommended it. The appeal and the revision petition having been rejected by the Patna High Court, the appellant finally came to the Supreme Court which upheld the appeal. The Supreme Court was of the view that neither the trial court; the appellate Court nor the High Court applied their mind to the requirement of the provisions of the Act.

Although the Court pointed out that it is true that the trial Court, the appellate Court as well as the High Court did consider the question of giving

242. Section 15 of the Act.

243. Usha Razdan, *Apex Court towards humanizing the administration of Juvenile Justice*, 33 *JILI*(1991) 384.

244. *AIR* 1965 SC 444 at 445.

245. *AIR* 1972 SC 214.

benefit to the appellate under section 6 but in view of the court they have completely misdirected themselves to the essential requirements of that provision. The court observed that there was no warrant for inferring that the appellant was an associate of the hardened criminal. Though he was illiterate he had a vocational aptitude for tailoring and was working in the Bihar Tailoring Works. The attitude of the family towards the offender appellant was one of sympathy and the father exercised reasonable control over him. The report of the neighbours was also in favour of him and no previous conviction was proved against him prior to this case and in the circumstances mentioned by him the release on probation was considered to be a suitable method to deal with him. The Court further pointed out that to sentence him to imprisonment would itself achieve the object of associating him with hardened criminals which association the Court thought was a good ground for denying him the benefit of being released on probation of good conduct. The court had no doubt that if he was released on probation on probation of good conduct there was hope of his being reclaimed and afforded the opportunity to live a normal life of a law abiding citizen. In this view the appeal was allowed and the sentence set aside with the direction that he be released under section 4 of the Probation of offenders Act, 1958²⁴⁶.

In *Mohd. Aziz V. State of Maharashtra*²⁴⁷, the probation provision were involved for the first time before the Supreme Court, which allowed the probation release in favour of the accused aged 17 years 7 months whose conviction for theft had been upheld by the High Court. Delivering the decision of the Supreme Court Bhagwati, J. pointed out that even though the point relating to the applicability of section 6 was not raised before the Learned Presidency Magistrate or the High Court, this Court is bound to take notice of the provisions of that section and give its benefit to the appellant, particularly since it is a section which is intended for the benefit of juvenile delinquents, reflecting the anxiety of the legislature to protect them from contact or association with

246. *Id.* at 216 - 217.

247. *AIR* 1976 SC 730.

hardened criminals in jails and retrieve them from a life of crime and rehabilitate them as responsible and useful members of society²⁴⁸.

New coming to the punishment and conviction of juvenile in conflict with law, the Juvenile Justice (Care and Protection of Children) Act, 2000 provides that a juvenile in conflict with law shall not be sentenced to death or imprisonment or committed to prison in default of payment of fine or in default of furnishing security. However, where a juvenile of sixteen years commits an offence of a serious nature and the Board is satisfied that it would not be in his interest or the interest of other juvenile to send him to a special home, the Board may order the juvenile in conflict with law to be kept in a place of safety²⁴⁹. Also, a juvenile cannot be tried for any offence together with a person who is not a juvenile²⁵⁰.

[C] OFFENCES AGAINST JUVENILES.

In a society children form a very important part specially because they are the future generations of a country. The welfare of children in a civilized society

248. *Id.* at 731.

249. Section 16 (1) of the Act says, "*Notwithstanding anything to the contrary contained in any other law for the time being in force, no juvenile in conflict with law shall be sentenced to death or imprisonment for any term which may extend to imprisonment for life, or committed to prison in default of payment of fine or in default of furnishing security: Provided that where a juvenile who has attained the age of sixteen years has committed an offence and the Board is satisfied that the offence committed is so serious in nature such that it would not be in his interest or in the interest of other juvenile in a special home to send him to such special home and that none of the other measures provided under this Act is suitable or sufficient, the Board may order the juvenile in conflict with law to be kept in such place of safety and in such manner as it thinks fit and shall report the case for the order of the state Government.*"

Section 16(2) of the Act says, "*On a report from a Board under sub - section (1), the state government may make such arrangement in respect of the juvenile as it seems proper and may order such juvenile to be kept under protective custody of such place and such conditions as it thinks fit.*

Provided that the period of detention so ordered shall not exceed in any case the maximum period provided under section 15 of this Act."

250. Section 18 (1) of the Act says, "*Notwithstanding anything contained in section 223 of the code of Criminal Procedure, 1973 (2 of 1974) or in any other law for the time being in force no juvenile shall be charged with or tried for any offence with a person who is not a juvenile.*"

Section 18(2) of the Act says, "*If a juvenile is accused of an offence for which under section 223 of the Code of Criminal Procedure, 1973 (2 of the 1974) or any other law for the time being in force, such juvenile and any other person who is not a juvenile would, but for the prohibition contained in sub section (1), have been charged and tried together, the Board taking cognizance of that offence shall direct separate trials of the juvenile and the other person.*"

must be given prime importance because the welfare of the entire community, its growth and development depend on the health and well being of its children. Every child must be helped to grow into maturity so that they can become decent and useful member of the society. They need special protection because of their tender age, specially against the various crimes committed against children.

Therefore, there are various provisions in the Indian Penal Code of 1860, the Code of Criminal Procedure, 1974 and also the Juvenile Justice (Care and Protection of Children) Act, 2000 dealing with the offences against juveniles and punishment thereof.

The first and foremost requirement for better development of children is that they should be provided good literature so that their minds may be attracted towards virtues. The major problem in the society is that obscene literatures are in circulation at large scale through multimedia. The minds of the children are often open to immoral influences. If such literature falls in the hands of children it may affect their minds adversely. Therefore, to protect children from immoral influences the sale, exhibition or circulation of any obscene object to them is made an offence punishable in accordance with law²⁵¹.

Another area which requires attention is the exploitation of children by selling and buying them for different purposes. Slavery was an age old social evil which has been abolished today the world over still it is prevalent in its new forms. Children are often enslaved and forced to do inhuman and immoral work. They are highly misused as prostitutes. Especially, children belonging to the poor and weaker sections are victims of exploitation. Therefore, trafficking in human beings, specially in women and children has become a global problem. It has become a matter of serious national and international concern. Since trafficking is a world wide phenomenon a large number of girls as well as boys

251. Section 293 IPC says, "whoever sells, lets to hire, distributes or circulates to any person under the age of twenty years any such obscene object as is referred to in the last preceding section or offers or attempts so to do, shall be punished on first conviction with imprisonment of either description for a term which may extend to three years and with fine which may extend to two thousand rupees, and in the event of a second or subsequent conviction, with imprisonment of either description for a term which may be extend to seven years, and also with fine which may extend to five thousand rupees".

are affected every day. The children along with their families are promised better employment and a better life and as a result children and their families get lured by such promises. Whereas others are kidnapped and sold. Human trafficking, especially of women and children, is on the rise also because of the tremendous growth in the global sex market.

The number of child victims trafficked worldwide for sexual exploitation or cheap labour on an annual basis is said to be about 1.2 million. After illegal drugs and arms trafficking human trafficking the third largest international crime, is said to be worth billions of dollars each year. Tremendous demand for commercial sexual exploitation is the driving force behind the trade. Seventy – nine percent of all global trafficking is said to be for sexual exploitation²⁵².

Therefore, India is no exception and is equally plagued by the problem of human trafficking specially in women and children. Commercial sexual exploitation of children in India that exists on a large scale and in various forms leads to trafficking in children for commercial sexual exploitation.

India along with Pakistan is said to be the main destinations for children under 16 who are trafficked in South Asia. Whereas, after Thailand and the Philippines, India is said to have 1.3 million children in its sex – trade centres. These children who come from relatively poorer areas are said to be trafficked to richer areas²⁵³.

As per the National Human Rights Commission Report on Trafficking in women and children, in India the population of women and children in sex work is stated to be between 70, 000 and 1 million and of these 30% are 20 years of age and nearly 15% were inducted into the sex trade when they were below 15 years of age²⁵⁴. Therefore keeping the magnitude of the problem in mind such practices need to be prohibited altogether. Therefore, in an effort to eliminate such practices the constitution makers have included right against exploitation in the fundamental right.

252 .www.ecpat.net/EI/Publications/Trafficking/Factsheet_India.Pdf (Visited on 2nd Dec 2011).

253. www.uri.edu/artsci/wms/hughes/india.htm (Visited on 2nd Dec 2011).

254. www.india.gov.in/allimpfrms/alldocs/12262.pdf (Visited on 5th Dec 2011).

The right against exploitation have been embodied in Articles 25 and 24 of the Constitution. Article 23 prohibits traffic in human beings and forced labour and makes their practice punishable under law whereas Article 24 prohibits employment of children below 14 years of age in factories, mines or other hazardous employment.

It may be mentioned here that the primary law for the prevention of immoral traffic came in the form of Suppression of Immoral Traffic in Women and Girls Act, 1956 which has been amended as The Immoral Traffic (Prevention) Act, 1956. This is an Act to provide in pursuance of the International Convention signed at New York for the prevention of immoral Traffic. This Act deals exclusively with trafficking. Its main objective is to inhibit or abolish traffic in women and girls for the purpose of prostitution as an organized means of living.

The Indian Penal Code, 1860 also contains provisions dealing with offences, against children. Therefore, importing, exporting, removing, buying, selling, trafficking or dealing in slaves is made an offence punishable in accordance with law²⁵⁵.

Buying and selling of minors for the purposes of prostitution or illicit intercourse or for any unlawful and immoral purpose is made punishable²⁵⁶. Therefore, section 372 of the Indian Penal Code, 1860 applies to males or females under the age of eighteen years. It applies to a married or an

255. Section 371, IPC says, "*whoever habitually imports, exports, removes, buys, sells, traffics, or deals in slaves shall be punished with imprisonment for life, or with imprisonment of either description for a term not exceeding ten years, and shall also be liable to fine*".

256. Section 372, IPC says, "*whoever sells, lets to hire or otherwise disposes of any such 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*".

Section 373, IPC says, "*whoever buys, hire or otherwise disposes of any such 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*".

unmarried female even where such female, prior to sale was leading an immoral life. Section 373 and 372 conjointly punish both the giver as well as receiver of a person under 18 years of age for an immoral purpose. Both the sections relate to the same subject matter. The first section strikes at any bargain of the nature contemplated by it, whoever may be the party who sells or lets the person, even though it could be the father or mother or lawful guardian. The second section strikes at the bawds, keepers of brothels and all other who fatten on the profits arising from the general prostitution of girls²⁵⁷.

Apart from the above mentioned provisions the inducing of any minor girl to go from any place or to do an act or knowing that she will be forced to do such act is made an offence punishable in accordance with law²⁵⁸. The import of girl under twenty one years of age from any country outside India for immoral purposes is made an offence punishable in accordance with law²⁵⁹.

A person who has sexual intercourse with a woman without her consent, when she is under 16 years of age is made an offence punishable in accordance with law²⁶⁰. Although there is an exception in favour of husband when the relationship between man and woman is that of husband and wife, the act would be an offence in that case also if the age of the woman is below twelve years. These provisions have been made to protect the youth and children, to prevent them from exploitation when their minds are immature. Exposing or leaving a child in any place with the intention of abandoning such child by any person

257. Ratanal and Dhirajlal, *The Indian Penal Code*, 28th Edition. (1997) at 509 - 10.

258. Section 366A IPC says, "*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 maybe, 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 liable to fine*".

259. Section 366B, IPC says, "*Whoever imports into India from any country 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 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 liable to fine*".

260. Section 376(1), IPC says, "*Whoever, except in the cases provided for by sub - section (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 a term which extend to ten years and shall also be liable to 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 fine or with both*".

being the father or mother is made an offence punishable by law²⁶¹. Kidnapping or maiming a minor for purposes of begging is made an offence punishable in accordance with law²⁶².

Apart from slavery and prostitution, another social evil that is still prevalent in one society is forced labour. As mentioned earlier Article 23 of one constitution deals with forced labour. Here we may also mention the problem of child labour. Article 24 of our constitution prohibits employment of children. It may be submitted that engaging children as labourers in various sectors is no less an offence than trafficking. The use of children and more specifically girl children in one form or the other in unorganized sectors like shops, hotels, dhabas, workshops and other small establishments are increasing by the day. Specially with the advent of industrialization the demand for labour increased tremendously and the need to increase productivity and national income was felt which has given rise to the employment of children as labourers. Child workers are specially preferred because they are cheap labour and by paying less more profit can be earned. Another reason for the increase in child labour is that they are a source of income for poor families.

It is submitted that a study conducted by the ILO Bureau of statistics found that "Children's work was considered essential to maintaining the economic level of households, either in the form of work for wages, of help in household enterprises or of household chores in order to free adult household

261. Section 317, IPC says, "Whoever being the father or mother of a child under the age of twelve years having the care of such child exposes or leaves such child in any place with the intention of wholly abandoning such child, shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine or with both".

262. Section 363 A (1), IPC says, "Whoever kidnaps any minor, or not being the lawful guardian of a minor, obtains the custody of the minor, in order that such minor may be employed or used for the purposes of begging shall be punishable with imprisonment of either description for a term which may extend to ten years and shall also be liable to fine". Section 363A(2), IPC says, "Whoever maims any minor in order that such minor may be employed or used for purposes of begging, shall be punishable with imprisonment for life and shall also be liable to fine".

Section 363 A(3), IPC says, "Where any person, not being the lawful guardian of a minor, employs or uses a minor for the purpose of begging, it shall be presumed, unless the contrary is proved, that he kidnapped or otherwise obtained the custody of that minor in order that the minor might be employed or used for the purposes of begging".

members for economic activity else where". Therefore, India is said to be the largest example of a nation that is plagued by the problem of child labour. It is estimated that there are between 60 and 115 million working children in India, the highest number in the world²⁶³.

Therefore, in order to address the problem of child labour the Child Labour (Prohibition and Regulation) Act was enacted in 1986. The Act prohibits the employment of children in certain specified hazardous occupations and processes and regulates the working conditions in others. It may also be mentioned here that the Child Labour (Prohibition and Regulation) Amendment Act, 2006 prohibits the employments of children in hotels and as domestic servants.

The Indian Penal Code, 1860 has also made provisions whereby any person who compels another person to forced labour shall be punishable in accordance with law²⁶⁴.

Apart from the Indian Penal Code the Juvenile Justice (Care and Protection of Children) Act, 2000²⁶⁵ also makes provision of punishment for special offences in respect of juveniles. Therefore, newspaper, magazines, news – sheet or visual media have been prohibited to disclose the name of the juvenile²⁶⁶. Assaulting, abandoning, exposing or neglecting the juvenile so as to cause the juvenile mental or physical suffering is made an offence punishable in accordance with law²⁶⁷. Employment of juvenile or child for begging is made an

263. <http://skcv.com/child%20labour.htm> (visited on 5th Dec 2011).

264. Section 374, IPC says, "*Whoever unlawfully compels any person to labour against the will of that person shall be punished with imprisonment for a term which may extend to one years, or with fine or both*".

265. Hereinafter referred to as the *Act*.

266. Section 21 (1) of the Act says, "*No report in any news paper, magazine, news sheet or visual media of any inquiry regarding a juvenile in conflict with law or a child in need of care and protection under this Act shall disclose the name, address or school or any such juvenile or child be published:*

Provided that for reason 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 Juvenile or the child".

Section 21 (2) of the Act says, "*Any person who contravenes the provisions of sub - section (1) shall be liable to a penalty which may extend to twenty five thousand rupees*".

267. Section 23 of the *Act*.

offence punishable in accordance with law²⁶⁸. Giving any juvenile any intoxicating liquor or any narcotic drug or psychotropic substance except under the order of a medical practitioner is an offence punishable by law²⁶⁹. Exploitation of juvenile or child employee is also an offence punishable by law²⁷⁰.

Lastly it is the duty of every individual to take care of his/her children. Apart from love and affection every child requires the basic needs like proper food, clothing and education to enable the child to grow into maturity and become a decent member of the society, thereby contributing to the overall development of a community. This is possible only if the parent takes care of a child physically, mentally and financially. However, if any person, having sufficient means neglects or refuses to maintain his children a Magistrate of the First Class is empowered to order such person to make a monthly payment for the maintenance of children²⁷¹.

268. Section 24(1) of the Act says, "*Whoever employs or uses any juvenile or the child for the purpose or causes any juvenile to beg shall be punishable with imprisonment for a term which may extend to three years and shall also be liable to fine*".

Section 24 (2) of the Act says, "*Whoever, having the actual charge of, or control over a juvenile or the child abets the commission of the offence punishable under sub - section (1), shall be punishable with imprisonment for a term which may extend to one year and shall also be liable to fine*".

269. Section 25 of the Act says, "*Whoever gives, or causes to be given to any juvenile or the child any intoxicating liquor in a public place or any narcotic drug or psychotropic substance except upon the order of duly qualified medical practitioner or in case of sickness shall be punishable with imprisonment for a term which may extend to three years and shall also be liable to fine*".

270. Section 26 of the Act says, "*Whoever ostensibly procures a juvenile or the child for the purpose of any hazardous employment keeps him in a bondage and withholds his earnings or uses such earning for his own purposes shall be punishable with imprisonment for a term which may extend to of three years and shall also be liable to fine*".

271. Section 125 of the *Criminal Procedure Code, 1973*.

CHAPTER – V

CARE AND PROTECTION OF JUVENILES

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CARE AND PROTECTION OF JUVENILES

Children form an important and integral part of every society in the world. In their tiny shoulders rests the future of mankind. It is, therefore, the duty of every society to provide proper care and attention to every child. Also their very dependent nature makes them entitled to special care and attention in the family and society at large. The fact that they are innocent and immature makes them vulnerable to all forms of exploitation. Therefore, a better state and peaceful society can be created only if the childhood of every child is properly nurtured, nourished and protected. A nation's future is dependent on the children because they are the pillars which forms the basis of the future generation. Referring to the relationship between today's children and the future of any nation, Zimring says¹:

“Every society views its young with a mixture of hope and trepidation. The Young are the society's future, for good or ill, and the focus of special efforts to educate, to protect and to transmit culture from one generation to the next”.

Therefore, the concept of juvenile justice is said to be based on the principle of guardianship. Since it is the duty of every person to take care of his/her children the state enforces this duty through law, because the ultimate responsibility lies on the state to take care of child in need of care and protection.² Apart from nutrition and education, natural love and affection is

1. Abdul Latif Wani, *Juvenile Delinquency in India*, V *Kashmir University Law Review* (1998) 66.

2. B.P. Dwivedi, *Neglected Juveniles, The Law and Laxity*, 16 *I.B.R.* (1989) 486.

very important for a child's physical and mental development. A child who is abandoned, avoided and neglected by the parent becomes unmanageable and makes the child frustrated and corrupted as a result of which the child has to face disrespect and humiliation in the society. Many a times a majority of such children are subjected to all forms of exploitation and are faced to do all sorts of inhuman work to earn their livelihood. There are also children who are abandoned by their parents and left to fend for themselves. This may result in the child committing delinquent acts. Therefore, to avoid this the law provides for the care of child in need of care of protection with treatment because they need protection rather than punishment.

Now, a question may arise as to who is a child in need of care and protection? It is said that the identification of child in need of care and protection is the basic work in solving their problems.³ It is, therefore, important to discuss the meaning of 'child in need of care and protection' and also to analyse the various provisions incorporated under the Juvenile Justice (Care and Protection of Children Act), 2000 regarding the care and protection of child in need of care and protection.

[A] CHILD IN NEED OF CARE AND PROTECTION

It is pertinent to note that the Parliament in the year 1986 took a bold step towards the welfare of neglected juveniles by passing the Juvenile Justice Act, the main purpose of which was to provide for the care, protection, treatment, development and rehabilitation of neglected or delinquent juveniles. However, the Juvenile Justice Act, 1986 has now been repealed by the passing of Juvenile Justice (Care and Protection of Children Act), 2000. The term 'neglected juvenile' as used in the Act of 1986 has now been changed to 'child in need of care and protection' in the Juvenile Justice (Care and Protection of Children Act), 2000.⁴ The definition of 'child in need of care and protection is

3. *Id.*

4. Hereinafter referred to as the Act.

so wide as to include a large number of children.⁵

It is seen that the definition of 'child in need of care and protection under the Act includes children who are found begging without having any home and any ostensible means of subsistence and is a destitute. These destitute children live and grow in a society where they are neglected and deprived of not only food, clothing and shelter but also education. They also lack affection, care and guidance from adults. These street children not only live but also work and struggle in situations and circumstances that are not conducive for their growth and development. Since a majority of these children come from poor families who are migrants and live in slums or squatter dwellings, therefore, they do not have an equal sharing of socio – cultural and economic opportunities for care, protection and socialization. Poverty may be submitted as the primary as the primary cause of growing problem of street children in India. Poverty exposes these children to innumerable problems and as a result the child remains poor throughout the life. These children are not deprived of their rights but are also denied access to education and adequate health care.

UNICEF has defined 'street children' as children who live on the streets

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5. Section 2(d) of the Act says, "*Child in need of care and Protection*" means a child -
- i) *Who is found without any home or settled place or abode and without any ostensible means of subsistence,*
 - a) *Who is found begging, or who is either a street child or a working child,*
 - ii) *Who resides with a person (whether a guardian of the child or not) and such person -*
 - a) *has threatened to kill or injure the child and there is a reasonable likelihood of the threat being carried out or,*
 - b) *has killed, abused or neglected some other child or children and there is reasonable likelihood of the child in question being killed, abused or neglected by that person,*
 - iii) *Who is mentally or physically challenged or ill children or children suffering from terminal diseases or incurable disease having no one to support or look after,*
 - iv) *Who has a parent or guardian and such parent or guardian is unfit or incapacitated to exercise control over the child,*
 - v) *Who does not have parent and no one is willing to take care of or whose parents have abandoned or surrendered him or who is missing and run away child and whose parents cannot be found after reasonable inquiry.*
 - vi) *Who is being or is likely to be grossly abused, tortured or exploited for the purpose of sexual abuse or illegal acts,*
 - vii) *Who is found vulnerable and is likely to be inducted into drug abuse or trafficking,*
 - viii) *Who is being or is likely to be abused for unconceivable gains,*
 - ix) *Who is victim of any armed conflict, civil commotion or natural calamity."*

alone or with their families, or children who spend most of their times on the streets to fend for themselves (but return home on a regular basis). It is stated that while there are no recently published statistics, UNICEF reported that the number of street children in India was as high as 18 million in 2000⁶.

Generally, children who are abused, neglected, abandoned and maltreated end up living in the streets. They do not have any other alternative and as such are faced to live their life in the streets. Mostly these children resort to varied odd jobs like rag pickers, shoe shine boys, washing utensils or serving tea in dhabas or working as fitters etc on workshops or small mechanic shops. These children generally live in groups at construction sites without any habitation facilities. It is unfortunate that inspite of the various constitutional provisions for protecting the tender and young age of children, they continue to live in such deplorable conditions.

Therefore, it is submitted that the poverty into which these children are born characteristics child labour⁷. Child labour is undoubtedly the worst form of social evil existing in our Indian Society because children are required to work beyond their physical capacity and the number of hours they have to work interferes with their education, recreation and rest. Apart from this the wages that they get are not commensurate with the amount of work done. A major factor leading to child labour is poverty but at the same time equally important is the system that exploits the children and allows them to work.

Child labour in India is said to be a product of socio – economic and cultural condition. Anticonstitutional polices, inadequate legislative measures and lack of political will have also been considered as important factors responsible for the persistence of this unlawful social evil. In majority of the cases the attitude of parents and their inability to appreciate the Childs educational capabilities and intelligence have been taken as the root cause behind child labour⁸. Further, in many cases the poor parents with bad habits

6. http://www.ashrayainitiative.org/doku.php?id=context:street_children (visited on 9th Dec 2011).

7. Usha Ramanathan, *On engaging with the law: Revisiting Child Labour*, 40 *JILI* (1998) 264.

8. Shrinivasan Gupta, *Right of Child and Child Labour: A Critical Study*, 37 *JILI* (1995) 537.

and criminal tendencies win the confidence of the child in convincing the child that education could not solve their problems and therefore the child is encouraged to work very early in life. As a result the child is not in a position to enjoy the benefit of state policy for free education to children only by the simple reason that the child cannot afford to miss the wages by going to school for education.

Therefore, as has already mentioned in the previous chapter the Parliament enacted the Child labour (Prohibition and Regulation) Act, 1986 as a step towards concretizing the labour conditions of the child workforce.

Next, the definition of 'child in need of care and protection also includes a child who is being or is likely to be abused, tortured or exploited for the purpose of sexual abuse or illegal acts. It is unfortunate that not only in India but throughout the world children are being exploited and abused. It is said that though we are fortunate to live in a century which recognizes the existence of children as being in their own right and not as objects to be treated at will, yet child abuse is rampant⁹. Parents and guardians are generally assumed and expected to naturally act in the best interest of the child but it is seen that this is not always so. Since children have no political power and their opinions are not given due weight they are dependent upon the adults and state to protect their rights but when this does not happen there is every possibility of these children being victims of sexual abuse and exploitation. As a result the sexual abuse of children is increasing by the day in every society. Internet has also contributed towards the increase in instances of sexual abuse of children because child sex has turned into global business through internet.

It is submitted that the use of children in pornographic literature is also increasing. Newspapers expose only the tip of the ice berg, because the victims and their guardians refrain from reporting cases of sexual abuse because of the shame and guilt associated with it¹⁰.

9. Ajay Rai, *Studies in Child Abuse*, VI *Legal News and Views* (1993) 52.

10. Valsamma Paul, *Sexual Abuse of Children – Need for Legislation*, XXXII (1&2) *Indian Bar Review* (2005) 114.

Sexual abuse of children is not only one of the worst forms of exploitation of children but also amounts to the violation of the basic human rights of the child. Many other factors are also responsible for the heinous crime of sexual abuse of children. Moral values of men are degrading 'by the day because man has become materialistic specially with industrialization and growth of metropolitan cities. As a result incidence of sexual abuse is on the rise. But it is submitted that when the society was a rural one and joint family system existed in majority in every society, incidents of sexual abuse specially rape were negligible¹¹.

However, with the decline in the joint family system moral and spiritual values have degraded and the desire for material wealth and enjoyment of life have become the major concern for men. Unimaginable levels of corruption is present in the society. Man wants to have maximum enjoyment at the cost of others. This tendency is said to breed promiscuity and vulgarity, and therefore, in relation to the opposite sex man has become unhealthy and sick¹².

However, with the decline of moral values in society, and specially in metropolitan cities, females belonging to middle class families come in contact with the upper strata of the society and they desire for material comforts and luxuries beyond their reach. Consequently, to fulfill such desire they willingly practice prostitution. Also, many a times young girls run away from home either because of poverty or abuse at the hands of the parents only to be abused again in the outside world. Some of these girls also leave home with the hope of making it big in the glamour industry but when they realize it is not possible they are forced to take up prostitution. Therefore, it would not be fair to only blame men for the sexual abuse of children.

Another factor for the ever growing problem of sexual abuse is poverty. Poverty makes children come to big cities from rural area in search of all kinds of odd jobs like domestic servants, servants in hotels, dhabas, offices etc. but in

11. *Id.* at 117.

12. *Id.* at 118.

reality what they get is torture, sexual abuse and forced entry into prostitution. However, sexual abuse of children is not only limited at the hands of the strangers. Nowadays, children are not safe in the hands of their own family members. Many a times children suffer sexual abuse at the hands of family members. As a result of which the child suffers not only physically but psychologically as well. This effects the emotional state of a child because in many cases the child is not able to disclose this to anybody out of fear and also because most of the time the parents would not believe the child.

