

CHAPTER – V

CARE AND PROTECTION OF JUVENILES

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Children form an important and integral part of every society in the world. In their tiny shoulders rests the future of mankind. It is, therefore, the duty of every society to provide proper care and attention to every child. Also their very dependent nature makes them entitled to special care and attention in the family and society at large. The fact that they are innocent and immature makes them vulnerable to all forms of exploitation. Therefore, a better state and peaceful society can be created only if the childhood of every child is properly nurtured, nourished and protected. A nation's future is dependent on the children because they are the pillars which forms the basis of the future generation. Referring to the relationship between today's children and the future of any nation, Zimring says¹:

"Every society views its young with a mixture of hope and trepidation. The Young are the society's future, for good or ill, and the focus of special efforts to educate, to protect and to transmit culture from one generation to the next".

Therefore, the concept of juvenile justice is said to be based on the principle of guardianship. Since it is the duty of every person to take care of his/her children the state enforces this duty through law, because the ultimate responsibility lies on the state to take care of child in need of care and protection.² Apart from nutrition and education, natural love and affection is

1. Abdul Latif Wani, *Juvenile Delinquency in India*, V *Kashmir University Law Review* (1998) 66.

2. B.P. Dwivedi, *Neglected Juveniles, The Law and Laxity*, 16 *I.B.R.* (1989) 486.

very important for a child's physical and mental development. A child who is abandoned, avoided and neglected by the parent becomes unmanageable and makes the child frustrated and corrupted as a result of which the child has to face disrespect and humiliation in the society. Many a times a majority of such children are subjected to all forms of exploitation and are faced to do all sorts of inhuman work to earn their livelihood. There are also children who are abandoned by their parents and left to fend for themselves. This may result in the child committing delinquent acts. Therefore, to avoid this the law provides for the care of child in need of care of protection with treatment because they need protection rather than punishment.

Now, a question may arise as to who is a child in need of care and protection? It is said that the identification of child in need of care and protection is the basic work in solving their problems.³ It is, therefore, important to discuss the meaning of 'child in need of care and protection' and also to analyse the various provisions incorporated under the Juvenile Justice (Care and Protection of Children Act), 2000 regarding the care and protection of child in need of care and protection.

[A] CHILD IN NEED OF CARE AND PROTECTION

It is pertinent to note that the Parliament in the year 1986 took a bold step towards the welfare of neglected juveniles by passing the Juvenile Justice Act, the main purpose of which was to provide for the care, protection, treatment, development and rehabilitation of neglected or delinquent juveniles. However, the Juvenile Justice Act, 1986 has now been repealed by the passing of Juvenile Justice (Care and Protection of Children Act), 2000. The term 'neglected juvenile' as used in the Act of 1986 has now been changed to 'child in need of care and protection' in the Juvenile Justice (Care and Protection of Children Act), 2000.⁴ The definition of 'child in need of care and protection is

3. *Id.*

4. Hereinafter referred to as the Act.

so wide as to include a large number of children.⁵

It is seen that the definition of 'child in need of care and protection under the Act includes children who are found begging without having any home and any ostensible means of subsistence and is a destitute. These destitute children live and grow in a society where they are neglected and deprived of not only food, clothing and shelter but also education. They also lack affection, care and guidance from adults. These street children not only live but also work and struggle in situations and circumstances that are not conducive for their growth and development. Since a majority of these children come from poor families who are migrants and live in slums or squatter dwellings, therefore, they do not have an equal sharing of socio – cultural and economic opportunities for care, protection and socialization. Poverty may be submitted as the primary as the primary cause of growing problem of street children in India. Poverty exposes these children to innumerable problems and as a result the child remains poor throughout the life. These children are not deprived of their rights but are also denied access to education and adequate health care.

UNICEF has defined 'street children' as children who live on the streets

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5. Section 2(d) of the Act says, "*Child in need of care and Protection*" means a child -
- i) *Who is found without any home or settled place or abode and without any ostensible means of subsistence,*
 - a) *Who is found begging, or who is either a street child or a working child,*
 - ii) *Who resides with a person (whether a guardian of the child or not) and such person -*
 - a) *has threatened to kill or injure the child and there is a reasonable likelihood of the threat being carried out or,*
 - b) *has killed, abused or neglected some other child or children and there is reasonable likelihood of the child in question being killed, abused or neglected by that person,*
 - iii) *Who is mentally or physically challenged or ill children or children suffering from terminal diseases or incurable disease having no one to support or look after,*
 - iv) *Who has a parent or guardian and such parent or guardian is unfit or incapacitated to exercise control over the child,*
 - v) *Who does not have parent and no one is willing to take care of or whose parents have abandoned or surrendered him or who is missing and run away child and whose parents cannot be found after reasonable inquiry.*
 - vi) *Who is being or is likely to be grossly abused, tortured or exploited for the purpose of sexual abuse or illegal acts,*
 - vii) *Who is found vulnerable and is likely to be inducted into drug abuse or trafficking,*
 - viii) *Who is being or is likely to be abused for unconceivable gains,*
 - ix) *Who is victim of any armed conflict, civil commotion or natural calamity."*

alone or with their families, or children who spend most of their times on the streets to fend for themselves (but return home on a regular basis). It is stated that while there are no recently published statistics, UNICEF reported that the number of street children in India was as high as 18 million in 2000⁶.

Generally, children who are abused, neglected, abandoned and maltreated end up living in the streets. They do not have any other alternative and as such are faced to live their life in the streets. Mostly these children resort to varied odd jobs like rag pickers, shoe shine boys, washing utensils or serving tea in dhabas or working as fitters etc on workshops or small mechanic shops. These children generally live in groups at construction sites without any habitation facilities. It is unfortunate that inspite of the various constitutional provisions for protecting the tender and young age of children, they continue to live in such deplorable conditions.

Therefore, it is submitted that the poverty into which these children are born characteristics child labour⁷. Child labour is undoubtedly the worst form of social evil existing in our Indian Society because children are required to work beyond their physical capacity and the number of hours they have to work interferes with their education, recreation and rest. Apart from this the wages that they get are not commensurate with the amount of work done. A major factor leading to child labour is poverty but at the same time equally important is the system that exploits the children and allows them to work.

