

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 Kазee 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 in case 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 necessaries 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 necessaries 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."