It is submitted that a study sponsored by the National Commission for women squarely blames law – enforcing agencies for their role in allowing child prostitution to grow in cities. The persons running child prostitution rackets are supported by these agencies wherein the agencies get involved from the stage of procuring minor girls to the stage of transporting them to the brothels. Such agencies are accused of raping minor girls and setting them free. Those who should be enforcing the law are the ones breaking them. By sexually abusing children. Therefore, in brief the changing materialistic society, the growing consumer culture, the focus on sex in visual media, the erosion of values in family and society, addiction to drinks and drugs and frustration due to joblessness and poverty have converted children into commodities of torture, exploitation and sexual abuse¹³.

Therefore, in the international front the U.N Convention on the Rights of the child, 1989. is the most promising instrument which was adopted by the General Assembly. This Convention casts important responsibilities on state parties to protect the child from all forms of sexual abuse¹⁴.

In India the Constitutional provisions contained in Articles 21, 23, 24, 39 (e) promote and protect the interest of children¹⁵. Apart from the Constitutional Provisions the Immoral Traffic Prevention Act, 1956 lays down provisions for the purpose of dealing with the problem of prostitution. The

13. *Id.* at 120-21.

14. Article 34, *UN Convention on the Rights of the Child, 1989*.

15. For discussion of the Articles see, *Supra* chapter III.

Indian Penal Code, 1860 has also made certain acts committed against children as offences punishable in accordance with law¹⁶.

Therefore, the Courts in India have attempted to remedy the situation within the available infrastructure¹⁷. For eg in *Ghanashyam Misra V. State*¹⁸, the culprit a school teacher of 39 years of age had committed the heinous act of rape on a young girl of 10 years. The accused had lured the girl into coming inside the school room and raped her. Therefore the Court enhanced the sentence to 7 years rigorous imprisonment and ordered the payment of compensation to the father of the victim girl.

In *State of Maharashtra V Rajendra Jawanmal Gandhi*¹⁹, the victim of sexual abuse was a young girl of 12 years old on whom an attempt to rape had been made. The Court agreed with the High Court that great harm had been caused to the girl by unnecessary publicity and taking out morcha by the public. It was further observed that as a matter of fact the crime is not only against the victim but it is against the whole society as well. The court pointed out that since late there had been spurt in crimes relating to sexual offences²⁰.

Therefore, after considering the whole aspect of the matter the court sentenced the accused undergo rigorous imprisonment for 5 years and pay a fine of Rs 40,000/-.

In *Kamal Kishore V. State of Himachal Pradesh*²¹, the victim of sexual abuse was a girl who had just crossed the single digit in her age. The Session Judge, however was not impressed by the story of the victim and hence her testimony was jettisoned and the accused was exonerated. However, a Division Bench of the High Court of Himachal Pradesh dissented from the said verdict and convicted the accused under section 376 IPC²².

16. For discussion of the relevant sections see, *Supra* chapter III.

17. Shalu Nigam, *Sexual Abuse of Children and Child Rights*, 16 *Legal News and Views* (2002)11.

18. AIR 1957 Ori. 78.

19. AIR 1997 SC 3986.

20. *Id.* at 3996 – 97.

21. AIR 2000 SC 1920

22. *Id.* at 1921.

The Court after considering the whole aspect of the matter observed that there was no scope of doubt that the victim had been sexually savaged by the accused. It was further observed that there was no spec of doubt that the Session Judge had reached an erroneous conclusion by approaching the question from a wrong angle. The evidence of the adolescent girl the victim of rape, as duly corroborated by the testimony of her mother and aunt and adequately confirmed by the medical evidence had conclusively established that she was subjected to ravishment by the accused and no one else. Supporting the decision of the High Court the Court had rightly reversed reserved the order of acquittal and convicted the accused under section 376 IPC²³.

Therefore the Court enhanced the sentence for the offence under section 376 IPC to imprisonment for 7 years.

More recently the case of *Ramesh bhai Chandu bhai Rathod V. State of Gujrat*²⁴, a young girl studying in class IV was a victim of sexual abuse. She was raped and murdered by the accused appellant who was employed as a watchman in the Sanudip Apartments, where in one of the apartments the victim resided with her family. The appellant had made an extra judicial confession that he had raped and killed the child. Accordingly on the completion of the charges the accused was charged for offences under sections 363, 366, 376, 302 and 397 of the Indian Penal Code, 1860 and brought to trial. The trial court convicted him and sentenced him to death. On appeal the High Court also confirmed the reference and dismissed the appeal. The High Court found that the case fell within the category of the rarest of rare cases²⁵.

The court, therefore, commuted the death sentence awarded to the appellant to life but directed that the life sentence must extend to the full life of the appellant but subject to any remission or commutation at the instance of the

23. *Id.* at 1922-23.

24. *AIR* 2011 SC 803.

25. *Id.* at 804.

government for good and sufficient reasons²⁶.

In yet another case of *Haresh Mohandas Rajput V. State of Maharashtra*²⁷, the victim – a 10 year old girl was raped and murdered by the appellant. The trial Court convicted the appellant and sentenced him to undergo life imprisonment under section 302 Indian Penal Code, 1860. Further, the High Court upheld the conviction and enhanced the sentence to death penalty. Hence, the appellant preferred an appeal before this Court.

The Court did not find any cogent reason to interfere with the well – reasoned judgements of the Courts below so far as the conviction of the appellant was concerned and affirmed the conviction under sections 302 and 376 of the Indian Penal Code. However, so far as the sentence part was concerned the court was of the opinion that the case did not fall within the category of “rarest of rare cases” and the High Court was not justified in enhancing the punishment. Thus, the Court set aside the punishment of death sentence awarded by the High Court and restored the sentence of life imprisonment awarded by the trial Court²⁸.

An important case that came up before the Supreme Court regarding exploitation of children is *Bachpan Bachao Andolan V. Union of India*²⁹, wherein a petition was filed in public interest under Article 32 of the Constitution in the wake of serious violations and abuse of children who were forcibly detained in circuses in many instances, without any access to their families under extreme inhuman conditions. There were also instances of sexual abuse on a daily basis, physical abuse as well as emotional abuse. These children were also deprived of basic human needs of food and water. The petitioner had filed this petition following a series of incidents where the petitioner came in contact with many children who were being trafficked into performing in circuses. The activities that were undertaken in these circuses

26. *Id.* at 806.

27. *AIR* 2011 SC 3681

28. *Id.* at 3690.

29. (2011) 5 *SCC* 1.

deprived the artists specially children of their basic fundamental rights. They were entrapped into the world of circuses for the rest of their lives, leading a vagrant tunneled existence away from the hub of society, which was tiresome, claustrophobic and dependent on vicissitudes³⁰.

It was submitted by the petitioner that there are no labour or any welfare laws which protect the rights of these children. These children were frequently physically, emotionally and sexually abused in these places. The petitioner also submitted that there was perpetual sexual harassment, violation of the Juvenile Justice Act and all international treaties and conventions related to human rights and child rights where India is a signatory³¹.

Therefore, the petitioner sought the application of the provisions of the Juvenile Justice (Care and Protection of Children) Act, 2000 and also suggested that intra – state trafficking of young children, their bondage and forcible confinements, regular sexual harassment and abuses should be made cognizable offences under the Indian Penal Code, 1860 as well as under section 31 of the Juvenile Justice Act. Child Welfare Committees under the Juvenile Justice (Care and Protection of Children) Act, 2000 should be empowered to award compensation to all those victims rescued from the circuses with time – bound rehabilitation packages and the state Government to create a fund for the same³².

The petitioner also gave innumerable instances in the petition of abuse of children in circuses. All those instances demonstrated under what horrible and inhuman conditions these children had to perform in the circuses.

The Court observed that it planned to deal with the problem of children's exploitation systematically and in this order limited its directions regarding children working in the Indian Circuses. Consequently the court issued a number of directions and among them the respondents were directed to conduct simultaneous raids in all the circuses to liberate the children and check

30. *Id.* at 5.

31. *Id.* at 7.

32. *Id.*

violation of the fundamental rights of the children. The rescued children were directed to be kept in the care and protective homes till they attained the age of 18 years. The respondents were also directed to frame proper scheme of rehabilitation of rescued children from circuses³³.

Apart from sexual abuse of children, child marriage is also another form of child abuse. A vast majority of our population is still illiterate and so they are most of the time superstitious. At the same time lack of proper health care and population control leads to cases of child marriage specially in rural areas. Child marriage is not a new phenomenon and has been in existence since a long time. However, it is submitted that various studies have indicated that although instances of 'swayamvara' were cited in the Ramayana and Mahabharata, child marriage was not prevalent in ancient India. Vedic mantras indicated that a girl should be married only when she was fully developed both physically and mentally. The seeds of insidious practices against women were sown, it is said probably during the reign of despotic Monarchs or feudal lords during the middle ages. During this period the birth of baby girls were considered as an ill omen and often resulted in the killing of such baby girls. Girls were married off before the marriageable age by parents to get rid of the feeling and responsibility of bringing up young unmarried girls. Disposal of young minor girls for the purpose of marriage to the highest bidder was another practice that was prevalent. Therefore, for a number of traditional, religious and other reasons, girls were married off before they attained the age of 8 or 9 years. However, the year 1860 saw the rise of socio – religious movements like the Brahma Samaj and the Arya Samaj which did pioneering work against child marriages. These movements influenced in prohibiting a husband's intercourse with his wife who had not reached ten years of age under the Indian penal Code, 1860, even though the menace could not be entirely uprooted³⁴.

Thereafter, in the year 1929 the Child Marriage Restraint Act was

33. *Id.* at 28.

34. Arti; *Not a bliss, but bondage*, 17 *Legal News and Views* (2003) 26.

enacted and was put into force on April 1, 1930. This Act aimed at retraining the solemnization of child marriages. This Act was amended in 1978 and has fixed the minimum age of marriage for boys at 21 years and for girls at 18 years. Offences are cognizable under this Act. Accordingly, this Act makes it unlawful for a male adult below as well as above twenty one years of age to marry a child³⁵. Under this Act where a minor contracts a child marriage any person having charge of the minor whether as a parent or guardian or in any other capacity, who does any act to promote the marriage or permits it to be solemnized or negligibility fails to prevent it from being solemnized can be punished with simple imprisonment to 3 months with fine. However, women have been exempted from imprisonment³⁶.

The definition of “*child in need of care and protection*” also includes children who are mentally or physically challenged or ill children or children suffering from terminal diseases or incurable diseases and do not have anyone to support or look after them. A differently abled person has been described as one who finds it difficult to perform normal physical and/or mental function because of an impairment. When the normal functioning of an individual is interfered with by such impairment, the person becomes a handicapped³⁷. Therefore, children who suffer from such impairment require care and special attention. However, since such children are generally educated in separate schools their interaction with other children is reduced to the minimum. As a result such children remain isolated and it becomes difficult to integrate them in society. This can quite often lead to lack of self – confidence, low self – esteem and feeling of being discriminated by others. Consequently these differently – abled children are also most likely to be neglected, abused and abandoned.

The problem of HIV/AIDS is one which has affected people of all countries. It has assumed epidemic proportions and is a matter of serious

35. Sections 3 and 4 of the *Child Marriage Restraint Act, 1929*.

36. Section 6, *Id.*

37. <http://www.childlineindia.org.in/pdf/CP-JJ-CNCP.pdf> (visited on 9th August 09)

concern throughout the world. Not only adults but children have also not been spared by this disease. Children who are infected with HIV/AIDS are majority of the time victims of circumstances. Consequently such children are at the risk of facing social exclusion. Therefore, such children need all types of case specially residential care, foster care, medical care, medical follow up and other forms of protection.

Some of the children who are more vulnerable are:

- a) Children who are confirmed as infected by the virus.
- b) Children born to HIV positive mothers acquiring the virus in the womb.
- c) Children who require blood transfusion due to any illness.
- d) Children who are addicted to drugs.
- e) Children who are sexually abused and exploited.
- f) Children become affected because their parents or siblings are HIV positive.
- g) Children vulnerable to HIV in high – risk communities.

Further the definition of 'child in need of care and protection' also includes children who are likely to be inducted into drug abuse or trafficking. It may be submitted that though the problem of substance abuse or drug abuse affects children belonging to the different strata of society living in the tribal, rural and urban India but children living in the streets are more likely to be affected by drug abuse. These children have to fight daily for their survival in an uncaring and hostile environment. As a result of having to grow up in a tough world these children become resilient. But because they live in the streets they are vulnerable and insecure. While many of these children resort to drugs to overcome the stressful lives that they live everyday, others are coerced into substance abuse.

It is submitted that the predominant reasons cited by children for taking of drugs in one of the study is to overcome homesickness, to cope up with hard weather conditions, to overcome the pain of exploitation and sexual abuse and the compulsion to spend money. Specially when they do not have food to

satisfy their hunger the use of drugs stops their hunger³⁸.

Therefore, the problem of substance abuse is growing alarmingly by the day not only in developed countries but also in developing countries. It has also become a growing global public health concern. Hence, in the international arena the UN Convention on the Rights of the Child, 1989 provides children with the right to protection from the use of drugs, and from being involved in their production or distribution³⁹. In India, the Narcotic Drugs and Psychotropic substances Act, 1985 was enacted which declares illegal the production, possession, transportation, purchase and sale of any narcotic drugs or psychotropic substances and makes the person, addict/trafficker liable for punishment. Apart from this, The prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act was enacted in the year 1988. Under this Act people who use children for drug trafficking can be booked as abettors or conspirators to the Act. The Juvenile Justice (Care and Protection of Children) Act, 2000 also provides for penalty for giving intoxicating liquor or narcotic drug or psychotropic substance to juvenile or child⁴⁰.

Furthermore, a child who is a victim of armed conflict, civil commotion or unnatural calamity also comes under the purview of the definition of the 'child in need of care and protection'. Children as victims of armed conflict all over the world is a serious problem. After and a war is over soldiers die and people suffer innumerable and irreparable loss and damage. Amongst all this children are the most and worst affected.

It may be said that during armed conflict more children die than soldiers. Therefore, it is submitted that in the past two decades, two million children have been killed in armed conflict. At the same time three times as many have been seriously injured or permanently disabled. Children are said to be affected by armed conflict in different ways but the most dangerous of all is their

38. <http://www.ihs.org.in/IHSPPresentation/Protecting Children From Substance Abuse 08 Jan 09. pdf> (visited on 9th Dec' 11).

39. Article 33, *UN Convention on the Rights of the Child, 1989*.

40. For discussion of the relevant provision See, *Supra* Chapter IV.

participation as soldiers. Availability of small arms and light weapons has made participation of children in armed conflict a lot more easier. Legal and illegal international arms trade has made assault rifles cheap hence at a time when children should be going to school and playing they learn how to use rifles and war techniques⁴¹.

The aftermath of armed conflicts has irreparable damage both physical and emotional on the child. The child loses everything – family members, schools, neighborhoods and communities. The child has to cope with such loss at such young age and many a times is not able to. This can prove to be detrimental to the growth and development of the child. Apart from this war violates the right of a child to live, the right to be with family and community, the right to health and education, the right to the development of the personality, and the right to be nurtured and protected.

Therefore, for the protection and care of children as victims of armed conflicts two treatise ie The Geneva Convention and the Convention of the Rights of the Child, 1989 exists. The Geneva Conventions of 1949 and their additional Protocol of 1977 lays down a series of rules giving the children special protection. On the other hand, the Convention on the Rights of child, 1989, also specifically protects child victims of war⁴².

A recent addition to these two international instruments is said to be the treaty to eliminate landmines, which was adopted in September 1977, in Ottawa, Canada. The Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti personnel Mines and on their Destruction was entered into force in 1999. Though this treaty does not specifically address children, this international treaty is meant to especially protect children from the suffering inflicted by these indiscriminate weapons of destruction⁴³.

41. <http://Legalservicesindia.com/article/article/children-in-armed-conflict> (visited on 9th December 11).

42. For discussion of relevant provision see, *Supra* Chapter II.

43. <http://Legalservicesindia.com/article/article/children-in-armed-conflict> (visited on 9th December 11).

Now coming to the provisions of the Juvenile Justice (Care and Protection of Children) Act, 2000⁴⁴ which was made various provisions in respect of separate handling of child in need of care and protection and juvenile in conflict with law. Child welfare committees and Juvenile Justice Boards has been constituted for the purpose of dealing with child in need of care and protection and juvenile in conflict with law separately. The aim of this provision is to segregate the two categories of children/juveniles and to provide treatment and training to the different categories of children separately i.e. children's homes and special homes. By this provision institutional discipline can be properly maintained and it also prevents the child in need of care and protection coming into contact with juvenile in conflict with law.

Therefore, the Act provides for the establishment of child welfare committees by the state government for exercising the powers and discharging the duties in relation to child in need of care and protection⁴⁵.

The Act lays down the powers of the committee. The Committee has been given the final authority to dispose of cases for the care, protection,

44. Hereinafter referred to as the Act.

45. Section 29(1) of the Act says, "*The state Government may within a period of one year from the date of commencement of the Juvenile Justice (Care and Protection of Children) Amendment Act, 2006, by notification in the official Gazette, constitute for every district one or more Child Welfare Committees for exercising the powers and discharge the duties conferred on such committees in relation to child in need of care and protection under this Act.*"

Section 29 (2) of the Act says, "*The Committee shall consist of a Chairperson and four other members as the state government may think fit to appoint of whom atleast one shall be woman and another, an expert on matters concerning children*". Section 29 (3) of the Act says, "*The qualifications of the chairperson and the members and the tenure for which they may be appointed shall be such as may be prescribed*". Section 29 (4) of the Act says, "*The appointment of any member of the Committee may be terminated, after holding inquiry, by the state Government, if -*

i) *he has been found guilty of misuse of power vested under this Act;*
ii) *he has been convicted of an offence involving moral turpitude, and such conviction has not been granted full pardon in respect of such offence;*
iii) *he fails to attend the proceedings of the committee for consecutive three months without any valid reason or he fails to attend less than three fourth of the sittings in a year*".

Section 29 (5) of the Act says, "*The Committee shall function as a Bench of Magistrates and shall have the powers conferred by the Code of Criminal Procedure, 1973 (2 of 1974) on a Metropolitan Magistrate, or, as the case may be, a Judicial Magistrate of the first class*".

treatment, development and rehabilitation of the children as well as to provide for their basic needs and protection of human rights. The committee has also been given power to deal exclusively with all proceedings under this Act relating to children in need of care and protection⁴⁶. It may be mentioned here that the Juvenile Justice (Care and Protection of Children) Rules, 2007⁴⁷ also lays down the functions and powers of the Committee. Some of the important functions among others are⁴⁸ – a) to take cognizance of and receive children produced before the committee b) to decide on the matters brought before the committee c) to reach out to such children in need of care and protection who are not in a position to be produced before the committee d) conduct necessary inquiry on all issues relating to and affecting the safety and well being of the child, e) direct the child welfare officers or probation officers or non – governmental organizations to conduct social inquiry and submit a report to the committee f) ensure necessary care and protection, including immediate shelter, g) ensure appropriate rehabilitation and restoration, including passing necessary directions to parents or guardians or fit persons or fit institutions in this regard, in addition to follow – up and co – ordination with District Child Protection Unit or State Adoption Resource Agency and other agencies, h) direct the Officer – in – Charge of children’s Homes to receive children requiring shelter and care, i) to provide a child friendly environment for children j) recommend ‘fit institutions’ to the state Government for the care and protection of children, k) declare ‘fit persons’, l) declare a child legally free for adoption, m) co – ordinate with the Police, Labour Department and other agencies involved in the care and protection of children with the support of District Child Protection Unit or state Child Protection Unit or State Government. The Act further provides for the production of child in need of

46. Section 31 of the *Act*.

47. Herein after referred to as the *Rules*.

48. Rule 25 of the *Rules*.

care and protection before the committee⁴⁹. It may be noted here that the Rules also lays down the procedure for production of a child before the committee. It has been provided under the Rules that if a child under two years of age is medically unfit then the person or the organization shall send a written report with the photocopy of the child to the committee within twenty four hours and produce the child before the committee as soon as the child is medically fit⁵⁰. However, in case the committee is not sitting, the child may be produced before the single member of the committee as per the provisions laid down under sub section (2) of section 30 of the Act⁵¹. If the single member is also not accessible or if the hours are odd, the child shall be taken by a non – governmental organization or childline or Police to an appropriate institution for children registered under the Act⁵². In order to facilitate legal services to the abused children when the cases of such children are taken up in regular courts it is provided that the committee shall have an empanelled list of lawyers, social workers and mental health expert who may assist the committee in dealing with cases of abused children and who may also interface with the Public Prosecutor or assistant Public Prosecutor⁵³. It has also been provided that every possible effort shall be made to trace the family with support from the District Child Protection Unit, and assistance of recognized voluntary

49. Section 32(1) of the Act “Any child in need care and protection may be produced before the committee by any one of the following persons:-

i) any police officer or special juvenile police unit or a designated police officer;

ii) any public servant;

iii) childline, a registered voluntary organization, or by such other voluntary organization or an agency as may be recognize by the state Government;

iv) any social worker or a public spirited citizen;

v) by the child himself;

Provided that the child shall be produced before the committee without any loss of time but within a period of twenty four hours excluding the time necessary for the journey.

Section 32 (2) of the Act says, “The State Government may make rules consistent with this Act to provide for the manner of making the report to the committee and the manner of sending and entrusting the child to children home pending the inquiry”.

50. Rule 27 sub-rule (2) of the Act.

51. Rule 27 sub-rule (4) of the Act.

52. Rule 27 sub-rule (5) of the Act.

53. Rule 27 sub-rule (12) of the Act.

organizations, childline or police may also be taken⁵⁴. Further, the child shall be placed in an institution closest to where his parents or guardians belong unless the child has been subjected to abuse or exploitation by parents or guardians⁵⁵.

The Act has further authorized the committee to hold an enquiry on a receipt of a report under section 32 in the prescribed manner and the committee may on its own or on a report from any person or agency as mentioned in sub-section (1) of section 32 pass an order to send the child to the children's home for speedy inquiry by a Social Worker or a child welfare officer. The inquiry has to be completed within four months of the receipt of the order or shorter period as may be fixed by the committee. If after the completion of the inquiry the committee thinks that the child has no family or ostensible support or is in need of continued care and protection, then, it may allow the child to remain in the children's home or shelter home till suitable rehabilitation is found or attains the age of 18 years⁵⁶.

The Juvenile Justice (Care and Protection of Children) Rules, 2007 also lays the procedure for inquiry⁵⁷.

54. Rule 27 sub-rule (13) of the Act.

55. Rule 27 sub-rule (20) of the Act.

56. Section 33 of the Act.

57. Rule 28(1) of the Rules says, "When a child is brought before the committee the committee shall assign the case to a social worker or case worker or child welfare officer or officer-in-charge as the case may be, of the institution or any recognized agency for conducting the inquiry through an order in form XII"

Rule 28 (2) of the Rules says, "The Committee shall direct the concerned person or organization about the details or particulars to be enquired into for developing an individual care plan and suitable rehabilitation".

Rule 28 (3) of the Rules says, "All inquiries conducted by social worker or case worker or Child Welfare Officer or Officer - in - Charge of the institution or any recognised agency shall be as per Form XIII and must provide an assessment of the family situation of the child in detail, and explain in writing whether it will be best interest of the child to restore him to his family"

Rule 28 (4) of the Rules says, "The inquiry must be completed within four months or within such shorter period as may be fixed by the committee:

Provided that the committee may, in the best interest of the child and for the reasons to be recorded in writing, extend the said period under special circumstances".

Rule 28 (5) of the Rules says, "After completion of the inquiry, if, the child is under orders to continue in the Children's home, the Committee shall direct the Officer - in - Charge of the home to submit quarterly progress report of such child and produce the child before the committee for an annual review of the progress".

[B] WELFARE PROVISIONS

India is a welfare state and this has been incorporated in the Preamble of our Constitution which spells out its prime objective. Thus constitutional goal finds elaboration in various provisions of the fundamental rights and directive principles in the particular and throughout the entire fabric of the constitution in general. By the process of judicial interpretation of the right to equality and human dignity intermingle with the relevant directive principles and the international covenants the judiciary has evolved many important rights and principles for the welfare of children. The exploitation of the child is writ large throughout the country, at the same time the welfare measures to be adopted at different levels are many fold. It is once again⁵⁸ mentioned here that the constitution through directive principles obliges the state to come up with social welfare legislation for the children. It is in furtherance of the aforesaid objectives that our parliament came forward with special legislations⁵⁹ for the welfare of children which have laid down the detail parameters for its enforcement.

In the present day world social problems have increased manifold and become complex as the expansion of society is taking place rapidly. Communities and families are being subjected to new and serious pressures. Consequently families are breaking up thereby turning children into destitute. Therefore, children affected by family break – down and other pressure are growing in numbers and therefore ways and approaches have to be thought of the handle these large numbers. However, it is said that in the old times where there were situations of neglect of children, destitution, abandonment or when children become orphaned there were spontaneous concerns and responses and solutions were arrived at by the local community where care, protection and rehabilitation was provided by the community. There was no social welfare

58. For discussion of some relevant provisions see, *supra* chapter III. .

59. For eg., *The Juvenile Justice (Care and Protection of Children) Act, 2000*, *The Child Labour (Prohibition and Regulation) Act, 1989* etc.

Department or NGO's to refer to, the community itself was the care taker of such children⁶⁰.

Nevertheless, even today effort has been made to take care of such children. The Juvenile Justice (Care and Protection of Children) Act, 2000 not only provides for separate trial of juvenile in conflict with law and child in need of care and protection but also provides for separate committal institutions. All these institutions are not penal but correctional centres aiming at the reformation of the child. These institutions have a setting of control, protection, rehabilitation and treatment which a child may not have experienced before, the absence of which might lead to his deviant behavior. Ordinarily the juvenile in conflict with law are committed to care of special homes and child in need of care and protection to children's home. There is also a provision under the Act to establish and maintain as many observation homes for the reception of juvenile in conflict with law during the pendency of any inquiry. Further, shelter homes may also be set up for juveniles or children.

AUTHORITIES AND INSTITUTIONS.

1) CHILDREN'S HOME –

The Juvenile Justice (Care and Protection of Children) Act, 2000 has made provisions for the establishment and maintenance of children's home by the state government for the reception of child in need of care and protection⁶¹.

60. Gerry J. Pinto, Juvenile Homes, 13 *Legal News and Views* (1999) 27.

61. Section 34(1) of the Act says, "*The State Government may establish and maintain either by itself or in association with the voluntary organizations, children's homes, in every district or group of districts, as the case may be for the reception of child in need of care and protection during the pendency of any inquiry and subsequently for their care, treatment, education, training, development and rehabilitation*".

Section 34 (2) of the Act says, "*The State Government may, by rules made under this Act, provide for the management of children's homes including the standards and the nature of services to be provided by them, and the circumstances under which, and the manner in which, the certification of a children's home or recognition to a voluntary organisation may be granted or withdrawn*".

Section 34 (3) of the Act says, "*Without prejudice to anything contained in any other law for the time being in force, all institutions, whether State Government run or those run by voluntary organizations for children in need of care and protection shall within a period of six months from the date of commencement of the Juvenile Justice (Care and Protection of Children) Amendment Act, 2006 be registered under this Act in such manner as may be prescribed*".

It is pertinent to note here that the Juvenile Justice (Care and Protection of Children) Rules, 2007 has also laid down rules for the establishment of children's homes. Providing separate facilities for boys and girls it has been laid down that children of both sexes below ten years may be kept in the same home but separate facilities shall be maintained for boys and girls in the age group of 5 to 10 years; every children's home shall include separate facilities for children in the age group of 0 – 5 years with appropriate facilities for infants; separate children's home shall be set – up for boys and girls in the age group 10 to 18 years. It has been further provided that each children home shall be a comprehensive child care centre the primary objective of which will be to promote an integrated approach to child care by involving the community and local Non – Governmental Organizations through the Management Committee set – up under rule 55 of these rules and the District Child Protection Unit or State Child Protection Unit or the State Government shall make an annual performance review of functioning of the children's homes. Among the various activities on which the centre shall focus some are – a) preparing and following individual care plans for every child, with child rights based approach, specifically addressing the child's physical and mental health, emotional needs, education, skill development, protection and special needs if any, b) family based non – institutional services such as, foster family care, adoption and sponsorship, c) specialized services in situations of conflict or disaster and for juvenile or children affected by terminal or incurable disease to prevent neglect by providing family counseling, nutrition, health interventions, psycho – social interventions and sponsorship; d) linkages with organizations and individuals who can provide support services to children⁶².