Child labour in India is said to be a product of socio – economic and cultural condition. Anticonstitutional polices, inadequate legislative measures and lack of political will have also been considered as important factors responsible for the persistence of this unlawful social evil. In majority of the cases the attitude of parents and their inability to appreciate the Childs educational capabilities and intelligence have been taken as the root cause behind child labour⁸. Further, in many cases the poor parents with bad habits

6. http://www.ashrayainitiative.org/doku.php?id=context:street_children (visited on 9th Dec 2011).

7. Usha Ramanathan, *On engaging with the law: Revisiting Child Labour*, 40 *JILI* (1998) 264.

8. Shrinivasan Gupta, *Right of Child and Child Labour: A Critical Study*, 37 *JILI* (1995) 537.

and criminal tendencies win the confidence of the child in convincing the child that education could not solve their problems and therefore the child is encouraged to work very early in life. As a result the child is not in a position to enjoy the benefit of state policy for free education to children only by the simple reason that the child cannot afford to miss the wages by going to school for education.

Therefore, as has already mentioned in the previous chapter the Parliament enacted the Child labour (Prohibition and Regulation) Act, 1986 as a step towards concretizing the labour conditions of the child workforce.

Next, the definition of 'child in need of care and protection also includes a child who is being or is likely to be abused, tortured or exploited for the purpose of sexual abuse or illegal acts. It is unfortunate that not only in India but throughout the world children are being exploited and abused. It is said that though we are fortunate to live in a century which recognizes the existence of children as being in their own right and not as objects to be treated at will, yet child abuse is rampant⁹. Parents and guardians are generally assumed and expected to naturally act in the best interest of the child but it is seen that this is not always so. Since children have no political power and their opinions are not given due weight they are dependent upon the adults and state to protect their rights but when this does not happen there is every possibility of these children being victims of sexual abuse and exploitation. As a result the sexual abuse of children is increasing by the day in every society. Internet has also contributed towards the increase in instances of sexual abuse of children because child sex has turned into global business through internet.

It is submitted that the use of children in pornographic literature is also increasing. Newspapers expose only the tip of the ice berg, because the victims and their guardians refrain from reporting cases of sexual abuse because of the shame and guilt associated with it¹⁰.

9. Ajay Rai, *Studies in Child Abuse*, VI *Legal News and Views* (1993) 52.

10. Valsamma Paul, *Sexual Abuse of Children – Need for Legislation*, XXXII (1&2) *Indian Bar Review* (2005) 114.

Sexual abuse of children is not only one of the worst forms of exploitation of children but also amounts to the violation of the basic human rights of the child. Many other factors are also responsible for the heinous crime of sexual abuse of children. Moral values of men are degrading 'by the day because man has become materialistic specially with industrialization and growth of metropolitan cities. As a result incidence of sexual abuse is on the rise. But it is submitted that when the society was a rural one and joint family system existed in majority in every society, incidents of sexual abuse specially rape were negligible¹¹.

However, with the decline in the joint family system moral and spiritual values have degraded and the desire for material wealth and enjoyment of life have become the major concern for men. Unimaginable levels of corruption is present in the society. Man wants to have maximum enjoyment at the cost of others. This tendency is said to breed promiscuity and vulgarity, and therefore, in relation to the opposite sex man has become unhealthy and sick¹².

However, with the decline of moral values in society, and specially in metropolitan cities, females belonging to middle class families come in contact with the upper strata of the society and they desire for material comforts and luxuries beyond their reach. Consequently, to fulfill such desire they willingly practice prostitution. Also, many a times young girls run away from home either because of poverty or abuse at the hands of the parents only to be abused again in the outside world. Some of these girls also leave home with the hope of making it big in the glamour industry but when they realize it is not possible they are forced to take up prostitution. Therefore, it would not be fair to only blame men for the sexual abuse of children.

Another factor for the ever growing problem of sexual abuse is poverty. Poverty makes children come to big cities from rural area in search of all kinds of odd jobs like domestic servants, servants in hotels, dhabas, offices etc. but in

11. *Id.* at 117.

12. *Id.* at 118.

reality what they get is torture, sexual abuse and forced entry into prostitution. However, sexual abuse of children is not only limited at the hands of the strangers. Nowadays, children are not safe in the hands of their own family members. Many a times children suffer sexual abuse at the hands of family members. As a result of which the child suffers not only physically but psychologically as well. This effects the emotional state of a child because in many cases the child is not able to disclose this to anybody out of fear and also because most of the time the parents would not believe the child.

It is submitted that a study sponsored by the National Commission for women squarely blames law – enforcing agencies for their role in allowing child prostitution to grow in cities. The persons running child prostitution rackets are supported by these agencies wherein the agencies get involved from the stage of procuring minor girls to the stage of transporting them to the brothels. Such agencies are accused of raping minor girls and setting them free. Those who should be enforcing the law are the ones breaking them. By sexually abusing children. Therefore, in brief the changing materialistic society, the growing consumer culture, the focus on sex in visual media, the erosion of values in family and society, addiction to drinks and drugs and frustration due to joblessness and poverty have converted children into commodities of torture, exploitation and sexual abuse¹³.

Therefore, in the international front the U.N Convention on the Rights of the child, 1989. is the most promising instrument which was adopted by the General Assembly. This Convention casts important responsibilities on state parties to protect the child from all forms of sexual abuse¹⁴.

In India the Constitutional provisions contained in Articles 21, 23, 24, 39 (e) promote and protect the interest of children¹⁵. Apart from the Constitutional Provisions the Immoral Traffic Prevention Act, 1956 lays down provisions for the purpose of dealing with the problem of prostitution. The

13. *Id.* at 120-21.

14. Article 34, *UN Convention on the Rights of the Child, 1989*.

15. For discussion of the Articles see, *Supra* chapter III.

Indian Penal Code, 1860 has also made certain acts committed against children as offences punishable in accordance with law¹⁶.