2) SHELTER HOMES –

The Juvenile Justice (Care and Protection of Children) Act, 2000 has empowered the state Governments to recognize reputed and capable voluntary

62. Rule 29 of the Rules.

organizations and provide them assistance to set up and administer shelter homes for juveniles or children. These shelter homes shall function as drop – in – centres for the children in need of urgent support⁶³. Further rules have been made with respect to shelter homes under the Juvenile Justice (Care and Protection of Children) Rules, 2007. It has provided that for children in urgent need of care and protection such as street children and run – away children, the state Government shall support the creation of requisite number of shelter homes or drop – in – centres through the voluntary organizations. It has been further laid down that shelter homes shall include – a) short stay homes for children needing temporary shelter, care and protection for a minimum period of one year, b) transitional homes providing immediate care and protection to a child for a maximum period of four months, c) 24 hour drop – in – centres for children needing day care or night shelter facility. Apart from the basic needs of clothing, food, health care and nutrition, safe drinking water and sanitation the shelter homes or drop – in centres are required to have the minimum requirement of boarding and lodging. Also no child is ordinarily allowed to stay in a short stay home for more than a year except in special circumstances with the approval of the committee⁶⁴.

In *Childline India Foundation V. Allan John Waters*⁶⁵, the Supreme Court had to deal with the issue of sexual abuse of child in shelter homes. The facts of the case in brief was that in 1986 a petition was brought before the High Court of Bombay complaining about the plight of children at various children homes in Maharashtra. The High Court appointed a committee that received complaints from the Child Rights Organizations like Saathi Online, Childline and CRY about the mismanagement of Anchorage Shelters, and on that basis the committee sought permission to visit Anchorage Shelters. After the visit a report was submitted before the High Court and on the basis of that report, specifically expressing unconfirmed report of sexual exploitation of

63. Section 37 of the *Act*.

64. Rule 30 of the *Rules*.

65. (2011) 6 *SCC* 261.

children, an Advocate Ms Maharukh Adenwala was informed that some children residing in shelter homes were being sexually exploited by those running these homes. After confirming the said fact and after consulting the committee, Ms Maharukh Adenwala moved a Suo Motu Criminal writ Petition before the High Court and the High Court passed an order for the protection of children at Anchorage Shelter Homes. Further with regard to the sexual and physical abuse at the Anchorage shelters, Childline India Foundation had filed a complaint but the police had not taken cognizance of the offence under the pretext that the matter was subjudice and was pending before the High Court. So Maharukh Adenwala herself recorded the statements of some of the victims and informed the said fact to the members of the committee. Thereafter, the High Court directed the police authorities of the state of Maharashtra to take action on the basis of the complaint lodged by child line India foundation. The Police, therefore, ultimately registered an offence by treating the statement of Sonu Raju Thakur as First Information Report. All the three accused pleaded not guilty and therefore, claimed to be tried. The Sessions Judge convicted all the three accused under the relevant sections of Indian Penal Code, 1860 and also the Juvenile Justice (Care and Protection of Children) Act, 2000. However, aggrieved by the order of the Session Judge, all the three accused filed criminal appeal before the High Court and the High Court set aside the order of conviction passed by the Session Judge and acquitted all of three accused from the charges leveled against them. Aggrieved by the order of the High Court, child Line India Foundation and Ms Maharukh Adenwala filed criminal Appeals and the state of Maharashtra also filed Criminal Appeal before the Supreme Court by way of special leave petitions.

The Court referred to the deposition of two victim boys who had given detailed account of the activities going on at the Anchorage shelters and in the opinion of the Court their depositions reflected that there was a criminal conspiracy among the accused to obtain possession of minor vulnerable boys

residing on the streets and subjected them to sexual abuse⁶⁶.

The Court further referred to the aim and objective of the Juvenile Justice Care and Protection of Children) Act, 2000 and stated that the objective of the Act was being ensured by establishing observations homes, juvenile homes for neglected juveniles and special homes for delinquent or neglected juveniles⁶⁷.

The Court also referred to the case *Vishal Jeet V Union of India*⁶⁸, wherein the Court had issued several directions to the State and Central Government for eradicating child Prostitution and for providing adequate rehabilitative homes well manned by well qualified trained senior workers, psychiatrists and doctors.

Therefore, under the circumstances of the case the Court set aside the impugned judgement of the High Court acquitting all the accused in respect of charges leveled against them and restored the conviction and sentence passed by the trial judge.

3) SPECIAL HOMES -

The Juvenile Justice (Care and Protection of Children) Act, 2000 empowers the state Governments to establish and maintain, either by themselves or under an agreement with voluntary organizations special homes in every district or group of districts for the reception and rehabilitation of juvenile in conflict with law. State Governments have also been empowered to certify any institution, other than a home established or maintained by themselves or under an agreement with voluntary organizations that it is fit for the reception of juvenile in conflict with law. The state Government may by rules provide for the management of special homes including the standards and various types of services to be provided by them which are necessary for re –

66. *Id.* at 267.

67. *Id.* at 278.

68. (1990) 3 SCC 318.

socialization of a juvenile. Further, these rules may also provide for the classification and separation of juvenile in conflict with law on the basis of age and nature of offence committed by them and his mental and physical status⁶⁹.

In the case of *Sheela Barse V. Union of India*⁷⁰, the Court observed that it is the duty of the state to look after the child for the all round development of his personality. A child should never be kept in jail because it is elementary that a jail is hardly a place where a child should be kept. Confinement in jail has a negative effect on development of the child and also brings the child into contact with hardened criminals. The Court further observed that this was why all statutes dealing with children provide that a child should not be kept in jail. Instead of confining such children in jail they should be kept in remand homes, observation homes or any other place of safety⁷¹.

Therefore, the Court directed the District Judge, Chief Judicial Magistrate or the Judicial Magistrate to make a report and to state whether there are any children's homes, remand homes or observation homes for children within his district and if there are, to inspect such children's homes, remand homes and observation homes for the purpose of ascertaining as to what are the conditions in which children are kept there and whether facilities for education or vocational training exists. The Court also directed the State Government to file an affidavit stating as to how many children's homes, remand homes and observation homes for children are in existence in the respective state and how many inmates are kept in such children's homes, remand homes or observation homes⁷².

4) OBSERVATION HOMES –

The Juvenile Justice (Care and Protection of Children) Act, 2000

69. Section 9 of the Act.

70. AIR 1986 SC 1773.

71. *Id.* at 1777.

72. *Id.* at 1775.

provides for the establishment and maintenance of observation homes by the state Government for the temporary reception of juvenile in conflict with law during the pendency of any inquiry regarding them. The State Government has also been empowered to certify any institution, other than a home established or maintained by themselves or under an agreement with voluntary organizations as an observation home for the purposes of this Act. The State Government can also make rules for the management of observation homes. There is further provision of keeping the juvenile initially in a reception unit of an observation home if such juvenile is not placed under the charge of parent or guardian for the purpose of preliminary inquiries, care and classification of juveniles according to his age group⁷³.

Juvenile Justice (Care and Protection of Children) Rules, 2007 lays down rules in respect of institutions for juveniles in conflict with law. It has been provide that separate observations homes or special homes for boys and girls shall be setup by the state Government o the Voluntary organization recognized by the state Government. Further these observation homes or special homes are to set – up separate residential facilities for boys and girls upto 12 years, 13 – 15 years and 16 years and abuse⁷⁴.

In *Sheela Barse V. Secretary, Children Aid Society*⁷⁵, the Court observed that the children are the citizens of the future era. On the proper bringing up of children and giving them the proper training to turn out to be good citizen depends the future of the country. The Court was of the view that this position had been well realized. The Court further referred to the Children Act, 1948 and pointed out that elaborate provisions had been made to cover the International Charters relating to the rights of children and in the opinion of the court if these provisions were properly translated into action and the authorities created under the Act became cognizant of their role, duties and obligations in the performance of the statutory mechanism created under the Act and if they

73. Section 8 of the Act.

74. Rule 16 of the Rules.

75. AIR 1987 SC 656.

were properly moderated to meet the situations that arise in handling the problems, the situation would certainly be very much eased. Therefore, the Court observed that it was very much necessary that officers at different level called upon to perform statutory duties by exercising powers conferred under the statute have to be given proper training and only when they had the requisite capacity in them should be called upon to handle the situation⁷⁶.

The Court further disagreed with the contention that for the employment in children home, the children would be given remuneration. The Court was of the view that children in observation homes should not be made to stay long and as long they are there they should be occupied and the occupation should be congenial and intended to bring about adaptability in life aimed at bringing about a self – confidence and picking of human virtues. The Court pointed out that dedicated workers have to be found out, proper training has to be imparted and such people alone should be introduced into the children's homes. The Court observed that every society must devote full attention to ensure that children are properly cared for and brought up in 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 up⁷⁷.

76. *Id.* at 658-59.

77. *Id.* at 659.

CHAPTER – VI

ENFORCEMENT INSTITUTIONS AND SOCIAL REINTEGRATION UNDER THE JUVENILE JUSTICE ACT

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ENFORCEMENT INSTITUTIONS AND SOCIAL REINTEGRATION UNDER THE JUVENILE JUSTICE ACT

[A] Rehabilitation and social Reintegration :-

Gabrial Mistral, the Nobel Laureate said¹ –

“We are guilty of many errors and faults, but our worst crime is abandoning the children, neglecting the foundation of life. Many of the things we need can wait. The child cannot; right now is the time his bones are being formed, his blood is being made and his senses are being developed. To him we cannot answer ‘tomorrow’. His name is ‘today’”.

Therefore, the need to care and protect the child cannot be overlooked. It is very important that in order to protect the ‘tomorrow’ of a child every step must be taken to ensure that the ‘today’ of every child is cared for and protected. It is specially important to take all steps and measures to ensure that not only children in need of care and protection but also juveniles in conflict with law are cared for and protected through the process of rehabilitation and social reintegration. A properly rehabilitated child will definitely be an asset to society.

Rehabilitation to the juvenile offender or the deprived or neglected juvenile is said to be both retrospective and prospective in effect. Retrospectively, it is said to imply restoration of status quo ante in the person’s past life starting at the time when disturbance in the behavior first happened and which was persistent enough to produce a socially deviant behavior in the person. Prospectively, rehabilitation is said to imply nothing more or nothing

1. <http://legalassistanceforum.org/downloads/Text Book in PDF Format.pdf> (visited on 13th Dec’ 11).

less than the process of enabling him to reach the take – off stage as near the point of discharge as the after care services or resources may permit². When the person's reabsorption into his family and community is complete then his rehabilitation process is complete. Further, rehabilitation is said to be durable only when all its three dimensions i.e. (1) psychological or emotional, (2) social and (3) vocational are co – ordinated and properly integrated so that he can regain his self – confidence and it gives him a sense of direction in life.

Therefore, the Juvenile Justice (Care and Protection of Children) Act, 2000³ was enacted by the Parliament with the objective of not only providing care and protection but also aim towards the ultimate rehabilitation of children who are in conflict with law and other children who are in need of care and protection. Rehabilitation is the very essence of the Act. Hence, when the juvenile justice functionaries deal with children as per the provisions of the Act the guiding philosophy of the best interest of the child and that their rights are fully respected and protected should be kept in mind.

Therefore, the Act provides that the rehabilitation and social reintegration of a child shall begin during the stay of the child in children's home or special home and the rehabilitation and social reintegration of children shall be carried out alternatively by (i) adoption, (ii) foster – care, (iii) sponsorship, and (iv) sending the child to an after care organisation⁴.

Whereas, according to the Juvenile Justice (Care and Protection of Children) Rules, 2007⁵ the primary aim of rehabilitation and social reintegration is to help children in restoring their dignity and self – worth and mainstream them through rehabilitation within the family where possible, or otherwise through alternate care programmes and long – term institutional care shall be of last resort⁶.

2. M.S Sabnis, *Juvenile Justice and Juvenile Correction – Pride and Prejudice*, (1996) at 346 – 347.

3. Hereinafter referred to as the *Act* .

4. Section 40 of the *Act*.

5. Hereinafter referred to as the *Rules*.

6. Rule 32 of the *Rules*.

Rehabilitation may be institutional or non – institutional. Institutional programmes to rehabilitate juveniles delinquents may be classified into two categories, viz., observation homes and special homes⁷. On the other hand the non – institutional programmes to rehabilitate children may be carried that by a) adoption b) foster - care c) sponsorship, and d) sending the child to an after care organization.

The Supreme Court has also in a number of cases⁸ emphasized the fact that the delinquent juvenile should not be kept in jails but instead should be sent to special homes for the purpose of rehabilitation and reformation. *Gaurav Jain v. Union of India*⁹, is a significant case where the Supreme Court referring to the plight of the prostitutes and their children observed that it is the duty of the state and all voluntary non – government organizations and public spirited persons to come in to their aid to retrieve them from prostitution, rehabilitate them with a helping hand to lead a life with dignity of person, self – employment through provisions of education, financial support, developed marketing facilities and some of major avenues in this behalf. The Court was of the opinion that law is a social engineer. It was further observed by the Court that judicial statesmanship is required to help regaining social order and stability. Interpretation is effective armory in its bow to steer clear the social malady, economic reorganization as effective instruments remove disunity, and prevent frustration of the disadvantaged, deprived and denied social segments in the efficacy of law and pragmatic direction pave way for social stability, peace and order. This process sustains faith of the people in rule of law and the democracy becomes useful means to the common man to realize his meaningful right to life guaranteed by article 21¹⁰. The Court observed that the children of the world are innocent, vulnerable

7. For detailed discussion see, *Supra* Chapter V.

8. *Munna v. State of U.P.* AIR 1982 SC 806, *Sheela Barse v. Union of India* AIR 1986 SC 1773, *Kadra Pehadiya v. State of Bihar* AIR 1981 SC 939.

9. AIR 1997 SC 3021.

10. *Id.* At 3035-36.

and dependent. They are all curious, active and full of hope. Therefore, the Court stated that their life should be full of joy and peace, playing, learning and growing. Their future should be shaped in harmony and co – operation. Their childhood should mature as they broaden their perspective and gain new experience. The Court was of the opinion that abandoning the children, excluding good foundation of life for them is a crime against humanity. The children cannot wait till tomorrow; they grow everyday, along with them grows their sense of awareness about the surroundings. Tomorrow is no answer and their present care, protection and rehabilitation is the need of the hour¹¹.

The Court then referred to the National Policy for children adopted by the Government of India. The main purpose of the policy is that the nation's children are a supremely important asset. Their nurture and solicitude are our responsibility. Therefore, the Court state that children's programme should find a prominent part in the national plans for the development of human resources so that children grow up to become robust citizens, physically fit, mentally alert and morally healthy. The Court further stated that equal opportunities for the development to all children during the period of growth should be the main aim and for this inequality should be reduced ensuring social justice¹².

The Court pointed out that every child who is found to be neglected juvenile should be dealt by the Board and should be brought within the protective umbrella of the children home. In the opinion of the Court the attribution as 'neglected children' is not social stigma, the purpose is to identify the children as juveniles to be dealt with under the Juvenile Justice Act which is more reformatory and rehabilitative rather than punishing the child as criminal, and mend their behavior and conduct.

The Court further pointed out that in an appropriate case, where the treatment of bringing the neglected juvenile into the national

11. *Id.* at 3037 – 38.

12. *Id.* At 3038 – 39.

mainstream takes long time, the definition coupled with age prescription should not be strictly interpreted to deny the ameliorative care, consideration and rehabilitation of the neglected juveniles. The benefit of reformation, rehabilitation and bringing them into the main stream after passing of the age prescription under the Act, is the goal sought to be achieved lest, it has the effect of throwing the neglected juvenile into the vile of prostitution or exploiting him for organized crimes by the organized gangsters taking advantage of his immaturity and dependence that would be deteriorous to the child's development and would widen the deep gap between hope and reality in the operation of the provisions of the Juvenile Justice Act. Therefore, in the opinion of the Court the definition of 'neglected juvenile should be interpreted broadly which is an important function for the purpose of identifying the groups of children who need care, attention and protection for rehabilitation¹³.

The Court observed that even if the economic capacity of the mother of neglected juvenile in the red light area to educate and to bring him up would not relieve the child from social trauma, it would always be adverse to keep the neglected juvenile in the custody of the mother or the manager of the brothel, thus the child prostitute is unsafe and insecure. So in the opinion of the Court they should be rescued, cared for and rehabilitated. On the other hand, involvement of the non – governmental organization in particular women organizations which are more resourceful for consulting and cautioning would make deep dent into the thinking mould of the fallen victims and would be a source of success for their retrieval from the prostitution or sending the neglected juvenile to the juvenile homes for initial treatment, psychologically and mentally, and will yield place to voluntariness to surrender guardianship of the child prostitute or neglected juvenile to the welfare Board or to the NGO's to take custody of a child prostitute or the neglected juvenile

13. *Id.* at 3041

for care, protection and rehabilitation¹⁴.

The main question in this case before the Supreme Court was: What is the proper method required to rehabilitate the neglected juvenile or child prostitute taken into custody under the Juvenile Justice Act for enduring results? The Court observed that it is rather unfortunate that the juvenile home established and being run by the Government are not effectively been managed and yielding expected results. They become ornament for the statistical purpose defeating the constitutional objectives and international conventions which are part of municipal law. The Court then pointed out to how it had earlier directed the enforcement agencies to bring the prostitute, neglected juveniles for the rehabilitation in the juvenile home manned by well qualified and trained social workers and the child prostitutes who are rescued from the red light areas should be shifted into the juvenile homes. Further, the officer – in – charge of the juvenile homes, the welfare officers and the probation officers should co – ordinate the operation and enforce it successfully. They should be made responsible for the protection of the child prostitutes or the neglected juveniles kept in the Juvenile homes for psychological treatment in the first instance relieving them from the trauma under which the were subjected to while in the brothels and red light areas. The Court further observed that the special police authorities should be established to coordinate with the special welfare officers of the state Government and public spirited persons, NGO's locally available and see that the juvenile homes are entrusted to efficient and effective management, the child prostitutes or neglected juveniles are properly protected and psychologically treated, education imparted and rehabilitation succeeded. They should also provided with proper accommodation maintenance facilities for education and other rehabilitation facilities¹⁵.

14. *Id.*

15. *Id.* at 3042.

Now coming to the Juvenile Justice (Care and Protection of Children) Act, 2000 that has made provisions for the rehabilitation of children. Therefore, herein has been discussed the various ways by which the non – institutional programmes to rehabilitate children can be carried out.

1. ADOPTION :

Adoption is defined as a process whereby people take a child not born to them and raise it as a member of their family¹⁶. Adoption provides a wonderful opportunity to both the child and the parent because through adoption a parentless child gets a family and childless parents gets a child. By the process of adoption a parent child relationship is established between people who are not related by blood. Adoption is also a better alternative to institutional care because after adoption the abandoned, destitute or neglected child gets happiness, love and understanding which a child otherwise cannot get in an institution. Family is the only institution which apart from food, clothing and shelter can provide happiness, love and understanding to a child and adoption is the only process through which this can be guaranteed to a child.

However, it is said that in the earlier days adoption was restricted in the traditional family and used to be secret affair because the tradition was that only with a view to ensure the continuity of tradition and to avoid alienation of property child used to be adopted by childless couples. But in the seventies a radical change was brought about in the societal attitude and concept of adoption with the professional intervention of child welfare agencies in the process of adoption. The procedures relating to adoption had been systematized to the best interest of the child, adoptive parents and the birth parents thereby bringing about significant changes in the legal, social and

16. <http://www.legalserviceindia.com/article/1327 - Adoption - under – Juvenile – Justice – Act.html> (visited on 14th Dec' 11).

practice levels of adoption programme¹⁷.

Consequently, today adoption rate has increased because couples who are not able to have a biological child are coming forward for adoption. Therefore, adoption is considered as the best non – institutional service for the orphaned, abandoned, destitute child since it provides permanent planning and substitute care in a family environment. In India apart from the Juvenile Justice (Care and Protection of Children) Act, 2000 that has made provisions relating to adoption, there are two other legislations for adoption or taking a child in custody in India viz., 1) The Hindu Adoptions and maintenance Act, 1956 and 2) The Guardians and Wards Act, 1860. The Hindu Adoptions and Maintenance Act, 1956 provides for adoption of hindu children by the adoptive parents belonging to Hinduism. Whereas, under the Guardians and Wards Act, 1890, people belonging to Muslim, Christians, Parsis and Jews religion and who are desirous of a adopting a child can take a child in ‘guardianship’ under the provisions of the Guardians and Wards Act, 1890. This statute mainly deals with guardianship and not with adoption as such. Under the provisions of this Act the child becomes a ward and not an adopted child.

However, the above mentioned enactments have not mentioned anything about the orphan, abandoned and surrendered children. For the purpose of adoption of the orphan, abandoned and surrendered children no codified legislation existed. Consequently the custody, guardianship or adoption of these children created misconceptions or irregularities which were harmful to the interest of the child.

Therefore, considering all these aspects as mentioned above noteworthy attempt were undertaken by the legislature by the stipulations, which have been made in Chapter IV of the Juvenile Justice (Care and Protection of Children) Act, 2000. It is said that this enactment shows that

17. <http://www.allindiareporter.in/articles/index/index.php?article=1080>(visited on 14th Dec’ 2011)

the legislature may be found to have accepted the concept of secular adoption whereby without any reference to the community or religious persuasion of the parents or the child concerned, a right appears to have been granted to all citizen to adopt and all children to be adopted¹⁸.

It is important to note here that the term adoption has not been defined in the Hindu Adoptions and Maintenance Act, 1956 nor in the Guardians and Wards Act, 1850. Moreover the legal status of the adopted child has not been declared to be equal to that of a biological legitimate child. The Juvenile Justice (Care and Protection of Children) Act, 2000 also did not contain provisions in this regard. However, after the amendment of the Juvenile Justice (Care and Protection of Children) Act, 2000 in the year 2006 the word 'Adoption' has been well defined so to remove all doubts and confusions as to the interpretation as well as concept of adoption.

The term 'Adoption' has been defined as the process through which the adopted child is permanently separated from his biological parents and become the legitimate child of his adoptive parents with all the rights, privileges and responsibilities that are attached to the relationship¹⁹.

The Act has further made provisions relating to adoption. It has been provided that the primary responsibility for providing care and protection to children shall be that of his family²⁰. On the other hand the Juvenile Justice (Care and Protection of Children) Rules, 2007 contains the provisions relating to adoption. It has been provided under the Rules that the primary aim of adoption is to provide a child who cannot be cared for by his biological parents with a permanent substitute family²¹.

The Act further provides that orphan, abandoned or surrendered child can be adopted for their rehabilitation through such

18. <http://www.legalserviceindia.com/article/1327 - Adoption - under - Juvenile - Justice - Act.html> (visited on 14th Dec' 11).

19. Section 2 (aa), Juvenile Justice (Care and Protection of Children) Act, 2000.

20. Section 41(1), *Id*

21. Rule 33(1), Juvenile Justice (Care and Protection of Children) Rules, 2007.

mechanisms as may be prescribed²². Such children may be given adoption by a Court in keeping with the provisions of the various guidelines for adoption issued from time to time by the State Government or the Central Adoption Resource Agency and notified by the Central Government. However, the Court has to be satisfied regarding the investigations having carried out that are required for giving such child in adoption²³. For the placement of such orphan, abandoned or surrendered children for adoption in accordance with the said guidelines, the State Government shall recognize in each district one or more of its institutions or voluntary organizations as specialized adoption agencies. Further the Children's Homes and institutions run by the state government or voluntary organizations for children in need of care and protection who are orphan, abandoned or surrendered shall ensure that these children are declared free for adoption by the Committee and such cases shall be referred to the adoption agency of that district for their placement in adoption²⁴. Provisions have also been incorporated relating to criteria for the child to be adopted. A child shall be adopted on the fulfillment of the following requirements²⁵:

- a) In case of abandoned child, if two members of the Committee declare the child legally free for placement.
- b) In case of surrendered child, if the two months period for reconsideration by the parent is over.
- c) In case of a child who can understand and express his consent, such child has given his/her consent in this regard.

The Court has further been empowered to allow a child to be given in adoption to the following persons²⁶ –

- a) A person irrespective of his or her marital status or;
- b) The parents to adopt a child of same sex irrespective of the number of living biological sons or daughters; or

22. Section 41(2), *Juvenile Justice (Care and Protection of Children) Act, 2000*

23. Section 41(3), *Id.*

24. Section 41(4), *Id.*

25. Section 41(5), *Id.*

26. Section 41(6), *Id.*

c) The childless couples.

It may be mentioned here that prior to the amendment of the Juvenile Justice (Care and Protection of Children) Act, 2000 the Juvenile Justice Board had been empowered to allow a child to be given in adoption. But after the amendment of the Act in 2006 the expression 'Board' has been replaced by the word 'Court'. However, the expression 'Court' has not been defined under the Juvenile Justice (Care and Protection of Children) Act, 2000. For this the model Rules framed by the Central Government relating to adoption has to be referred wherein the expression 'Court' has been defined to mean a Civil Court, which has jurisdiction in matters of adoption and guardianship and may include the Court of the district judge, family courts and city civil court²⁷.

The procedure for adoption has been provided for under the Juvenile Justice (Care and Protection of Children) Rules, 2007. The guidelines issued by the Central Adoption Resource Agency and notified by the Central Government under sub – section 3 of section 41 of the Act shall apply for all matters relating to adoption²⁸.

In case of orphaned and abandoned children the procedure is that the Specialized Adoption Agencies shall produce all orphaned and abandoned children who are to be declared legally free for adoption before the Committee within 24 hours of receiving such children, excluding the time 0020taken for journey. A copy of the report should be filed with the police station in whose jurisdiction the child was found abandoned. A child becomes eligible for adoption when the Committee declares the child legally free for adoption after completion of its inquiry. Such inquiry should be conducted by the Probation Officer or Child Welfare Officer, who shall produce report to the Committee containing the findings within one month. Further, the specialized adoption agency has to declare that there has been no claimant for the child

27. Rule 33 (5), *Juvenile Justice (Care and Protection of Children) Rules, 2007*

28. Rule 33(2), *Id.*

even after making notification in atleast one leading national newspaper and one regional language newspaper for children below two years of age and for children above two years, an additional television or radio announcement and notification to the missing persons squad shall be made. In case of abandoned child below two years, such a declaration shall be done by Child Welfare Committee within a period of sixty days from the time the child is found and for an abandoned child above two years of age, such a declaration shall be done within a period of four months. Also a child must be produced before the Committee at the time of declaring him or her legally free for adoption. Subsequently, the child has to be placed in a specialized adoption agency or recognized and certified children's home or in a pediatric unit of a Government hospital followed by production of the child before the Committee within 24 hours. A child above seven years of age who can understand and express his opinion shall not be declared for adoption without his or her consent²⁹.

On the other hand a surrendered child is one who has been declared as such after due process of inquiry by the committee and in order to be declared legally free for adoption a surrendered child shall be any of the following³⁰ –

1. Born as a consequence of non – consensual relationship;
2. Born of an unwed mother or out of wedlock;
3. Where one of the biological parents of the child is dead and the living parent is incapacitated to take care;
4. A child whose parents or guardians are compelled to relinquish the child due to physical, emotional and social factors beyond their control.

It has been further provided that the Committee shall make serious efforts to provide counselling to the parents, explaining the consequences of adoption and exploring the possibilities of parents retaining the child and after that if the parents are not willing to retain then such children

29. Rule 33(3) *Juvenile Justice (Care and Protection of Children) Rules, 2007.*

30. Rule 33(4), *Id.*

shall be initially kept in foster care or arranged for their sponsorship. If the surrender is inevitable, a deed of surrender shall be executed on a non – judicial stamp paper in the presence of the Committee. In case of surrendered child, two months reconsideration time shall be given to the biological parents or parents after surrender before the child is declared legally free for adoption. Subsequently, after a sixty days reconsideration period as per Central Adoption Resource Agency guidelines the Committee after due inquiry shall declare the surrendered child legally free for adoption³¹.

In *Robert Heijkamp v. Bal Anand World Children Welfare Trust, India, Mumbai*³², the question that came up for consideration before the Court was whether a child of a mentally ill person falls within the ambit of Juvenile Justice Act. The Court was of the opinion that a child of a mentally ill person would be declared to be abandoned within the meaning of this expression in section 41 of the Juvenile Justice Act. The Court pointed out that though the term ‘abandoned’ has not been defined in the Act the term ‘abandoned’ must receive a wide interpretation at least to include within its ambit children of a mentally ill person for due to the unfortunate circumstances of their parents mental illness they are for all practical purposes abandoned and their parents cannot provide for them materially or emotionally or otherwise³³.

The Court observed that the Child Welfare Committee would have to necessarily satisfy itself clearly in each case whether the abandonment is likely to be only temporary or whether it is likely to be of long duration. However, the Court pointed out that even this conclusion would be subjected to the decision of the Court in such matters and the Child Welfare Committee cannot on its own come this conclusion. Since there is no provision in the Juvenile Justice Act or in any other law which confers any power statutory or otherwise on the Child Welfare Committee to

31. *Id.*

32. *AIR* 2008 (NOC) 1054 (BOM)

33. *Id.* at 317

determine whether a person is mentally ill or not, therefore, the Court observed that the decision of Child Welfare Committee in regard to the mental health of the parents of a child would necessarily be based upon the determination of the same by the concerned Court/authorities under the Mental Health Act³⁴.

In the significant case of *Laxmikant Pande v. Union of India*³⁵, a writ petition was initiated on the basis of letter addressed by one Laxmikant Pandey, an Advocate practicing in the Supreme Court, complaining of malpractices indulged in by social organizations and voluntary agencies engaged in the work of offering Indian children in adoption to foreign parents. Accordingly, relief was sought by the petitioner to restrain the Indian based private agencies from carrying out further activity of routing children for adoption abroad. This letter was treated as a writ petition and by an order the Court issued notice to the Union of India, the Indian Council of Child Welfare and the Indian Council of Social Welfare to appear in answer to the writ petition and assist the court in laying down principles and norms which should be followed in determining whether a child should allowed to be adopted by foreign parents and if so, the procedure to be followed for that purpose, with the object of ensuring the welfare of the child.

The Court observed that every child has a right to love and be loved and to grow up in an atmosphere of love and affection and of moral and material security and this is possible only if the child is brought up in a family. The court was of the opinion that the most congenial environment would be that of the family of his biological parents. But if for any reason it is not possible for the biological parents or other near relative to look after the child or the child is abandoned and it is either not possible to trace the parents or the parents are not willing to take care of the child, the next best alternative would be to find adoptive parents for the child so that the child can grow up under the loving care and attention of the adoptive parents. The adoptive

34. *Id.*

35. *AIR* 1984 SC 469

parents would be the next best substitute for the child. The Court further laid down that when the parents of a child want to give it away in adoption or the child is abandoned and it is considered necessary in the interest of the child to give it in adoption, every effort must be made first to find adoptive parents for it within the country, because such adoption would steer clear of any problems of assimilation of the child in the family of the adoptive parents which might arise on account of cultural, social or linguistic differences in case of adoption of the child by foreign parents. However, if it is not possible to find suitable adoptive parents within the country it may become necessary to give the child in adoption to foreign parents rather than allow the child to grow up in an orphanage or an institution where it will have no family life and no love and affection of parents and quite often, in the socio-economic conditions prevailing in the country, it might have to lead the life of a destitute, half clad, half hungry and suffering from malnutrition and illness. The Court was of the opinion that such adoption would be quite consistent with our National Policy on children because it would provide an opportunity to children, otherwise destitute, neglected or abandoned to lead a healthy decent life, without privation and suffering arising from poverty, ignorance, malnutrition and lack of sanitation and free from neglect and exploitation, where they would be able to realize "full potential and growth". The Court however, reiterated and stressed the fact that every effort must be made first to see if the child can be rehabilitated by adoption within the country and if that is not possible, then only adoption by foreign parents, or as it is sometimes called 'inter - country adoption' should be acceptable. The Court stated that this principle stems from the fact that inter - country adoption may involve trans - social, trans - cultural and trans - national aspects which would not arise in case adoption within the country and the first alternative should therefore always be to find adoptive parents for the child within the country³⁶.

The court laid down that while supporting inter - country

36. *Id.* at 476

adoption, it is necessary to bear in mind that the primary object of giving the child in adoption being the welfare of the child, great care has to be exercised in permitting the child to be given in adoption to foreign parents, lest the child may be neglected or abandoned by the adoptive parents in the foreign country or the adoptive parents may not be able to provide to the child a life of moral or material security or the child may be subjected to moral or sexual abuse or forced labour or experimentation for medical or other research and may be placed in a worse situation than that in his own country³⁷.

The Court observed that it would be convenient to set out the procedure which is at present being followed for giving a child in adoption to foreign parents. Since there is no statutory enactment in our country providing for adoption of a child by foreign parents or laying down the procedure which must be followed in such a case, therefore, the Court stated that resort should be taken to the provisions of the Guardians and Wards Act, 1860 for the purpose of facilitating such adoption³⁸.

The Court further laid down the requirements which should be insisted upon so far as a foreigner wishing to take a child in adoption is concerned. In the first place, every application from foreigner desiring to adopt a child must be sponsored by a Social or Child Welfare Agency recognized or licensed by the Government of the Country in which the foreigner is resident. No application by a foreigner for taking a child in adoption should be entertained directly 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 Court stated that this was important mainly for three reasons. First, it would reduce, if not eliminate altogether, the possibility of profiteering and trafficking in children, because if a foreigner were allowed to contact directly with agencies or individuals in India for the purpose of obtaining a child in adoption,

37. *Id.* at 477

38. *Id.* at 480

he might in his anxiety to secure a child for adoption, be induced or persuaded to pay any unconscionable or unreasonable amount which might be demanded by the agency or individual procuring the child. Secondly, it would be almost impossible for the Court to satisfy itself that the foreigner who wishes to take the child in adoption would be suitable as a parent for the child and whether he would be able to provide a stable and secure family life to the child and would be able to handle trans – social, trans – cultural and trans – national problems likely to arise from such adoption, because where the application for adopting a child has not been sponsored by a social or child welfare agency in the country of the foreigner, there would be no proper and satisfactory home study report on which the Court can rely. Thirdly, in such a case, where the application of a foreigner for taking a child in adoption is made directly without the intervention of a social or Child Welfare Agency, there would be no authority in the country of the foreigner who could be made responsible for supervising the progress of the child and ensuring that the child is adopted at the earliest in accordance with law and grows up in an atmosphere of warmth and affection with moral and material security assured to it. However, the Court observed that it is not necessary that there should be only one social or child welfare agency in the foreign country through which an application for adoption of a child may be routed, there may be more than one such social or child welfare agency, but every such social or child welfare must be licensed or recognized by the Government of the foreign country and the Court should not make an order for appointment of a foreigner unless it is satisfied that the application of the foreigner for adopting a child has been sponsored by such social or child welfare agency³⁹.

Next, in respect of the safeguards to be provided in so far as biological parents are concerned the Court observed that it should be regarded as an elementary requirement that if the biological parents are known, they should be properly assisted in making a decision about relinquishing the

39. *Id.* at 484-85

child for adoption, by the institution or centre or home for child care or social or child welfare agency to which the child is being surrendered. The Court further stated that the biological parents should not be subjected to any duress in making a decision about relinquishment and even after they have taken a decision to relinquish the child for giving in adoption a further period of about three months should be allowed to them to reconsider their decision. But once the decision is taken and not reconsidered within such further time as may be allowed to them, it must be regarded as irrevocable and the procedure for giving the child in adoption to a foreigner can then be initiated without any further reference to the biological parents by filing an application for the child. It was also pointed out that the biological parents should not be induced or encouraged or even be permitted to take a decision in regard to giving of a child in adoption before the birth of the child or within a period of three months from the date of birth⁴⁰.

The Court further observed that it should not be open to any and every agency or individual to process an application from a foreigner for taking child in adoption and such application should be processed only through a Social or Child Welfare Agency licensed or recognized by the Government of India or the Government of the state in which it is operating. It would also be desirable not to recognize an organization or agency which has been set up only for the purpose of placing children in adoption. The Court was of the opinion that only an organization or agency which is engaged in the work of childcare and welfare which should be regarded as eligible for recognition, since inter- country adoption must be looked upon not as an independent activity itself, but as a part of child welfare programme so that it may not tend to degenerate into trading⁴¹.

40. *Id.* at 486-87.

41. *Id.* at 487.

The Court also thought it necessary to point that the recognized Social or Child Welfare Agency through which an application of a foreigner for taking in adoption is routed must, before offering a child in adoption, make sure that the child is free for adoption. Where the parents have relinquished the child for adoption and there is a document of surrender, the child must obviously be taken to be free for adoption. So also where a child is an orphan, destitute or abandoned child and it has not been possible by the concerned social or child welfare agency to trace its parents or where the child is committed by a juvenile justice Court to an institution, centre or home for committed children and declared to be destitute by the juvenile court it must be regarded as free for adoption. The recognized social or child welfare agency must place sufficient material before the Court to satisfy it that the child is legally available for adoption⁴². The Court observed that since it was directing that every application of a foreigner for taking a child in adoption shall be routed only through a recognized social or child welfare agency and an application for appointment of the foreigners as guardian of the child shall be made to the court only through such recognized social or child welfare agency, there would hardly be any scope for a social or child welfare agency or individual who brings a child from another state for the purpose of being given in adoption to indulge in trafficking and such a possibility would be reduced to almost nil. It was also pointed out that if a child is to be given in inter – country adoption, it would be desirable that it is given in adoption before it completes the age of 3 years. The Court suggested that even children above the age of seven years may be given in inter – country adoption but the court recommended that in such cases their wishes may be ascertained if they are in a position to indicate any preference⁴³.

Thereafter, in *Laxmikant Pandey v. Union of India*⁴⁴ some

42. *Id.* at 490.

43. *Id.* at 491-92.

44. *AIR* 1986 SC 272.

of the social or child welfare agencies engaged in placement of children in inter – country adoption felt that there were certain difficulties in implementing the principles and norms laid down by the Court in its judgement and various applications were therefore made by them asking for clarification and alteration in the principles and norms adopted and procedure laid down by the Court. These applications were disposed of by the Court by this common judgement. The Supreme Court agreed with the submission made by some social and child welfare agencies that the scrutinizing agency appointed by the Court for the purpose of assisting it in reaching the conclusion whether it would be in the interest of the child to be given in adoption to the foreign parent must not in any manner be involved in placement of children in adoption. The Court was of the view that the scrutinizing agency must be an expert body having experience in the area of child welfare and it should have nothing to do with placement of children in adoption for otherwise objective and impartial evaluation may not be possible. The Court agreed with the point that the social or child welfare agency engaged in the work of placing children in adoption should not readily assure that children including cradle babies who are found abandoned are legally free from adoption. The Court stated that such children must be produced before the Juvenile Courts so that further enquiries can be made and their parents or guardians can be traced. This procedure should be completed at the latest within three months and no children who are found abandoned should be deemed to be legally free for adoption until the Juvenile Court or the social department declares them as destitute or abandoned⁴⁵. As it had already been pointed out by the Court in its earlier judgement that every effort be made first to find adoptive parents for it within the Country, therefore, the Court in this case too laid down that wherever any Indian family approaches a recognized social or child welfare agency for taking a child in adoption facilities must be provided by such social or child welfare agency to the Indian family to have a look at the children available with it for adoption and if the Indian family wants

45. *Id.* at 274.

to see the child, such child study report in respect of a particular child, such child study report must also be made available to the Indian family in order to enable the Indian family to decide whether they would take the child in adoption. But the question was as to how this can be done effectively and without any avoidable delay. The Court laid down that one of the ways in which adoption by an Indian family can be facilitated is to set up a centralized agency in the state or even in a large city where there are several social or child welfare agencies. The Court further laid down that each social or child welfare agency must feed information to the centralized agency in regard to the particulars of the children available with it for adoption with various social or child welfare agency attached or affiliated to the centralized agency, should be circulated to all such social or child welfare agency, so that if any Indian family comes to a social or child welfare agency for taking a child in adoption, such social or child welfare agency would be able to give full and detailed information to the Indian family as to which children are available for adoption. The Court pointed out that if within a period of three to four weeks, the child is not taken in adoption by an Indian family, it should be regarded as available for inter – country adoption. But even where it is not possible to find an Indian family which is prepared to take a child an Indian family and it is cleared for inter – country adoption, the first priority for taking the child in adoption should be given to Indian residing abroad and if no such Indians are available then to adoptive couples where atleast one parent is of Indian origin⁴⁶.

Again in *Laxmikant Pandey v. Union of India*⁴⁷, an application was made by the petitioner since according to the petitioner there had been illegal sale of babies. The Court pointed out that by its very nature it is not possible to devise a full proof formula which will in all cases prevent illegal sale of babies but a procedure could be and had to be formulated which would definitely reduce the possibility of such illegal sale of babies. With this

46. *Id.* at 279-80.

47. *AIR* 1984 SC 232.

end in view, the court directed that all nursing homes and hospitals which come across abandoned or destitute children or find such children abandoned in their pre – points or otherwise shall immediately give information in regard to the discovery or find of such children to the social welfare department of the concerned government where such nursing homes or hospitals are situate in the capital of the state and in other cases the Collector of the district and copies of such intimation should also be sent to the foster care home where there is such a home run by the government as also to the recognized placement agencies functioning in the city or town where such nursing homes or hospitals are situate⁴⁸.

The Court further modified the direction given by it in Para 6 of the supplemental judgement dated 27th September, 1985 by providing that whenever a child is produced before the Juvenile Court by a recognized placement agency for a release order declaring that the child is abandoned or destitute so as to be legally free for adoption, the Juvenile Court must in all such cases complete the inquiry within one month from the date of the application and proper vigilancé should be exercised by the High Court for the purpose of ensuring that this new direction given by the Court is complied with the Juvenile Court. The Court was very anxious that in respect of abandoned or destitute children, there should be no undue delay in offering them for adoption to Indian parents and failing Indian parents and failing Indian parents to foreign parents because in the opinion of the Court it was absolutely essential that such children should be able to secure love and affection of adoptive parents at the earliest and indeed, nothing can take the place of love and affection of parents and therefore every effort had to be made to see that no procedural delays hold up the process of such children being taken up in adoption⁴⁹.

48. *Id.* at 234-35.

49. *Id.* at 236.

[2] FOSTER CARE :-

Foster care is defined as a situation where certified adults serve as substitute parents to children who need them for whatever reason⁵⁰. Children who are not fortunate enough to live in a healthy environment can be provided with a stable and safe home through the process of foster care. The system of foster care benefits both the children and society. The children can be taught the value of culture, discipline and stability. As a result these children can become contributing members of the society. Thus, foster care provides a temporary substitute care for them due to illness, death, desertion of one parent or any other crisis situation.

The Juvenile Justice (Care and Protection of Children) Act, 2000⁵¹ provides for the foster care of children. The Act⁵² provides for two types of foster care –

- a) Those infants who are to be ultimately given in adoption, may be placed temporarily in foster care.
- b) A child may be placed with another family in foster care for a short or extended period of time and during this time the biological parents usually visit regularly and eventually when rehabilitation is complete the child may return to his own family.

The state government has further been empowered to make rules for the purposes of carrying out the scheme of foster care programmes of children⁵³. Further the Juvenile Justice (Care and Protection of Children) Rules, 2007⁵⁴ has laid down rules relating to foster care. It has been provided that for all those children who cannot be placed in adoption an order shall be issued by the competent authority for carrying out foster care as given in sub – section (2) of section 42 of the Act and rule 35 (1) of the rules and this

50. <http://socyberty.com/sociology/foster-care-in-india/2>(visited on 15th Dec' 11)

51. Hereinafter referred to as the *Act*.

52. Section 42(1) and (2) of the *Act*.

53. Section 42(3) of the *Act*.

54. Hereinafter referred to as the *Rules*.

shall be done under the supervision of a probation officer or case worker or social worker depending on the case and the period of foster care shall depend on the need of the child. Further, in order to reduce institutionalization of children and enable a nurturing family environment for every child every state Government is to design its own foster care programmes and in developing such programmes every state Government is to consult the Boards or Committees, non – governmental organizations, academicians and organizations working on alternative care for children⁵⁵.

The criteria for selection of families for foster care has also been laid down. In case of children who cannot be placed for adoption the following criteria shall apply for selection of families for foster care⁵⁶ –

- a) Foster parents should have stable emotional adjustment within the family;
- b) Foster parents should have an income in which they are able to meet the needs of the child and should not be dependent on the foster care maintenance payment;
- c) The family should have adequate monthly income to take care of foster child and should also be approved by the committee;
- d) Medical reports of all the members of the family residing in the premises should be obtained including checks on Human Immuno Deficiency Virus (HIV), Tuberculosis (TB) and Hepatitis B to determine that they are physically fit;
- e) The foster parents should have the capacity to provide good child care and should also be experienced in child caring;
- f) The foster parents should be physically, mentally and emotionally stable;
- g) There should be adequate space and basic facilities available in the home of foster parents;
- h) The foster family should be willing to follow rules laid down including regular visits to pediatrician, maintenance of child health and their records;

55. Rule 34 of the *Rules*.

56. Rule 35(1) of the *Rules*.

- i) The family should be willing to sign an agreement and to return the child to the specialized adoption agency wherever called to do so;
- j) The foster parents should be willing to attend training or orientation programmes; and
- h) The foster parents should be willing to take the child for regular (atleast once a month in the case of infants) checkups to a pediatrician approved by the agency.

It has been further provided that the best interest of the child shall be permanent in deciding foster care placement and no discrimination shall be made on the basis of caste, religion, ethnic status, disability or health status while selecting foster parents⁵⁷.

[3] SPONSORSHIP–

The concept of sponsorship is said to have been explained by Dabir and Nigudkar in their study Children in conflict with law and the Juvenile Justice (Care and Protection of children) Act, 2000 as being “..... a supplementary service provided to families in need. The objective of sponsorship is to reach out to the family through different kinds of assistance such as monitoring assistance for the children’s education, school related expenses, medical help, counselling and guidance to family members and loans for small business. Thus, sponsorship enables a child to stay with his or her family and is another important measure along with adoption and foster care to prevent institutionalization of children in difficult circumstances”⁵⁸.

Therefore, the aim of sponsorship is to ensure and prevent the children from being taken away from their families to be placed in institutions and at the same time to ensure that their essential and basic needs are met. It is important for the state governments to step in situations where the parents or guardians of the child are unable to fulfill children’s basic needs due

57. Rule 35(2) of the Rules.

58. <http://www.childlineindia.org.in/pdf/CP-JJ-JCL.pdf>(visited on 19th Dec’ 2011).

to monetary problems. This would ensure that the child's development is not affected in any way and the child gets the opportunity of staying with his or her family.

The Juvenile Justice (Care and Protection of Children) Act, 2000 provides that in order to meet medical, nutritional, education and other needs of the children with a view to improving their quality of life the sponsorship programme may provide supplementary support to families, to children's homes and to special homes. The Act further empowers the state Government to make rules for the purposes of carrying out the scheme of foster care programme of children⁵⁹.

On the other hand the Juvenile Justice (Care and Protection of Children) Rules, 2007 provides that while preparing sponsorship programmes the state government has to do it in consultation with the Non – Governmental Organizations, Child Welfare Committee, other relevant government agencies and the corporate sector. The state government has to further identify families and children at risk with the help of District or State Child Protection Units for the purpose of providing necessary support services in the form of sponsorship for child's education, health, nutrition and other development needs. Also the Children's homes and special homes has to promote sponsorship programmes as laid down in section 43 of the Act⁶⁰.

[4] AFTER CARE ORGANISATIONS -

Aftercare is said to be the penultimate process-cum procedure in the whole series of process and procedures through which a court-processed or court-committed person is groomed. Aftercare is the terminus that opens or should open the gateway to freedom and to a renewed opportunity to

59. Section 43 of the *Act*.

60. Rule 37 of the *Rules*.

the discharged person to make amends for his past errant conduct and to make up on the last time⁶¹.

Generally when the juvenile is put into an institution he has to follow or most of the times he is made to follow the rules of the institution. As a result because of the effects of his life in the institution and of the attitude of the community to which he has to return his reintegration into the society proves to be a tough task. For this reason aftercare can provide the juvenile a last chance to lead a normal life. Thus, aftercare programmes must be carefully planned, expertly executed and highly individualized so that it can help the juvenile to settle and reintegrate in the society.

The term 'aftercare' is said to have been borrowed from the discipline of medicare and medicine. It is said to involve a concept which closely resembles the medical concept of convalescence which aims at restoring a patient who is discharged from medical or surgical treatment, to his former state of good health. Thus, it is said that the term 'aftercare', as is now being universally used in social welfare and related fields, is chiefly intended to delineate both the processes and the procedures by which specific aid or assistance can be provided to any person who has been either through a custody – care – training – treatment programme or through a non – institutional social treatment programme and vocational or trade training⁶².

The origin of aftercare of the offender in India can be traced back to the opening of small funds called the Claude Martin Funds and the Aid to Discharged Prisoners Fund. In the year 1893 in the then United Provinces such funds is said to have been raised for the first time. Since 1889 every Jail Commission or Committee that was appointed started accepting reformation of the offenders as the guiding principle of prison administration and reformatory programmes. Apart from the term reformation, specially the

61. M.S. Sabnis, *Juvenile Justice and Juvenile Correction – Pride and Prejudice* (1996) at 344.

62. *Id.* at 348.

Juvenile and youthful offender, the terms aftercare and rehabilitation were meaningfully used for the first time in the Report of the Indian Jails Committee. The report stressed upon the view that after the discharge of a juvenile and youthful offender from the institution if proper and timely aftercare could be made available to them then the juvenile and youthful offender was amenable to care, training and treatment and could be rehabilitated⁶³.

In 1954 the Central Social Welfare Advisory Board which was then under the Ministry of education, Government of India appointed the Advisory Committee on Aftercare Programmes.

The definition of 'Aftercare' as given by this Committee contained three important ingredients as follows⁶⁴ –

- 1) Aftercare is intended for a person who has undergone a certain period of care and training within an institution;
- 2) Such a person has been found to be in special need by reason of a social, physical or mental handicap; and
- 3) Aftercare is intended to complete the process of rehabilitation of such a person, and to prevent the possibility of his relapse into a life of dependence or custodial care.

Therefore, aftercare organizations are for the care, guidance and protection of juveniles in conflict with law a children in need of care and protection who have completed their term in the Special Homes or Children's Homes and their rehabilitation process is not completed.

Under the Juvenile Justice (Care and Protection of Children) Act, 2000 the State Government has been empowered to provide for the establishment or recognition of aftercare organizations and their functions. For the purpose of enabling juveniles or the children to lead an honest, industrious and useful life and also for the purpose of taking care of juveniles or the children after they leave special homes, children homes the state

63. *Id.* at 351.

64. *Id.* at 348.

government may provide for a scheme of aftercare programmes to be followed by such aftercare organization. However, it has been provided that any rule made shall not provide for such juvenile or child to stay in the aftercare organization for more than three years but in case of a juvenile or child over seventeen years of age but less than eighteen years of age would have to stay in the aftercare organization until he attains the age of twenty years⁶⁵.

Whereas under the Juvenile Justice (Care and Protection of Children) Rules, 2007 the objectives of these aftercare organizations has been said to enable such children to adapt to the society and during their stay in these transitional homes these children will be encouraged to move away from an institution – based life to a normal one⁶⁶.

In order to facilitate their transition from an institution – based life to mainstream society for social reintegration the state Government is to set up an aftercare programme for care of juveniles or children after they leave special homes and children's homes⁶⁷. The District or State Child Protection Units in collaboration with voluntary organizations shall make available aftercare programmes for 18 – 21 years old persons who have no place to go or who are unable to support themselves⁶⁸.

5) Probation:

Apart from the above mentioned non – institutional programmes to rehabilitate children it may be mentioned that Probation is another important non – institutional rehabilitation programme specially for juvenile in conflict with law. The term 'probation' is said to have been derived from one of the latin words : probare (prove) or probo meaning 'I prove (my worth)' or 'probatio' meaning 'test on approval'. It is said that the legal origins of modern

65. Section 44 of the *Act*.

66. Rule 38 (5) of the *Rules*.

67. Rule 38 (1) of the *Rules*.

68. Rule 38 (2) of the *Rules*.

probation and related social treatment measures may, historically, be traced to the devices used for the mitigation of punishment in England in the thirteenth century. Therefore, probation is non – institutional social treatment of the adjudged juvenile or youthful or adult offender⁶⁹.

In India the origin of probation can be found in section 562 of the code of Criminal Procedure 1898 which provided that ‘the offender be released on probation of good conduct’ on his entering into a bond with or without sureties, instead of being sentenced at once, if he had no previous conviction, the offence committed by him was of trivial nature and attracted a punishment of not more than two years, and if his age, character and antecedents were, on inquiry, found to be favourable. However, the scope of selection of offenders for being given the benefit of probation was widened when in 1923 section 562 of the code of criminal Procedure 1898 was amended and substituted by section 562 (1). But this amended provision did not include an important ingredient of probation ie, supervision of the probationer. Therefore, probation as it is now understood is said to have began with the acceptance of a suggestion which was made in 1918 by then Chief Presidency Magistrate of Bombay for the appointment of a police court missionary. In the proposal it was stated that when the first offender who was charged at the police courts for minor offences and released, under section 562 of the Code of Criminal Procedure, after executing a bond of good behaviour may be interviewed before trial by an agent or representative of a social service agency. The duty of such agent was to find out surety in case of necessity, to inquire into the problem or difficulty faced by the offender, to bring to light extenuating circumstances in relation to the offence, and to also keep in touch with the offender who was released, so that he can be encouraged to keep good behavior and to report to the Magistrate incase the offender deviated from the rightful track. However, this duty was not entrusted to any Police Officer

69. M.S. Sabnis, *Juvenile Justice and Juvenile Correction – Pride and Prudence*, (1996) at 251-52.

because there would be every possibility of the system turning into a instrument of surveillance. Therefore, section 562 of the Code of Criminal Procedure was only legal device for releasing juvenile offenders on probation specially in those states where special laws had not been operative⁷⁰.

Thereafter, in the year 1958 the Parliament enacted the Probation of Offenders Act. This was an Act to provide for the release of offenders on probation or after due admonition and for matters connected therewith. The Probation of Offenders Act, 1958 has made provisions relating to the power of court to release certain offenders after admonition⁷¹, the power of the Court to release certain offenders on probation of good conduct⁷². The Act has also enumerated the duties of the probation officer⁷³.

On the other hand, the Juvenile Justice (Care and Protection of Children) Act, 2000⁷⁴ also contains provisions relating to probation. It has been provided that the Juvenile Justice Board after being satisfied on inquiry that a juvenile has committed an offence may direct the juvenile to be released on probation of good conduct for any period not exceeding three years. Such juvenile then has to be placed under the care of any parent, guardian or other fit person executing a bond with or without surety⁷⁵. The Juvenile Justice Board has also been empowered to direct the juvenile to be released on probation of good conduct for the good behavior and well being of the juvenile for any period not exceeding three years. Such juvenile has to be placed under the care of any fit institution⁷⁶. Further, the Juvenile Justice Board while passing any order may direct that the juvenile

70. *Id.* at 253-54.