Therefore, the Courts in India have attempted to remedy the situation within the available infrastructure¹⁷. For eg in *Ghanashyam Misra V. State*¹⁸, the culprit a school teacher of 39 years of age had committed the heinous act of rape on a young girl of 10 years. The accused had lured the girl into coming inside the school room and raped her. Therefore the Court enhanced the sentence to 7 years rigorous imprisonment and ordered the payment of compensation to the father of the victim girl.

In *State of Maharashtra V Rajendra Jawanmal Gandhi*¹⁹, the victim of sexual abuse was a young girl of 12 years old on whom an attempt to rape had been made. The Court agreed with the High Court that great harm had been caused to the girl by unnecessary publicity and taking out morcha by the public. It was further observed that as a matter of fact the crime is not only against the victim but it is against the whole society as well. The court pointed out that since late there had been spurt in crimes relating to sexual offences²⁰.

Therefore, after considering the whole aspect of the matter the court sentenced the accused undergo rigorous imprisonment for 5 years and pay a fine of Rs 40,000/-.

In *Kamal Kishore V. State of Himachal Pradesh*²¹, the victim of sexual abuse was a girl who had just crossed the single digit in her age. The Session Judge, however was not impressed by the story of the victim and hence her testimony was jettisoned and the accused was exonerated. However, a Division Bench of the High Court of Himachal Pradesh dissented from the said verdict and convicted the accused under section 376 IPC²².

16. For discussion of the relevant sections see, *Supra* chapter III.

17. Shalu Nigam, *Sexual Abuse of Children and Child Rights*, 16 *Legal News and Views* (2002)11.

18. AIR 1957 Ori. 78.

19. AIR 1997 SC 3986.

20. *Id.* at 3996 – 97.

21. AIR 2000 SC 1920

22. *Id.* at 1921.

The Court after considering the whole aspect of the matter observed that there was no scope of doubt that the victim had been sexually savaged by the accused. It was further observed that there was no spec of doubt that the Session Judge had reached an erroneous conclusion by approaching the question from a wrong angle. The evidence of the adolescent girl the victim of rape, as duly corroborated by the testimony of her mother and aunt and adequately confirmed by the medical evidence had conclusively established that she was subjected to ravishment by the accused and no one else. Supporting the decision of the High Court the Court had rightly reversed reserved the order of acquittal and convicted the accused under section 376 IPC²³.

Therefore the Court enhanced the sentence for the offence under section 376 IPC to imprisonment for 7 years.

More recently the case of *Ramesh bhai Chandu bhai Rathod V. State of Gujrat*²⁴, a young girl studying in class IV was a victim of sexual abuse. She was raped and murdered by the accused appellant who was employed as a watchman in the Sanudip Apartments, where in one of the apartments the victim resided with her family. The appellant had made an extra judicial confession that he had raped and killed the child. Accordingly on the completion of the charges the accused was charged for offences under sections 363, 366, 376, 302 and 397 of the Indian Penal Code, 1860 and brought to trial. The trial court convicted him and sentenced him to death. On appeal the High Court also confirmed the reference and dismissed the appeal. The High Court found that the case fell within the category of the rarest of rare cases²⁵.

The court, therefore, commuted the death sentence awarded to the appellant to life but directed that the life sentence must extend to the full life of the appellant but subject to any remission or commutation at the instance of the

23. *Id.* at 1922-23.

24. *AIR* 2011 SC 803.

25. *Id.* at 804.

government for good and sufficient reasons²⁶.

In yet another case of *Haresh Mohandas Rajput V. State of Maharashtra*²⁷, the victim – a 10 year old girl was raped and murdered by the appellant. The trial Court convicted the appellant and sentenced him to undergo life imprisonment under section 302 Indian Penal Code, 1860. Further, the High Court upheld the conviction and enhanced the sentence to death penalty. Hence, the appellant preferred an appeal before this Court.

The Court did not find any cogent reason to interfere with the well – reasoned judgements of the Courts below so far as the conviction of the appellant was concerned and affirmed the conviction under sections 302 and 376 of the Indian Penal Code. However, so far as the sentence part was concerned the court was of the opinion that the case did not fall within the category of “rarest of rare cases” and the High Court was not justified in enhancing the punishment. Thus, the Court set aside the punishment of death sentence awarded by the High Court and restored the sentence of life imprisonment awarded by the trial Court²⁸.

An important case that came up before the Supreme Court regarding exploitation of children is *Bachpan Bachao Andolan V. Union of India*²⁹, wherein a petition was filed in public interest under Article 32 of the Constitution in the wake of serious violations and abuse of children who were forcibly detained in circuses in many instances, without any access to their families under extreme inhuman conditions. There were also instances of sexual abuse on a daily basis, physical abuse as well as emotional abuse. These children were also deprived of basic human needs of food and water. The petitioner had filed this petition following a series of incidents where the petitioner came in contact with many children who were being trafficked into performing in circuses. The activities that were undertaken in these circuses

26. *Id.* at 806.

27. *AIR* 2011 SC 3681

28. *Id.* at 3690.

29. (2011) 5 *SCC* 1.

deprived the artists specially children of their basic fundamental rights. They were entrapped into the world of circuses for the rest of their lives, leading a vagrant tunneled existence away from the hub of society, which was tiresome, claustrophobic and dependent on vicissitudes³⁰.

It was submitted by the petitioner that there are no labour or any welfare laws which protect the rights of these children. These children were frequently physically, emotionally and sexually abused in these places. The petitioner also submitted that there was perpetual sexual harassment, violation of the Juvenile Justice Act and all international treaties and conventions related to human rights and child rights where India is a signatory³¹.

Therefore, the petitioner sought the application of the provisions of the Juvenile Justice (Care and Protection of Children) Act, 2000 and also suggested that intra – state trafficking of young children, their bondage and forcible confinements, regular sexual harassment and abuses should be made cognizable offences under the Indian Penal Code, 1860 as well as under section 31 of the Juvenile Justice Act. Child Welfare Committees under the Juvenile Justice (Care and Protection of Children) Act, 2000 should be empowered to award compensation to all those victims rescued from the circuses with time – bound rehabilitation packages and the state Government to create a fund for the same³².

The petitioner also gave innumerable instances in the petition of abuse of children in circuses. All those instances demonstrated under what horrible and inhuman conditions these children had to perform in the circuses.