71. Section 3 of the *Probation of Offenders Act, 1958*.

72. *Id.* Section 4.

73. *Id.* Section 14.

74. Herein after referred to as the *Act*.

75. Section 15 (1) (e) of the *Act*.

76. Section 15 (1) (f) of the *Act*.

shall remain under the supervision of the Probation Officer. Thus, a supervision order may be passed by the Juvenile Justice Board at the time of granting bail⁷⁷. Such an order may also be passed during the final disposal of the case of the juvenile. But if during the period of supervision the Probation Officer reports that the juvenile in conflict with law has not been of good behavior, and then the Juvenile Justice Board after making inquiry may order the Juvenile to be placed in the Special home⁷⁸.

Therefore, the Probation Officer plays an important role under the juvenile legislation. For the well being of the juvenile it is important that the juvenile even after being released on bail, pending inquiry he should continue to be in touch with the Probation Officer. The Probation Officer can play the role of a guide of the juvenile so that he can be guided into the right track and encourage the juvenile not to repeat the same bad behavior on release after inquiry is completed. If the juvenile continues to keep in touch with the Probation Officer and seek his advice specially when faced with problems, that would be the true test of a proficient Probation Officer.

77. Section 12 (1) of the *Act*.

78. Section 15 (3) of the *Act*.

CHAPTER – VII

EPILOGUE

CHAPTER - VII

EPILOGUE

“Children, I think, all over India have the first claim on us, because they represent the India of tomorrow”.

.....Jawaharlal Nehru.

As rightly pointed out by Pandit Jawaharlal Nehru children undoubtedly are the citizens of tomorrow. They are the only ones who will carry forward our ideologies, philosophies, knowledge and cultural heritage. They are an important asset for the whole of mankind. If properly cared for and protected they can develop into healthy and useful members of the society. Children have and should always remain the object and care of protection not only in the family but in the society as well. A better state can be created if a child is given a proper and loving childhood. Thus, the state as a law - maker and the up holder of societal welfare should take all steps necessary for the proper growth and development of children. The objective of our constitution as spelled out in the preamble is social justice. Our Constitution promises to achieve this goal of social justice through fundamental rights and directive principles. Certain fundamental rights have also been guaranteed to children and the most important amongst them is the right to education.

Right to education has been dealt with in Articles 41 and 45 under Part IV of the Constitution. But after the 86th Amendment 2002, a new Article 21 - A has been inserted which deals with the right to education. Right to education has been made a fundamental right by virtue of Article 21-A. Insertion of the Article is a laudable effort on the part of the Parliament. Education undoubtedly forms an important part of any child's life because it brings excellence and enriches the mind and promotes human values. Education has always played an important part in developing self-confidence and self-

reliance. Nevertheless we cannot deny the fact that majority of our population still remains illiterate. The practice of dropping out from schools is still prevalent specially among girls. Also it would not be unfair to say that the education system in our country is not in a good shape. This would mainly be because of political will and lack of funds. Therefore, the government may find out methods to generate adequate funds. However, if funds are available then efforts must be made to see that their allocation and management is being properly made. At the same time in the field of education any sort of political influence and interference should be removed. The appointment of teachers should be fair and the pay of the school's teachers must be considerably increased while taking into account other incentives as well. It is also suggested that besides declaring that a child has a fundamental right to free education the Courts would have to display activism for the purpose of implementation of children's basic right to education. Proper care must be taken to ensure that children go to school regularly and take education of quality.

The first Central Legislation on Juvenile Justice was enacted in the year 1986 which provided for a uniform law on juvenile justice for the whole country. By the passing of this Act it was clear that after years of independence the children and their problems seemed to have received some attention both on the legislative and judicial fronts. It was realized that because of bad social environment, neglect by the parent and quite often abuse at the hands of adult criminals led to the child turning into a delinquent. Consequently differential treatment of young offenders appeared on the statute. A lot of differences existed between the Children Acts of various states and the infrastructure to be framed under the Act was also lacking. As a result the Supreme Court continuously tried for the devolution of human rights of the children who were subjected to jail sentence and incarcerated with adult criminals. This led to the enactment of the Juvenile Justice Act, 1986. However, The Juvenile Justice Act, 1986 was repealed by the enactment of the Juvenile Justice (Care and Protection of Children) Act in the year 2000. The fact that such a legislation is the first step in the right direction has to be appreciated but the mere passing of

such welfare legislation is not enough because it is really important that every law enacted and especially welfare legislation for the benefit of juveniles must be implemented in its true spirit for achieving the objective for which the legislation was passed. The Act of 2000 has provided separate provisions for dealing with juvenile in conflict with law and child in need of care and protection. Juveniles who come in conflict with law commit delinquent acts because of the various unwanted experiences that the juvenile has to go through. Different phases of abandonment, destitution, neglect, truancy, vagrancy, abuse or exploitation makes a child commit various kinds of offences. Since law alone cannot be expected to eradicate the problem of delinquency among juveniles, therefore, the problem has to be viewed from a larger perspective and measures need to be taken to improve the conditions of childhood and families. A change in the social and economic fonts cannot be brought an out though the legislation may strengthen the judiciary. Above all and most importantly the society should come together to deal with the problem of delinquency among juveniles. However, the identification and prevention of the emergence of delinquency at the pre-delinquency stage is even more important. For this the family can play a very important role. If any of the symptoms like disobedience, truancy, cruelty to animals, possession of articles that have not been purchased, untidy appearance, possession of weapons and proof of consumption of drugs or alcohol is present then it becomes a matter of concern. In such a situation it becomes imperative for the parents or other family members to give guidance and counselling. Home is the place where a child is not only provided with food, shelter, clothing and education but also love and affection by the parents and other family members. There should be free communication between the parents and the child so that the child is able to freely share their problems with the parents. But in reality it is often seen that the child fears the parents or one of the parents. Therefore, the parents have to make sure that while being strict with their children they should also make themselves accessible to their children. Apart from the family the role of teachers is also very important in preventing the problem of delinquency

among juveniles. It is essential that the teacher gives equal attention to all categories of students i.e., average students, bright students or poor students. If only the average students are catered to and the brighter and poor students are not given adequate attention then there is every possibility of the students dropping out from school specially the poor students. These school drops outs consequently join gangs and this is for the majority of the times the first step towards delinquency. For this the sensitization of teachers may be carried out by providing effective training and orientation to the teachers. Workshops may be mandatorily carried out at schools for the teachers for this specific purpose. Though child psychology is a vast subject but if possible a part of child psychology may be included as a part of the curriculum in Teachers Training Programmes for example: – how to identify children facing problems be it mental or physical and how to deal with such children. This would go a long way in helping children come out of their shell and talk freely with the teachers specially those children who fear the parents. Another problem faced by children in today's age is lack of emotional support as a result of increase in nuclear families especially in urban areas. Since in most of the cases both parents are working and by the time they return home they are tired and not in a position to spend quality time with their children. Consequently, children of such parents feel neglected and not cared for. Specially when the child is facing problems at school or with his peers it is absolutely essential that the parents listen to their children's problems and try to solve them. However, in most of the cases this does not happen. And when this does not happen children go into depression and tries to look for support and comfort outside the family among their friends. Even where only one of the parent is working specially the father and the mother stays at home the children fail to get the love and support that they need because it is generally seen that even mothers have now a days found ways to keep themselves busy as a result of which children becomes neglected. Here the friend's of the child can play a very important role that is if the child is lucky enough to find good friends who can encourage and support the child. However, not everybody is lucky to get such friends. Sometimes children come

across friends who are into all kinds of unwanted activities. Once a child gets inducted into such groups it becomes difficult for the child to remove himself or herself because the child is already lacking support at home so when a child comes into contact with such groups they think they have friends to support them and listen to them and thus gets carried away and does whatever their friends want them to. If such children are not identified at an early time there is every possibility of such children committing delinquent acts. Hence it is very important for children to get emotional support they need from home and also to have good and proper friends.

The mass media can also contribute towards combating delinquency among juveniles. Though the role of the mass media has already been laid down under the Juvenile Justice (Care and Protection of Children) Act, 2000 by protecting the juvenile's right to privacy by restricting reportage in the media. The mass media can work on a planned campaign of self regulation and education which can encourage the young people of the society towards good behaviors.

The lawyers can also play a very important part though their role would be post – delinquency. The lawyers can familiarize themselves with juvenile jurisprudence and its essence so that whenever they get an opportunity they can provide representation on behalf of a juvenile because in order to assure justice to a juvenile it is essential to be represented by a lawyer because of their age and in the absence of lawyers juveniles are not able to meaningfully participate in their inquiry.

In the prevention of delinquency among juveniles the role of the Police cannot be avoided. The Police Officer is the first person with whom the juvenile in conflict with law comes in contact with. Every police contact with the juvenile in conflict with law has an influence on the juvenile. Therefore every Police Officer dealing with a juvenile in conflict with law has a responsibility to exercise understanding judgment while dealing with juveniles in conflict with law so that juveniles learn to trust the police and not develop a feeling of hostility especially against those people who are in authority. It is

important for the police personnel to have adequate knowledge of child behavior and a certain degree of skill needed to deal with problems of delinquency among the juveniles. For this it is imperative to provide adequate training and orientation to the Police Personnel. Though the Juvenile Justice (Care and Protection of Children) Act, 2000 has made provisions for the establishment of special Juvenile Police Unit it is essential that there has to be proper implementation of the laws or else it would only be limited to the statute book and the juveniles would be the ones to suffer. It has to be ensured that the Police Officer who is to be designated as the 'juvenile or the child welfare officer' and the special Juvenile Police Unit should be placed under the control and supervision of superior authority which the Act fails to mention. This is important because they are not accountable to any agency under the Act. Most of the time the said Police Officer and Unit are busy in criminal investigation and administration and they may not be able to give the required time in matters relating to juveniles. Hence it is important to place the special Juvenile Police Unit under the supervision of superior authority.

Under the Juvenile Justice (Care and Protection of Children) Act, 2000 the state Government may establish a Juvenile Justice Board for the purpose of dealing with juveniles in conflict with law. The Board has been given wide powers to release the juveniles to home after advice or admonition or to participate in group counselling, community service, and order to fine, order to release on probation of good conduct and lastly send him to special home. Such vast powers without limitation are unreasonable and arbitrary. Therefore, the vast powers of the Juvenile Justice Board may be amended to effect that the child should be in correction homes only for a specific minimum period for the purpose of training and rehabilitation.

Further, the Board may set the juvenile free after the whole inquiry. However, this is against the main base of this law i.e. training, education and reformation. The goal of correction and reformation will not be achieved if the juvenile is released after inquiry proceedings without any kind of training and education. As a result the child fails to realize his own responsibilities towards

the society.

It is very important that in order to provide proper justice to the juvenile in conflict with law the members of the Juvenile Justice Board require special knowledge and training in child psychology or child welfare. The Juvenile Justice Act, 2000 contains provisions relating to this aspect but it may be mentioned that there is no provision in the Juvenile Justice Act, 2000 for the purpose of imparting necessary training to members of the Board apart from the Principal Magistrate to act under Criminal Procedure Code with respect to bail provisions therein. Therefore, training with respect to bail provision under Criminal Procedure Code, 1973 should be given to two social workers. The Juvenile Justice (Care and Protection of Children) Act, 2000 does not mention specially whether the two social workers who are members of the Board have got magisterial power other than the Principal Magistrate to deal individually with provision under the Criminal Procedure Code. Therefore, those two members should also be given the power of Judicial Magistrate, First Class. This will enable them to deal with contingencies that may arise under the Act. This will further ensure that the members of the Board are not handicapped in any way and consequently they will be able to fulfill the aims and objectives of the Act and provide necessary justice to the juvenile in conflict with law.

The Juvenile Justice (Care and Protection of Children) Act, 2000 provides that inquiry should be carried out as per trial in summons case. However, the procedure for disposal of cases under summons procedure is a complicated one. So to avoid the juvenile from facing the intricacies of legal procedure the juvenile should be tried under summary proceedings as well as the juvenile should be allowed to react freely and not keep quiet under stringent procedural hazards.

The Juvenile Justice (Care and Protection of Children) Act, 2000 has prescribed the different types of orders that the Board can pass if the Juvenile Conflict with law is found to have committed an offence. One such order speaks of directing a juvenile to pay fine if the juvenile is about 14 years of age and is earning money. Under the Indian Penal Code imposition of fine is a

punishment. If a juvenile is ordered to pay fine it may induce the juvenile to commit further offence. Therefore, keeping in mind the aim and objective of the Juvenile Justice (Care and Protection of Children) Act, 2000 which is a child friendly legislation the provision of imposing fine should be removed.

Children by their very nature are innocent and dependent which makes them vulnerable to all kinds of offences being committed against them. Trafficking of children for sexual purposes is one of the most heinous crimes that can be committed against children. One of the significant problems in India is child labour. Poverty is one of the major factors leading to child labour. Undoubtedly children earn less than adults but in poor families the earning of even one child is of greater benefit to the family. Education should be made accessible to all because it is either not affordable or is found to be inadequate. There should be improvement in the state of education in India. But by only providing education and strictly enforcing child labour laws cannot help eliminate child labour. Since poverty is a major determinant of child labour, therefore, the government has to make sure that the needs of the poor are addressed. The necessity for child labour has to be tackled and that is possible if poverty is addressed. If the need for child labour is removed the problem will diminish. Framing of governmental policies and effective implementation of these policies will help in the fight against child labour.

Another significant problem that needs to be addressed is trafficking of children for the purpose of prostitution. The following are some suggestive measures to address the problem –

1. At the local level and source areas government should generate compulsory high quality education, employment opportunities and income generation programme.
2. The Parents, teachers and the entire community should be sensitized regarding this issue.
3. Child sexual abuse and trafficking should be introduced as subjects in schools.

4. The NGO's can sensitize the community about trafficking so that members of the community can watch for any irregular movements leading to trafficking of children.
5. The media can create awareness by showing that trafficking is inappropriate and illegal with negative consequences.
6. Through radio and television publicity should be made relating to the legal and penal provisions against trafficking and the modes operandi of the traffickers.
7. Awareness should be generated among the children, parents and schools teachers.
8. For the purpose of law and law enforcement India should make a priority to ratify the Trafficking Protocol.
9. Though amendments have been proposed to the Immoral Traffic Prevention Act, 1956 by the Indian Legislators, but they have not yet been enacted as law. This should be done as early as possible.
10. Trafficking of boys for prostitution as an issue must be recognized by the government because generally exploitation of children is only taken as limited to girls. As a result, in spite of the existence of prostitution of boys there is very little or no awareness about this. So there should be legislation to protect boy children as well.

Another area that requires attention is the problem of children who are neglected or child in need of care and protection. Under the Juvenile Justice (Care and Protection of Children) Act, 2000 has defined 'child in need of care of protection' to include various categories of children. One of those categories includes those who are likely to be abused, tortured or exploited for the purpose of sexual abuse. Sexual abuse of children undoubtedly hampers the overall development of children who are the promising future citizen of tomorrow. Every effort must be made to ensure that children are protected from all kinds of abuses for their whole some development. However, there is no single legislation to address the problem of sexual abuse of children. Existing laws do not contain definition of 'child sexual abuse'. The Indian Penal Code, 1860

deals with three types of sexual offences ie rape, unnatural offences and outraging modesty. Therefore, the Indian Penal Code, 1860 does not deal with various kinds of sexual abuses of children like inappropriate touching, fondling, indecent exposure of children, child pornography etc. The Immoral Traffic (Prevention) Act, 1956 on the other hand only aims at the prevention of sexual offences for commercial purposes. Whereas the Juvenile Justice (Care and Protection of Children) Act, 2000 only emphasizes on providing care and protection to children who are being abused are likely to be abused for sexual purpose. Therefore, in these circumstances a separate and specific legislation may be enacted for curbing the menace of child sexual abuse. In this context, it may also be mentioned that the Protection of Children from Sexual Offences Bill, 2011 was introduced in the Rajya Sabha. The law will cover all new aspects of sexual offences against children that has not been covered by any other law. As and when this Bill will be passed it will bring hope and justice to children who are victims of sexual abuse and who have so far been denied justice. Hence, this is a very laudable effort on the part of the government.

Under the scheme of the Juvenile Justice (Care and Protection of Children) Act, 2000 provisions have been made for the establishment of separate committal institutions. These institutions work for the protection, rehabilitation and treatment of both child in need of care and protection and juvenile in conflict with the law. But unfortunately these juvenile correctional institutions that are places established for care, constructive discipline and general upliftment of children is most of the times limited only to theory because in reality the children live in deplorable conditions in these institutions. The children living in these institutions are always looking for opportunities to run away from these institutions because of lack of planned and organized daily routines. Another serious problem that children face in these institutions is abuse and most of time sexual abuse. Therefore, in order to deal with such problems necessary provisions may be made in the Act or Rules giving power to the Juvenile Justice Board to visit special homes once in a month for the purpose of supervising the juveniles and ensuring that they are being cared for

and imparted training for their reintegration in the society. Provisions should also be made for the establishment of a Juvenile Cell in each district that may consist of collector, chief Judicial Magistrate and Superintendent of Police of District to visit the Special Homes in order to ensure that for the purpose of fulfilling the objective of juvenile justice statute the juveniles are being sensitized to inculcate in them social values that would help in their reintegration into the society. Further, for various reasons there is a lack of qualified trainees in juvenile institutions. Whereas the capable and trained ones would not be willing to work if proper remuneration is not given. So proper remuneration along with other incentives may be given consideration for the proper and effective functioning of these juvenile institutions. Also in order to maintain transparency in the functioning of these institutions it should be made mandatory that all homes should be made open to visitors, social workers etc. though it may be mentioned here that the Juvenile Justice (Care and Protection and Children) Act, 2000 has made provision for the appointment of inspection committees for the children's homes and not in respect of other homes. Therefore, for this reason these homes should be open for visit.

Further, for the purpose of rehabilitation and integration provision has been made for giving the child in adoption, foster care or providing sponsorship or sending the child to an after care adoption. Adoption is a very appropriate process of providing orphan, abandoned, or surrendered child with the love and care of adoptive parents. The recognition of adoption of orphan, abandoned and surrendered child by people irrespective of their religious status by the Juvenile Justice (Care and Protection and Children) Act, 2000 is a significant effort on the part of the legislature. However, the Act does not mention how an adopted child will inherit properties of adoptive father or mother. Therefore, in this respect necessary provision has to be made to ensure the future of an adopted child. Also, the Act provides for adoption by any person irrespective of his or her marital status, but in the case of adoption by a married couple the Act does not say whether the consent of the other spouse is essential or not? The Act also does not say anything about the age difference between

the adoptee and the adoptive parents in case they are of the opposite sex. The age difference is a very important for the purpose of preventing child abuse. There should also be a monitoring agency that would make regular inspections to the new homes of the adopted child to ensure that the child is being treated properly, cared for and protected by the adoptive parents. This would help in ensuring that the child is not being exploited in any ways. Keeping all this in mind appropriate amendments should be made in the Juvenile Justice (Care and Protection and Children) Act, 2000.

It may also be mentioned that apart from the various steps taken nationally for the purpose of dealing with the problem of juveniles, internationally also steps have been taken to deal with the various problems relating to children. The realization that children in themselves are a group and they need to be treated separately and they need special care and protection resulted in international recognition and acceptance of the fact that the children need special care and protection. Therefore, the protection of child was given prime importance and independent conventions on the subject were prepared. Like all other nations India also adopted the rights of the child in its constitution. Some of the important human rights either have been incorporated in our laws through judicial interpretation or have been incorporated by legislative enactments. Therefore, so far as the judiciary is concerned the Supreme Court has been the champion of human rights of the child. It has played an important role in securing for them and putting on solid foundation several important basic rights including right not to be sent to jail, right to be tried by the Judge who has special knowledge and training for dealing with cases against children, right to free legal aid and right to be defended by a legal practitioner of his choice, right to speedy trial and right to bail etc. However, the apex Court shall have to be more active as regards the right of the child. It is also unfortunate that on many occasions the directives of the court are not taken seriously by the government departments or the authorities concerned eg – one can still find juveniles in conflict with law behind bars in flagrant violation of the highest courts directives. In many cases the parents and

guardians are ignorant of the rights of the child and their own duties towards them, therefore they need to be educated on this count.

Lastly, some suggestive measures have been given for the prevention of delinquency among juveniles: -

1. Juvenile misconduct must be treated as unacceptable and should be immediately confronted by the family, neighbours, teachers or friends so as to prevent delinquency.
2. Children should be taught discipline along with modesty, respect for others and to be obedient to authority. If all these are lacking then there is risk of being exposed to all kinds of deviant behavior.
3. Delinquency prevention programmes must be properly planned and coordinated.
4. The government must take all steps to provide facilities specially educational facilities to the juveniles released from institutions. In this respect the government may also consider giving reservations in government jobs for these juveniles and also make provision for financial support for self employment. This would help in the juvenile's social rehabilitation and reintegration into the society.
5. Certain categories of cinema that depict violence, rape, robbery and theft should be strictly censored so that the innocent minds of children are not exploited.
6. In schools Counseling Centers must be established so that early detection and cure of troubled children can be made.
7. Departments of Social Welfare and Social Defence must support the voluntary agencies who must be encouraged to undertake preventive and curative measures.
8. In order to avoid reintroduction into delinquency the Psychologist in Social Welfare Department and the after – care organization must ensure regular follow – up after the delinquent is released from Special Homes.

9. In the curriculum for training/Refresher courses for Magistrates, Court staff and Police Personnel Juvenile Justice should be adopted as one of the subjects.
10. In the Police and Jail Manuals adequate provisions regarding juvenile in conflict with law should be made.
11. Apart from the voluntary organizations the *Panchyats* should also come forward and take up the responsibility of providing care and protection to children in need of care and protection. Facilities for education should also be provided.

In conclusion it may be submitted that the Juvenile Justice (Care and Protection and Children) Act, 2000 is a noble piece of legislation wherein with some minor changes the scheme and special features of the Juvenile Justice Act, 1986 has been adopted. The change of law as it appears from the Preamble of the Act was mainly due to international opinion and for other reasons. However, the juveniles were not looking for a change of legislation that has brought about only change of certain terminology relating to juveniles institutions. Justice is what the juveniles in our Country need. Law is there justice is the demand. An enactment cannot be successful unless there is a suitable mechanism for implementation of the objectives of the enactment. Therefore, if we are to at all stand at the international level and if we are to rise at the national level every effort must be made to provide logistic support by the state for the effective implementation of the law. Hence, in spite of the existing drawbacks it is hoped and expected that the state agencies and voluntary agencies will unite together in their efforts to bring justice to children so that every child can turn into respectful, law abiding and responsible citizen.

APPENDICES

APPENDICES

APPENDIX 1.

DECLARATION OF THE RIGHTS OF THE CHILD (1959)

Preamble

Whereas the peoples of the United Nations have, in the Charter, reaffirmed their faith in fundamental human rights and in the dignity and worth of the human person, and have determined to promote social progress and better standards of life in larger freedom,

Whereas the United Nations has, in the *Universal Declaration of Human Rights*, proclaimed that everyone is entitled to all the rights and freedoms set forth therein, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status,

Whereas the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth,

Whereas the need for such special safeguards has been stated in the *Geneva Declaration of the Rights of the Child* of 1924, and recognized in the *Universal Declaration of Human Rights* and in the statutes of specialized agencies and international organizations concerned with the welfare of children,

Whereas mankind owes to the child the best it has to give,

Now therefore,

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 freedoms herein set forth, and calls upon parents, upon men and women as individuals, and upon voluntary organizations, local authorities and national Governments to recognize these rights and strive for their observance by legislative and other measures progressively taken in accordance with the following principles:

Principle 1: The child shall enjoy all the rights set forth in this Declaration. Every child, without any exception whatsoever, shall be entitled to these rights, without distinction or discrimination on account of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, whether of himself or of his family.

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 the paramount consideration.

Principle 3: The child shall be entitled from his birth to a name and a nationality.

Principle 4: The child shall enjoy the benefits of social security. He shall be entitled to grow and develop in health; to this end, special care and protection shall be provided both to him and to his mother, including adequate pre-natal and post-natal care. The child shall have the right to adequate nutrition, housing, recreation and medical services.

Principle 5: The child who is physically, mentally or socially handicapped shall be given the special treatment, education and care required by his particular condition.

Principle 6: The child, for the full and harmonious development of his personality, needs love and understanding. He shall, wherever possible, grow up in the care and under the responsibility of his parents, and, in any case, in an atmosphere of affection and of moral and material security; a child of tender years shall not, save in exceptional circumstances, be separated from his mother. Society and the public authorities shall have the duty to extend particular care to children without a family and to those without adequate means of support. Payment of State and other assistance towards the maintenance of children of large families is desirable.

Principle 7: The child is entitled to receive education, which shall be free and compulsory, at least in the elementary stages. He shall be given an education which will promote his general culture and enable him, on a basis of equal opportunity, to develop his abilities, his individual judgement, and his sense of moral and social responsibility, and to become a useful member of society.

The best interests of the child shall be the guiding principle of those responsible for his education and guidance; that responsibility lies in the first place with his parents.

The child shall have full opportunity for play and recreation, which should be directed to the same purposes as education; society and the public authorities shall endeavour to promote the enjoyment of this right.

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 any occupation or employment which would prejudice his health or education, or interfere with his physical, mental or moral development.

Principle 10: The child shall be protected from practices which may foster racial, religious and any other form of discrimination. He shall be brought up in a spirit of understanding, tolerance, friendship among peoples, peace and universal brotherhood, and in full consciousness that his energy and talents should be devoted to the service of his fellow men.

APPENDIX 2.

CONVENTION ON THE RIGHTS OF THE CHILD (1989)

Adopted and opened for signature, ratification and accession by General
Assembly resolution 44/25 of 20 November 1989

Entry into force 2 September 1990, in accordance with article 49

Preamble

The States Parties to the present Convention,

Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Bearing in mind that the peoples of the United Nations have, in the Charter, reaffirmed their faith in fundamental human rights and in the dignity and worth of the human person, and have determined to promote social progress and better standards of life in larger freedom,

Recognizing that the United Nations has, in the Universal Declaration of Human Rights and in the International Covenants on Human Rights, proclaimed and agreed that everyone is entitled to all the rights and freedoms set forth therein, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status,

Recalling that, in the Universal Declaration of Human Rights, the United

Nations has proclaimed that childhood is entitled to special care and assistance, Convinced that 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, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community,

Recognizing that the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding,

Considering that the child should be fully prepared to live an individual life in society, and brought up in the spirit of the ideals proclaimed in the Charter of the United Nations, and in particular in the spirit of peace, dignity, tolerance, freedom, equality and solidarity,

Bearing in mind that the need to extend particular care to the child has been stated in the Geneva Declaration of the Rights of the Child of 1924 and in the Declaration of the Rights of the Child adopted by the General Assembly on 20 November 1959 and recognized in the Universal Declaration of Human Rights, in the International Covenant on Civil and Political Rights (in particular in articles 23 and 24), in the International Covenant on Economic, Social and Cultural Rights (in particular in article 10) and in the statutes and relevant instruments of specialized agencies and international organizations concerned with the welfare of children,

Bearing in mind that, as indicated in the Declaration of the Rights of the Child, "the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth",

Recalling the provisions of the Declaration on Social and Legal Principles

relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally; the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules); and the Declaration on the Protection of Women and Children in Emergency and Armed Conflict, Recognizing that, in all countries in the world, there are children living in exceptionally difficult conditions, and that such children need special consideration,

Taking due account of the importance of the traditions and cultural values of each people for the protection and harmonious development of the child, Recognizing the importance of international co-operation for improving the living conditions of children in every country, in particular in the developing countries,

Have agreed as follows:

PART I

Article 1

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

Article 2

1. States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.

2. States Parties shall take all appropriate measures to ensure that the child is

protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.