The Court observed that it planned to deal with the problem of children's exploitation systematically and in this order limited its directions regarding children working in the Indian Circuses. Consequently the court issued a number of directions and among them the respondents were directed to conduct simultaneous raids in all the circuses to liberate the children and check

30. *Id.* at 5.

31. *Id.* at 7.

32. *Id.*

violation of the fundamental rights of the children. The rescued children were directed to be kept in the care and protective homes till they attained the age of 18 years. The respondents were also directed to frame proper scheme of rehabilitation of rescued children from circuses³³.

Apart from sexual abuse of children, child marriage is also another form of child abuse. A vast majority of our population is still illiterate and so they are most of the time superstitious. At the same time lack of proper health care and population control leads to cases of child marriage specially in rural areas. Child marriage is not a new phenomenon and has been in existence since a long time. However, it is submitted that various studies have indicated that although instances of 'swayamvara' were cited in the Ramayana and Mahabharata, child marriage was not prevalent in ancient India. Vedic mantras indicated that a girl should be married only when she was fully developed both physically and mentally. The seeds of insidious practices against women were sown, it is said probably during the reign of despotic Monarchs or feudal lords during the middle ages. During this period the birth of baby girls were considered as an ill omen and often resulted in the killing of such baby girls. Girls were married off before the marriageable age by parents to get rid of the feeling and responsibility of bringing up young unmarried girls. Disposal of young minor girls for the purpose of marriage to the highest bidder was another practice that was prevalent. Therefore, for a number of traditional, religious and other reasons, girls were married off before they attained the age of 8 or 9 years. However, the year 1860 saw the rise of socio – religious movements like the Brahma Samaj and the Arya Samaj which did pioneering work against child marriages. These movements influenced in prohibiting a husband's intercourse with his wife who had not reached ten years of age under the Indian penal Code, 1860, even though the menace could not be entirely uprooted³⁴.

Thereafter, in the year 1929 the Child Marriage Restraint Act was

33. *Id.* at 28.

34. Arti; *Not a bliss, but bondage*, 17 *Legal News and Views* (2003) 26.

enacted and was put into force on April 1, 1930. This Act aimed at retraining the solemnization of child marriages. This Act was amended in 1978 and has fixed the minimum age of marriage for boys at 21 years and for girls at 18 years. Offences are cognizable under this Act. Accordingly, this Act makes it unlawful for a male adult below as well as above twenty one years of age to marry a child³⁵. Under this Act where a minor contracts a child marriage any person having charge of the minor whether as a parent or guardian or in any other capacity, who does any act to promote the marriage or permits it to be solemnized or negligibility fails to prevent it from being solemnized can be punished with simple imprisonment to 3 months with fine. However, women have been exempted from imprisonment³⁶.

The definition of “*child in need of care and protection*” also includes children who are mentally or physically challenged or ill children or children suffering from terminal diseases or incurable diseases and do not have anyone to support or look after them. A differently abled person has been described as one who finds it difficult to perform normal physical and/or mental function because of an impairment. When the normal functioning of an individual is interfered with by such impairment, the person becomes a handicapped³⁷. Therefore, children who suffer from such impairment require care and special attention. However, since such children are generally educated in separate schools their interaction with other children is reduced to the minimum. As a result such children remain isolated and it becomes difficult to integrate them in society. This can quite often lead to lack of self – confidence, low self – esteem and feeling of being discriminated by others. Consequently these differently – abled children are also most likely to be neglected, abused and abandoned.

The problem of HIV/AIDS is one which has affected people of all countries. It has assumed epidemic proportions and is a matter of serious

35. Sections 3 and 4 of the *Child Marriage Restraint Act, 1929*.

36. Section 6, *Id.*

37. <http://www.childlineindia.org.in/pdf/CP-JJ-CNCP.pdf> (visited on 9th August 09)

concern throughout the world. Not only adults but children have also not been spared by this disease. Children who are infected with HIV/AIDS are majority of the time victims of circumstances. Consequently such children are at the risk of facing social exclusion. Therefore, such children need all types of case specially residential care, foster care, medical care, medical follow up and other forms of protection.

Some of the children who are more vulnerable are:

- a) Children who are confirmed as infected by the virus.
- b) Children born to HIV positive mothers acquiring the virus in the womb.
- c) Children who require blood transfusion due to any illness.
- d) Children who are addicted to drugs.
- e) Children who are sexually abused and exploited.
- f) Children become affected because their parents or siblings are HIV positive.
- g) Children vulnerable to HIV in high – risk communities.

Further the definition of 'child in need of care and protection' also includes children who are likely to be inducted into drug abuse or trafficking. It may be submitted that though the problem of substance abuse or drug abuse affects children belonging to the different strata of society living in the tribal, rural and urban India but children living in the streets are more likely to be affected by drug abuse. These children have to fight daily for their survival in an uncaring and hostile environment. As a result of having to grow up in a tough world these children become resilient. But because they live in the streets they are vulnerable and insecure. While many of these children resort to drugs to overcome the stressful lives that they live everyday, others are coerced into substance abuse.

It is submitted that the predominant reasons cited by children for taking of drugs in one of the study is to overcome homesickness, to cope up with hard weather conditions, to overcome the pain of exploitation and sexual abuse and the compulsion to spend money. Specially when they do not have food to

satisfy their hunger the use of drugs stops their hunger³⁸.

Therefore, the problem of substance abuse is growing alarmingly by the day not only in developed countries but also in developing countries. It has also become a growing global public health concern. Hence, in the international arena the UN Convention on the Rights of the Child, 1989 provides children with the right to protection from the use of drugs, and from being involved in their production or distribution³⁹. In India, the Narcotic Drugs and Psychotropic substances Act, 1985 was enacted which declares illegal the production, possession, transportation, purchase and sale of any narcotic drugs or psychotropic substances and makes the person, addict/trafficker liable for punishment. Apart from this, The prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act was enacted in the year 1988. Under this Act people who use children for drug trafficking can be booked as abettors or conspirators to the Act. The Juvenile Justice (Care and Protection of Children) Act, 2000 also provides for penalty for giving intoxicating liquor or narcotic drug or psychotropic substance to juvenile or child⁴⁰.

Furthermore, a child who is a victim of armed conflict, civil commotion or unnatural calamity also comes under the purview of the definition of the 'child in need of care and protection'. Children as victims of armed conflict all over the world is a serious problem. After and a war is over soldiers die and people suffer innumerable and irreparable loss and damage. Amongst all this children are the most and worst affected.

It may be said that during armed conflict more children die than soldiers. Therefore, it is submitted that in the past two decades, two million children have been killed in armed conflict. At the same time three times as many have been seriously injured or permanently disabled. Children are said to be affected by armed conflict in different ways but the most dangerous of all is their

38. <http://www.ihs.org.in/IHSPPresentation/Protecting Children From Substance Abuse 08 Jan 09. pdf> (visited on 9th Dec' 11).

39. Article 33, *UN Convention on the Rights of the Child, 1989*.

40. For discussion of the relevant provision See, *Supra* Chapter IV.

participation as soldiers. Availability of small arms and light weapons has made participation of children in armed conflict a lot more easier. Legal and illegal international arms trade has made assault rifles cheap hence at a time when children should be going to school and playing they learn how to use rifles and war techniques⁴¹.

The aftermath of armed conflicts has irreparable damage both physical and emotional on the child. The child loses everything – family members, schools, neighborhoods and communities. The child has to cope with such loss at such young age and many a times is not able to. This can prove to be detrimental to the growth and development of the child. Apart from this war violates the right of a child to live, the right to be with family and community, the right to health and education, the right to the development of the personality, and the right to be nurtured and protected.

Therefore, for the protection and care of children as victims of armed conflicts two treatise ie The Geneva Convention and the Convention of the Rights of the Child, 1989 exists. The Geneva Conventions of 1949 and their additional Protocol of 1977 lays down a series of rules giving the children special protection. On the other hand, the Convention on the Rights of child, 1989, also specifically protects child victims of war⁴².

A recent addition to these two international instruments is said to be the treaty to eliminate landmines, which was adopted in September 1977, in Ottawa, Canada. The Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti personnel Mines and on their Destruction was entered into force in 1999. Though this treaty does not specifically address children, this international treaty is meant to especially protect children from the suffering inflicted by these indiscriminate weapons of destruction⁴³.

41. <http://Legalservicesindia.com/article/article/children-in-armed-conflict> (visited on 9th December 11).

42. For discussion of relevant provision see, *Supra* Chapter II.

43. <http://Legalservicesindia.com/article/article/children-in-armed-conflict> (visited on 9th December 11).

Now coming to the provisions of the Juvenile Justice (Care and Protection of Children) Act, 2000⁴⁴ which was made various provisions in respect of separate handling of child in need of care and protection and juvenile in conflict with law. Child welfare committees and Juvenile Justice Boards has been constituted for the purpose of dealing with child in need of care and protection and juvenile in conflict with law separately. The aim of this provision is to segregate the two categories of children/juveniles and to provide treatment and training to the different categories of children separately i.e. children's homes and special homes. By this provision institutional discipline can be properly maintained and it also prevents the child in need of care and protection coming into contact with juvenile in conflict with law.

Therefore, the Act provides for the establishment of child welfare committees by the state government for exercising the powers and discharging the duties in relation to child in need of care and protection⁴⁵.

The Act lays down the powers of the committee. The Committee has been given the final authority to dispose of cases for the care, protection,

44. Hereinafter referred to as the Act.

45. Section 29(1) of the Act says, "*The state Government may within a period of one year from the date of commencement of the Juvenile Justice (Care and Protection of Children) Amendment Act, 2006, by notification in the official Gazette, constitute for every district one or more Child Welfare Committees for exercising the powers and discharge the duties conferred on such committees in relation to child in need of care and protection under this Act.*"

Section 29 (2) of the Act says, "*The Committee shall consist of a Chairperson and four other members as the state government may think fit to appoint of whom atleast one shall be woman and another, an expert on matters concerning children*". Section 29 (3) of the Act says, "*The qualifications of the chairperson and the members and the tenure for which they may be appointed shall be such as may be prescribed*". Section 29 (4) of the Act says, "*The appointment of any member of the Committee may be terminated, after holding inquiry, by the state Government, if -*

i) *he has been found guilty of misuse of power vested under this Act;*
ii) *he has been convicted of an offence involving moral turpitude, and such conviction has not been granted full pardon in respect of such offence;*
iii) *he fails to attend the proceedings of the committee for consecutive three months without any valid reason or he fails to attend less than three fourth of the sittings in a year*".

Section 29 (5) of the Act says, "*The Committee shall function as a Bench of Magistrates and shall have the powers conferred by the Code of Criminal Procedure, 1973 (2 of 1974) on a Metropolitan Magistrate, or, as the case may be, a Judicial Magistrate of the first class*".

treatment, development and rehabilitation of the children as well as to provide for their basic needs and protection of human rights. The committee has also been given power to deal exclusively with all proceedings under this Act relating to children in need of care and protection⁴⁶. It may be mentioned here that the Juvenile Justice (Care and Protection of Children) Rules, 2007⁴⁷ also lays down the functions and powers of the Committee. Some of the important functions among others are⁴⁸ – a) to take cognizance of and receive children produced before the committee b) to decide on the matters brought before the committee c) to reach out to such children in need of care and protection who are not in a position to be produced before the committee d) conduct necessary inquiry on all issues relating to and affecting the safety and well being of the child, e) direct the child welfare officers or probation officers or non – governmental organizations to conduct social inquiry and submit a report to the committee f) ensure necessary care and protection, including immediate shelter, g) ensure appropriate rehabilitation and restoration, including passing necessary directions to parents or guardians or fit persons or fit institutions in this regard, in addition to follow – up and co – ordination with District Child Protection Unit or State Adoption Resource Agency and other agencies, h) direct the Officer – in – Charge of children’s Homes to receive children requiring shelter and care, i) to provide a child friendly environment for children j) recommend ‘fit institutions’ to the state Government for the care and protection of children, k) declare ‘fit persons’, l) declare a child legally free for adoption, m) co – ordinate with the Police, Labour Department and other agencies involved in the care and protection of children with the support of District Child Protection Unit or state Child Protection Unit or State Government. The Act further provides for the production of child in need of