Article 3

1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.

3. States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.

Article 4

States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention. With regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international co-operation.

Article 5

States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention.

Article 6

1. States Parties recognize that every child has the inherent right to life.
2. States Parties shall ensure to the maximum extent possible the survival and development of the child.

Article 7

1. The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents.
2. States Parties shall ensure the implementation of these rights in accordance with their national law and their obligations under the relevant international instruments in this field, in particular where the child would otherwise be stateless.

Article 8

1. States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference.
2. Where a child is illegally deprived of some or all of the elements of his or

her identity, States Parties shall provide appropriate assistance and protection, with a view to re-establishing speedily his or her identity.

Article 9

1. States 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 for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence.
2. In any proceedings pursuant to paragraph 1 of the present article, all interested parties shall be given an opportunity to participate in the proceedings and make their views known.
3. States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests.
4. Where such separation results from any action initiated by a State Party, such as the detention, imprisonment, exile, deportation or death (including death arising from any cause while the person is in the custody of the State) of one or both parents or of the child, that State Party shall, upon request, provide the parents, the child or, if appropriate, another member of the family with the essential information concerning the whereabouts of the absent member(s) of the family unless the provision of the information would be detrimental to the well-being of the child. States Parties shall further ensure that the submission of such a request shall of itself entail no adverse consequences for the person(s) concerned.

Article 10

1. In accordance with the obligation of States Parties under article 9, paragraph 1, applications by a child or his or her parents to enter or leave a State Party for the purpose of family reunification shall be dealt with by States Parties in a positive, humane and expeditious manner. States Parties shall further ensure that the submission of such a request shall entail no adverse consequences for the applicants and for the members of their family.

2. A child whose parents reside in different States shall have the right to maintain on a regular basis, save in exceptional circumstances personal relations and direct contacts with both parents. Towards that end and in accordance with the obligation of States Parties under article 9, paragraph 1, States Parties shall respect the right of the child and his or her parents to leave any country, including their own, and to enter their own country. The right to leave any country shall be subject only to such restrictions as are prescribed by law and which are necessary to protect the national security, public order (*ordre public*), public health or morals or the rights and freedoms of others and are consistent with the other rights recognized in the present Convention.

Article 11

1. States Parties shall take measures to combat the illicit transfer and non-return of children abroad.

2. To this end, States Parties shall promote the conclusion of bilateral or multilateral agreements or accession to existing agreements.

Article 12

1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age

and maturity of the child.

2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

Article 13

1. The child shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of the child's choice.

2. The exercise of this right may be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) For respect of the rights or reputations of others; or

(b) For the protection of national security or of public order (ordre public), or of public health or morals.

Article 14

1. States Parties shall respect the right of the child to freedom of thought, conscience and religion.

2. States Parties shall respect the rights and duties of the parents and, when applicable, legal guardians, to provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child.

3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety,

order, health or morals, or the fundamental rights and freedoms of others.

Article 15

1. States Parties recognize the rights of the child to freedom of association and to freedom of peaceful assembly.
2. No restrictions may be placed on the exercise of these rights other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.

Article 16

1. No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, or correspondence, nor to unlawful attacks on his or her honour and reputation.
2. The child has the right to the protection of the law against such interference or attacks.

Article 17

States Parties recognize the important function performed by the mass media and shall ensure that the child has access to information and material from a diversity of national and international sources, especially those aimed at the promotion of his or her social, spiritual and moral well-being and physical and mental health.

To this end, States Parties shall:

- (a) Encourage the mass media to disseminate information and material of social

and cultural benefit to the child and in accordance with the spirit of article 29;

(b) Encourage international co-operation in the production, exchange and dissemination of such information and material from a diversity of cultural, national and international sources;

(c) Encourage the production and dissemination of children's books;

(d) Encourage the mass media to have particular regard to the linguistic needs of the child who belongs to a minority group or who is indigenous;

(e) Encourage the development of appropriate guidelines for the protection of the child from information and material injurious to his or her well-being, bearing in mind the provisions of articles 13 and 18.

Article 18

1. States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern.

2. For the purpose of guaranteeing and promoting the rights set forth in the present Convention, States 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.

3. States Parties shall take all appropriate measures to ensure that children of working parents have the right to benefit from child-care services and facilities for which they are eligible.

Article 19

1. States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or 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. States Parties shall in accordance with their national laws ensure alternative care for such a child.

3. Such care could include, inter alia, foster placement, kafalah of 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 a child's upbringing and to the child's ethnic, religious, cultural and linguistic background.

Article 21

States Parties that recognize and/or permit the system of adoption shall ensure that the best interests of the child shall be the paramount consideration and they shall:

(a) Ensure that the adoption of a child is authorized only by competent authorities who determine, in accordance with applicable law and procedures and on the basis of all pertinent and reliable information, that the adoption is permissible in view of the child's status concerning parents, relatives and legal guardians and that, if required, the persons concerned have given their informed consent to the adoption on the basis of such counselling as may be necessary;

(b) Recognize that inter-country adoption may be considered as an alternative means of child's care, if the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child's country of origin;

(c) Ensure that the child concerned by inter-country adoption enjoys safeguards and standards equivalent to those existing in the case of national adoption;

(d) Take all appropriate measures to ensure that, in inter-country adoption, the placement does not result in improper financial gain for those involved in it;

(e) Promote, where appropriate, the objectives of the present article by concluding bilateral or multilateral arrangements or agreements, and endeavour, within this framework, to ensure that the placement of the child in another country is carried out by competent authorities or organs.

Article 22

1. States Parties shall take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures shall, whether

unaccompanied or accompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present Convention and in other international human rights or humanitarian instruments to which the said States are Parties.

2. For this purpose, States Parties shall provide, as they consider appropriate, co-operation in any efforts by the United Nations and other competent intergovernmental organizations or non-governmental organizations co-operating with the United Nations to protect and assist such a child and to trace the parents or other members of the family of any refugee child in order to obtain information necessary for reunification with his or her family. In cases where no parents or other members of the family can be found, the child shall be accorded the same protection as any other child permanently or temporarily deprived of his or her family environment for any reason , as set forth in the present Convention.

Article 23

1. States Parties recognize that a mentally or physically disabled child should enjoy a full and decent life, in conditions which ensure dignity, promote self-reliance and facilitate the child's active participation in the community.

2. States Parties recognize the right of the disabled child to special care and shall encourage and ensure the extension, subject to available resources, to the eligible child and those responsible for his or her care, of assistance for which application is made and which is appropriate to the child's condition and to the circumstances of the parents or others caring for the child.

3. Recognizing the special needs of a disabled child, assistance extended in accordance with paragraph 2 of the present article shall be provided free of charge, whenever possible, taking into account the financial resources of the parents or others caring for the child, and shall be designed to ensure that the

disabled child has effective access to and receives education, training, health care services, rehabilitation services, preparation for employment and recreation opportunities in a manner conducive to the child's achieving the fullest possible social integration and individual development, including his or her cultural and spiritual development

4. States Parties shall promote, in the spirit of international cooperation, the exchange of appropriate information in the field of preventive health care and of medical, psychological and functional treatment of disabled children, including dissemination of and access to information concerning methods of rehabilitation, education and vocational services, with the aim of enabling States Parties to improve their capabilities and skills and to widen their experience in these areas. In this regard, particular account shall be taken of the needs of developing countries.

Article 24

1. States Parties recognize the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. States Parties shall strive to ensure that no child is deprived of his or her right of access to such health care services.

2. States Parties shall pursue full implementation of this right and, in particular, shall take appropriate measures:

(a) To diminish infant and child mortality;

(b) To ensure the provision of necessary medical assistance and health care to all children with emphasis on the development of primary health care;

(c) To combat disease and malnutrition, including within the framework of primary health care, through, inter alia, the application of readily available technology and through the provision of adequate nutritious foods and clean

drinking-water, taking into consideration the dangers and risks of environmental pollution;

(d) To ensure appropriate pre-natal and post-natal health care for mothers;

(e) To ensure that all segments of society, in particular parents and children, are informed, have access to education and are supported in the use of basic knowledge of child health and nutrition, the advantages of breastfeeding, hygiene and environmental sanitation and the prevention of accidents;

(f) To develop preventive health care, guidance for parents and family planning education and services.

3. States Parties shall take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children.

4. States Parties undertake to promote and encourage international co-operation with a view to achieving progressively the full realization of the right recognized in the present article. In this regard, particular account shall be taken of the needs of developing countries.

Article 25

States Parties recognize the right of a child who has been placed by the competent authorities for the purposes of care, protection or treatment of his or her physical or mental health, to a periodic review of the treatment provided to the child and all other circumstances relevant to his or her placement.

Article 26

1. States Parties shall recognize for every child the right to benefit from social security, including social insurance, and shall take the necessary measures to achieve the full realization of this right in accordance with their national law.

2. The benefits should, where appropriate, be granted, taking into account the resources and the circumstances of the child and persons having responsibility for the maintenance of the child, as well as any other consideration relevant to an application for benefits made by or on behalf of the child.

Article 27

1. States Parties recognize the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development.

2. The parent(s) or others responsible for the child have the primary responsibility to secure, within their abilities and financial capacities, the conditions of living necessary for the child's development.

3. States Parties, in accordance with national conditions and within their means, shall take appropriate measures to assist parents and others responsible for the child to implement this right and shall in case of need provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing.

4. States Parties shall take all appropriate measures to secure the recovery of maintenance for the child from the parents or other persons having financial responsibility for the child, both within the State Party and from abroad. In particular, where the person having financial responsibility for the child lives in a State different from that of the child, States Parties shall promote the accession to international agreements or the conclusion of such agreements, as well as the making of other appropriate arrangements.

Article 28

1. States Parties recognize the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity, they

shall, in particular:

- (a) Make primary education compulsory and available free to all;
- (b) Encourage the development of different forms of secondary education, including general and vocational education, make them available and accessible to every child, and take appropriate measures such as the introduction of free education and offering financial assistance in case of need;
- (c) Make higher education accessible to all on the basis of capacity by every appropriate means;
- (d) Make educational and vocational information and guidance available and accessible to all children;
- (e) Take measures to encourage regular attendance at schools and the reduction of drop-out rates.

2. States Parties shall take all appropriate measures to ensure that school discipline is administered in a manner consistent with the child's human dignity and in conformity with the present Convention.

3. States Parties shall promote and encourage international cooperation in matters relating to education, in particular with a view to contributing to the elimination of ignorance and illiteracy throughout the world and facilitating access to scientific and technical knowledge and modern teaching methods. In this regard, particular account shall be taken of the needs of developing countries.

Article 29

1. States Parties agree that the education of the child shall be directed to:

- (a) The development of the child's personality, talents and mental and physical

abilities to their fullest potential;

(b) The development of respect for human rights and fundamental freedoms, and for the principles enshrined in the Charter of the United Nations;

(c) The development of respect for the child's parents, his or her own cultural identity, language and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilizations different from his or her own;

(d) The preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin;

(e) The development of respect for the natural environment.

2. No part of the present article or article 28 shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principle set forth in paragraph 1 of the present article and to the requirements that the education given in such institutions shall conform to such minimum standards as may be laid down by the State.

Article 30

In those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practise his or her own religion, or to use his or her own language.

Article 31

1. States Parties recognize the right of the child to rest and leisure, to engage in play and recreational activities appropriate to the age of the child and to participate freely in cultural life and the arts.

2. States Parties shall respect and promote the right of the child to participate fully in cultural and artistic life and shall encourage the provision of appropriate and equal opportunities for cultural, artistic, recreational and leisure activity.

Article 32

1. States Parties recognize the right 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.

2. States Parties shall take legislative, administrative, social and educational measures to ensure the implementation of the present article. To this end, and having regard to the relevant provisions of other international instruments, States Parties shall in particular:

(a) Provide for a minimum age or minimum ages for admission to employment;

(b) Provide for appropriate regulation of the hours and conditions of employment;

(c) Provide for appropriate penalties or other sanctions to ensure the effective enforcement of the present article.

Article 33

States Parties shall take all appropriate measures, including legislative, administrative, social and educational measures, to protect children from the illicit use of narcotic drugs and psychotropic substances as defined in the

relevant international treaties, and to prevent the use of children in the illicit production and trafficking of such substances.

Article 34

States Parties undertake to protect the child from all forms of sexual exploitation and sexual abuse. For these purposes, States Parties shall in particular take all appropriate national, bilateral and multilateral measures to prevent:

- (a) The inducement or coercion of a child to engage in any unlawful sexual activity;
- (b) The exploitative use of children in prostitution or other unlawful sexual practices;
- (c) The exploitative use of children in pornographic performances and materials.

Article 35

States 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

States Parties shall protect the child against all other forms of exploitation prejudicial to any aspects of the child's welfare.

Article 37

States Parties shall ensure that:

- (a) No child shall be subjected to torture or other cruel, inhuman or degrading

treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age;

(b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time;

(c) Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances;

(d) Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.

Article 38

1. States Parties undertake to respect and to ensure respect for rules of international humanitarian law applicable to them in armed conflicts which are relevant to the child.

2. States Parties shall take all feasible measures to ensure that persons who have not attained the age of fifteen years do not take a direct part in hostilities.

3. States Parties shall refrain from recruiting any person who has not attained

the age of fifteen years into their armed forces. In recruiting among those persons who have attained the age of fifteen years but who have not attained the age of eighteen years, States Parties shall endeavour to give priority to those who are oldest.

4. In accordance with their obligations under international humanitarian law to protect the civilian population in armed conflicts, States Parties shall take all feasible measures to ensure protection and care of children who are affected by an armed conflict.

Article 39

States 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.

Article 40

1. States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.

2. To this end, and having regard to the relevant provisions of international instruments, States Parties shall, in particular, ensure that:

(a) No child shall be alleged as, be accused of, or recognized as having

infringed the penal law by reason of acts or omissions that were not prohibited by national or international law at the time they were committed;

(b) Every child alleged as or accused of having infringed the penal law has at least the following guarantees:

(i) To be presumed innocent until proven guilty according to law;

(ii) To be informed promptly and directly of the charges against him or her, and, if appropriate, through his or her parents or legal guardians, and to have legal or other appropriate assistance in the preparation and presentation of his or her defence;

(iii) To have the matter determined without delay by a competent, independent and impartial authority or judicial body in a fair hearing according to law, in the presence of legal or other appropriate assistance and, unless it is considered not to be in the best interest of the child, in particular, taking into account his or her age or situation, his or her parents or legal guardians;

(iv) Not to be compelled to give testimony or to confess guilt; to examine or have examined adverse witnesses and to obtain the participation and examination of witnesses on his or her behalf under conditions of equality;

(v) If considered to have infringed the penal law, to have this decision and any measures imposed in consequence thereof reviewed by a higher competent, independent and impartial authority or judicial body according to law;

(vi) To have the free assistance of an interpreter if the child cannot understand or speak the language used;

(vii) To have his or her privacy fully respected at all stages of the proceedings.

3. States Parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as,

accused of, or recognized as having infringed the penal law, and, in particular:

(a) The establishment of a minimum age below which children shall be presumed not to have the capacity to infringe the penal law;

(b) Whenever appropriate and desirable, measures for dealing with such children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected. 4. A variety of dispositions, such as care, guidance and supervision orders; counselling; probation; foster care; education and vocational training programmes and other alternatives to institutional care shall be available to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence.

Article 41

Nothing in the present Convention shall affect any provisions which are more conducive to the realization of the rights of the child and which may be contained in:

(a) The law of a State party; or

(b) International law in force for that State.

PART II

Article 42

States Parties undertake to make the principles and provisions of the Convention widely known, by appropriate and active means, to adults and children alike.

Article 43

1. For the purpose of examining the progress made by States Parties in achieving the realization of the obligations undertaken in the present Convention, there shall be established a Committee on the Rights of the Child, which shall carry out the functions hereinafter provided.

2. The Committee shall consist of eighteen experts of high moral standing and recognized competence in the field covered by this Convention.1/ The members of the Committee shall be elected by States Parties from among their nationals and shall serve in their personal capacity, consideration being given to equitable geographical distribution, as well as to the principal legal systems.

3. The members of the Committee shall be elected by secret ballot from a list of persons nominated by States Parties. Each State Party may nominate one person from among its own nationals.

4. The initial election to the Committee shall be held no later than six months after the date of the entry into force of the present Convention and thereafter every second year. At least four months before the date of each election, the Secretary-General of the United Nations shall address a letter to States Parties inviting them to submit their nominations within two months. The Secretary-General shall subsequently prepare a list in alphabetical order of all persons thus nominated, indicating States Parties which have nominated them, and shall submit it to the States Parties to the present Convention.

5. The elections shall be held at meetings of States Parties convened by the Secretary-General at United Nations Headquarters. At those meetings, for which two thirds of States Parties shall constitute a quorum, the persons elected to the Committee shall be those who obtain the largest number of votes and an absolute majority of the votes of the representatives of States Parties present and voting.

6. The members of the Committee shall be elected for a term of four years.

They shall be eligible for re-election if renominated. The term of five of the members elected at the first election shall expire at the end of two years; immediately after the first election, the names of these five members shall be chosen by lot by the Chairman of the meeting.

7. If a member of the Committee dies or resigns or declares that for any other cause he or she can no longer perform the duties of the Committee, the State Party which nominated the member shall appoint another expert from among its nationals to serve for the remainder of the term, subject to the approval of the Committee.

8. The Committee shall establish its own rules of procedure.

9. The Committee shall elect its officers for a period of two years.

10. The meetings of the Committee shall normally be held at United Nations Headquarters or at any other convenient place as determined by the Committee. The Committee shall normally meet annually. The duration of the meetings of the Committee shall be determined, and reviewed, if necessary, by a meeting of the States Parties to the present Convention, subject to the approval of the General Assembly.

11. The Secretary-General of the United Nations shall provide the necessary staff and facilities for the effective performance of the functions of the Committee under the present Convention.

12. With the approval of the General Assembly, the members of the Committee established under the present Convention shall receive emoluments from United Nations resources on such terms and conditions as the Assembly may decide.

Article 44

1. States Parties undertake to submit to the Committee, through the Secretary-General of the United Nations, reports on the measures they have adopted which give effect to the rights recognized herein and on the progress made on the enjoyment of those rights

(a) Within two years of the entry into force of the Convention for the State Party concerned;

(b) Thereafter every five years.

2. Reports made under the present article shall indicate factors and difficulties, if any, affecting the degree of fulfilment of the obligations under the present Convention. Reports shall also contain sufficient information to provide the Committee with a comprehensive understanding of the implementation of the Convention in the country concerned.

3. A State Party which has submitted a comprehensive initial report to the Committee need not, in its subsequent reports submitted in accordance with paragraph 1 (b) of the present article, repeat basic information previously provided.

4. The Committee may request from States Parties further information relevant to the implementation of the Convention.

5. The Committee shall submit to the General Assembly, through the Economic and Social Council, every two years, reports on its activities.

6. States Parties shall make their reports widely available to the public in their own countries.

Article 45

In order to foster the effective implementation of the Convention and to

encourage international co-operation in the field covered by the Convention:

(a) The specialized agencies, the United Nations Children's Fund, and other United Nations organs shall be entitled to be represented at the consideration of the implementation of such provisions of the present Convention as fall within the scope of their mandate. The Committee may invite the specialized agencies, the United Nations Children's Fund and other competent bodies as it may consider appropriate to provide expert advice on the implementation of the Convention in areas falling within the scope of their respective mandates. The Committee may invite the specialized agencies, the United Nations Children's Fund, and other United Nations organs to submit reports on the implementation of the Convention in areas falling within the scope of their activities;

(b) The Committee shall transmit, as it may consider appropriate, to the specialized agencies, the United Nations Children's Fund and other competent bodies, any reports from States Parties that contain a request, or indicate a need, for technical advice or assistance, along with the Committee's observations and suggestions, if any, on these requests or indications;

(c) The Committee may recommend to the General Assembly to request the Secretary-General to undertake on its behalf studies on specific issues relating to the rights of the child;

(d) The Committee may make suggestions and general recommendations based on information received pursuant to articles 44 and 45 of the present Convention. Such suggestions and general recommendations shall be transmitted to any State Party concerned and reported to the General Assembly, together with comments, if any, from States Parties.

PART III

Article 46

The present Convention shall be open for signature by all States.

Article 47

The present Convention is subject to ratification. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.

Article 48

The present Convention shall remain open for accession by any State. The instruments of accession shall be deposited with the Secretary-General of the United Nations.

Article 49

1. The present Convention shall enter into force on the thirtieth day following the date of deposit with the Secretary-General of the United Nations of the twentieth instrument of ratification or accession.
2. For each State ratifying or acceding to the Convention after the deposit of the twentieth instrument of ratification or accession, the Convention shall enter into force on the thirtieth day after the deposit by such State of its instrument of ratification or accession.

Article 50

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 States Parties, with a request that they indicate whether they favour a conference of States 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 States 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 States 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 States Parties.

3. When an amendment enters into force, it shall be binding on those States Parties which have accepted it, other States Parties still being bound by the provisions of the present Convention and any earlier amendments which they have accepted.

Article 51

1. The Secretary-General of the United Nations shall receive and circulate to all States the text of reservations made by States at the time of ratification or accession.

2. A reservation incompatible with the object and purpose of the present Convention shall not be permitted.

3. Reservations may be withdrawn at any time by notification to that effect addressed to the Secretary-General of the United Nations, who shall then inform all States. Such notification shall take effect on the date on which it is received by the Secretary-General

Article 52

A State Party may denounce the present Convention by written notification to the Secretary-General of the United Nations. Denunciation becomes effective one year after the date of receipt of the notification by the Secretary-General.

Article 53

The Secretary-General of the United Nations is designated as the depositary of the present Convention.

Article 54

The original of the present Convention, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations. In witness thereof the undersigned plenipotentiaries, being duly authorized thereto by their respective Governments, have signed the present Convention.

APPENDIX 3.

United Nations Standard Minimum Rules for Non-custodial Measures (The Tokyo Rules)

Adopted by General Assembly resolution 45/110 of 14 December 1990

I. General principles

1. Fundamental aims

1.1 The present Standard Minimum Rules provide a set of basic principles to promote the use of non-custodial measures, as well as minimum safeguards for persons subject to alternatives to imprisonment.

1.2 The Rules are intended to promote greater community involvement in the management of criminal justice, specifically in the treatment of offenders, as well as to promote among offenders a sense of responsibility towards society.

1.3 The Rules shall be implemented taking into account the political, economic, social and cultural conditions of each country and the aims and objectives of its criminal justice system.

1.4 When implementing the Rules, Member States shall endeavour to ensure a proper balance between the rights of individual offenders, the rights of victims, and the concern of society for public safety and crime prevention.

1.5 Member States shall develop non-custodial measures within their legal systems to provide other options, thus reducing the use of imprisonment, and to rationalize criminal justice policies, taking into account the observance of human rights, the requirements of social justice and the rehabilitation needs of the offender.

2. The scope of non-custodial measures

2.1 The relevant provisions of the present Rules shall be applied to all persons subject to prosecution, trial or the execution of a sentence, at all stages of the administration of criminal justice. For the purposes of the Rules, these persons are referred to as "offenders", irrespective of whether they are suspected, accused or sentenced.

2.2 The Rules shall be applied without any discrimination on the grounds of race, colour, sex, age, language, religion, political or other opinion, national or social origin, property, birth or other status.

2.3 In order to provide greater flexibility consistent with the nature and gravity of the offence, with the personality and background of the offender and with the protection of society and to avoid unnecessary use of imprisonment, the criminal justice system should provide a wide range of non-custodial measures, from pre-trial to post-sentencing dispositions. The number and types of non-custodial measures available should be determined in such a way so that consistent sentencing remains possible.

2.4 The development of new non-custodial measures should be encouraged and closely monitored and their use systematically evaluated.

2.5 Consideration shall be given to dealing with offenders in the community avoiding as far as possible resort to formal proceedings or trial by a court, in accordance with legal safeguards and the rule of law.

2.6 Non-custodial measures should be used in accordance with the principle of minimum intervention.

2.7 The use of non-custodial measures should be part of the movement towards depenalization and decriminalization instead of interfering with or delaying efforts in that direction.

3 . Legal safeguards

3.1 The introduction, definition and application of non-custodial measures shall be prescribed by law.

3.2 The selection of a non-custodial measure shall be based on an assessment of established criteria in respect of both the nature and gravity of the offence and the personality, background of the offender, the purposes of sentencing and the rights of victims.

3.3 Discretion by the judicial or other competent independent authority shall be exercised at all stages of the proceedings by ensuring full accountability and only in accordance with the rule of law.

3.4 Non-custodial measures imposing an obligation on the offender, applied before or instead of formal proceedings or trial , shall require the offender's consent.

3.5 Decisions on the imposition of non-custodial measures shall be subject to review by a judicial or other competent independent authority, upon application by the offender.

3.6 The offender shall be entitled to make a request or complaint to a judicial or other competent independent authority on matters affecting his or her individual rights in the implementation of non-custodial measures.

3.7 Appropriate machinery shall be provided for the recourse and, if possible, redress of any grievance related to non-compliance with internationally recognized human rights.

3.8 Non-custodial measures shall not involve medical or psychological experimentation on, or undue risk of physical or mental injury to, the offender.

3.9 The dignity of the offender subject to non-custodial measures shall be protected at all times.

3.10 In the implementation of non-custodial measures, the offender's rights shall not be restricted further than was authorized by the competent authority that rendered the original decision.

3.11 In the application of non-custodial measures, the offender's right to privacy shall be respected, as shall be the right to privacy of the offender's family.

3.12 The offender's personal records shall be kept strictly confidential and closed to third parties. Access to such records shall be limited to persons directly concerned with the disposition of the offender's case or to other duly authorized persons.

4 . Saving clause

4.1 Nothing in these Rules shall be interpreted as precluding the application of the Standard Minimum Rules for the Treatment of Prisoners, the United Nations Standard Minimum Rules for the Administration of Juvenile Justice, the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment or any other human rights instruments and standards recognized by the international community and relating to the treatment of offenders and the protection of their basic human rights.

II. Pre-trial stage

5. Pre-trial dispositions

5.1 Where appropriate and compatible with the legal system, the police, the prosecution service or other agencies dealing with criminal cases should be empowered to discharge the offender if they consider that it is not necessary to proceed with the case for the protection of society, crime prevention or the promotion of respect for the law and the rights of victims. For the purpose of deciding upon the appropriateness of discharge or determination of proceedings, a set of established criteria shall be developed within each legal system. For minor cases the prosecutor may impose suitable non-custodial measures, as appropriate.

6. Avoidance of pre-trial detention

6.1 Pre-trial detention shall be used as a means of last resort in criminal proceedings, with due regard for the investigation of the alleged offence and for the protection of society and the victim.

6.2 Alternatives to pre-trial detention shall be employed at as early a stage as possible. Pre-trial detention shall last no longer than necessary to achieve the objectives stated under rule 5.1 and shall be administered humanely and with respect for the inherent dignity of human beings.

6.3 The offender shall have the right to appeal to a judicial or other competent independent authority in cases where pre-trial detention is employed.

III. Trial and sentencing stage

7. Social inquiry reports

7.1 If the possibility of social inquiry reports exists, the judicial authority may avail itself of a report prepared by a competent, authorized official or agency. The report should contain social information on the offender that is relevant to the person's pattern of offending and current offences. It should also contain information and recommendations that are relevant to the sentencing procedure. The report shall be factual, objective and unbiased, with any expression of opinion clearly identified.

8. Sentencing dispositions

8.1 The judicial authority, having at its disposal a range of non-custodial measures, should take into consideration in making its decision the rehabilitative needs of the offender, the protection of society and the interests of the victim, who should be consulted whenever appropriate.