46. Section 31 of the *Act*.

47. Herein after referred to as the *Rules*.

48. Rule 25 of the *Rules*.

care and protection before the committee⁴⁹. It may be noted here that the Rules also lays down the procedure for production of a child before the committee. It has been provided under the Rules that if a child under two years of age is medically unfit then the person or the organization shall send a written report with the photocopy of the child to the committee within twenty four hours and produce the child before the committee as soon as the child is medically fit⁵⁰. However, in case the committee is not sitting, the child may be produced before the single member of the committee as per the provisions laid down under sub section (2) of section 30 of the Act⁵¹. If the single member is also not accessible or if the hours are odd, the child shall be taken by a non – governmental organization or childline or Police to an appropriate institution for children registered under the Act⁵². In order to facilitate legal services to the abused children when the cases of such children are taken up in regular courts it is provided that the committee shall have an empanelled list of lawyers, social workers and mental health expert who may assist the committee in dealing with cases of abused children and who may also interface with the Public Prosecutor or assistant Public Prosecutor⁵³. It has also been provided that every possible effort shall be made to trace the family with support from the District Child Protection Unit, and assistance of recognized voluntary

49. Section 32(1) of the Act “Any child in need care and protection may be produced before the committee by any one of the following persons:-

i) any police officer or special juvenile police unit or a designated police officer;

ii) any public servant;

iii) childline, a registered voluntary organization, or by such other voluntary organization or an agency as may be recognize by the state Government;

iv) any social worker or a public spirited citizen;

v) by the child himself;

Provided that the child shall be produced before the committee without any loss of time but within a period of twenty four hours excluding the time necessary for the journey.

Section 32 (2) of the Act says, “The State Government may make rules consistent with this Act to provide for the manner of making the report to the committee and the manner of sending and entrusting the child to children home pending the inquiry”.

50. Rule 27 sub-rule (2) of the Act.

51. Rule 27 sub-rule (4) of the Act.

52. Rule 27 sub-rule (5) of the Act.

53. Rule 27 sub-rule (12) of the Act.

organizations, childline or police may also be taken⁵⁴. Further, the child shall be placed in an institution closest to where his parents or guardians belong unless the child has been subjected to abuse or exploitation by parents or guardians⁵⁵.

The Act has further authorized the committee to hold an enquiry on a receipt of a report under section 32 in the prescribed manner and the committee may on its own or on a report from any person or agency as mentioned in sub-section (1) of section 32 pass an order to send the child to the children's home for speedy inquiry by a Social Worker or a child welfare officer. The inquiry has to be completed within four months of the receipt of the order or shorter period as may be fixed by the committee. If after the completion of the inquiry the committee thinks that the child has no family or ostensible support or is in need of continued care and protection, then, it may allow the child to remain in the children's home or shelter home till suitable rehabilitation is found or attains the age of 18 years⁵⁶.

The Juvenile Justice (Care and Protection of Children) Rules, 2007 also lays the procedure for inquiry⁵⁷.

54. Rule 27 sub-rule (13) of the Act.

55. Rule 27 sub-rule (20) of the Act.

56. Section 33 of the Act.

57. Rule 28(1) of the Rules says, "When a child is brought before the committee the committee shall assign the case to a social worker or case worker or child welfare officer or officer-in-charge as the case may be, of the institution or any recognized agency for conducting the inquiry through an order in form XII"

Rule 28 (2) of the Rules says, "The Committee shall direct the concerned person or organization about the details or particulars to be enquired into for developing an individual care plan and suitable rehabilitation".

Rule 28 (3) of the Rules says, "All inquiries conducted by social worker or case worker or Child Welfare Officer or Officer - in - Charge of the institution or any recognised agency shall be as per Form XIII and must provide an assessment of the family situation of the child in detail, and explain in writing whether it will be best interest of the child to restore him to his family"

Rule 28 (4) of the Rules says, "The inquiry must be completed within four months or within such shorter period as may be fixed by the committee:

Provided that the committee may, in the best interest of the child and for the reasons to be recorded in writing, extend the said period under special circumstances".

Rule 28 (5) of the Rules says, "After completion of the inquiry, if, the child is under orders to continue in the Children's home, the Committee shall direct the Officer - in - Charge of the home to submit quarterly progress report of such child and produce the child before the committee for an annual review of the progress".

[B] WELFARE PROVISIONS

India is a welfare state and this has been incorporated in the Preamble of our Constitution which spells out its prime objective. Thus constitutional goal finds elaboration in various provisions of the fundamental rights and directive principles in the particular and throughout the entire fabric of the constitution in general. By the process of judicial interpretation of the right to equality and human dignity intermingle with the relevant directive principles and the international covenants the judiciary has evolved many important rights and principles for the welfare of children. The exploitation of the child is writ large throughout the country, at the same time the welfare measures to be adopted at different levels are many fold. It is once again⁵⁸ mentioned here that the constitution through directive principles obliges the state to come up with social welfare legislation for the children. It is in furtherance of the aforesaid objectives that our parliament came forward with special legislations⁵⁹ for the welfare of children which have laid down the detail parameters for its enforcement.

In the present day world social problems have increased manifold and become complex as the expansion of society is taking place rapidly. Communities and families are being subjected to new and serious pressures. Consequently families are breaking up thereby turning children into destitute. Therefore, children affected by family break – down and other pressure are growing in numbers and therefore ways and approaches have to be thought of to handle these large numbers. However, it is said that in the old times where there were situations of neglect of children, destitution, abandonment or when children become orphaned there were spontaneous concerns and responses and solutions were arrived at by the local community where care, protection and rehabilitation was provided by the community. There was no social welfare

58. For discussion of some relevant provisions see, *supra* chapter III. .

59. For eg., *The Juvenile Justice (Care and Protection of Children) Act, 2000*, *The Child Labour (Prohibition and Regulation) Act, 1989* etc.

Department or NGO's to refer to, the community itself was the care taker of such children⁶⁰.

Nevertheless, even today effort has been made to take care of such children. The Juvenile Justice (Care and Protection of Children) Act, 2000 not only provides for separate trial of juvenile in conflict with law and child in need of care and protection but also provides for separate committal institutions. All these institutions are not penal but correctional centres aiming at the reformation of the child. These institutions have a setting of control, protection, rehabilitation and treatment which a child may not have experienced before, the absence of which might lead to his deviant behavior. Ordinarily the juvenile in conflict with law are committed to care of special homes and child in need of care and protection to children's home. There is also a provision under the Act to establish and maintain as many observation homes for the reception of juvenile in conflict with law during the pendency of any inquiry. Further, shelter homes may also be set up for juveniles or children.

AUTHORITIES AND INSTITUTIONS.

1) CHILDREN'S HOME –

The Juvenile Justice (Care and Protection of Children) Act, 2000 has made provisions for the establishment and maintenance of children's home by the state government for the reception of child in need of care and protection⁶¹.

60. Gerry J. Pinto, Juvenile Homes, 13 *Legal News and Views* (1999) 27.

61. Section 34(1) of the Act says, "*The State Government may establish and maintain either by itself or in association with the voluntary organizations, children's homes, in every district or group of districts, as the case may be for the reception of child in need of care and protection during the pendency of any inquiry and subsequently for their care, treatment, education, training, development and rehabilitation*".

Section 34 (2) of the Act says, "*The State Government may, by rules made under this Act, provide for the management of children's homes including the standards and the nature of services to be provided by them, and the circumstances under which, and the manner in which, the certification of a children's home or recognition to a voluntary organisation may be granted or withdrawn*".

Section 34 (3) of the Act says, "*Without prejudice to anything contained in any other law for the time being in force, all institutions, whether State Government run or those run by voluntary organizations for children in need of care and protection shall within a period of six months from the date of commencement of the Juvenile Justice (Care and Protection of Children) Amendment Act, 2006 be registered under this Act in such manner as may be prescribed*".

It is pertinent to note here that the Juvenile Justice (Care and Protection of Children) Rules, 2007 has also laid down rules for the establishment of children's homes. Providing separate facilities for boys and girls it has been laid down that children of both sexes below ten years may be kept in the same home but separate facilities shall be maintained for boys and girls in the age group of 5 to 10 years; every children's home shall include separate facilities for children in the age group of 0 – 5 years with appropriate facilities for infants; separate children's home shall be set – up for boys and girls in the age group 10 to 18 years. It has been further provided that each children home shall be a comprehensive child care centre the primary objective of which will be to promote an integrated approach to child care by involving the community and local Non – Governmental Organizations through the Management Committee set – up under rule 55 of these rules and the District Child Protection Unit or State Child Protection Unit or the State Government shall make an annual performance review of functioning of the children's homes. Among the various activities on which the centre shall focus some are – a) preparing and following individual care plans for every child, with child rights based approach, specifically addressing the child's physical and mental health, emotional needs, education, skill development, protection and special needs if any, b) family based non – institutional services such as, foster family care, adoption and sponsorship, c) specialized services in situations of conflict or disaster and for juvenile or children affected by terminal or incurable disease to prevent neglect by providing family counseling, nutrition, health interventions, psycho – social interventions and sponsorship; d) linkages with organizations and individuals who can provide support services to children⁶².

2) SHELTER HOMES –

The Juvenile Justice (Care and Protection of Children) Act, 2000 has empowered the state Governments to recognize reputed and capable voluntary

62. Rule 29 of the Rules.

organizations and provide them assistance to set up and administer shelter homes for juveniles or children. These shelter homes shall function as drop – in – centres for the children in need of urgent support⁶³. Further rules have been made with respect to shelter homes under the Juvenile Justice (Care and Protection of Children) Rules, 2007. It has provided that for children in urgent need of care and protection such as street children and run – away children, the state Government shall support the creation of requisite number of shelter homes or drop – in – centres through the voluntary organizations. It has been further laid down that shelter homes shall include – a) short stay homes for children needing temporary shelter, care and protection for a minimum period of one year, b) transitional homes providing immediate care and protection to a child for a maximum period of four months, c) 24 hour drop – in – centres for children needing day care or night shelter facility. Apart from the basic needs of clothing, food, health care and nutrition, safe drinking water and sanitation the shelter homes or drop – in centres are required to have the minimum requirement of boarding and lodging. Also no child is ordinarily allowed to stay in a short stay home for more than a year except in special circumstances with the approval of the committee⁶⁴.

In *Childline India Foundation V. Allan John Waters*⁶⁵, the Supreme Court had to deal with the issue of sexual abuse of child in shelter homes. The facts of the case in brief was that in 1986 a petition was brought before the High Court of Bombay complaining about the plight of children at various children homes in Maharashtra. The High Court appointed a committee that received complaints from the Child Rights Organizations like Saathi Online, Childline and CRY about the mismanagement of Anchorage Shelters, and on that basis the committee sought permission to visit Anchorage Shelters. After the visit a report was submitted before the High Court and on the basis of that report, specifically expressing unconfirmed report of sexual exploitation of

63. Section 37 of the *Act*.

64. Rule 30 of the *Rules*.

65. (2011) 6 *SCC* 261.

children, an Advocate Ms Maharukh Adenwala was informed that some children residing in shelter homes were being sexually exploited by those running these homes. After confirming the said fact and after consulting the committee, Ms Maharukh Adenwala moved a Suo Motu Criminal writ Petition before the High Court and the High Court passed an order for the protection of children at Anchorage Shelter Homes. Further with regard to the sexual and physical abuse at the Anchorage shelters, Childline India Foundation had filed a complaint but the police had not taken cognizance of the offence under the pretext that the matter was subjudice and was pending before the High Court. So Maharukh Adenwala herself recorded the statements of some of the victims and informed the said fact to the members of the committee. Thereafter, the High Court directed the police authorities of the state of Maharashtra to take action on the basis of the complaint lodged by child line India foundation. The Police, therefore, ultimately registered an offence by treating the statement of Sonu Raju Thakur as First Information Report. All the three accused pleaded not guilty and therefore, claimed to be tried. The Sessions Judge convicted all the three accused under the relevant sections of Indian Penal Code, 1860 and also the Juvenile Justice (Care and Protection of Children) Act, 2000. However, aggrieved by the order of the Session Judge, all the three accused filed criminal appeal before the High Court and the High Court set aside the order of conviction passed by the Session Judge and acquitted all of three accused from the charges leveled against them. Aggrieved by the order of the High Court, child Line India Foundation and Ms Maharukh Adenwala filed criminal Appeals and the state of Maharashtra also filed Criminal Appeal before the Supreme Court by way of special leave petitions.