8.2 Sentencing authorities may dispose of cases in the following ways:

- (a) Verbal sanctions, such as admonition, reprimand and warning;
- (b) Conditional discharge;
- (c) Status penalties;
- (d) Economic sanctions and monetary penalties, such as fines and day-fines;
- (e) Confiscation or an expropriation order;
- (f) Restitution to the victim or a compensation order;
- (g) Suspended or deferred sentence;
- (h) Probation and judicial supervision;
- (i) A community service order;
- (j) Referral to an attendance centre;
- (k) House arrest;
- (l) Any other mode of non-institutional treatment;
- (m) Some combination of the measures listed above.

IV. Post-sentencing stage

9 . Post-sentencing dispositions

9.1 The competent authority shall have at its disposal a wide range of post-sentencing alternatives in order to avoid institutionalization and to assist offenders in their early reintegration into society.

9.2 Post-sentencing dispositions may include:

- (a) Furlough and half-way houses;
- (b) Work or education release;
- (c) Various forms of parole;
- (d) Remission;
- (e) Pardon.

9.3 The decision on post-sentencing dispositions, except in the case of pardon, shall be subject to review by a judicial or other competent independent authority, upon application of the offender.

9.4 Any form of release from an institution to a non-custodial programme shall be considered at the earliest possible stage.

V. Implementation of non-custodial measures

10. Supervision

10.1 The purpose of supervision is to reduce reoffending and to assist the offender's integration into society in a way which minimizes the likelihood of a return to crime.

10.2 If a non-custodial measure entails supervision, the latter shall be carried out by a competent authority under the specific conditions prescribed by law.

10.3 Within the framework of a given non-custodial measure, the most suitable type of supervision and treatment should be determined for each individual case aimed at assisting the offender to work on his or her offending. Supervision and treatment should be periodically reviewed and adjusted as necessary.

10.4 Offenders should, when needed, be provided with psychological, social and material assistance and with opportunities to strengthen links with the community and facilitate their reintegration into society.

11. Duration

11.1 The duration of a non-custodial measure shall not exceed the period established by the competent authority in accordance with the law.

11.2 Provision may be made for early termination of the measure if the offender has responded favourably to it.

12. Conditions

12.1 If the competent authority shall determine the conditions to be observed by the offender, it should take into account both the needs of society and the needs and rights of the offender and the victim.

12.2 The conditions to be observed shall be practical, precise and as few as possible, and be aimed at reducing the likelihood of an offender relapsing into criminal behaviour and of increasing the offender's chances of social integration, taking into account the needs of the victim.

12.3 At the beginning of the application of a non-custodial measure, the offender shall receive an explanation, orally and in writing, of the conditions

governing the application of the measure, including the offender's obligations and rights.

12.4 The conditions may be modified by the competent authority under the established statutory provisions, in accordance with the progress made by the offender.

13. Treatment process

13.1 Within the framework of a given non-custodial measure, in appropriate cases, various schemes, such as case-work, group therapy, residential programmes and the specialized treatment of various categories of offenders, should be developed to meet the needs of offenders more effectively.

13.2 Treatment should be conducted by professionals who have suitable training and practical experience.

13.3 When it is decided that treatment is necessary, efforts should be made to understand the offender's background, personality, aptitude, intelligence, values and, especially, the circumstances leading to the commission of the offence.

13.4 The competent authority may involve the community and social support systems in the application of non-custodial measures.

13.5 Case-load assignments shall be maintained as far as practicable at a manageable level to ensure the effective implementation of treatment programmes.

13.6 For each offender, a case record shall be established and maintained by the competent authority.

14. Discipline and breach of conditions

14.1 A breach of the conditions to be observed by the offender may result in a modification or revocation of the non-custodial measure.

14.2 The modification or revocation of the non-custodial measure shall be made by the competent authority; this shall be done only after a careful examination of the facts adduced by both the supervising officer and the offender.

14.3 The failure of a non-custodial measure should not automatically lead to the imposition of a custodial measure.

14.4 In the event of a modification or revocation of the non-custodial measure, the competent authority shall attempt to establish a suitable alternative non-

custodial measure. A sentence of imprisonment may be imposed only in the absence of other suitable alternatives.

14.5 The power to arrest and detain the offender under supervision in cases where there is a breach of the conditions shall be prescribed by law.

14.6 Upon modification or revocation of the non-custodial measure, the offender shall have the right to appeal to a judicial or other competent independent authority.

VI. Staff

15. Recruitment

15.1 There shall be no discrimination in the recruitment of staff on the grounds of race, colour, sex, age, language, religion, political or other opinion, national or social origin, property, birth or other status. The policy regarding staff recruitment should take into consideration national policies of affirmative action and reflect the diversity of the offenders to be supervised.

15.2 Persons appointed to apply non-custodial measures should be personally suitable and, whenever possible, have appropriate professional training and practical experience. Such qualifications shall be clearly specified.

15.3 To secure and retain qualified professional staff, appropriate service status, adequate salary and benefits commensurate with the nature of the work should be ensured and ample opportunities should be provided for professional growth and career development.

16 . Staff training

16.1 The objective of training shall be to make clear to staff their responsibilities with regard to rehabilitating the offender, ensuring the offender's rights and protecting society. Training should also give staff an understanding of the need to cooperate in and coordinate activities with the agencies concerned.

16.2 Before entering duty, staff shall be given training that includes instruction on the nature of non-custodial measures, the purposes of supervision and the various modalities of the application of non-custodial measures.

16.3 After entering duty, staff shall maintain and improve their knowledge and professional capacity by attending in-service training and refresher courses. Adequate facilities shall be made available for that purpose.

VII. Volunteers and other community resources

17. Public participation

17.1 Public participation should be encouraged as it is a major resource and one of the most important factors in improving ties between offenders undergoing non-custodial measures and the family and community. It should complement the efforts of the criminal justice administration.

17.2 Public participation should be regarded as an opportunity for members of the community to contribute to the protection of their society.

18. Public understanding and cooperation

18.1 Government agencies, the private sector and the general public should be encouraged to support voluntary organizations that promote noncustodial measures.

18.2 Conferences, seminars, symposia and other activities should be regularly organized to stimulate awareness of the need for public participation in the application of non-custodial measures.

18.3 All forms of the mass media should be utilized to help to create a constructive public attitude, leading to activities conducive to a broader application of non-custodial treatment and the social integration of offenders.

18.4 Every effort should be made to inform the public of the importance of its role in the implementation of non-custodial measures.

19. Volunteers

19.1 Volunteers shall be carefully screened and recruited on the basis of their aptitude for and interest in the work involved. They shall be properly trained for the specific responsibilities to be discharged by them and shall have access to support and counselling from, and the opportunity to consult with, the competent authority.

19.2 Volunteers should encourage offenders and their families to develop meaningful ties with the community and a broader sphere of contact by providing counselling and other appropriate forms of assistance according to their capacity and the offenders' needs.

19.3 Volunteers shall be insured against accident, injury and public liability when carrying out their duties. They shall be reimbursed for authorized expenditures incurred in the course of their work. Public recognition should be

extended to them for the services they render for the well-being of the community.

VIII. Research, planning, policy formulation and evaluation

20. Research and planning

20.1 As an essential aspect of the planning process, efforts should be made to involve both public and private bodies in the organization and promotion of research on the non-custodial treatment of offenders.

20.2 Research on the problems that confront clients, practitioners, the community and policy-makers should be carried out on a regular basis.

20.3 Research and information mechanisms should be built into the criminal justice system for the collection and analysis of data and statistics on the implementation of non-custodial treatment for offenders.

21. Policy formulation and programme development

21.1 Programmes for non-custodial measures should be systematically planned and implemented as an integral part of the criminal justice system within the national development process.

21.2 Regular evaluations should be carried out with a view to implementing non-custodial measures more effectively.

21.3 Periodic reviews should be concluded to assess the objectives, functioning and effectiveness of non-custodial measures.

22. Linkages with relevant agencies and activities

22.1 Suitable mechanisms should be evolved at various levels to facilitate the establishment of linkages between services responsible for non-custodial measures, other branches of the criminal justice system, social development and welfare agencies, both governmental and non-governmental, in such fields as health, housing, education and labour, and the mass media.

23. International cooperation

23.1 Efforts shall be made to promote scientific cooperation between countries in the field of non-institutional treatment. Research, training, technical assistance and the exchange of information among Member States on non-custodial measures should be strengthened, through the United Nations institutes for the prevention of crime and the treatment of offenders, in close collaboration with the Crime Prevention and Criminal Justice Branch of the

Centre for Social Development and Humanitarian Affairs of the United Nations Secretariat.

23.2 Comparative studies and the harmonization of legislative provisions should be furthered to expand the range of non-institutional options and facilitate their application across national frontiers, in accordance with the Model Treaty on the Transfer of Supervision of Offenders Conditionally Sentenced or Conditionally Released.

APPENDIX 4.

UNITED NATIONS RULES FOR THE PROTECTION OF JUVENILES DEPRIVED OF THEIR LIBERTY

Adopted by General Assembly resolution 45/113 of 14 December 1990

I. Fundamental Perspectives

1. The juvenile justice system should uphold the rights and safety and promote the physical and mental well-being of juveniles. Imprisonment should be used as a last resort.
2. Juveniles should only be deprived of their liberty in accordance with the principles and procedures set forth in these Rules and in the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules). 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 length of the sanction should be determined by the judicial authority, without precluding the possibility of his or her early release.
3. The Rules are intended to establish minimum standards accepted by the United Nations for the protection of juveniles deprived of their liberty in all forms, consistent with human rights and fundamental freedoms, and with a view to counteracting the detrimental effects of all types of detention and to fostering integration in society.
4. The Rules should be applied impartially, without discrimination of any kind as to race, colour, sex, age, language, religion, nationality, political or other opinion, cultural beliefs or practices, property, birth or family status, ethnic or social origin, and disability. The religious and cultural beliefs, practices and moral concepts of the juvenile should be respected.
5. The Rules are designed to serve as convenient standards of reference and to provide encouragement and guidance to professionals involved in the management of the juvenile justice system.

6. The Rules should be made readily available to juvenile justice personnel in their national languages. Juveniles who are not fluent in the language spoken by the personnel of the detention facility should have the right

to the services of an interpreter free of charge whenever necessary, in particular during medical examinations and disciplinary proceedings.

7. Where appropriate, States should incorporate the Rules into their legislation or amend it accordingly and provide effective remedies for their breach, including compensation when injuries are inflicted on juveniles. States should also monitor the application of the Rules.

8. The competent authorities should constantly seek to increase the awareness of the public that the care of detained juveniles and preparation for their return to society is a social service of great importance, and to this end active steps should be taken to foster open contacts between the juveniles and the local community.

9. Nothing in the Rules should be interpreted as precluding the application of the relevant United Nations and human rights instruments and standards, recognized by the international community, that are more conducive to ensuring the rights, care and protection of juveniles, children and all young persons.

10. In the event that the practical application of particular Rules contained in sections II to V, inclusive, presents any conflict with the Rules contained in the present section, compliance with the latter shall be regarded as the predominant requirement.

II. Scope and Application of the Rules

11. For the purposes of the Rules, the following definitions should apply:

(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.

12. The deprivation of liberty should be effected in conditions and circumstances which ensure respect for the human rights of juveniles. Juveniles detained in facilities should be guaranteed the benefit of meaningful activities and programmes which would serve to promote and sustain their health and self-respect, to foster their sense of responsibility and encourage those attitudes and skills that will assist them in developing their potential as members of society.

13. Juveniles deprived of their liberty shall not for any reason related to their status be denied the civil, economic, political, social or cultural rights to which they are entitled under national or international law, and which are compatible with the deprivation of liberty.

14. The protection of the individual rights of juveniles with special regard to the legality of the execution of the detention measures shall be ensured by the competent authority, while the objectives of social integration should be secured by regular inspections and other means of control carried out, according to international standards, national laws and regulations, by a duly constituted body authorized to visit the juveniles and not belonging to the detention facility.

15. The Rules apply to all types and forms of detention facilities in which juveniles are deprived of their liberty. Sections I, II, IV and V of the Rules apply to all detention facilities and institutional settings in which juveniles are detained, and section III applies specifically to juveniles under arrest or awaiting trial.

16. The Rules shall be implemented in the context of the economic, social and cultural conditions prevailing in each Member State.

III. Juveniles under Arrest or Awaiting Trial

17. Juveniles who are detained under arrest or awaiting trial ("untried") are presumed innocent and shall be treated as such. Detention before trial shall be avoided to the extent possible and limited to exceptional circumstances. Therefore, all efforts shall be made to apply alternative measures. When preventive detention is nevertheless used, juvenile courts and investigative bodies shall give the highest priority to the most expeditious processing of such cases to ensure the shortest possible duration of detention. Untried detainees should be separated from convicted juveniles.

18. The conditions under which an untried juvenile is detained should be consistent with the rules set out below, with additional specific provisions as are necessary and appropriate, given the requirements of the presumption of innocence, the duration of the detention and the legal status and circumstances of the juvenile. These provisions would include, but not necessarily be restricted to, the following:

(a) Juveniles should have the right of legal counsel and be enabled to apply for free legal aid, where such aid is available, and to communicate regularly with their legal advisers. Privacy and confidentiality shall be ensured for such communications;

(b) Juveniles should be provided, where possible, with opportunities to pursue work, with remuneration, and continue education or training, but should not be required to do so. Work, education or training should not cause the continuation of the detention;

(c) Juveniles should receive and retain materials for their leisure and recreation as are compatible with the interests of the administration of justice.

IV. The Management of Juvenile Facilities

A. Records

19. All reports, including legal records, medical records and records of disciplinary proceedings, and all other documents relating to the form, content

and details of treatment, should be placed in a confidential individual file, which should be kept up to date, accessible only to authorized persons and classified in such a way as to be easily understood. Where possible, every juvenile should have the right to contest any fact or opinion contained in his or her file so as to permit rectification of inaccurate, unfounded or unfair statements. In order to exercise this right, there should be procedures that allow an appropriate third party to have access to and to consult the file on request. Upon release, the records of juveniles shall be sealed, and, at an appropriate time, expunged.

20. No juvenile should be received in any detention facility without a valid commitment order of a judicial, administrative or other public authority. The details of this order should be immediately entered in the register. No juvenile should be detained in any facility where there is no such register.

B. Admission, registration, movement and transfer

21. In every place where juveniles are detained, a complete and secure record of the following information should be kept concerning each juvenile received:

- (a) Information on the identity of the juvenile;
- (b) The fact of and reasons for commitment and the authority therefor;
- (c) The day and hour of admission, transfer and release;
- (d) Details of the notifications to parents and guardians on every admission, transfer or release of the juvenile in their care at the time of commitment;
- (e) Details of known physical and mental health problems, including drug and alcohol abuse.

22. The information on admission, place, transfer and release should be provided without delay to the parents and guardians or closest relative of the juvenile concerned.

23. As soon as possible after reception, full reports and relevant information on the personal situation and circumstances of each juvenile should be drawn up and submitted to the administration.

24. On admission, all juveniles shall be given a copy of the rules governing the detention facility and a written description of their rights and obligations in a language they can understand, together with the address of the authorities competent to receive complaints, as well as the address of public or private agencies and organizations which provide legal assistance. For those juveniles who are illiterate or who cannot understand the language in the written form, the information should be conveyed in a manner enabling full comprehension.

25. All juveniles should be helped to understand the regulations governing the internal organization of the facility, the goals and methodology of the care provided, the disciplinary requirements and procedures, other authorized methods of seeking information and of making complaints and all such other matters as are necessary to enable them to understand fully their rights and obligations during detention.

26. The transport of juveniles should be carried out at the expense of the administration in conveyances with adequate ventilation and light, in conditions that should in no way subject them to hardship or indignity. Juveniles should not be transferred from one facility to another arbitrarily.

C. Classification and placement

27. As soon as possible after the moment of admission, each juvenile should be interviewed, and a psychological and social report identifying any factors relevant to the specific type and level of care and programme required by the juvenile should be prepared. This report, together with the report prepared by a medical officer who has examined the juvenile upon admission, should be forwarded to the director for purposes of determining the most appropriate placement for the juvenile within the facility and the specific type and level of care and programme required and to be pursued. When special rehabilitative treatment is required, and the length of stay in the facility permits, trained personnel of the facility should prepare a written, individualized treatment plan

specifying treatment objectives and time-frame and the means, stages and delays with which the objectives should be approached.

28. The detention of juveniles should only take place under conditions that take full account of their particular needs, status and special requirements according to their age, personality, sex and type of offence, as well as mental and physical health, and which ensure their protection from harmful influences and risk situations. The principal criterion for the separation of different categories of juveniles deprived of their liberty should be the provision of the type of care best suited to the particular needs of the individuals concerned and the protection of their physical, mental and moral integrity and well-being.

29. In all detention facilities juveniles should be separated from adults, unless they are members of the same family. Under controlled conditions, juveniles may be brought together with carefully selected adults as part of a special programme that has been shown to be beneficial for the juveniles concerned.

30. Open detention facilities for juveniles should be established. Open detention facilities are those with no or minimal security measures. The population in such detention facilities should be as small as possible. The number of juveniles detained in closed facilities should be small enough to enable individualized treatment. Detention facilities for juveniles should be decentralized and of such size as to facilitate access and contact between the juveniles and their families. Small-scale detention facilities should be established and integrated into the social, economic and cultural environment of the community.

D. Physical environment and accommodation

31. Juveniles deprived of their liberty have the right to facilities and services that meet all the requirements of health and human dignity.

32. The design of detention facilities for juveniles and the physical environment should be in keeping with the rehabilitative aim of residential treatment, with due regard to the need of the juvenile for privacy, sensory stimuli, opportunities for association with peers and participation in sports,

physical exercise and leisure-time activities. The design and structure of juvenile detention facilities should be such as to minimize the risk of fire and to ensure safe evacuation from the premises. There should be an effective alarm system in case of fire, as well as formal and drilled procedures to ensure the safety of the juveniles. Detention facilities should not be located in areas where there are known health or other hazards or risks.

33. Sleeping accommodation should normally consist of small group dormitories or individual bedrooms, while bearing in mind local standards. During sleeping hours there should be regular, unobtrusive supervision of all sleeping areas, including individual rooms and group dormitories, in order to ensure the protection of each juvenile. Every juvenile should, in accordance with local or national standards, be provided with separate and sufficient bedding, which should be clean when issued, kept in good order and changed often enough to ensure cleanliness.

34. Sanitary installations should be so located and of a sufficient standard to enable every juvenile to comply, as required, with their physical needs in privacy and in a clean and decent manner.

35. The possession of personal effects is a basic element of the right to privacy and essential to the psychological well-being of the juvenile. The right of every juvenile to possess personal effects and to have adequate storage facilities for them should be fully recognized and respected. Personal effects that the juvenile does not choose to retain or that are confiscated should be placed in safe custody. An inventory thereof should be signed by the juvenile. Steps should be taken to keep them in good condition. All such articles and money should be returned to the juvenile on release, except in so far as he or she has been authorized to spend money or send such property out of the facility. If a juvenile receives or is found in possession of any medicine, the medical officer should decide what use should be made of it.

36. To the extent possible juveniles should have the right to use their own clothing. Detention facilities should ensure that each juvenile has personal clothing suitable for the climate and adequate to ensure good health, and which should in no manner be degrading or humiliating. Juveniles removed from or leaving a facility for any purpose should be allowed to wear their own clothing.

37. Every detention facility shall ensure that every juvenile receives food that is suitably prepared and presented at normal meal times and of a quality and quantity to satisfy the standards of dietetics, hygiene and health and, as far as possible, religious and cultural requirements. Clean drinking water should be available to every juvenile at any time.

E. Education, vocational training and work

38. Every juvenile of compulsory school age has the right to education suited to his or her needs and abilities and designed to prepare him or her for return to society. Such education should be provided outside the detention facility in community schools wherever possible and, in any case, by qualified teachers through programmes integrated with the education system of the country so that, after release, juveniles may continue their education without difficulty. Special attention should be given by the administration of the detention facilities to the education of juveniles of foreign origin or with particular cultural or ethnic needs. Juveniles who are illiterate or have cognitive or learning difficulties should have the right to special education.

39. Juveniles above compulsory school age who wish to continue their education should be permitted and encouraged to do so, and every effort should be made to provide them with access to appropriate educational programmes.

40. Diplomas or educational certificates awarded to juveniles while in detention should not indicate in any way that the juvenile has been institutionalized.

41. Every detention facility should provide access to a library that is adequately stocked with both instructional and recreational books and periodicals suitable for the juveniles, who should be encouraged and enabled to make full use of it.

42. Every juvenile should have the right to receive vocational training in occupations likely to prepare him or her for future employment.

43. With due regard to proper vocational selection and to the requirements of institutional administration, juveniles should be able to choose the type of work they wish to perform.

44. All protective national and international standards applicable to child labour and young workers should apply to juveniles deprived of their liberty.

45. Wherever possible, juveniles should be provided with the opportunity to perform remunerated labour, if possible within the local community, as a complement to the vocational training provided in order to enhance the possibility of finding suitable employment when they return to their communities. The type of work should be such as to provide appropriate training that will be of benefit to the juveniles following release. The organization and methods of work offered in detention facilities should resemble as closely as possible those of similar work in the community, so as to prepare juveniles for the conditions of normal occupational life.

46. Every juvenile who performs work should have the right to an equitable remuneration. The interests of the juveniles and of their vocational training should not be subordinated to the purpose of making a profit for the detention facility or a third party. Part of the earnings of a juvenile should normally be set aside to constitute a savings fund to be handed over to the juvenile on release. The juvenile should have the right to use the remainder of those earnings to purchase articles for his or her own use or to indemnify the victim injured by his or her offence or to send it to his or her family or other persons outside the detention facility.

F. Recreation

47. Every juvenile should have the right to a suitable amount of time for daily free exercise, in the open air whenever weather permits, during which time appropriate recreational and physical training should normally be provided.

Adequate space, installations and equipment should be provided for these activities. Every juvenile should have additional time for daily leisure activities, part of which should be devoted, if the juvenile so wishes, to arts and crafts skill development. The detention facility should ensure that each juvenile is physically able to participate in the available programmes of physical education. Remedial physical education and therapy should be offered, under medical supervision, to juveniles needing it. G. Religion

48. Every juvenile should be allowed to satisfy the needs of his or her religious and spiritual life, in particular by attending the services or meetings provided in the detention facility or by conducting his or her own services and having possession of the necessary books or items of religious observance and instruction of his or her denomination. If a detention facility contains a sufficient number of juveniles of a given religion, one or more qualified representatives of that religion should be appointed or approved and allowed to hold regular services and to pay pastoral visits in private to juveniles at their request. Every juvenile should have the right to receive visits from a qualified representative of any religion of his or her choice, as well as the right not to participate in religious services and freely to decline religious education, counselling or indoctrination.

H. Medical care

49. Every juvenile shall 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. All such medical care should, where possible, be provided to detained juveniles through the appropriate health facilities and services of the community in which the detention facility is located, in order to prevent stigmatization of the juvenile and promote self-respect and integration into the community.

50. Every juvenile has a right to be examined by a physician immediately upon admission to a detention facility, for the purpose of recording any evidence of prior ill-treatment and identifying any physical or mental condition requiring medical attention.

51. The medical services provided to juveniles should seek to detect and should treat any physical or mental illness, substance abuse or other condition that may hinder the integration of the juvenile into society. Every detention facility for juveniles should have immediate access to adequate medical facilities and equipment appropriate to the number and requirements of its residents and staff trained in preventive health care and the handling of medical emergencies. Every juvenile who is ill, who complains of illness or who demonstrates symptoms of physical or mental difficulties, should be examined promptly by a medical officer.

52. Any medical officer who has reason to believe that the physical or mental health of a juvenile has been or will be injuriously affected by continued detention, a hunger strike or any condition of detention should report this fact immediately to the director of the detention facility in question and to the independent authority responsible for safeguarding the well-being of the juvenile.

53. A juvenile who is suffering from mental illness should be treated in a specialized institution under independent medical management. Steps should be taken, by arrangement with appropriate agencies, to ensure any necessary continuation of mental health care after release.

54. Juvenile detention facilities should adopt specialized drug abuse prevention and rehabilitation programmes administered by qualified personnel. These programmes should be adapted to the age, sex and other requirements of the juveniles concerned, and detoxification facilities and services staffed by trained personnel should be available to drug- or alcohol-dependent juveniles.

55. Medicines should be administered only for necessary treatment on medical grounds and, when possible, after having obtained the informed consent of the

juvenile concerned. In particular, they must not be administered with a view to eliciting information or a confession, as a punishment or as a means of restraint. Juveniles shall never be testers in the experimental use of drugs and treatment. The administration of any drug should always be authorized and carried out by qualified medical personnel.

I. Notification of illness, injury and death

56. The family or guardian of a juvenile and any other person designated by the juvenile have 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 director of the detention facility should notify immediately the family or guardian of the juvenile concerned, or other designated person, in case of death, illness requiring transfer of the juvenile to an outside medical facility, or a condition requiring clinical care within the detention facility for more than 48 hours. Notification should also be given to the consular authorities of the State of which a foreign juvenile is a citizen.

57. Upon the death of a juvenile during the period of deprivation of liberty, the nearest relative should have the right to inspect the death certificate, see the body and determine the method of disposal of the body. Upon the death of a juvenile in detention, there should be an independent inquiry into the causes of death, the report of which should be made accessible to the nearest relative. This inquiry should also be made when the death of a juvenile occurs within six months from the date of his or her release from the detention facility and there is reason to believe that the death is related to the period of detention.

58. A juvenile should be informed at the earliest possible time of the death, serious illness or injury of any immediate family member and should be provided with the opportunity to attend the funeral of the deceased or go to the bedside of a critically ill relative. J. Contacts with the wider community

59. Every means should be provided to ensure that juveniles have adequate communication with the outside world, which is an integral part of the right to fair and humane treatment and is essential to the preparation of juveniles for

their return to society. Juveniles should be allowed to communicate with their families, friends and other persons or representatives of reputable outside organizations, to leave detention facilities for a visit to their home and family and to receive special permission to leave the detention facility for educational, vocational or other important reasons. Should the juvenile be serving a sentence, the time spent outside a detention facility should be counted as part of the period of sentence.

60. Every juvenile should have the right to receive regular and frequent visits, in principle once a week and not less than once a month, in circumstances that respect the need of the juvenile for privacy, contact and unrestricted communication with the family and the defence counsel.

61. Every juvenile should have the right to communicate in writing or by telephone at least twice a week with the person of his or her choice, unless legally restricted, and should be assisted as necessary in order effectively to enjoy this right. Every juvenile should have the right to receive correspondence.

62. Juveniles should have the opportunity to keep themselves informed regularly of the news by reading newspapers, periodicals and other publications, through access to radio and television programmes and motion pictures, and through the visits of the representatives of any lawful club or organization in which the juvenile is interested.

K. Limitations of physical restraint and the use of force

63. Recourse to instruments of restraint and to force for any purpose should be prohibited, except as set forth in rule 64 below.

64. Instruments of restraint and force can only be used in exceptional cases, where all other control methods have been exhausted and failed, and only as explicitly authorized and specified by law and regulation. They should not cause humiliation or degradation, and should be used restrictively and only for the shortest possible period of time. By order of the director of the

administration, such instruments might be resorted to in order to prevent the juvenile from inflicting self-injury, injuries to others or serious destruction of property. In such instances, the director should at once consult medical and other relevant personnel and report to the higher administrative authority.

65. The carrying and use of weapons by personnel should be prohibited in any facility where juveniles are detained.

L. Disciplinary procedures

66. Any disciplinary measures and procedures should maintain the interest of safety and an ordered community life and should be consistent with the upholding of the inherent dignity of the juvenile and the fundamental objective of institutional care, namely, instilling a sense of justice, self-respect and respect for the basic rights of every person.