The Court referred to the deposition of two victim boys who had given detailed account of the activities going on at the Anchorage shelters and in the opinion of the Court their depositions reflected that there was a criminal conspiracy among the accused to obtain possession of minor vulnerable boys

residing on the streets and subjected them to sexual abuse⁶⁶.

The Court further referred to the aim and objective of the Juvenile Justice Care and Protection of Children) Act, 2000 and stated that the objective of the Act was being ensured by establishing observations homes, juvenile homes for neglected juveniles and special homes for delinquent or neglected juveniles⁶⁷.

The Court also referred to the case *Vishal Jeet V Union of India*⁶⁸, wherein the Court had issued several directions to the State and Central Government for eradicating child Prostitution and for providing adequate rehabilitative homes well manned by well qualified trained senior workers, psychiatrists and doctors.

Therefore, under the circumstances of the case the Court set aside the impugned judgement of the High Court acquitting all the accused in respect of charges leveled against them and restored the conviction and sentence passed by the trial judge.

3) SPECIAL HOMES -

The Juvenile Justice (Care and Protection of Children) Act, 2000 empowers the state Governments to establish and maintain, either by themselves or under an agreement with voluntary organizations special homes in every district or group of districts for the reception and rehabilitation of juvenile in conflict with law. State Governments have also been empowered to certify any institution, other than a home established or maintained by themselves or under an agreement with voluntary organizations that it is fit for the reception of juvenile in conflict with law. The state Government may by rules provide for the management of special homes including the standards and various types of services to be provided by them which are necessary for re –

66. *Id.* at 267.

67. *Id.* at 278.

68. (1990) 3 SCC 318.

socialization of a juvenile. Further, these rules may also provide for the classification and separation of juvenile in conflict with law on the basis of age and nature of offence committed by them and his mental and physical status⁶⁹.

In the case of *Sheela Barse V. Union of India*⁷⁰, the Court observed that it is the duty of the state to look after the child for the all round development of his personality. A child should never be kept in jail because it is elementary that a jail is hardly a place where a child should be kept. Confinement in jail has a negative effect on development of the child and also brings the child into contact with hardened criminals. The Court further observed that this was why all statutes dealing with children provide that a child should not be kept in jail. Instead of confining such children in jail they should be kept in remand homes, observation homes or any other place of safety⁷¹.

Therefore, the Court directed the District Judge, Chief Judicial Magistrate or the Judicial Magistrate to make a report and to state whether there are any children's homes, remand homes or observation homes for children within his district and if there are, to inspect such children's homes, remand homes and observation homes for the purpose of ascertaining as to what are the conditions in which children are kept there and whether facilities for education or vocational training exists. The Court also directed the State Government to file an affidavit stating as to how many children's homes, remand homes and observation homes for children are in existence in the respective state and how many inmates are kept in such children's homes, remand homes or observation homes⁷².

4) OBSERVATION HOMES –

The Juvenile Justice (Care and Protection of Children) Act, 2000

69. Section 9 of the Act.

70. AIR 1986 SC 1773.

71. *Id.* at 1777.

72. *Id.* at 1775.

provides for the establishment and maintenance of observation homes by the state Government for the temporary reception of juvenile in conflict with law during the pendency of any inquiry regarding them. The State Government has also been empowered to certify any institution, other than a home established or maintained by themselves or under an agreement with voluntary organizations as an observation home for the purposes of this Act. The State Government can also make rules for the management of observation homes. There is further provision of keeping the juvenile initially in a reception unit of an observation home if such juvenile is not placed under the charge of parent or guardian for the purpose of preliminary inquiries, care and classification of juveniles according to his age group⁷³.

Juvenile Justice (Care and Protection of Children) Rules, 2007 lays down rules in respect of institutions for juveniles in conflict with law. It has been provide that separate observations homes or special homes for boys and girls shall be setup by the state Government o the Voluntary organization recognized by the state Government. Further these observation homes or special homes are to set – up separate residential facilities for boys and girls upto 12 years, 13 – 15 years and 16 years and abuse⁷⁴.

In *Sheela Barse V. Secretary, Children Aid Society*⁷⁵, the Court observed that the children are the citizens of the future era. On the proper bringing up of children and giving them the proper training to turn out to be good citizen depends the future of the country. The Court was of the view that this position had been well realized. The Court further referred to the Children Act, 1948 and pointed out that elaborate provisions had been made to cover the International Charters relating to the rights of children and in the opinion of the court if these provisions were properly translated into action and the authorities created under the Act became cognizant of their role, duties and obligations in the performance of the statutory mechanism created under the Act and if they

73. Section 8 of the Act.

74. Rule 16 of the Rules.

75. AIR 1987 SC 656.

were properly moderated to meet the situations that arise in handling the problems, the situation would certainly be very much eased. Therefore, the Court observed that it was very much necessary that officers at different level called upon to perform statutory duties by exercising powers conferred under the statute have to be given proper training and only when they had the requisite capacity in them should be called upon to handle the situation⁷⁶.

The Court further disagreed with the contention that for the employment in children home, the children would be given remuneration. The Court was of the view that children in observation homes should not be made to stay long and as long they are there they should be occupied and the occupation should be congenial and intended to bring about adaptability in life aimed at bringing about a self – confidence and picking of human virtues. The Court pointed out that dedicated workers have to be found out, proper training has to be imparted and such people alone should be introduced into the children's homes. The Court observed that every society must devote full attention to ensure that children are properly cared for and brought up in proper atmosphere where they could receive adequate training, education and guidance in order that they may be able to have their rightful place in the society when they grow up⁷⁷.

76. *Id.* at 658-59.

77. *Id.* at 659.