67. All disciplinary measures constituting cruel, inhuman or degrading treatment shall be strictly prohibited, including corporal punishment, placement in a dark cell, closed or solitary confinement or any other punishment that may compromise the physical or mental health of the juvenile concerned. The reduction of diet and the restriction or denial of contact with family members should be prohibited for any purpose. Labour should always be viewed as an educational tool and a means of promoting the self-respect of the juvenile in preparing him or her for return to the community and should not be imposed as a disciplinary sanction. No juvenile should be sanctioned more than once for the same disciplinary infraction. Collective sanctions should be prohibited.

68. Legislation or regulations adopted by the competent administrative authority should establish norms concerning the following, taking full account of the fundamental characteristics, needs and rights of juveniles:

- (a) Conduct constituting a disciplinary offence;
- (b) Type and duration of disciplinary sanctions that may be inflicted;
- (c) The authority competent to impose such sanctions;
- (d) The authority competent to consider appeals.

69. A report of misconduct should be presented promptly to the competent authority, which should decide on it without undue delay. The competent authority should conduct a thorough examination of the case.

70. No juvenile should be disciplinarily sanctioned except in strict accordance with the terms of the law and regulations in force. No juvenile should be sanctioned unless he or she has been informed of the alleged infraction in a manner appropriate to the full understanding of the juvenile, and given a proper opportunity of presenting his or her defence, including the right of appeal to a competent impartial authority. Complete records should be kept of all disciplinary proceedings.

71. No juveniles should be responsible for disciplinary functions except in the supervision of specified social, educational or sports activities or in self-government programmes.

M. Inspection and complaints

72. Qualified inspectors or an equivalent duly constituted authority not belonging to the administration of the facility should be empowered to conduct inspections on a regular basis and to undertake unannounced inspections on their own initiative, and should enjoy full guarantees of independence in the exercise of this function. Inspectors should have unrestricted access to all persons employed by or working in any facility where juveniles are or may be deprived of their liberty, to all juveniles and to all records of such facilities.

73. Qualified medical officers attached to the inspecting authority or the public health service should participate in the inspections, evaluating compliance with the rules concerning the physical environment, hygiene, accommodation, food, exercise and medical services, as well as any other aspect or conditions of institutional life that affect the physical and mental health of juveniles. Every juvenile should have the right to talk in confidence to any inspecting officer.

74. After completing the inspection, the inspector should be required to submit a report on the findings. The report should include an evaluation of the compliance of the detention facilities with the present rules and relevant

provisions of national law; and recommendations regarding any steps considered necessary to ensure compliance with them. Any facts discovered by an inspector that appear to indicate that a violation of legal provisions concerning the rights of juveniles or the operation of a juvenile detention facility has occurred should be communicated to the competent authorities for investigation and prosecution.

75. Every juvenile should have the opportunity of making requests or complaints to the director of the detention facility and to his or her authorized representative.

76. Every juvenile should have the right to make a request or complaint, without censorship as to substance, to the central administration, the judicial authority or other proper authorities through approved channels, and to be informed of the response without delay.

77. Efforts should be made to establish an independent office (ombudsman) to receive and investigate complaints made by juveniles deprived of their liberty and to assist in the achievement of equitable settlements.

78. Every juvenile should have the right to request assistance from family members, legal counsellors, humanitarian groups or others where possible, in order to make a complaint. Illiterate juveniles should be provided with assistance should they need to use the services of public or private agencies and organizations which provide legal counsel or which are competent to receive complaints.

N. Return to the community

79. All juveniles should benefit from arrangements designed to assist them in returning to society, family life, education or employment after release. Procedures, including early release, and special courses should be devised to this end.

80. Competent authorities should provide or ensure services to assist juveniles in re-establishing themselves in society and to lessen prejudice against such

juveniles. These services should ensure', to the extent possible, that the juvenile is provided with suitable residence, employment, clothing, and sufficient means to maintain himself or herself upon release in order to facilitate successful reintegration. The representatives of agencies providing such services should be consulted and should have access to juveniles while detained, with a view to assisting them in their return to the community.

V. Personnel

81. Personnel should be qualified and include a sufficient number of specialists such as educators, vocational instructors, counsellors, social workers, psychiatrists and psychologists. These and other specialist staff should normally be employed on a permanent basis. This should not preclude part-time or volunteer workers when the level of support and training they can provide is appropriate and beneficial. Detention facilities should make use of all remedial, educational, moral, spiritual, and other resources and forms of assistance that are appropriate and available in the community, according to the individual needs and problems of detained juveniles.

82. The administration should provide for the careful selection and recruitment of every grade and type of personnel, since the proper management of detention facilities depends on their integrity, humanity, ability and professional capacity to deal with juveniles, as well as personal suitability for the work.

83. To secure the foregoing ends, personnel should be appointed as professional officers with adequate remuneration to attract and retain suitable women and men. The personnel of juvenile detention facilities should be continually encouraged to fulfil their duties and obligations in a humane, committed, professional, fair and efficient manner, to conduct themselves at all times in such a way as to deserve and gain the respect of the juveniles, and to provide juveniles with a positive role model and perspective.

84. The administration should introduce forms of organization and management that facilitate communications between different categories of

staff in each detention facility so as to enhance cooperation between the various services engaged in the care of juveniles, as well as between staff and the administration, with a view to ensuring that staff directly in contact with juveniles are able to function in conditions favourable to the efficient fulfilment of their duties.

85. The personnel should receive such training as will enable them to carry out their responsibilities effectively, in particular training in child psychology, child welfare and international standards and norms of human rights and the rights of the child, including the present Rules. The personnel should maintain and improve their knowledge and professional capacity by attending courses of in-service training, to be organized at suitable intervals throughout their career.

86. The director of a facility should be adequately qualified for his or her task, with administrative ability and suitable training and experience, and should carry out his or her duties on a full-time basis.

87. In the performance of their duties, personnel of detention facilities should respect and protect the human dignity and fundamental human rights of all juveniles, in particular, as follows:

(a) No member of the detention facility or institutional personnel may 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 circumstance whatsoever;

(b) All personnel should rigorously oppose and combat any act of corruption, reporting it without delay to the competent authorities;

(c) All personnel should respect the present Rules. Personnel who have reason to believe that a serious violation of the present Rules has occurred or is about to occur should report the matter to their superior authorities or organs vested with reviewing or remedial power;

(d) All personnel should ensure the full protection of the physical and mental health of juveniles, including protection from physical, sexual and emotional

abuse and exploitation, and should take immediate action to secure medical attention whenever required;

(e) All personnel should respect the right of the juvenile to privacy, and, in particular, should safeguard all confidential matters concerning juveniles or their families learned as a result of their professional capacity;

(f) All personnel should seek to minimize any differences between life inside and outside the detention facility which tend to lessen due respect for the dignity of juveniles as human beings

APPENDIX 5.

Guidelines for Action on Children in the Criminal Justice System

Recommended by Economic and Social Council resolution 1997/30 of 21 July 1997

1. Pursuant to Economic and Social Council resolution 1996/13 of 23 July 1996, the present Guidelines for Action on Children in the Criminal Justice System were developed at an expert group meeting held at Vienna from 23 to 25 February 1997 with the financial support of the Government of Austria. In developing the Guidelines for Action, the experts took into account the views expressed and the information submitted by Governments.
2. Twenty-nine experts from eleven States in different regions, representatives of the Centre for Human Rights of the Secretariat, the United Nations Children's Fund and the Committee on the Rights of the Child, as well as observers for non-governmental organizations concerned with juvenile justice, participated in the meeting.
3. The Guidelines for Action are addressed to the Secretary-General and relevant United Nations agencies and programmes, States parties to the Convention on the Rights of the Child, as regards its implementation, as well as Member States as regards the use and application of the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules), the United Nations Guidelines for the Prevention of Juvenile Delinquency (The Riyadh Guidelines) and the United Nations Rules for the Protection of Juveniles Deprived of their Liberty, hereinafter together referred to as United Nations standards and norms in juvenile justice.

I. Aims, objectives and basic considerations

4. The aims of the Guidelines for Action are to provide a framework to achieve the following objectives:

(a) To implement the Convention on the Rights of the Child and to pursue the goals set forth in the Convention with regard to children in the context of the administration of juvenile justice, as well as to use and apply the United Nations standards and norms in juvenile justice and other related instruments, such as the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power;

(b) To facilitate the provision of assistance to States parties for the effective implementation of the Convention on the Rights of the Child and related instruments.

5. In order to ensure effective use of the Guidelines for Action, improved cooperation between Governments, relevant entities of the United Nations system, non-governmental organizations, professional groups, the media, academic institutions, children and other members of civil society is essential.

6. The Guidelines for Action should be based on the principle that the responsibility to implement the Convention clearly rests with the States parties thereto.

7. The basis for the use of the Guidelines for Action should be the recommendations of the Committee on the Rights of the Child.

8. In the use of the Guidelines for Action at both the international and national levels, consideration should be given to the following:

(a) Respect for human dignity, compatible with the four general principles underlying the Convention, namely: non-discrimination, including gender-sensitivity; upholding the best interests of the child; the right to life, survival and development; and respect for the views of the child;

(b) A rights-based orientation;

(c) A holistic approach to implementation through maximization of resources and efforts;

(d) The integration of services on an interdisciplinary basis;

(e) Participation of children and concerned sectors of society;

(f) Empowerment of partners through a developmental process;

(g) Sustainability without continuing dependency on external bodies;

(h) Equitable application and accessibility to those in greatest need;

(i) Accountability and transparency of operations;

(j) Proactive responses based on effective preventive and remedial measures.

9. Adequate resources (human, organizational, technological, financial and information) should be allocated and utilized efficiently at all levels (international, regional, national, provincial and local) and in collaboration with relevant partners, including Governments, United Nations entities, non-governmental organizations, professional groups, the media, academic institutions, children and other members of civil society, as well as other partners.

II. Plans for the implementation of the Convention on the Rights of the Child, the pursuit of its goals

and the use and application of international standards and norms in juvenile justice

A. Measures of general application

10. The importance of a comprehensive and consistent national approach in the area of juvenile justice should be recognized, with respect for the interdependence and indivisibility of all rights of the child.

11. Measures relating to policy, decision-making, leadership and reform should be taken, with the goal of ensuring that:

(a) The principles and provisions of the Convention on the Rights of the Child and the United Nations standards and norms in juvenile justice are fully reflected in national and local legislation policy and practice, in particular by establishing a child-oriented juvenile justice system that guarantees the rights of children, prevents the violation of the rights of children, promotes children's sense of dignity and worth, and fully respects their age, stage of development and their right to participate meaningfully in, and contribute to, society;

(b) The relevant contents of the above-mentioned instruments are made widely known to children in language accessible to children. In addition, if necessary, procedures should be established to ensure that each and every child is provided with the relevant information on his or her rights set out in those instruments, at least from his or her first contact with the criminal justice system, and is reminded of his or her obligation to obey the law;

(c) The public's and the media's understanding of the spirit, aims and principles of justice centred on the child is promoted in accordance with the United Nations standards and norms in juvenile justice.

B. Specific targets

12. States should ensure the effectiveness of their birth registration programmes. In those instances where the age of the child involved in the justice system is unknown, measures should be taken to ensure that the true age of a child is ascertained by independent and objective assessment.

13. Notwithstanding the age of criminal responsibility, civil majority and the age of consent as defined by national legislation, States should ensure that children benefit from all their rights, as guaranteed to them by international law, specifically in this context those set forth in articles 3, 37 and 40 of the Convention.

14. Particular attention should be given to the following points:

(a) There should be a comprehensive child-centred juvenile justice process;

(b) Independent expert or other types of panels should review existing and proposed juvenile justice laws and their impact on children;

(c) No child who is under the legal age of criminal responsibility should be subject to criminal charges;

(d) States should establish juvenile courts with primary jurisdiction over juveniles who commit criminal acts and special procedures should be designed to take into account the specific needs of children. As an alternative, regular courts should incorporate such procedures, as appropriate. Wherever necessary, national legislative and other measures should be considered to accord all the rights of and protection for the child, where the child is brought before a court other than a juvenile court, in accordance with articles 3, 37 and 40 of the Convention.

15. A review of existing procedures should be undertaken and, where possible, diversion or other alternative initiatives to the classical criminal justice systems should be developed to avoid recourse to the criminal justice systems for young persons accused of an offence. Appropriate steps should be taken to make

available throughout the State a broad range of alternative and educative measures at the pre-arrest, pre-trial, trial and post-trial stages, in order to prevent recidivism and promote the social rehabilitation of child offenders. Whenever appropriate, mechanisms for the informal resolution of disputes in cases involving a child offender should be utilized, including mediation and restorative justice practices, particularly processes involving victims. In the various measures to be adopted, the family should be involved, to the extent that it operates in favour of the good of the child offender. States should ensure that alternative measures comply with the Convention, the United Nations standards and norms in juvenile justice, as well as other existing standards and norms in crime prevention and criminal justice, such as the United Nations Standard Minimum Rules for Non-custodial Measures (The Tokyo Rules), with special regard to ensuring respect for due process rules in applying such measures and for the principle of minimum intervention.

16. Priority should be given to setting up agencies and programmes to provide legal and other assistance to children, if needed free of charge, such as interpretation services, and, in particular, to ensure that the right of every child to have access to such assistance from the moment that the child is detained is respected in practice.

17. Appropriate action should be ensured to alleviate the problem of children in need of special protection measures, such as children working or living on the streets or children permanently deprived of a family environment, children with disabilities, children of minorities, immigrants and indigenous peoples and other vulnerable groups of children.

18. The placement of children in closed institutions should be reduced. Such placement of children should only take place in accordance with the provisions of article 37 (b) of the Convention and as a matter of last resort and for the shortest period of time. Corporal punishment in the child justice and welfare systems should be prohibited.

19. The United Nations Rules for the Protection of Juveniles Deprived of their Liberty and article 37 (d) of the Convention also apply to any public or private setting from which the child cannot leave at will, by order of any judicial, administrative or other public authority.

20. In order to maintain a link between the detained child and his or her family and community, and to facilitate his or her social reintegration, it is important to ensure easy access by relatives and persons who have a legitimate interest in the child to institutions where children are deprived of their liberty, unless the best interests of the child would suggest otherwise.

21. An independent body to monitor and report regularly on conditions in custodial facilities should be established, if necessary. Monitoring should take place within the framework of the United Nations standards and norms in juvenile justice, in particular the United Nations Rules for the Protection of Juveniles Deprived of their Liberty. States should permit children to communicate freely and confidentially with the monitoring bodies.

22. States should consider positively requests from concerned humanitarian, human rights and other organizations for access to custodial facilities, where appropriate.

23. In relation to children in the criminal justice system, due account should be taken of concerns raised by intergovernmental and non-governmental organizations and other interested parties, in particular systemic issues, including inappropriate admissions and lengthy delays that have an impact on children deprived of their liberty.

24. All persons having contact with, or being responsible for, children in the criminal justice system should receive education and training in human rights, the principles and provisions of the Convention and other United Nations standards and norms in juvenile justice as an integral part of their training programmes. Such persons include police and other law enforcement officials;

judges and magistrates, prosecutors, lawyers and administrators; prison officers and other professionals working in institutions where children are deprived of their liberty; and health personnel, social workers, peacekeepers and other professionals concerned with juvenile justice.

25. In the light of existing international standards, States should establish mechanisms to ensure a prompt, thorough and impartial investigation into allegations against officials of deliberate violation of the fundamental rights and freedoms of children. States should equally ensure that those found responsible are duly sanctioned.

C. Measures to be taken at the international level

26. Juvenile justice should be given due attention internationally, regionally and nationally, including within the framework of the United Nations system-wide action.

27. There is an urgent need for close cooperation between all bodies in this field, in particular, the Crime Prevention and Criminal Justice Division of the Secretariat, the Office of the United Nations High Commissioner for Human Rights/Centre for Human Rights, the Office of the United Nations High Commissioner for Refugees, the United Nations Children's Fund, the United Nations Development Programme, the Committee on the Rights of the Child, the International Labour Organization, the United Nations Educational, Scientific and Cultural Organization and the World Health Organization. In addition, the World Bank and other international and regional financial institutions and organizations, as well as non-governmental organizations and academic institutions, are invited to support the provision of advisory services and technical assistance in the field of juvenile justice. Cooperation should therefore be strengthened, in particular with regard to research, dissemination of information, training, implementation and monitoring of the Convention on the Rights of the Child and the use and application of existing standards, as

well as with regard to the provision of technical advice and assistance programmes, for example by making use of existing international networks on juvenile justice.

28. The effective implementation of the Convention on the Rights of the Child, as well as the use and application of international standards through technical cooperation and advisory service programmes, should be ensured by giving particular attention to the following aspects related to protecting and promoting human rights of children in detention, strengthening the rule of law and improving the administration of the juvenile justice system:

(a) Assistance in legal reform;

(b) Strengthening national capacities and infrastructures;

(c) Training programmes for police and other law enforcement officials, judges and magistrates, prosecutors, lawyers, administrators, prison officers and other professionals working in institutions where children are deprived of their liberty, health personnel, social workers, peacekeepers and other professionals concerned with juvenile justice;

(d) Preparation of training manuals;

(e) Preparation of information and education material to inform children about their rights in juvenile justice;

(f) Assistance with the development of information and management systems.

29. Close cooperation should be maintained between the Crime Prevention and Criminal Justice Division and the Department of Peacekeeping Operations of the Secretariat in view of the relevance of the protection of children's rights in peacekeeping operations, including the problems of children and youth as victims and perpetrators of crime in peace-building and post-conflict or other emerging situations.

D. Mechanisms for the implementation of technical advice and assistance projects

30. In accordance with articles 43, 44 and 45 of the Convention, the Committee on the Rights of the Child reviews the reports of States parties on the implementation of the Convention. According to article 44 of the Convention, these reports should indicate factors and difficulties, if any, affecting the degree of fulfilment of the obligations under the Convention.

31. States parties to the Convention are invited to provide in their initial and periodic reports comprehensive information, data and indicators on the implementation of the provisions of the Convention and on the use and application of the United Nations standards and norms in juvenile justice.

32. As a result of the process of examining the progress made by States parties in fulfilling their obligations under the Convention, the Committee may make suggestions and general recommendations to the State party to ensure full compliance with the Convention (in accordance with article 45 (d) of the Convention). In order to foster the effective implementation of the Convention and to encourage international cooperation in the area of juvenile justice, the Committee transmits, as it may consider appropriate, to specialized agencies, the United Nations Children's Fund and other competent bodies any reports from States parties that contain a request, or indicate a need, for advisory services and technical assistance, together with observations and suggestions of the Committee, if any, on those requests or indications (in accordance with article 45 (b) of the Convention).

33. Accordingly, should a State party report and the review process by the Committee reveal any necessity to initiate reform in the area of juvenile justice, including through assistance by the United Nations technical advice and assistance programmes or those of the specialized agencies, the State party may request such assistance, including assistance from the Crime Prevention and

Criminal Justice Division, the Centre for Human Rights and the United Nations Children's Fund.

34. In order to provide adequate assistance in response to those requests, a coordination panel on technical advice and assistance in juvenile justice should be established, to be convened at least annually by the Secretary-General. The panel will consist of representatives of the Division, the Office of the United Nations High Commissioner for Human Rights/Centre for Human Rights, the United Nations Children's Fund, the United Nations Development Programme, the Committee on the Rights of the Child, the institutes comprising the United Nations Crime Prevention and Criminal Justice Programme network and other relevant United Nations entities, as well as other interested intergovernmental, regional and non-governmental organizations, including international networks on juvenile justice and academic institutions involved in the provision of technical advice and assistance, in accordance with paragraph 39 below.

35. Prior to the first meeting of the coordination panel, a strategy should be elaborated for addressing the issue of how to activate further international cooperation in the field of juvenile justice. The coordination panel should also facilitate the identification of common problems, the compilation of examples of good practice and the analysis of shared experiences and needs, which in turn would lead to a more strategic approach to needs assessment and to effective proposals for action. Such a compilation would allow for concerted advisory services and technical assistance in juvenile justice, including an early agreement with the Government requesting such assistance, as well as with all other partners having the capacity and competence to implement the various segments of a country project, thus ensuring the most effective and problem-oriented action. This compilation should be developed continuously in close cooperation with all parties involved. It will take into account the possible introduction of diversion programmes and measures to improve the administration of juvenile justice, to reduce the use of remands and pre-trial

detention, to improve the treatment of children deprived of their liberty and to create effective reintegration and recovery programmes.

36. Emphasis should be placed on formulating comprehensive prevention plans, as called for in the United Nations Guidelines for the Prevention of Juvenile Delinquency (the Riyadh Guidelines). Projects should focus on strategies to socialize and integrate all children and young persons successfully, in particular through the family, the community, peer groups, schools, vocational training and the world of work. These projects should pay particular attention to children in need of special protection measures, such as children working or living on the streets or children permanently deprived of a family environment, children with disabilities, children of minorities, immigrants and indigenous peoples and other vulnerable groups of children. In particular, the placement of these children in institutions should be proscribed as much as possible. Measures of social protection should be developed in order to limit the risks of criminalization for these children.

37. The strategy will also set out a coordinated process for the delivery of international advisory services and technical assistance to States parties to the Convention, on the basis of joint missions to be undertaken, whenever appropriate, by staff of the different organizations and agencies involved, with a view to devising longer term technical assistance projects.

38. Important actors in the delivery of advisory services and technical assistance programmes at the country level are the United Nations resident coordinators, with significant roles to be played by the field offices of the Office of the United Nations High Commissioner for Human Rights/Centre for Human Rights, the United Nations Children's Fund and the United Nations Development Programme. The vital nature of the integration of juvenile justice technical cooperation in country planning and programming, including through the United Nations country strategy note, is emphasized.

39. Resources must be mobilized for both the coordinating mechanism of the coordination panel and regional and country projects formulated to improve observance of the Convention. Resources for those purposes (see paragraphs 34 to 38 above) will come either from regular budgets or from extrabudgetary resources. Most of the resources for specific projects will have to be mobilized from external sources.

40. The coordination panel may wish to encourage, and in fact be the vehicle for, a coordinated approach to resource mobilization in this area. Such resource mobilization should be on the basis of a common strategy as contained in a programme document drawn up in support of a global programme in this area. All interested United Nations bodies and agencies as well as non-governmental organizations that have a demonstrated capacity to deliver technical cooperation services in this area should be invited to participate in such a process.

E. Further considerations for the implementation of country projects

41. One of the obvious tenets in juvenile delinquency prevention and juvenile justice is that long-term change is brought about not only when symptoms are treated but also when root causes are addressed. For example, excessive use of juvenile detention will be dealt with adequately only by applying a comprehensive approach, which involves both organizational and managerial structures at all levels of investigation, prosecution and the judiciary, as well as the penitentiary system. This requires communication, inter alia, with and among police, prosecutors, judges and magistrates, authorities of local communities, administration authorities and with the relevant authorities of detention centres. In addition, it requires the will and ability to cooperate closely with each other.

42. To prevent further overreliance on criminal justice measures to deal with children's behaviour, efforts should be made to establish and apply programmes

aimed at strengthening social assistance, which would allow for the diversion of children from the justice system, as appropriate, as well as improving the application of non-custodial measures and reintegration programmes. To establish and apply such programmes, it is necessary to foster close cooperation between the child justice sectors, different services in charge of law enforcement, social welfare and education sectors.

III. Plans concerned with child victims and witnesses

43. In accordance with the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, States should undertake to ensure that child victims and witnesses are provided with appropriate access to justice and fair treatment, restitution, compensation and social assistance. If applicable, measures should be taken to prevent the settling of penal matters through compensation outside the justice system, when doing so is not in the best interests of the child.

44. Police, lawyers, the judiciary and other court personnel should receive training in dealing with cases where children are victims. States should consider establishing, if they have not yet done so, specialized offices and units to deal with cases involving offences against children. States should establish, as appropriate, a code of practice for proper management of cases involving child victims.

45. Child victims should be treated with compassion and respect for their dignity. They are entitled to access to the mechanisms of justice and to prompt redress, as provided for by national legislation, for the harm they have suffered.

46. Child victims should have access to assistance that meets their needs, such as advocacy, protection, economic assistance, counselling, health and social services, social reintegration and physical and psychological recovery services. Special assistance should be given to those children who are disabled or ill.

Emphasis should be placed upon family- and community-based rehabilitation rather than institutionalization.

47. Judicial and administrative mechanisms should be established and strengthened where necessary to enable child victims to obtain redress through formal or informal procedures that are prompt, fair and accessible. Child victims and/or their legal representatives should be informed accordingly.

48. Access should be allowed to fair and adequate compensation for all child victims of violations of human rights, specifically torture and other cruel, inhuman or degrading treatment or punishment, including rape and sexual abuse, unlawful or arbitrary deprivation of liberty, unjustifiable detention and miscarriage of justice. Necessary legal representation to bring an action within an appropriate court or tribunal, as well as interpretation into the native language of the child, if necessary, should be available.

49. Child witnesses need assistance in the judicial and administrative processes. States should review, evaluate and improve, as necessary, the situation for children as witnesses of crime in their evidential and procedural law to ensure that the rights of children are fully protected. In accordance with the different law traditions, practices and legal framework, direct contact should be avoided between the child victim and the offender during the process of investigation and prosecution as well as during trial hearings as much as possible. The identification of the child victim in the media should be prohibited, where necessary to protect the privacy of the child. Where prohibition is contrary to the fundamental legal principles of Member States, such identification should be discouraged.

50. States should consider, if necessary, amendments of their penal procedural codes to allow for, inter alia, videotaping of the child's testimony and presentation of the videotaped testimony in court as an official piece of evidence. In particular, police, prosecutors, judges and magistrates should

apply more child-friendly practices, for example, in police operations and interviews of child witnesses.

51. The responsiveness of judicial and administrative processes to the needs of child victims and witnesses should be facilitated by:

(a) Informing child victims of their role and the scope, timing and progress of the proceedings and of the disposition of their cases, especially where serious crimes are involved;

(b) Encouraging the development of child witness preparation schemes to familiarize children with the criminal justice process prior to giving evidence. Appropriate assistance should be provided to child victims and witnesses throughout the legal process;

(c) Allowing the views and concerns of child victims to be presented and considered at appropriate stages of the proceedings where their personal interests are affected, without prejudice to the accused and in accordance with the relevant national criminal justice system;

(d) Taking measures to minimize delays in the criminal justice process, protecting the privacy of child victims and witnesses and, when necessary, ensuring their safety from intimidation and retaliation.

52. Children displaced illegally or wrongfully retained across borders are as a general principle to be returned to the country of origin. Due attention should be paid to their safety, and they should be treated humanely and receive necessary assistance, pending their return. They should be returned promptly to ensure compliance with the Convention on the Rights of the Child. Where the Hague Convention on the Civil Aspects of International Child Abduction of 1980 or the Hague Convention on the Protection of Children and Cooperation in respect of Inter-Country Adoption of 1993, approved by the Hague Conference on Private International Law, the Convention on Jurisdiction,

Applicable Law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of the Child are applicable, the provisions of these conventions with regard to the return of the child should be promptly applied. Upon the return of the child, the country of origin should treat the child with respect, in accordance with international principles of human rights, and offer adequate family-based rehabilitation measures.

53. The United Nations Crime Prevention and Criminal Justice Programme, including the institutes comprising the Programme network, the Office of the United Nations High Commissioner for Human Rights/Centre for Human Rights, the United Nations Children's Fund, the United Nations Development Programme, the Committee on the Rights of the Child, the United Nations Educational, Scientific and Cultural Organization, the World Bank and interested non-governmental organizations should assist Member States, at their request, within the overall appropriations of the United Nations budgets or from extrabudgetary resources, in developing multidisciplinary training, education and information activities for law enforcement and other criminal justice personnel, including police officers, prosecutors, judges and magistrates.

1 In resolution 1997/30, paragraph 1, the Economic and Social Council welcomed the Guidelines for Action on Children in the Criminal Justice System annexed to the resolution and invited all parties concerned to make use of the Guidelines in the implementation of the Convention on the Rights of the Child with regard to juvenile justice.

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